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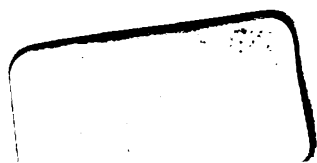
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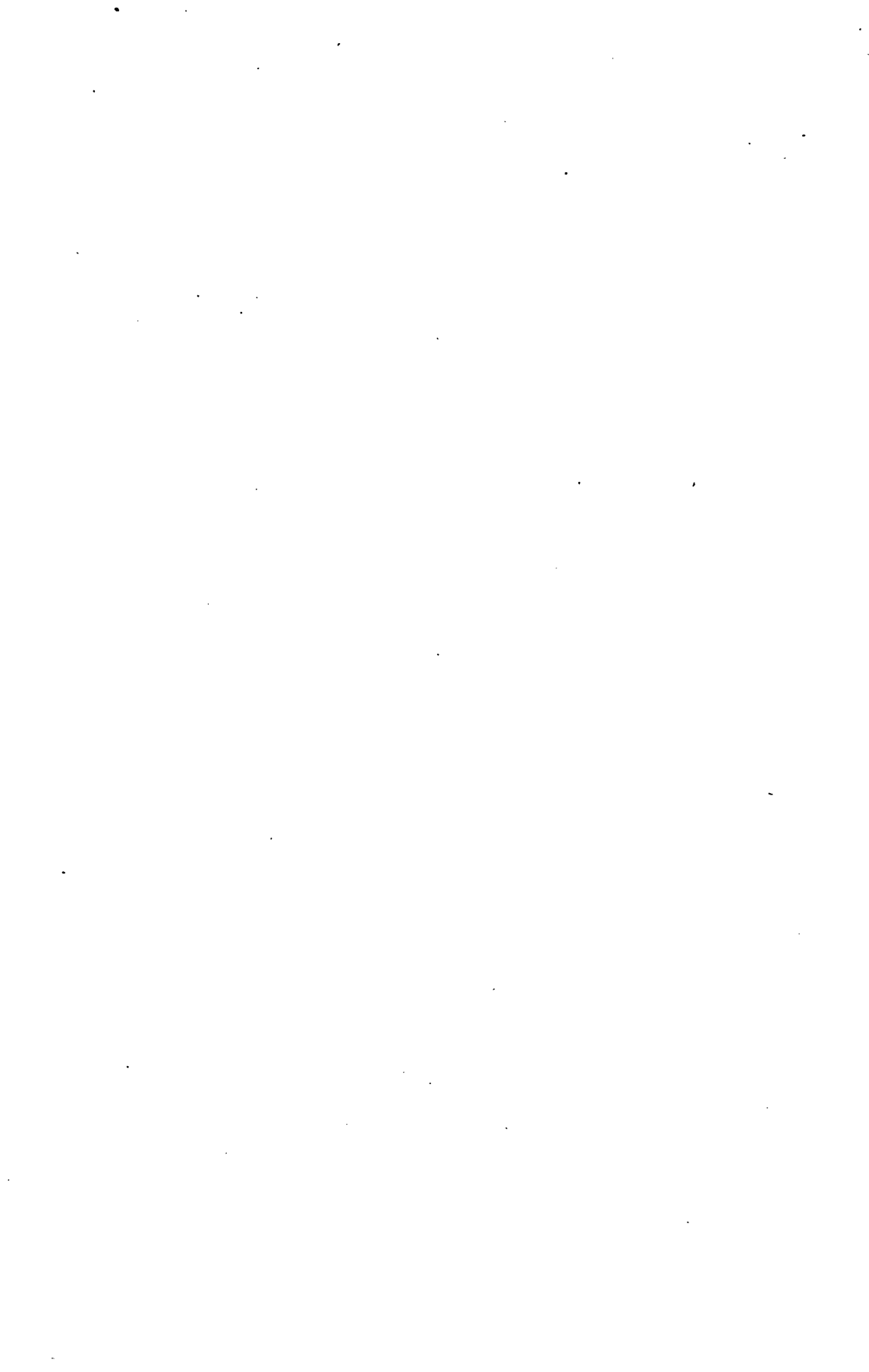
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TABLE

OF

CASES REPORTED

A.		B.	
Adams, Everly v. (Kan.)	448	Bailey, Southern R. Co. v. (Ga.)	1043
Ainsworth, Calhoun v. (Ark.)	395	Baltimore & O. R. Co., Brabham v. (C. C. A.)	1201
Aitken, Steidl v. (N. D.)	192	Bank, Farmers' & Traders Nat., Holden v. (N. H.)	309
Allen, Beshirs v. (Okla.)	413	Portland Sav., Walker v. (Ma.)	840
Amberg v. Kinley (N. Y.)	519	State Sav. & Commercial, v. Anderson (Cal.)	675
American Ins. Co., Dinneen v. (Neb.)	618	Basey v. Louisiana R. & Nav. Co. (La.)	964
Anderson, State Sav. & Commercial Bank v. (Cal.)	675	Bates, Bodie v. (Neb.)	421
Angel, Board of Edu. v. (W. Va.)	139	Becker v. Becker (Wis.)	56
Angus v. Downs (Wash.)	351	Benson Hospital Asso. v. Moyer (Minn.)	844
Annear v. Swartz (Okla.)	267	Beshirs v. Allen (Okla.)	413
Arrowsmith v. State (Tenn.)	363	Big Creek Development Co., Grass v. (W. Va.)	1057
Atchison, T. & S. F. R. Co., Nicholson v. (Kan.)	417	Black, State ex rel., v. Delaye (Ala.)	640
State ex rel. Ise v. (Kan.)	751	Board of Edu. v. Angel (W. Va.)	139
v. Vosburg .. (U. S. Sup. Ct.)	953	Bodie v. Bates (Neb.)	421
Atkinson, Interstate Business Men's Acci. Asso. v. (Ky.)	656	Boeck, Re (Wis.)	1008
C.		Boise Asso. of Credit Men v. Ellis (Idaho)	917
Brabham v. Baltimore & O. R. Co. (C. C. A.)	1201	Boyne City, G. & A. R. Co., Mehegan v. (Mich.)	1170
Brenneman, Denman v. (Okla.)	1047	C.	
Brown v. Elm City Lumber Co. (N. C.) ..	275	Cadillac Motor Car Co. v. Johnson (C. C. A.)	287
C.		Calhoun v. Ainsworth (Ark.)	395
Cadillac Motor Car Co. v. Johnson (C. C. A.)	287	Cambridge, Perley v. (Mass.)	432
Calhoun v. Ainsworth (Ark.)	395	Catron, Lovato v. (N. M.)	451
Cambridge, Perley v. (Mass.)	432	Causey v. Seaboard A. L. R. Co. (N. C.)	1185
Catron, Lovato v. (N. M.)	451	Chase, Cox v. (Kan.)	590
Causey v. Seaboard A. L. R. Co. (N. C.)	1185	Cheadle v. State (Okla. Crim. Ct. of App.)	1031
Chase, Cox v. (Kan.)	590	Chicago, M. & St. P. R. Co., Steltzer v. (Iowa)	1017
Cheadle v. State (Okla. Crim. Ct. of App.)	1031	Taylor v. (Wash.)	634
Chicago, M. & St. P. R. Co., Steltzer v. (Iowa)	1017	Chicago, R. I. & P. R. Co. v. Watkins (Ark.)	311
Taylor v. (Wash.)	634	Cincinnati, Loudon v. (Ohio St.)	356
Chicago, R. I. & P. R. Co. v. Watkins (Ark.)	311	Clark v. Du Pont de Nemours Powder Co. (Kan.)	479
Cincinnati, Loudon v. (Ohio St.)	356	Clester v. Clester (Kan.)	648
Clark v. Du Pont de Nemours Powder Co. (Kan.)	479	Coffin v. Laskan (Conn.)	959
Clester v. Clester (Kan.)	648	Cohen v. Todd (Minn.)	846
Coffin v. Laskan (Conn.)	959	Colvin, Phillips v. (Ark.)	875
Cohen v. Todd (Minn.)	846	Com., Hollin v. (Ky.)	608
Colvin, Phillips v. (Ark.)	875	Com. v. Kingsbury (Mass.)	284
Com., Hollin v. (Ky.)	608	Connecticut Co., Dwy v. (Conn.)	800
Com. v. Kingsbury (Mass.)	284	Conrad v. Roberts (Kan.)	131
Connecticut Co., Dwy v. (Conn.)	800	Conway v. Monidah Trust .. (Mont.)	500
Conrad v. Roberts (Kan.)	131	Coody v. Coody (Okla.)	465
Conway v. Monidah Trust .. (Mont.)	500	Cooper, Louisville & N. R. Co. v. (Ky.)	336
Coody v. Coody (Okla.)	465	Co-operative Asso., Jones v. .. (Me.)	745
Cooper, Louisville & N. R. Co. v. (Ky.)	336	Corbell, Tempe v. (Ariz.)	581
Co-operative Asso., Jones v. .. (Me.)	745	Cornils, Re (Iowa)	762
Corbell, Tempe v. (Ariz.)	581	v. Jacobs (Iowa)	762
Cornils, Re (Iowa)	762	Cox v. Chase (Kan.)	590
v. Jacobs (Iowa)	762	v. Revelle (Md.)	443
Cox v. Chase (Kan.)	590	Coy v. Title Guarantee & T. Co. (Fed.)	211
v. Revelle (Md.)	443	Crane Breed Mfg. Co., Hall Furniture Co. v. (N. C.)	428
Coy v. Title Guarantee & T. Co. (Fed.)	211		

Crombie, State ex rel., v. Superior Ct. for King County (Wash.)	567	Francis v. McNeal .. (U. S. Sup. Ct.)	706
Crosby v. Maine C. R. Co. (Me.)	225	Frasch v. New Ulm (Minn.)	749
Crout v. Yazoo & M. V. R. Co. (Tenn.)	281	Fylar, Sagal v. (Conn.)	747
Crow v. McKown (Ala.)	372		
Cummings v. Wallower (Okla.)	774		
		G.	
D.		George v. Travis (Mich.)	408
Daffin, Nicholson v. (Ga.)	168	Goode, St. Louis & S. F. R. Co. v. (Okla.)	1141
Darbinsky v. Pennsylvania Co. (Pa.)	781	Goodwin, Lynn v. (Cal.)	588
Davis v. Tway (Ariz.)	604	Grainger v. Jenkins (Ky.)	404
Delaware Ins. Co., Dinneen v. (Neb.)	618	Grass v. Big Creek Development Co. (W. Va.)	1057
Delaye, State ex rel. Black v. (Ala.)	640	Green v. Green (Md.)	972
De Long v. Oklahoma City .. (Okla.)	597	Grigsby v. Reib (Tex.)	1
Denman v. Brenneman (Okla.)	1047	Grunland, People v. (Mich.)	314
Denver & R. G. R. Co., Lovejoy v. (Colo.)	888		
Desha Bank & T. Co. v. Quilling (Ark.)	794	H.	
Dibelka, People ex rel., v. Reinberg (Ill.)	401	Hagan v. McNary (Cal.)	562
Dickinson v. Johnson (Ark.)	496	Hall v. New York Teleph. Co. (N. Y.)	191
Dinneen v. American Ins. Co. (Neb.)	618	Hall Furniture Co. v. Crane Breed Mfg. Co. .. (N. C.)	428
Dixon Pure Ice Co., Sandusky Portland Cement Co. v. (C. C. A.)	1210	Hamilton v. McKenna (Kan.)	455
Downs, Angus v. (Wash.)	351	Handlin, McCoy v. (S. D.)	858
Du Pont de Nemours Powder Co., Clark v. (Kan.)	479	Hanford v. Hanford Gas & Power Co. (Cal.)	165
Du Pont Powder Co., Simpson v. (Ga.)	430	Hanford Gas & Power Co., Hanford v. (Cal.)	165
Dwy v. Connecticut Co. (Conn.)	800	Harbert v. Hope Natural Gas Co. (W. Va.)	570
		Harris, Missouri, K. & T. R. Co. v. (U. S. Sup. Ct.)	942
E.		Hartman v. National Council, K. & L. of S. (Or.)	152
Edwards v. Yearby (N. C.)	462	Hart-Parr Co. v. Finley (N. D.)	851
Ellis, Boise Asso. of Credit Men v. (Idaho)	917	Haycraft, Vincent v. (Ky.)	307
Elm City Lumber Co., Brown v. (N. C.)	275	Hiter, Federal Ins. Co. v. (Ky.)	575
Everly v. Adams (Kan.)	448	Hogan v. Nashville Interurban R. Co. (Tenn.)	788
Ex parte Roberson (Nev.)	691	Holden v. Farmers' & Traders Nat. Bank (N. H.)	309
		Hollin v. Com. (Ky.)	608
F.		Holmes, Swentzel v. (Mo.)	926
Farmers' & Traders Nat. Bank, Holden v. (N. H.)	309	Hope Natural Gas Co., Harbert v. (W. Va.)	570
Farmers' Irrig. Dist., State ex rel. O'Shea v. (Neb.)	687	Houghton v. Humphries (Wash.)	1051
Farmers' Loan & T. Co. v. Planck (Neb.)	564	Hubble, Nashville, C. & St. L. R. Co. v. (Ga.)	1132
Federal Ins. Co. v. Hiter (Ky.)	575	Humphries, Houghton v. (Wash.)	1051
Ferch, Pabst v. (Minn.)	822	Hutton v. Sherrard (Mich.)	976
Fidelity & Casualty Co., Stokely v. (Ala.)	955	v. States Acci. Ins. Co. (Ill.)	127
Finley, Hart-Parr Co. v. (N. D.)	851		
Flowers v. State (Fla.)	848	I.	
Focks v. Munger (N. M.)	1019	Indiana & M. Electric Co., Taylor v. (Mich.)	294
Ford, Jinkiaway v. (Kan.)	343	Inland Lines, Sharrow v. (N. Y.)	1192
Foster, State ex rel. Syverson v. (Wash.)	340	Insurance Co., American, Dinneen v. (Neb.)	618
		Delaware, Dinneen v. (Neb.)	618
		Federal, v. Hiter (Ky.)	575
		Oklahoma Nat. L., v. Norton (Okla.)	695

CASES REPORTED.

Insurance Co., Prussian Nat., v.		Love, Re (Okla.) 109	
Lawrence	(C. C. A.) 489	v. Love (Okla.) 109	
States Acci., Hutton v. (Ill.)	127	Lovejoy v. Denver & R. G. R. Co.	
Interstate Business Men's Acci.		(Colo.)	888
Asso. v. Atkinson (Ky.)	656	Lynn v. Goodwin (Cal.) 588	
Ise, State ex rel., v. Atchison, T.		M.	
& S. F. R. Co. .. (Kan.)	751	McCoy v. Handlin (S. D.) 858	
J.		McInnis v. New Orleans & N. E.	
Jackson, St. Louis, I. M. & S.		R. Co. (Miss.)	682
R. Co. v. (Ark.)	668	McKenna, Hamilton v. (Kan.) 455	
Jacobs v. Cornils	(Iowa) 762	Ressell v. (Kan.) 455	
Jenkins, Grainger v. (Ky.)	404	McKown, Crow v. (Ala.) 372	
Jester, Tippecanoe Loan & Trust		MacLaren, Morrison v. (Wis.) 469	
Co. v. (Ind.)	721	McLaughlin v. United R. Co. (Cal.) 1205	
Jinkiaway v. Ford	(Kan.) 343	McNary, Hagan v. (Cal.) 562	
Johnson, Cadillac Motor Car Co.		McNeal, Francis v. (U. S. Sup. Ct.) 706	
v. (C. C. A.)	287	Maine C. R. Co., Crosby v. (Me.) 225	
Dickinson v. (Ark.)	496	Manning v. St. Paul Gaslight	
v. Olson	(Kan.) 327	Co. (Minn.)	1022
Jones v. Co-operative Asso. (Me.)	745	Marshak v. Marshak (Ark.) 161	
v. Van Bever	(Ky.) 172	Maryland Casualty Co., Welch v.	
Journeyman Bricklayers' Union		(Okla.)	708
No. 3, Powers v. (Tenn.)	1006	Maxwell, Louisville & N. R. Co.	
Judge v. Wallen	(Neb.) 436	v. (U. S. Sup. Ct.)	665
K.		Mehegan v. Boyne City, G. & A.	
Kelliher v. New York C. & H.		R. Co. (Mich.)	1170
R. R. Co. (N. Y.)	1178	Melitch, State use of, v. United	
King, Lemmon v. (Kan.)	882	Rys. & Electric Co. (Md.)	1163
Kingsbury, Com. v. (Mass.)	264	Memphis Street R. Co. v. Strat-	
Kinley, Amberg v. (N. Y.)	519	ton	(Tenn.) 704
Kouns, Spaeth v. (Kan.)	271	Minnesota Loan & T. Co., State	
L.		ex rel., v. Probate Ct.	
Lambrecht v. Schreyer	(Minn.) 812	of Hennepin County	
Lamont v. Stavannah	(Minn.) 460	(Minn.)	815
Lanng, State ex rel., v. Long (La.)	235	Missouri, K. & T. R. Co. v.	
Lasecki, State v. (Ohio St.)	202	Harris .. (U. S. Sup. Ct.)	942
Laskau, Coffin v. (Conn.)	959	Moody, Tennessee Coal, I. & R.	
Umbrogia v. (Conn.)	959	Co. v. (Ala.)	369
Lawrence, Prussian Nat. Ins.		Monidah Trust, Conway v. (Mont.) 500	
Co. v. (C. C. A.)	489	Morawetz, Thompson-McDonald	
Watson v. (La.)	121	Lumber Co. v. (Minn.)	302
Lemmon v. King	(Kan.) 882	Morris County Traction Co.,	
Leonard v. Vaughan	(Va.) 714	Summit v. (N. J. L.)	385
Le Ray Paper Co., Radley v. (N. Y.)	1199	Morrison v. MacLaren (Wis.) 469	
Lhota v. Oppenheimer	(Pa.) 1102	Mount Airy Milling & Grain Co.	
Long, State ex rel. Lanng v. (La.)	235	v. Runkles	(Md.) 373
Louden v. Cincinnati (Ohio St.)	356	Moyer, Benson Hospital Asso. v.	
Louisiana R. & Nav. Co., Basey		(Minn.)	844
v. (La.)	964	Tryon v. (Minn.) 844	
Louisville & N. R. Co. v. Cooper (Ky.)	336	Munger, Focks v. (N. M.) 1019	
v. Maxwell .. (U. S. Sup. Ct.)	665	Murphy v. Nett (Mont.) 797	
Railroad Commission of		Musicians' Protective Union, Lo-	
Ga. v. (Ga.)	902	cal No. 198, Rhodes	
v. Russellville Home Teleph.		Bros. Co. v. (R. I.)	1037
Co. (Ky.)	138	Myatt-Dicks Motor Co., Wilker-	
v. Williams	(Ky.) 613	son v. (La.)	439
Lovato v. Catron	(N. M.) 451	N.	
L.R.A.1915E.		Nashville, Saulman v. (Tenn.) 316	
		Nashville & Interurban R. Co.,	
		Hogan v. (Tenn.)	788

Nashville, C. & St. L. R. Co. v. Hubble(Ga.)	1132	Probate Ct. of Hennepin County, State ex rel. Minne- sota Loan & T. Co. v. (Minn.)	815
National Council, K. & L. of S., Hartman v.(Or.)	152	Prussian Nat. Ins. Co. v. Law- rence(C. C. A.)	489
Nett, Murphy v.(Mont.)	797		
New Amsterdam Casualty Co., Rathman v.(Mich.)	980	Q.	
New Orleans & N. E. R. Co., McInnis v.(Minn.)	682	Quereau Co., Shultz v.(N. Y.)	986
New Ulm, Frasch v.(Minn.)	749	Talcott v.(N. Y.)	986
New York C. & H. R. R. Co., Kelliher v.(N. Y.)	1178	Quilling, Desha Bank & T. Co. v. (Ark.)	794
New York Teleph. Co., Hall v. (N. Y.)	191		
Nicholson v. Atchison, T. & S. F. R. Co.(Kan.)	417	R.	
v. Daffin(Ga.)	168	Radley v. Le Ray Paper Co. (N. Y.)	1199
Norfolk & W. R. Co., Turk v. (W. Va.)	145	Railroad Commission of Ga. v. Louisville & N. R. Co. (Ga.)	902
Northern P. R. Co., Wilson v. (N. D.)	991	Railroad Co., Baltimore & O., Brabham v.(C. C. A.)	1201
Norton, Oklahoma Nat. L. Ins. Co. v.(Okla.)	695	Boyne City, G. & A., Mehe- gan v.(Mich.)	1170
O.		Denver & R. G., Lovejoy v.(Colo.)	888
Oklahoma City, De Long v. ..(Okla.)	597	Louisville & N., v. Cooper (Ky.)	336
Oklahoma Nat. L. Ins. Co. v. Norton(Okla.)	695	Louisville & N., v. Max- well ..(U. S. Sup. Ct.)	665
Oklahoma Portland Cement Co. v. Shepherd(Okla.)	699	Louisville & N., Railroad Commission of Ga. v. (Ga.)	902
Olson, Johnson v.(Kan.)	327	Louisville & N., v. Russell- ville Home Teleph. Co.(Ky.)	138
Oppenheimer, Lhota v.(Pa.)	1102	Louisville & N., v. Wil- liams(Ky.)	613
O'Shea, State ex rel., v. Farmers' Irrig. Dist.(Neb.)	687	Maine C., Crosby v.(Me.)	225
Owens v. Way(Ga.)	399	New Orleans & N. E., Mc- Innis v.(Minn.)	682
P.		New York C. & H. R., Kelliher v.(N. Y.)	1178
Pabst v. Ferch(Minn.)	822	Pennsylvania, Roman Cath- olic Church of St. Anthony v.(C. C. A.)	623
Parmenter, State ex rel., v. Troup(Neb.)	936	St. Louis & S. F., v. Goode (Okla.)	1141
Patterson, St. Louis, I. M. & S. R. Co. v.(Ark.)	668	Tennessee Coal, I. & v. Moody(Ala.)	369
v. Wallace(Okla.)	662	Yazoo & M. V., Crout v.(Tenn.)	281
Pennsylvania Co., Darbrinsky v. (Pa.)	781	Yazoo & M. V., v. Scott (Miss.)	239
Pennsylvania R. Co., Roman Catholic Church of St. Anthony v. (C. C. A.)	623	United, McLaughlin v. (Cal.)	1205
People v. Grunland(Mich.)	314	Railway & Nav. Co., Louisiana, Basey v.(La.)	964
v. Shaw(Ill.)	87	Railway Co., Atchison, T. & S. F., Nicholson v.(Kan.)	417
People ex rel. Dibelka v. Rein- berg(Ill.)	401	Atchison, T. & S. F., State ex rel. Ise v.(Kan.)	751
Perley v. Cambridge(Mass.)	432	Atchison, T. & S. F., v. Vosburg (U. S. Sup. Ct.)	953
Phillips v. Colvin(Ark.)	875	Chicago, M. & St. P., Steltzer v.(Iowa)	1017
Planck, Farmers' Loan & T. Co. v.(Neb.)	564		
Portland Sav. Bank, Walker v. (Me.)	840		
Powers v. Journeymen Brick- layers' Union No. 3 (Tenn.)	1006		

Railway Co., Chicago, M. & St. P., Taylor v. (Wash.)	634	St. Louis, I. M. & S. R. Co. v. Jackson (Ark.)	668
Chicago, R. I. & P., v. Watkins (Ark.)	811	v. Patterson (Ark.)	668
Memphis Street, v. Strat- ton (Tenn.)	704	v. Tukey (Ark.)	320
Missouri, K. & T., v. Harris (U. S. Sup. Ct.)	942	St. Paul Gaslight Co., Manning v. (Minn.)	1022
Nashville, C. & St. L., v. Hubble (Ga.)	1132	Sandusky Portland Cement Co. v. Dixon Pure Ice Co. (C. C. A.)	1210
Nashville Interurban, Ho- gan v. (Tenn.)	788	Saulman v. Nashville (Tenn.)	316
Norfolk & W., Turk v. (W. Va.)	145	Schreyer, Lambrecht v. (Minn.)	812
Northern P., Wilson v. (N. D.)	991	Scott, Yazoo & M. V. R. Co. v. (Miss.)	239
St. Louis, I. M. & S., v. Jackson (Ark.)	668	Seaboard A. L. R. Co., Causey v. (N. C.)	1185
St. Louis, I. M. & S., v. Patterson (Ark.)	668	Selden-Breck Constr. Co., Wright v. (Neb.)	740
St. Louis, I. M. & S., v. Tukey (Ark.)	320	Sevier, Reynolds v. (Ky.)	593
Seaboard A. L., Causey v. (N. C.)	1185	Shaeffer v. Richardson (Md.)	186
Southern, v. Bailey (Ga.)	1043	Sharp, Southwestern Teleg. & Teleph. Co. v. (Ark.)	323
Railways & Electric Co., United, State use of Melitch v. (Md.)	1163	Sharrow v. Inland Lines .. (N. Y.)	1192
Rathman v. New Amsterdam Casualty Co. (Mich.)	980	Shaw, People v. (Ill.)	87
Re Boeck (Wis.)	1008	Shepherd, Oklahoma Portland Cement Co. v. (Okla.)	699
Cornils (Iowa)	762	Sherrard, Hutton v. (Mich.)	976
Love (Okla.)	109	Shultz v. Quereau Co. (N. Y.)	986
Reib, Grigsby v. (Tex.)	1	Simpson v. Du Pont Powder Co. (Ga.)	430
Reinberg, People ex rel. Dibel- ka v. (Ill.)	401	Sloan, Wood v. (N. M.)	766
Ressell v. McKenna (Kan.)	455	Southern R. Co. v. Bailey .. (Ga.)	1043
Revelle, Cox v. (Md.)	443	Southwestern Teleg. & Teleph. Co. v. Sharp (Ark.)	323
Reynolds v. Sevier (Ky.)	593	Spaeth v. Kouns (Kan.)	271
Rhodes Bros. Co. v. Musicians' Protective Union, Lo- cal No. 198 (R. I.)	1037	Stalker, State v. (Iowa)	1222
Richards, Rowe v. (S. D.)	1075	State, Arrowsmith v. (Tenn.)	363
Rowe v. (S. D.)	1069	Cheadle v. (Okla. Crim. Ct. of App.)	1031
Richardson, Shaeffer v. (Md.)	186	Flowers v. (Fla.)	848
Roberson, Ex parte (Nev.)	691	v. Lasecki (Ohio St.)	202
Roberts, Conrad v. (Kan.)	131	Robinson v. (Fla.)	1215
Robinson v. State (Fla.)	1215	v. Stalker (Iowa)	1222
Roman Catholic Church of St. Anthony v. Pennsyl- vania R. Co. .. (C. C. A.)	623	State ex rel. Ise v. Atchison, T. & S. F. R. Co. (Kan.)	751
Rowe v. Richards (S. D.)	1069	Black v. Delaye (Ala.)	640
v. Richards (S. D.)	1075	O'Shea v. Farmers' Irrig. Dist. (Neb.)	687
Runkles, Mount Airy Milling & Grain Co. v. (Md.)	373	Syversen v. Foster .. (Wash.)	340
Russellville Home Teleph. Co., Louisville & N. R. Co. v. (Ky.)	138	Lanng v. Long (La.)	235
		Minnesota Loan & T. Co. v. Probate Ct. of Hennepin County (Minn.)	815
		Crombie v. Superior Ct. for King County (Wash.)	567
		Parmenter v. Troup .. (Neb.)	936
		State use of Melitch v. United Rys. & Electric Co. (Md.)	1163
		States Acci. Ins. Co., Hutton v. (Ill.)	127
		State Sav. & Commercial Bank v. Anderson (Cal.)	675
		Stavanaugh, Lamont v. (Minn.)	460
		Steidl v. Aitken (N. D.)	192
		Steltzer v. Chicago, M. & St. P. R. Co. (Iowa)	1017

S.

Sagal v. Fylar (Conn.) 747
St. Louis & S. F. R. Co. v.
Goode (Okla.) 1141
L.R.A.1915E.

Stokely v. Fidelity & Casualty Co. (Ala.)	955	United R. Co., McLaughlin v. (Cal.)	1205
Stonerook v. Wisner (Iowa)	834	United Rys. & Electric Co., State use of Melitch v. (Md.)	1183
Stratton, Memphis Street R. Co. v. (Tenn.)	704		
Summit v. Morris County Traction Co. (N. J. L.)	385	V.	
Superior Ct. for King County, State ex rel. Crombie v. (Wash.)	567	Van Bever, Jones v. (Ky.)	172
Swartz, Annear v. (Okla.)	267	Vaughan, Leonard v. (Va.)	714
Swentzel v. Holmes (Mo.)	926	Vincent v. Haycraft (Ky.)	307
Syversen, State ex rel., v. Foster (Wash.)	340	Virginia Brew. Co., Terrill v. (Minn.)	1028
		Vosburg, Atchison, T. & S. F. R. Co. v. .. (U. S. Sup. Ct.)	953
T.		W.	
Talcott v. Quereau Co. (N. Y.)	986	Walker v. Portland Sav. Bank (Me.)	840
Taylor v. Chicago, M. & St. P. R. Co. (Wash.)	634	Wallace, Patterson v. (Okla.)	662
v. Indiana & M. Electric Co. (Mich.)	294	Wallen, Judge v. (Neb.)	436
Tempe v. Corbell (Ariz.)	581	Wallower, Cummings v. (Okla.)	774
Tennessee Coal, I. & R. Co. v. Moody (Ala.)	369	Watkins, Chicago, R. I. & P. R. Co. v. (Ark.)	311
Terrill v. Virginia Brew. Co. (Minn.)	1028	Watson v. Lawrence (La.)	121
Thompson-McDonald Lumber Co. v. Morawetz (Minn.)	302	Way, Owens v. (Ga.)	399
Tippecanoe Loan & Trust Co. v. Jester (Ind.)	721	Weich v. Maryland Casualty Co. (Okla.)	708
Title Guarantee & T. Co., Coy v. (Fed.)	211	Wiese, Re (Neb.)	832
Todd, Cohen v. (Minn.)	846	Wilkerson v. Myatt-Dicks Motor Co. (La.)	439
Travis, George v. (Mich.)	408	Williams, Louisville & N. R. Co. v. (Ky.)	613
Troup, State ex rel. Parmenter v. (Neb.)	936	Wilson v. Northern P. R. Co. (N. D.)	991
Tryon v. Moyer (Minn.)	844	Wisner, Stonerook v. (Iowa)	834
Tukey, St. Louis, I. M. & S. R. Co. v. (Ark.)	320	Wood v. Sloan (N. M.)	766
Turk v. Norfolk & W. R. Co. (W. Va.)	145	Wright v. Selden-Breck Constr. Co. (Neb.)	740
Tway, Davis v. (Ariz.)	604		
		Y.	
U.		Yazoo & M. V. R. Co., Crout v. (Tenn.)	281
Umbrogia v. Laskau (Conn.)	959	v. Scott (Miss.)	239
L.R.A.1915E.		Yearby, Edwards v. (N. C.)	462

LAWYERS REPORTS

ANNOTATED

NEW SERIES.

TEXAS SUPREME COURT.

JESSIE STALLCUP GRIGSBY, Plf. in
Err.,
v.

ELIZA J. REIB.

(105 Tex. 597, 153 S. W. 1124.)

Common law — adoption — what constitutes.

1. The common law of England, adopted by Texas as part of its law in 1840, was not the law existing in England at that time, but the law as it was declared by the courts of the different states of the Union.

Marriage — common law — requisites.

2. To constitute a common-law marriage, the parties must, in addition to present consent to take each other for husband and wife, professedly live and cohabit together as such in pursuance of the agreement, and therefore no marriage exists between a man and the proprietor of a rooming house, who in her room agreed to be man and wife, if she retains her own name, and conducts her business as formerly, with nothing to indicate that her status was changed.

(February 26 1913.)

ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District to review a judgment affirming a judgment of the District Court for Dallas County in defendant's favor in an action brought to recover a share in the estate of G. M. D. Grigsby, deceased, to which plaintiff claimed to be entitled as his surviving wife. Affirmed.

The facts are stated in the opinion.

Messrs. Parks, Patton, & Plowman and W. H. Allen for plaintiff in error.

Messrs. Spence & Baker and W. L. Crawford, Jr., for defendant in error:

A mere agreement between a man and a woman, to be husband and wife, without the

present bona fide intention on the part of each of them then and there to assume that relation, does not constitute a valid marriage between the parties.

Pegg v. Pegg, 136 Iowa, 572, 115 N. W. 1027; Robinson v. Robinson, 188 Ill. 371, 58 N. E. 906; McKenna v. McKenna, 180 Ill. 577, 54 N. E. 641; Cox v. State, 117 Ala. 103, 41 L.R.A. 760, 67 Am. St. Rep. 166, 23 So. 806.

It is not the law of Texas that a "common-law marriage" is constituted where a man and a prostitute agree to become husband and wife, and do nothing more to effectuate and carry out such alleged contract, except to have carnal intercourse in continuation of that immoral relation which had its inception several years before, at a time when the man had a living wife.

Robinson v. Robinson, 188 Ill. 371, 58 N. E. 906; Port v. Port, 70 Ill. 484; Roszel v. Roszel, 73 Mich. 133, 16 Am. St. Rep. 569, 40 N. W. 868; Edelstein v. Brown, — Tex. Civ. App. —, 95 S. W. 1129; Pegg v. Pegg, 136 Iowa, 572, 115 N. W. 1027; Cartwright v. McGown, 121 Ill. 398, 2 Am. St. Rep. 105, 12 N. E. 787; Kilpfel v. Kilpfel, 41 Colo. 40, 124 Am. St. Rep. 99, 92 Pac. 26.

Brown, Ch. J., delivered the opinion of the court:

Jessie Stallcup Grigsby, hereinafter styled plaintiff, instituted this suit in a district court of Dallas county against Eliza J. Reib, hereinafter designated defendant. The husband of Mrs. Reib was joined; but, they having been divorced, he was dismissed from the case. G. M. D. Grigsby, a childless widower, and brother of Mrs. Reib, died in 1906, leaving a valuable estate, much of which was claimed and held by Mrs. Reib under her brother's will. There is no question of defendant's title to the property, except as the claim of plaintiff may be superior thereto. We will therefore omit all description of the property, and state the plaintiff's claim.

Note. — See note, post, 8.
L.R.A.1915E.

Plaintiff was keeping what she terms a rooming house in Dallas—in fact, an assignation house—in which girls roomed and received their visitors, and to which men with women resorted for illicit purposes. Adopting the statements of plaintiff and her witness as true, the facts were, in substance, that Grigsby's wife having died, he visited plaintiff in her place, and they agreed to be husband and wife, and then began sexual intercourse; he coming to that house at different times and frequently. They occupied the same room and the same bed, and indulged their sexual desires. Grigsby called plaintiff his wife, and introduced her to some persons as such. Plaintiff continued her business, and sold beer to the girls and their visitors, and to such others as visited her house. Her business was conducted in the name of Jessie Stalloup. She had her bank account in that name. She did not assume the name of Grigsby until after his death. Grigsby died at Jefferson in 1906, and defendants, under lawful claim, took possession of his property, at least of that part in suit which plaintiff claims to have been acquired by Grigsby after her alleged marriage to him, wherefore she claims one half of it as community property.

The foregoing statement presents the plaintiff's case. We deem it unnecessary to state the facts relied upon by the defendant, because the law which must control can be more clearly stated under this plain condensed statement of plaintiff's claim.

The court gave to the jury this charge: "The court instructs you that a common-law marriage is legal and valid under the law of Texas; and neither the issuance of license or ministerial or official marriage ceremony is necessary to constitute a lawful and binding common-law marriage. All that is necessary to constitute such a marriage is that if the parties mutually agree and consent together to become husband and wife, and thereafter carry out that agreement and live and cohabit together as husband and wife, the marriage would be valid under our law. If you find and believe from the evidence that the plaintiff and the deceased, G. M. D. Grigsby, on or about the 10th day of April, 1905, mutually consented and agreed together with each other to become husband and wife, with the intention at that time of living and cohabiting with each other as husband and wife, and that in pursuance of such agreement, if any, they did professedly lived and cohabit together as husband and wife, you will find for the plaintiff that she was the common-law wife of the deceased, G. M. D. Grigsby. If, however, on the other hand, you fail to find that plaintiff and deceased, G. M. D. Grigsby, mutually consented and agreed together L.R.A.1915E.

with each other to become husband and wife on or about April 10, 1905, or if you find that plaintiff and deceased, Grigsby, did not professedly live and cohabit with each other as husband and wife in pursuance of such agreement, if any, you will find for the defendant, Eliza J. Reib."

The plaintiff in error challenges the correctness of the charge by this proposition of law: "In order to constitute a valid common-law marriage, where the parties have mutually agreed and consented together to become husband and wife, it is immaterial as to whether the husband and wife either carried out the agreement, or whether they either lived or cohabited together as husband and wife." The proposition clearly defines the issue which must be decided by this court in disposing of the case. If the proposition correctly states the law, the court erred in the charge, and the judgment must be reversed.

The marriage asserted in this case, if sustained at all, must find its support and sanction in the common law in force in this state; therefore the first question to be settled is, What rule of the common law must govern in arriving at our conclusion? In the year 1840, the Congress of the republic enacted a law (Laws 1840, p. 3) which embraced article 3258 of our Revised Civil Statutes of 1895, which reads: "The common law of England (so far as it is not inconsistent with the Constitution and laws of this state) shall, together with such Constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the legislature."

In 1823, by act of Parliament, all marriages in England were required to be performed according to the requirements of the statute; the common law on that subject being thereby abrogated. 16 Laws of England, pp. 278-286.

We must first ascertain what the Congress of the republic intended to designate by the language, "The common law of England." If it was intended to adopt the common law as it was in force in England in 1840, then we have no common law on the subject of marriage, for none such was in force in that kingdom at that date. Our courts have uniformly recognized the existence, in this state, of the common law which permitted marriage without compliance with the statute upon that subject; therefore we conclude that "the common law of England," adopted by the Congress of the republic, was that which was declared by the courts of the different states of the United States. This conclusion is supported by the fact that the lawyer members of that Congress, who framed and enacted that statute, had been reared and educated in the United

States, and would naturally have in mind the common law with which they were familiar. If we adopt that as our guide and source of authority, the decisions of the courts of those states determine what rule of the common law of England to apply to this case.

The effect of the act of 1840, *supra*, was not to introduce and put into effect the body of the common law, but to make effective the provisions of the common law, so far as they are not inconsistent with the conditions and circumstances of our people. *Clarendon Land Invest Agency Co. v. McClelland Bros.* 86 Tex. 185, 22 L.R.A. 105, 23 S. W. 576, 1100.

In the courts of the different states of the United States, there are two lines of cases between which we must choose, which Mr. Freeman in his notes to cases in 124 Am. St. Rep. 111, 112, states, in substance, as follows: Both lines of authority rest upon the doctrine that marriage is a civil contract, and that no marriage can be binding which does not rest upon the consent of the parties. One rule is "that a marriage is complete when the parties agree, in words of the present tense, to take each other as husband and wife." That statement of the law is indorsed by Mr. Freeman, in support of which he cites a number of cases. The other rule is stated thus: "An assumption of the marriage status is essential to a common-law marriage; that an agreement presently to be husband and wife is not sufficient to constitute marriage, until it is acted upon by the parties."

The question presented in this case is of first importance; indeed, it lies at the foundation of good society. In *Sheffield v. Sheffield*, 3 Tex. 86, our first Chief Justice Hemphill said: "The nature, object, and important purposes of the contract should have their just influence upon the mind. The parties have pledged themselves, not only for their own happiness, but for purposes important to society, to live together during the term of their natural lives. This engagement is the most solemn and important of human transactions. It is regarded by all Christian nations as the basis of civilized society, of sound morals, and of the domestic affections; and the relations, duties, obligations, and consequences flowing from the contract are so important to the peace and welfare of society as to have placed it under the control of special municipal regulations, independent of the will of the parties. The mutual comfort and happiness of the parties are the principal, but not the only, objects of the engagement. It is intended, also, for the benefit of their common offspring, and is an important

element in the moral order, security, and tranquillity of civilized society."

In his work on the Conflict of Laws, Judge Story said: "The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The status of marriage is *juris gentium*; and the foundation of it, like that of all other contracts, rests on the consent of parties. But it differs from other contracts in this: That the rights, obligations, or duties arising from it are not left entirely to be regulated by the agreements of parties, but are, to a certain extent, matters of municipal regulation, over which the parties have no control by any declaration of their will. It confers the status of legitimacy on children born in wedlock, with all the consequential rights, duties, and privileges thence arising; it gives rise to the relations of consanguinity and affinity; in short, it pervades the whole system of civil society." Section 109, pp. 185, 186.

Appreciating the importance of the issue, we have devoted much time, thought, and research to its solution. As we have stated above, the question must be decided according to the common law, as we may find it applicable to this state.

We will restate the issue to be decided in this case. Every marriage must be by contract, express or implied; that is, the relation of husband and wife must be assumed, as such, by mutual consent. The contract between parties to be husband and wife is a civil contract; that is, it is not a church ordinance or rite.

In this state, marriage may be contracted without compliance with the statute, and without a ceremony by an officer or minister of the gospel. To present the issue of law sharply, we quote from *Simmons v. Simmons*, — Tex. Civ. App. —, 39 S. W. 639, in which Judge Williams, then on the court of civil appeals of the first district, in his usual clear style, said: "To constitute such a marriage, it requires *only* the agreement of the man and woman to become *then* and *thenceforth* husband and wife. When this takes place, the marriage is *complete*." (The italics are the writer's.) To illustrate the legal proposition announced by that able and careful lawyer and judge, I will use this hypothetical case. A man, whom I will designate as B, and a woman, C, meet and in writing or orally agree to then become husband and wife. B says, "I, B, now take you, C, to be my lawfully wedded wife for and during our natural lives." C responds, "I, C, now take you, B, to be my lawfully wedded husband for and during our natural lives." Without a kiss or embrace the couple bow politely and separate.

There are no witnesses and no publication of the marriage, and no conjugal relations. Are they husband and wife under the laws of this state?

It is well settled in this state that a marriage without a license or ceremony may be lawfully entered into when, by consent of both parties, they professedly, as husband and wife, cohabit and maintain that relation. The proposition submitted by counsel for plaintiff in error is: "To constitute a common-law marriage, it requires only the agreement of the man and woman to become then and thenceforth husband and wife." The district court refused a charge embodying that proposition of law, which is assigned as error. If the proposition announced and quoted above is a correct statement of the law, then B and C would be husband and wife, although they should never meet again. Before entering upon an examination of the authorities, we must understand the rules by which the authoritative force of an opinion must be determined.

"*Dictum*" is defined to be: "An opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication; an opinion expressed by a judge on a point not necessarily arising in a case; an opinion of a judge which does not embody the resolution or determination of the court, and made without argument, or full consideration of the point; not the professed deliberate determination of the judge himself." As to the weight to be given to such expressions, we cite *Tompkins v. Bennett*, 3 Tex. 48. In that case Judge Lipscomb said: "On the trial in the court below, the judge was not called upon to decide on the legal effect of a foreign bankrupt law, out of the limits of its own territory. Whether it could affect real or personal property, one or both, belonging to the bankrupt in the other countries, were questions not made, and therefore not responded to by the judge. Nor was he called on to decide on any conflict of claim between a citizen of Texas and one claiming under the bankrupt's assignment in the United States. Any discussion of those questions now would be traveling out of the record, and, in my opinion, violating the appropriate duty of an appellate tribunal."

The phrase quoted from *Simmons v. Simmons*, *supra*, could only apply to a case in which the parties entered into a contract in words of the present tense, and did no more. The facts did not call for the conclusion of the law there expressed, because there was, in the *Simmons* Case, cohabitation to the extent that the court presumed therefrom a marriage contract. The statement that a marriage can be established

only by a contract *in presenti* was not relevant to the facts of that case, and it is not entitled, as to that statement, to be regarded as a judicial decision. But the facts showed such cohabitation as proved the contract, and that case was decided upon the proposition that the marriage was to be conclusively presumed from the character of the cohabitation. That case is not authority for the proposition that B and C were husband and wife. The marriage in the *Simmons* Case did not rest upon the contract alone. Judge Williams said: "The parties, under the evidence, should have been treated as husband and wife from the time when they assumed that relation; and a charge to that effect, requested by appellant, should have been given." The conclusion reached is that the parties were husband and wife from the time they assumed that relation, not from the time of making the contract; therefore the marriage was not formed by the contract alone, but by consent and cohabitation, which is sound doctrine.

The writer has examined every case that he could discover in the supreme court library which had a bearing upon the question before the court, and has found but two cases in which a common-law marriage has been sustained in the absence of any cohabitation or other acts of consummation. In *Jackson ex dem. Dies v. Winne*, 7 Wend. 47, 22 Am. Dec. 563, the facts stated were: It appeared that Enoch was arrested in the year 1800 on the complaint of the overseers of the poor of the town of Blenheim, under the bastardy act, on a charge of having gotten Joanna with child. He was taken to the house of Joanna's father, and thence with the father and the mother of Joanna, in company of the constable, to a justice of the peace to be married. The justice asked Enoch and Joanna if they consented to be married, and told them to join hands. Enoch dropped his hand and turned from Joanna. She took it and held it until they were pronounced man and wife. The justice hesitated when Enoch refused to take Joanna's hand, but proceeded in a minute or two and concluded the ceremony. It was customary for the justice to offer a prayer; but he did not do so on this occasion, and Joanna's father did so instead. During the whole time, Enoch said nothing. After the ceremony, Joanna returned to her father's house, but Enoch did not go with her; nor did they ever afterwards cohabit. Under that state of facts, the court held that the marriage was valid. There was neither cohabitation nor contract; but that court held that it was a contract on the part of the man, who, being a prisoner, stood mute, refusing his hand to the woman, who seized

it and made the declarations. If it be conceded that Enoch by silence gave consent, and thereby made a contract, then to become and thereafter to be her husband, it stands as one of two cases within my reach that sustain the proposition that a marriage by contract alone establishes the status of husband and wife.

Mr. Freeman, who attained a great reputation as an annotator, in a note to *Klipfel v. Klipfel*, 124 Am. St. Rep. 112, says: "The true rule, however, is that a marriage is complete when the parties agree, in words of the present tense, to take each other as husband and wife. Cohabitation or copulation following such agreement may be evidence of the existence of the agreement; but it adds nothing to the agreement, and is not essential to the validity of the marriage. *Dumaresly v. Fishly*, 3 A. K. Marsh. 368; *Jackson ex dem. Dies v. Winne*, supra. Said the supreme court of Minnesota in the leading case of *Hulett v. Carey*, 66 Minn. 327, 34 L.R.A. 384, 61 Am. St. Rep. 419, 69 N. W. 31: 'Upon this state of facts, the contention of the appellants is that there was no marriage, notwithstanding the execution by them of the written contract; that, in order to constitute a valid common law marriage, the contract, although *per verba de presenti*, must be followed by habit or reputation of marriage,—that is, as we understand counsel, by the public assumption of marital relations. We do not so understand the law. The law views marriage as being merely a civil contract, not differing from any other contract, except that it is not revocable or dissoluble at the will of the parties. The essence of the contract of marriage is the consent of the parties, as in the case of any other contract; and, when there is a present, perfect consent to be husband and wife, the contract of marriage is completed. The authorities are practically unanimous to this effect. Marriage is a civil contract *jure gentium*, to the validity of which the consent of parties able to contract is all that is required by natural or public law. If the contract is made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, in the absence of any civil regulations to the contrary. The maxim of the civil law was, *Consensus non concubitus facit matrimonium*. The whole law on the subject is that, to render competent parties husband and wife, they must and need only agree in the present tense to be such; no time being contemplated to elapse before the assumption of the status. If cohabitation follows, it adds nothing in law, although it may be evidence of marriage. It is mutual, present consent, lawfully expressed, L.R.A.1915E.

which makes the marriage. 1 Bishop, Marr. Div. & Sep. §§ 239, 313, 315, 317. See also the leading case of *Dalrymple v. Dalrymple*, 2 Hagg. Consist. Rep. 54, 17 Eng. Rul. Cas. 11, which is the foundation of much of the law on the subject.' To the same effect is the recent case of *Davis v. Stouffer*, 132 Mo. App. 555, 112 S. W. 282."

Let us understand the distinction between the two contentions on this question. The first, just stated; the second is: "That an assumption of the marriage status is essential to a common-law marriage; that an agreement presently to be husband and wife is not sufficient to constitute marriage until it is acted upon by the parties." Both propositions embrace consent of the parties—the contract—for there can be no marriage without such contract; therefore we again state that, for a decision to be authority for the proposition, upon which plaintiff in error relies, that a marriage is complete by the contract, the case must not embrace in its facts cohabitation or any form of consummation, for it would not then be a case of marriage by contract only. Keeping that distinction in mind, we will review the authorities cited by Mr. Freeman, and appraise their value in this investigation.

In *Dumaresly v. Fishly*, 3 A. K. Marsh. 368, the question was squarely before the court, and a divided court held that a marriage by contract, without any subsequent recognition by the parties, constituted a valid marriage. Chief Justice Boyle delivered the opinion concurred in by Justice Owsley. The parties had gone from Kentucky to Indiana for marriage, which was the home of the bride's father. A license was procured and a ceremony performed, but the bride refused to cohabit. We infer these facts, which are not fully stated. The majority said: "Marriage is nothing but a contract; and, to render it valid, it is only necessary, upon the principles of natural law, that the parties should be able to contract—willing to contract, and should actually contract. A marriage thus made, without further ceremony, was, according to the simplicity of the ancient common law, deemed valid to all persons; and such continued to be the law of England until the time of Pope Innocent the Third." Judge Mills dissented in a very able opinion; and contended for the rule that cohabitation was necessary to complete a marriage by agreement. Besides, the marriage was entered into in the state of Indiana, and should have been determined by the law of that state. I can find no decision by the supreme court of Indiana that promulgates the "contract only" doctrine.

Hulett v. Carey, 66 Minn. 327, 34 L.R.A.

384, 61 Am. St. Rep. 419, 69 N. W. 31, cited by the annotator, was based upon these facts: The man and woman had lived in the same house, she as housekeeper, and entered into a contract of marriage, in writing, in the present tense, after which they occupied the same bed, and lived secretly as husband and wife. The court said: "The law views marriage as being merely a civil contract, not different from any other contract, except that it is not revocable or dissoluble at the will of the parties. The essence of the contract of marriage is the consent of the parties, as in the case of any other contract; and whenever there is a present, perfect consent to be husband and wife, the contract of marriage is completed." But there was such cohabitation as would have made the marriage valid, and the use of the common phrase was *dicta*, that was not a marriage by contract alone. That court really rested the decision upon the cohabitation.

Dalrymple v. Dalrymple, supra, is cited to the same proposition. The case originated in Scotland, and was decided under the law of that country; but in that case the contract was definite, and the parties cohabited. The husband was an army officer, and visited the wife as an army officer would, and treated her as his wife. The case does not support the position that marriage by contract only was valid in Scotland.

Davis v. Stouffer, supra, was decided by the court of appeals of Missouri at Kansas City. The opinion was written by Justice Ellison, who quotes as the law this language: "When there is mutual consent, in the present tense, between the parties, they are married." The judge expended much time in research and argument to establish a proposition unsound and not involved in the facts of that case, which show that cohabitation followed immediately upon the making of the agreement, and continued until the man's death. In so far as that case asserts that consent without cohabitation or assumption of the marriage status constitutes marriage in Missouri, it is in direct conflict with *Topper v. Perry*, 197 Mo. 531, 114 Am. St. Rep. 777, 95 S. W. 203, in which the supreme court of that state said: "Under our law, marriage is a civil contract, by which a man and a woman agree to take each other for husband and wife during their joint lives, unless it is annulled by law, and to discharge toward each other the duties imposed by law upon such relation. Each must be capable of assenting, and must, in fact, consent to form this new relation. When the consent to marry is manifested by words *de presenti*, a present assumption of the L.R.A.1915E.

marriage status is necessary." The authorities cited do not sustain Mr. Freeman's contention.

The counter proposition to that asserted by Mr. Freeman and submitted by defendant in error is that an agreement to be husband and wife, not followed by cohabitation, does not constitute marriage. *Hawkins v. Hawkins*, 142 Ala. 571, 110 Am. St. Rep. 53, 38 So. 640; *Topper v. Perry*, supra. We are confident that there is no state court (except in the two cases cited) which holds such marriage, without cohabitation, to be valid. There are a number of cases in which the "stock phrase"—"Marriage is a civil contract, and to constitute such marriage requires only the agreement of the man and the woman to become then and thenceforth husband and wife"—is used; but in each case which sustained the marriage, except the two, there was cohabitation.

We deem it unnecessary to cite the great number of cases which hold that marriage by contract is not valid unless it be followed by acts of consummation; however, we will add the following cases, with this quotation from *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164: "Whatever the form of ceremony, or even if all ceremony is dispensed with, if the parties agreed presently to take each other for husband and wife, and from that time lived together professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding upon the parties, and which would subject them and others to legal penalties for a disregard of its obligations. This has become the settled doctrine of the American courts; the few cases of dissent, or apparent dissent, being borne down by a great weight of authority in favor of the rule as we have stated." In addition we cite: *Pegg v. Pegg*, 138 Iowa, 572, 115 N. W. 1027; *McKenna v. McKenna*, 180 Ill. 557, 54 N. E. 641; *Tartt v. Negus*, 127 Ala. 301, 28 So. 713; *Travers v. Reinhardt*, 205 U. S. 440, 51 L. ed. 873, 27 Sup. Ct. Rep. 563.

The fallacy of the phrase so frequently quoted is in the fact that it ignores the correct definition of marriage; that it is a status—the relation of husband and wife. A status cannot be created by contract. The attitude of this court on this question is best shown by the excellent opinion written by Judge Lightfoot in *Ingersol v. McWillie*, 9 Tex. Civ. App. 549, 30 S. W. 57, which was approved by this court. Judge Lightfoot said: "Each mutually agreeing that they would then and thenceforward be husband and wife, and, upon the faith of such mutual agreement and promise, they then cohabited and lived together as such husband and wife, and so continued." The

opinion was approved by this court on application for writ of error. *Ingersol v. McWillie*, 87 Tex. 647, 30 S. W. 869.

In *Simmons v. Simmons*, — Tex. Civ. App. —, 39 S. W. 639, the court granted a divorce, but refused a charge to the effect that their property rights should be determined as arising when the marriage relation was assumed. Judge Williams said: "The parties, under the evidence, should have been treated as husband and wife from the time when they assumed that relation, and a charge to that effect, requested by appellant, should have been given." If the contract created the status of husband and wife, surely the property rights began then; and, if the right of property began when the relation was assumed, the contract did not constitute the marriage.

The logical mind of the author of the opinion in the last above-named case reached the correct result, and demonstrated the absurdity of the doctrine that marriage is a contract by showing that the rights of the parties arise out of the status of husband and wife in fact, not in theory.

Marriage was not originated by human law. When God created Eve, she was a wife to Adam; they then and there occupied the status of husband to wife and wife to husband. When God created the first pair, He gave the command: "Multiply and replenish [people] the earth"—which was enjoined upon their expulsion from the garden. When Noah was selected for salvation from the flood, he and his wife and his three sons and their wives were placed in the Ark; and, when the flood waters had subsided and the families came forth, it was Noah and his wife and each son and his wife, and God repeated to them the command: "Multiply." All of the duties and obligations that have existed at any time between husband and wife existed between those husbands and wives before civil government was formed. The truth is that civil government has grown out of marriage; marriage by cohabitation, not by contract, which created homes, and population, and society, from which government became necessary to settle differences in matters of private interest, to protect the weak, and to conserve the moral forces of society, to the support of religion and free government. In what respect does the contract of marriage of B and C contribute to their happiness? How does that marriage benefit society? It will contribute nothing to sustaining the dignity of the state, nor add to its citizenship. Such a contract, if it be regarded as such, is worse than a *nudum pactum*, for it is without consideration or obligation to or from either party. Such life is in defiance of the commands of God, L.R.A.1915E.

and in disregard of every obligation to society and state. Such a transaction has but one element of a contract: Mutual consent to do nothing for themselves, their country, or their God. The abstract theory has had little influence in the determination of causes, except to confuse the judicial mind. Contract marriages exist when the parties, for some pecuniary or social advantages, have desecrated the sacred status by their union, and such marriages often furnish business to the divorce courts and scandals to society.

If the rule of law claimed in this case is not given effect, it should be repudiated, because it is unsound and inapplicable to present conditions, serving only to confuse courts and juries. If it were put into effect, as is sought to be done in this case, it would open a wide door, with a strong invitation to perjury and fraud. It would be a menace to the heirs of men like Mr Grigsby, and make their estates the prey of the bawd and the adventuress, with no possible safeguard, one party being dead, and no witnesses to the contract nor publicity of the marriage. One of the parties to such a contract might marry and raise a family, and, dying without disclosing the former marriage, the "common-law widow" could come forward, claim to be the surviving wife, and thus displace the woman who had borne the hardships of wife and mother, brand the children as bastards, and take the position as survivor with her rights in the estate. A rule for the regulation of the sacred rights of marriage and the rights of families that makes such wrongs possible should not be recognized in civilized governments.

The term "civil contract," as applied to marriage, means nothing now, for there does not exist the church's claim that it is a religious rite. There is nothing to be differentiated by the language. It is obsolete.

Marriage is not a contract, but a status created by mutual consent of one man and one woman. The method by which it is solemnized or entered into may be by proceedings prescribed by statute, or by mutual agreement with cohabitation, but, however contracted, having the same elements, and producing the status of husband and wife. The sole difference which can legally exist is in the method of expressing consent; and the only particular in which a marriage as at common law can differ from the statutory method is the absence of license and the ceremony.

The cohabitation must be professedly as husband and wife, and public, so that, by their conduct towards each other, they may be known as husband and wife. Such marriages may be equally the consummation of

a mutual affection, which will produce a home and family that will contribute to good society, to free and just government, and to the support of Christianity,—to the common weal. It would be sacrilegious to apply the designation, “a civil contract,” to such a marriage. It is that and more; a status ordained by God, the foundation and support of good government, and absolutely necessary to the purity and preservation of

good society. When the “wedding day” of the parent ceases to be revered by the offspring, there will be a weakening of the family ties, and a lowering of the standard of marriage and home.

The court instructed the jury correctly, and the jury seem to have found correctly on the facts. The judgments of the courts are affirmed.

Note.—General characteristics and validity of common-law marriage.

- I. Introduction, 8.
- II. In general
 - a. In England and Scotland, 9.
 - b. In Canada and United States.
 1. Generally, 12.
 2. Rule in several jurisdictions of the United States
 - (a) Where repudiated, 17.
 - (b) Where adopted, but abrogated by statute, 19.
 - (c) Where adopted and retained, 19.
 - (d) In Spanish colonies, 20.
- III. Marriage *per verba de presenti*, 23.
- IV. Marriage *per verba de futuro cum copula*, 31.
- V. Habit and repute.
 - a. Generally, 33.
 - b. Nature and essentials of habit, 38.
 - c. Nature and essentials of repute, 39.
 - d. Necessity of concurrence, 42.
 - e. Nature of inference or presumption; marriage in fact, 44.
 - f. Effect of abrogation of substantive common law, 47.
 - g. Proceedings in which available, 51.

1. Introduction.

The common law of this country, so far as it relates to marriage, is founded upon the English common law of marriage, which never existed. This paradox rests upon the fact that our law was founded upon what was supposed to be the law in England while ours was in the making, but was afterwards held never to have been the rule in that country.

Now and then is heard a note of regret that the law should have countenanced marriage by private consent. This doctrine of informal marriage, which accords the relation of husband and wife to persons who have exchanged mutual consent to that

relation, has been the source of much insecurity and doubt; but its good effects have far outnumbered the bad. Indeed, such a doctrine was as necessary as its necessity was lamentable. Only after the evolution of centuries was the marriage by capture, gift, or sale supplanted by marriage upon the consent of the parties themselves, and this in turn modified for ecclesiastical purposes, when papal persistence finally made a ceremony essential. Throughout these years, judges, both ecclesiastical and temporal, had no fixed idea of what was necessary to constitute marriage. Much less did the people, illiterate as they were, know or probably care about the rules that were attempted to be formed for their guidance. They could, then, but fall back upon the self-made rules of custom and experience, whose highest form was that of marriage by mutual consent. To uphold such nonceremonial marriages was to give effect to the marital intent of persons who, in furtherance of it, had often done all they thought necessary to create the status of husband and wife. To refuse them standing as such was to create bastards and concubines irrespective of matrimonial desire,—a result that was not calculated to make a happy and wholesome people,—the theoretical purpose of all law.

There may have come a time between then and the present when the abandonment of the doctrine of informal marriages would seldom have been attended with such unfortunate results: when the increase and availability of functionaries to celebrate marriage facilitated solemnization; when the spread of education and the facilities for disseminating intelligence would tend to acquaint most persons with any restraint that might be imposed. But it is hard to say that such a situation existed at any particular time. The idea, based on custom and experience, that marriage could be constituted by mere private consent, was firmly fixed, and could not be eradicated merely by statute or judgment. And so long as that notion endured it was unsafe to abrogate the common law at one stroke of the pen without a previous campaign of education. A strong testimonial to this

fact is the refusal of the courts to hold that a statute abrogates the common law unless it contains express words of nullity.

It is to be regretted that the conditions of society in the centuries that have gone made necessary the judicial recognition of such lax rules for constituting a relation which is justly said to be the very foundation of society; but the fact remains that those rules have been, and still are, recognized very extensively, and therefore, a consideration of their peculiar characteristics should be more profitable than comments on their present expediency.

II. In general.

a. In England and Scotland.

In a case in a consistory court, decided in 1795,¹ Sir William Scott, later and better known as Lord Stowell, said: "It is held by some persons that marriage is a contract merely civil; by others, that it is a sacred, religious, and spiritual contract, and only so to be considered. The jurisdiction of the ecclesiastical courts was founded on ideas of this last described nature; but in a more correct view of this subject, I conceive that neither of these opinions is perfectly accurate. According to juster notions of the nature of the mar-

riage contract, it is not merely either a civil or a religious contract; and, at the present time, it is not to be considered as originally and simply one or the other. It is a contract according to the law of nature, antecedent to civil institutions, and which may take place to all intents and purposes wherever two persons of different sexes engaged, by mutual contracts, to live together. Our first parents lived not in political society, but as individuals, without the regulation of any institutions of that kind. It is hardly necessary to enter something of a protest against the opinion, if any such opinion exists, that a mere commerce between the sexes is itself marriage. A marriage is not every casual commerce; nor would it be so even in the law of nature. A mere casual commerce, without the intention of cohabitation and bringing up of children, would not constitute marriage under any supposition. But when two persons agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation,—that, in a state of nature, would be a marriage, and in the absence of all civil and religious institutions might safely be presumed to be, as it is popularly called, a marriage in the sight of God." In the celebrated case of *Dalrymple v. Dalrymple*,²

¹ *Lindo v. Belisario*, 1 Hagg. Consist. Rep. 216.

² 2 Hagg. Consist. Rep. 54, 17 Eng. Rul. Cas. 11. This case, in which a Scotch marriage was confirmed by the consistory court of London by the application of the Scotch law, discussed the general history and development of the law on the question. It said: "Marriage, being a contract, is, of course, consensual (as is much insisted on, I observe, by some of the learned advocates), for it is of the essence of all contracts, to be constituted by the consent of parties. *Consensus non concubitus facit matrimonium*, the maxim of the Roman civil law, is, in truth, the maxim of all law upon the subject; for the *concubitus* may take place for the mere gratification of present appetite, without a view to anything further; but a marriage must be something more; it must be an agreement of the parties looking to the *consortium ritæ*; an agreement indeed of parties capable of the *concubitus*, for though the *concubitus* itself will not constitute marriage, yet it is so far one of the essential duties, for which the parties stipulate, that the incapacity of either party to satisfy that duty nullifies the contract. Marriage, in its origin, is a contract of natural law; it may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind: it is the parent, not the child, of civil society.

In civil society it becomes a civil

contract, regulated and prescribed by law, and endowed with civil consequences. In most civilized countries, acting under a sense of the force of sacred obligation, it has had the sanction of religion superadded: it then becomes a religious as well as a natural and civil contract; for it is a great mistake to suppose that, because it is the one, therefore it may not likewise be the other. Heaven itself is made a party to the contract, and the consent of the individuals, pledged to each other, is ratified and consecrated by a vow to God. It was natural enough that such a contract should, under the religious system which prevailed in Europe, fall under ecclesiastical notice and cognizance, with respect both to its theological and its legal constitution; though it is not unworthy of remark that, amidst the manifold ritual provisions made by the Divine Lawgiver of the Jews for various offices and transactions of life, there is no ceremony prescribed for the celebration of marriage. In the Christian Church marriage was elevated in a later age to the dignity of a sacrament, in consequence of its Divine institution, and of some expressions of high and mysterious import respecting it contained in the Sacred Writings. The law of the Church, the canon law (a system which, in spite of its absurd pretensions to a higher origin, is in many of its provisions deeply enough founded in the wisdom of man), although, in conformity to the prevailing theological opinion, it revered marriage as a sacra-

the same judge went into the question at much greater length, writing an opinion which has been most highly commended for its learning and logic. While the case involved a consensual marriage under the law of Scotland, he essayed to speak also for England, and he spoke so logically and convincingly that his opinion was for years, extensively, if not commonly, regarded as correctly stating that while the church elevated marriage to the dignity of a sac-

rament, it respected its natural and civil origin, and did not absolutely require the intervention of a priest; that such was the state of the law when solemnization *in facie ecclesie* was required by the council of Trent, whose decree, however, never became effective in England, since that country, at the Reformation, disclaimed the doctrine of a sacrament in marriage, and retained those rules of the canon law which had their foundation not in the sacrament

ment, still so far respected its natural and civil origin as to consider that where the natural and civil contract was formed, it had the full essence of matrimony without the intervention of the priest; it had even in that state the character of a sacrament; for it is a misapprehension to suppose that this intervention was required as a matter of necessity, even for that purpose before the Council of Trent [by which it was decreed by the Catholic Church that no marriage should be valid unless duly celebrated *in facie ecclesie* and with other formalities]. It appears from the histories of that council, as well from many other authorities, that this was the state of the earlier law, until that council passed its decree for the reformation of marriage [which decree, however, never had any force in England because it occurred subsequently to the breach between Henry VIII. and the Pope]; the consent of two parties, expressed in words of present mutual acceptance, constituted an actual and legal marriage, technically known by the name of *sponsalia per verba de presenti*; improperly enough, because *sponsalia*, in the original and classical meaning of the word, are preliminary ceremonials of marriage, and therefore, Brower justly observes, *jus pontificium nimis laxo significato, imo etymologia invitâ ipsas nuptias sponsalia appellavit*. The expression, however, was constantly used in succeeding times to signify clandestine marriages, that is, marriages unattended by the prescribed ecclesiastical solemnities, in opposition, first, to regular marriages; secondly, to mere engagements for a future marriage, which were termed *sponsalia per verba de futuro*, a distinction of *sponsalia* not at all known to the Roman civil law. Different rules, relative to their respective effects in point of legal consequence, applied to these three cases,—of regular marriages, of irregular marriages, and of mere promises or engagements. In the regular marriage everything was presumed to be complete and consummated both in substance and in ceremony. In the irregular marriage everything was presumed to be complete and consummated in substance, but not in ceremony; and the ceremony was enjoined to be undergone, as a matter of order. In the promise or *sponsalia de futuro*, nothing was presumed to be complete or consummate either in substance or ceremony. Mutual consent would release the parties from their engagement; and one party, without the con-

sent of the other, might contract a valid marriage, regularly or irregularly, with another person; but if the parties who had exchanged the promise had carnal intercourse with each other, the effect of that carnal intercourse was to interpose a presumption of present consent at the time of the intercourse to convert the engagement into an irregular marriage, and to produce all the consequences attributable to that species of matrimonial connection. . . . The reason of these rules is manifest enough. In proceedings under the canon law, though it is usual to plead consummation, it is not necessary to prove it, because it is always to be presumed in parties not shewn to be disabled by original infirmity of body. In the case of a marriage *per verba de presenti*, the parties there also deliberately accepted the relation of husband and wife, and consummation was presumed as naturally following the acceptance of that relation unless controverted in like manner. But a promise *per verba de futuro* looked to a future time; the marriage which is contemplated might perhaps never take place. It was defeasible in various ways; and, therefore, consummation was not to be presumed; it must either have been proved or admitted. Till that was done, the relation of husband and wife was not contracted: it must be a promise *cum copula* that implied a present acceptance and created a valid contract founded upon it. Such was the state of the canon law, the known basis of the matrimonial law of Europe. At the Reformation, this country disclaimed, amongst other opinions of the Romish Church, the doctrine of a sacrament in marriage, though still retaining the idea of its being of Divine institution in its general origin; and on that account, as well as of the religious forms that were prescribed for its regular celebration, an holy estate, holy matrimony, but it likewise retained those rules of the canon law which had their foundation not in the sacrament, or in any religious view of the subject, but in the natural and civil contract of marriage. The ecclesiastical courts, therefore, which had the cognizance of matrimonial causes, enforced these rules, and, amongst others, that rule which held an irregular marriage, constituted *per verba de presenti*, not followed by any consummation shewn, valid to the full extent of voiding a subsequent regular marriage contracted with another person."

or in any religious view of the subject, but in the natural and civil contract; the ecclesiastical court therefore enforcing those rules, and, among others, that rule which held an irregular marriage *per verba de presenti*, not followed by consummation, valid to the extent of voiding subsequent regular marriage of one of the parties. The claim that this was extensively regarded as the law of England is substantiated by cases cited below³ and the English decisions discussed in the succeeding divisions of this note.

The common law did not adopt the canon law in a body. This is frequently stated as a fundamental. It has also at times been looked upon as indicating that the temporal courts never followed the ecclesiastical in recognizing the natural and civil nature of the contract of marriage. But the idea was current in some quarters, and still persists in this country, that whatever doctrines of the canon law may have been rejected by the common law, the doctrine of informal marriages was not one of them. However, in 1844, what had thus been regarded as a rule of the common law,

as derived from the ecclesiastical law, was overturned by the House of Lords, which, being equally divided on the question of the validity of a marriage *per verba de presenti*, resolved it in the negative by the application of the maxim, *Semper presumitur pro negante*. Such was the result in *Reg. v. Millis*⁴ on an appeal from the court of Queen's bench of Ireland, wherein the Lords consulted the law judges rather than judges of the consistorial court, which was, of course, more competent to declare the ecclesiastical law on the subject. As it was, the law judges, through Tindal, Ch. J., advised that while a contract *per verba de presenti* was indissoluble between the parties, and gave either the right to compel solemnization by application to the spiritual courts, it did not constitute a full marriage in itself unless solemnized by a person in Holy Orders. The weaknesses of this case as an authority are referred to by Lords who wrote on both sides of the question, and the decision is severely scored by Mr. Bishop in his work on Marriage and Divorce.⁵ But, so far as England is concerned, the decision stands as law. Regret-

³ In other cases the opinion had been expressed that, before the act of 26 Geo. II (the first marriage act, invalidating all subsequent marriages not celebrated according to the formalities therein prescribed), the canon law governed in England, and that a contract *per verba de presenti* was binding upon the parties. Such was the view of Gibbs, Ch. J., in *Lautour v. Teesdale*, 8 Taunt. 830, 2 Marsh. 243, 17 Revised Rep. 518, 12 Eng. Rul. Cas. 729, who intimated that a contract entered into *per verba de presenti* was an actual marriage without subsequent cohabitation, though holding the marriage valid upon the ground that the parties did cohabit. It was likewise declared by Lord Ellenborough in *Rex v. Brampton*, 10 East, 282, 10 Revised Rep. 299, that contracts *per verba de presenti* would have bound parties in England before the marriage act. And in *Collins v. Jessot*, 6 Mod. 155, 2 Salk. 437, Holt, Chief Justice, said that where a contract was *per verba de presenti* it amounted to an actual marriage, which the parties could not dissolve by release or other mutual agreement, since the same was as such a marriage in the sight of God as if it had been *in facie ecclesie*; and that where the contract was *per verba de futuro*, and one of the parties contracted a subsequent marriage with a third person, the latter could be dissolved if entered into without a release from the other party to the prior contract.

⁴ 10 Clark & F. 534, 8 Jur. 717, 17 Eng. Rul. Cas. 66.

⁵ The fact that in *Reg. v. Millis*, supra, the Lords consulted the law judges, and not the judges of the consistorial court, who had peculiar knowledge of the law of L.R.A.1915E.

this question, was particularly emphasized by Lords Brougham and Campbell, who declared in favor of the marriage; and Lord Abinger, who declared against it, lamented the fact that sufficient time had not been given them for mature consideration of the case. In commenting upon this case, Bishop says, in his great work on Marriage and Divorce, in volume 1, § 401: "We have here a question of almost pure ecclesiastical law, submitted to a tribunal composed of common-law and equity lawyers, who necessarily possessed little or no knowledge of the subject. So they asked advice, not from the ecclesiastical judges, whose functions had qualified them to give it, but from the uninstructed common-law judges. The latter were competent to learn, but they were not allowed the necessary time. Lord Chief Justice Tindal, who delivered their opinion, complained of the want of time for investigation; and the opinion throughout shows the complaint to have been well founded. Thereupon, the law Lords, with this unintelligent advice before them, and not one of them being an ecclesiastical judge, or otherwise possessing any special knowledge of the subject, proceeded, not by a majority opinion, but by separate opinions equally divided, to overturn what that matchless ecclesiastical Judge, Lord Stowell, had held [in *Dalrymple v. Dalrymple*, supra] on the amplest investigation, and what every other ecclesiastical judge, both before and since, has deemed to be the true law. Again, as a whole, the opinions alike of judges and Lords were apparently based on what they deemed to be the common law of England. Yet there were statutes relating to Ireland, more or less considered in the arguments; one of which, in particular, had great

fully, the House of Lords declared in *Beamish v. Beamish*⁶ that however unfortunate the decision in *Reg. v. Millis*, the supposed-ly correct principle that the intervention of a clergyman was not necessary was discarded and could not be restored; and it has been said that if the victorious cause pleased the Lords, it is the vanquished cause that will please the historian of the Middle Ages.⁷

b. In Canada and United States.

1. Generally.

The doctrine of *Reg. v. Millis*, and the question whether it is right or wrong, are, since the English marriage act expressly rendering void marriages which are not solemnized in accordance with its provisions, no longer of importance in England

except in dealing with questions of pedigree as affected by informal marriages before the marriage act. So far as the United States and Canada are concerned, the general view obtaining before the decision in *Reg. v. Millis*, as to what was the common law in England, became the common law of these countries. The English common law was transplanted long before *Reg. v. Millis* was decided, and at a time when the doctrine of *Dalrymple v. Dalrymple* was thought to have become the doctrine of the common law. So here is found the justification for the statement at the beginning of this discussion, that the common law of the United States and Canada is founded upon the English common law which never existed.

It has been held that the doctrine of *Reg. v. Millis* does not obtain in Canada.⁸ It

weight with the Lord Chancellor, and it may have turned the scale. It was 58 Geo. III. chapter 81, which provided that thereafter there should no 'suit or proceeding be had in any ecclesiastical court in Ireland, in order to compel a celebration of any marriage *in facie ecclesie*, by reason of any contract of matrimony whatever, whether *per verba de presenti* or *per verba de futuro*.' It seemed to this learned person that the effect of this statute had been to change the character of the contract *per verba de presenti*. Lord Chief Justice Tindal plainly did not put his opinion upon this ground; and, though he expressly said the other judges were not answerable for his reasons, he employed language not quite consistent with the idea of any other basis for their conclusion than the English common law as unaffected by the marriage acts." Such an eminent writer as Kent (2 Com. 87) says that the common law is laid down in *Dalrymple v. Dalrymple*, notwithstanding *Reg. v. Millis*. Prof. Wigmore says (Ev. § 2082) that the view taken in *Dalrymple v. Dalrymple* was, historically, the correct one.

⁶ 9 H. L. Cas. 274. In this case it was held that *Reg. v. Millis* settled the law for England that a marriage was not valid by the common law of England unless celebrated in the presence of a clergyman in Holy Orders. However, considerable dissatisfaction with that case was expressed, Willes, J., who expressed the opinion of the Lords, saying: "Had the case been *res nova*, we might have thought that the law of Edmund, the Rubric, and other indications that by the law of England a priest was to be present at a marriage, were but reflections of the general law of the Church, by which, from the earliest times, the intervention of a priest had been inculcated, and from time to time enforced by penalties, though never, before the Council of Trent, by nullifying the marriage at which no priest assisted. That view was presented and considered in *Reg. v. Millis*, and it raised a question worthy of all the zeal, L.R.A.1915E.

learning, and genius which it called forth; but that view was not adopted in the result, and it is not competent for us to restore it. It is to be assumed for the purpose of to-day, that England, from time immemorial, divided from the Church, held the presence of a priest to be essential; and whatever hardship such a law may, in the course of years, have wrought to dissenting bodies, and also to British subjects in the colonies and in foreign countries, where no priest could be procured, if the law was ever rightly held to apply under such circumstances, . . . as to which we say nothing, those hardships (now mitigated by numerous statutes passed before and since the decision in *Reg. v. Millis*) were very unlikely to have been foreseen at the time when the law assumed to exist must have been established." The Lord Chancellor (Campbell) said that had the case arisen before *Reg. v. Millis*, he would not have hesitated in advising the Lords to affirm the judgment in favor of the validity of the marriage and the legitimacy of the respondent; and Lord Wensleydale intimated that he would have done the same. *Catherwood v. Caslon*, 13 Mees. & W. 261, Car. & M. 431, 13 L. J. Exch. N. S. 334, 8 Jur. 1076, and *Dumoulin v. Druitt*, 13 Ir. C. L. Rep. 212, held it settled by *Reg. v. Millis* that marriage was invalid without the intervention of a minister in Holy Orders.

And *Catterall v. Catterall*, 1 Rob. Eccl. Rep. 580, 9 Jur. 951, 11 Jur. 914, limited *Reg. v. Millis* to the case decided, and held that marriage without the intervention of a minister in Holy Orders was valid for the purpose of granting separation of the parties *a mensa et thoro*.

⁷ 2 Pollock & M. History of English Law, 372.

⁸ In *Doe ex dem. Breakey v. Breakey*, 2 U. C. Q. B. 349, the court seemed reluctant to regard *Reg. v. Millis* as authority, and indicated that it should have regarded the *Dalrymple Case* as having stated the law of England as well as that of Scotland. The *Breakey Case* refused to extend the de-

was said that since the Church of Canada was not the established Church of England, but merely a voluntary association of persons holding to the doctrines and forms of the Church of England, and since no ecclesiastical courts were ever constituted in Canada, and in view of the doctrine that colonists carry with them only such laws as are applicable in their new situation in the country colonized,—it was almost certain, from the authorities, that the common law of England, so far as brought to Canada, would hold a marriage *per verba de presenti*, without the intervention of a priest, as a marriage; and that in any event it was absolutely certain that, as introduced into this country, such law did hold that such a contract created an indissoluble bond, which the parties were not at liberty to set aside at will; and that it certainly was a valid marriage when made in the presence of an ordained minister or person in Holy Orders, without regard to the place where it was celebrated, and without regard to the religion of the persons married.⁹

The following statement by Chancellor Kent,¹⁰ is a statement of the common law as conceived and applied in most jurisdictions in this country: "No peculiar ceremonies are requisite by the common law to the valid celebration of the marriage. The consent of the parties is all that is required; and as marriage is said to be a contract *jure gentium*, that consent is all that is required by natural or public law. The Roman lawyers strongly inculcated the doctrine that the very foundation and essence of the contract consisted in consent freely given by parties competent to contract. *Nihil proderit signasse tabulas, si mentem*

cision in Reg. v. Millis beyond a like state of facts, that is, a prosecution for bigamy, and intimated that it would not be bound thereby in a case of legitimacy and right to inherit, unaffected by any question of subsequent marriage.

It was held that after the Council of Trent, marriages not celebrated in the presence of the church nor with the other formalities required were deemed only irregular, and were visited with punishment and ecclesiastical censure; but they were good morally so far as they went, in the eyes of both court and state, and the issue were legitimate. Robb v. Robb, 20 Ont. Rep. 591.

⁹ Delpit v. Cote, Rap. Jud. Quebec 20 C. S. 338. This case, which was decided in 1901, is an echo of the early efforts of the Church of Rome to dictate and control the question of marriages, to the exclusion of the temporal courts. In this case two Roman Catholics had been married by a Protestant minister, and the marriage had been, upon the application of the man, declared void by certain church functionaries for matrimonial causes in the diocese of Quebec, and this judgment had been confirmed upon appeal to Rome. The man then applied to the court to have the marriage declared void as to its civil effects, it being contended that under the principles of the Roman Church marriage was a sacrament, and that it was the office of the church, and not the state, to determine the validity of that tie; that the church tribunals having declared the marriage null as contrary to a church requirement that a marriage between its members should be celebrated by a priest, there was nothing left for the temporal court but to adjudge the civil effects of the attempted marriage. But the court held that the ecclesiastical body had no authority to pass upon the validity of the marriage tie, that the decree attempting to render it null was itself void, and that the marriage was valid.

matrimonii non fuisse constabit. Nuptias non concubitus, sed consensus facit. This is the language equally of the common law and canon law, and of common reason. If the contract be made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage in the absence of all civil regulations to the contrary, and which the parties (being competent as to age and consent) cannot dissolve, and it is equally binding as if made *in facie ecclesie*. There is no recognition of any ecclesiastical authority in forming the connection, and it is considered entirely in the light of a civil contract. This is the doctrine of the common law, and also of the canon law, which governed marriages in England prior to the marriage act of 26 Geo II. . . . The only doubt entertained by the common law was whether cohabitation was also necessary to give validity to the contract. It is not necessary that a clergyman should be present to give validity to the marriage, though it is doubtless a very becoming practice and suitable to the solemnity of the occasion. The consent of the parties may be declared before a magistrate, or simply before witnesses, or subsequently confessed or acknowledged, or the marriage may even be inferred from continual cohabitation, and reputation as husband and wife, except in cases of civil actions for adultery, or in public prosecutions for bigamy or adultery, when actual proof of marriage is required."

Inasmuch as the supposed English common law of marriage was of comparatively short duration, our own common law has been developed without substantial indebtedness to it.

declared void by certain church functionaries for matrimonial causes in the diocese of Quebec, and this judgment had been confirmed upon appeal to Rome. The man then applied to the court to have the marriage declared void as to its civil effects, it being contended that under the principles of the Roman Church marriage was a sacrament, and that it was the office of the church, and not the state, to determine the validity of that tie; that the church tribunals having declared the marriage null as contrary to a church requirement that a marriage between its members should be celebrated by a priest, there was nothing left for the temporal court but to adjudge the civil effects of the attempted marriage. But the court held that the ecclesiastical body had no authority to pass upon the validity of the marriage tie, that the decree attempting to render it null was itself void, and that the marriage was valid.

¹⁰ 2 Kent, Com. 86.

¹¹ Citing Co. Litt. 33a.

edness to the English courts except for its origin and a few fundamentals. Just as the Canadian courts held that the supposed common law was transplanted and took root in Canada before it was determined in Reg. v. Millis that it never did embrace the doctrine of consensual marriages, so the courts of this country upheld informal marriages conformably to what was supposed to be the English common law,¹² the English marriage act having no application here.¹³ It was truly said that it would have seemed strange to our Puritan forefathers if, in order to contract a legal marriage, they had been obliged to bring

with them a clergyman of the Church of England or of Rome to be present at the ceremony.¹⁴ Quite in keeping with this is the leading New York case of Cheney v. Arnold,¹⁵ upholding consensual marriages, although proceeding upon the theory that this did not become the law of New York by virtue of its adoption of the common law of England, inasmuch as that law did not embrace the doctrine of marriages by mere agreement. Ohio, too, favored consensual marriages, and said that they could be upheld even if the common law of England did not uphold them.¹⁶ But the doctrine of these cases does not differ, in char-

¹² For instance, in a New York case decided before Reg. v. Millis, it was held that it was a rule of the common law which was brought into New York by the first English settlers, and which was probably the same among the ancient Protestant Dutch inhabitants, that any mutual agreement between the parties to be husband and wife *in presenti*, especially where it was followed by cohabitation, constituted a valid and binding marriage if there was no legal disability on the part of either to contract matrimony. Rose v. Clark, 8 Paige, 574.

And in a Kentucky case decided before Reg. v. Millis, it was held that before the English marriage act the contract of marriage *per verba de presenti* was considered *ipsum matrimonium*; and that although Pope Innocent III. endeavored to convert marriage from a civil into a religious rite, the common law never required that it should be *in facie ecclesiæ*. Sneed v. Ewing, 5 J. J. Marsh. 460, 22 Am. Dec. 41.

The law of England was supposed to be contrary to that laid down in Reg. v. Millis until the decision in that case. Mathewson v. Phoenix Iron Foundry, 20 Fed. 281.

That Reg. v. Millis was decided after many of the American courts had become committed to a contrary view as to what the common law was is pointed out in Becker v. Becker, post. 56.

Although Reg. v. Millis was decided before Dyer v. Brannock, 66 Mo. 391, 27 Am. Rep. 359, the latter, which involved a marriage occurring before the former was decided, gave it scant consideration, and said that it was evident that "the common law of England," when it was expressly adopted by the territorial legislature of Missouri in 1816, was understood to embrace the law of marriage, not as it was expounded in Reg. v. Millis, but as it was declared by Blackstone in his Commentaries, vol. 2, page 86, where he said that no peculiar ceremonies were requisite by the common law, and that the consent of the parties was all that was required by natural or public law.

So, Davis v. Stouffer, 132 Mo. App. 555, 112 S. W. 282, states that Reg. v. Millis does not state the common law of England as it was understood by the courts and legislatures of this country when it was introduced here, and that our courts are not under any obligation to follow the mutations of decisions or new views announced in England as to what was the law of that country.

duced here, and that our courts are not under any obligation to follow the mutations of decisions or new views announced in England as to what was the law of that country.

¹³ The act of 26 Geo. II. chap. 33, declaring void all marriages which did not observe all the formalities thereby specified, did not apply to the American colonies. Cheney v. Arnold, 15 N. Y. 345, 69 Am. Dec. 609.

¹⁴ Mathewson v. Phoenix Iron Foundry, supra.

¹⁵ 15 N. Y. 345, 69 Am. Dec. 609. It was said in that case that it was extremely difficult to ascertain what the English matrimonial law was prior to the marriage act, but after a review of some of the English cases and allusions to commentaries thereon the court expressly adopted the view of Lord Mansfield, who, when introducing the act of 26 Geo. II. chap. 33, into Parliament, said: "I believe that it will be allowed, if a man and woman seriously and sincerely enter into a marriage contract without the interposition of a clergyman or any religious ceremony whatever, it will be a good marriage, both by the law of God and the law of nature; yet the law of this society, and I believe of every other Christian society, has declared it not to be a good marriage." The court said that it followed that the doctrine of the canon law that a contract of marriage *per verba de futuro*, followed by carnal intercourse, was enforceable as a marriage, did not become the law of New York by force of its adoption of the common law of England, for it was not a part of that common law; and it was added that if it should be contended that this position of the court, if consistently carried out, would require the repudiation of marriages *per verba de presenti* without solemnization, it could be answered that the validity of such marriages was firmly established by judicial decisions in the state which could not be questioned.

¹⁶ It was said in Ohio that even if it should be admitted that the common law of England was as declared in Reg. v. Millis, still a different rule might properly be adopted in the United States, and in fact the court upheld a marriage *per verba de presenti*. Carmichael v. State, 12 Ohio St. 553.

acter or effect, from that of decisions upholding such marriages by what was supposed to be the English common law, for, as said before, the common law has been developed in this respect mainly by our own courts, even when professedly imported from England. It is therefore to them that we must look for definitions and general principles.

Perhaps no other generality has been so frequently voiced in jurisdictions upholding marriages by mere consent as that which characterizes marriage as a civil contract, deriving its obligation from the consent of the parties. It has practically become an axiom for which it would serve no purpose to cite authority beyond an illustrative case.¹⁷ In a few instances the term "civil contract" has been held inadequate, although correct so far as it goes. It has been said that, while in a sense a contract, marriage is more than that, being the foundation of all social order, and of the continued existence of the society and nation;¹⁸ and that the statement that marriage is a civil contract is, in most instances, employed to differentiate it from a sacrament. In a case decided in Missouri in which the common law prevails, and which has a statute declaring marriage to be a

civil contract, it is well said that, by the consensus of opinion in civilized nations, it is something more than a dry contract. "It is a contract differing from all others. For instance: only a court can dissolve it; it may not be rescinded at will, like other contracts; only one such can exist at a time; it may not exist between near blood kin; it legitimizes children; it touches the laws of inheritance; it affects title to real estate; it provides for the perpetuity of the race; it makes a hearthstone, a home, a family; it marks the line between the morals of the barnyard and the morals of civilized men,—between reasoning affection and animal lust."¹⁹ In fine, it rises to the dignity of a "social status" in which society, morals, religion, reason, and the state itself have an interest.²⁰

However, the question whether marriage is a civil contract or a social status is an academic one. The courts may define and characterize the relation as best suits their fancy, but its validity and effect are tested by the same general principles. Underlying the whole subject is the basic idea that consent alone is all that is necessary to constitute marriage,²¹ and that that consent may be written or oral, express or im-

¹⁷ Marriage is a civil contract, and may be made by any persons of different sexes, competent to make contracts, and while commonly entered into with some ceremony, either civil or religious, it may be consummated without any ceremony merely by the mutual consent of the parties; and such a contract, unless forbidden by some express statute, constitutes a valid common-law marriage, and confers upon the parties to it all the rights and subjects them to all the duties and obligations incident to the marriage relation. *Davis v. Pryor*, 50 C. C. A. 579, 112 Fed. 274.

In *Oneale v. Com.* 17 Gratt. 582, the court declared that marriage is a civil contract deriving its obligation like all other contracts from the consent of the parties, in holding that a marriage contracted in Virginia after its secession, and before the establishment of the government under the Alexandria Constitution, was valid.

¹⁸ Marriage, though in one sense a civil contract, is much more than a contract; and is founded in nature, and ordained by Providence for perpetuating the race of mankind. It constitutes a relation, and is the cause of other relations, which, extending through the whole fabric of every community, constitute the foundation not only of all social order and refinement, but of the continued existence of society and of nations. *Stevenson v. Gray*, 17 B. Mon. 193.

¹⁹ *Bishop v. Brittain Invest. Co.* 229 Mo. 699, 129 S. W. 668, Ann. Cas. 1912A, 868.

²⁰ *Ibid.*

L.R.A.1915E.

What persons establish by entering into matrimony is not a contractual relation, but a social status, and the only essential features of the transaction are that the participants be of legal capacity to assume that status, and freely consent to do so. *University of Michigan v. McGuckin*, 64 Neb. 300, 89 N. W. 778.

Marriage is the civil status of one man and one woman capable of contracting, united by contract and mutual consent for life, for the discharge to each other and to the community of the duties legally incumbent upon those whose association is founded on the distinction of sex. *State v. Bittick*, 103 Mo. 183, 11 L.R.A. 587, 23 Am. St. Rep. 869, 15 S. W. 325; *State v. Cooper*, 103 Mo. 266, 15 S. W. 327; *Banks v. Galbraith*, 149 Mo. 529, 51 S. W. 105; *Imboden v. St. Louis Union Trust Co.* 111 Mo. App. 220, 86 S. W. 263.

²¹ Whatever may be the rule governing other contracts, the contract of marriage is a contract *jure gentium*, and consent and the assumption of the marriage status are all that is required by natural or public law; and in the absence of local restrictions or regulations persons are capable of contracting marriage as of common right. *Laurence v. Laurence*, 164 Ill. 367, 45 N. E. 1071. It is observed that assumption of the marriage status is here stated as an element. Whether it is an essential is discussed in a subsequent subdivision dealing specifically with contracts *per verba de presenti*.

plied,²³ with or without witnesses,²³ it being necessary only that the minds of the parties meet in a common understanding of, and consent to, the present and future existence of the relation of husband and wife. It is the consent, and not the cohabitation, that constitutes marriage.²⁴ While enough has to be said and done by the parties to make a contract,²⁵ once the status is thus established, it is legal for all purposes, and has been regarded as sufficient even in that exacting proceeding, a prosecution for bigamy.²⁶ A Georgia case,²⁷ summarizing the authorities, states that marriage is founded in the law of nature, and is anterior to all human law; that in society it is a civil contract; that if the contract is *per verba de presenti*, though it be not consummated by cohabitation, or if it be made *per verba de futuro* and be consummated, it amounts to a valid marriage in the absence of all regulations

to the contrary. These two forms of contract are discussed below in subdivisions respectively devoted to them.

These principles are but adoptions from or echoes of the doctrines of the Scotch law of marriage, under which it was declared generally that the consent of both parties was necessary,²⁸ and this entailed an intent on both sides to enter into a marriage contract, and a belief thereafter that such a contract existed.²⁹ It was said that the consent must be deliberate and serious,³⁰ and that no contract could be upheld whose consummation was conditioned upon a future event.³¹ If, however, express words were used which would ordinarily be sufficient, their effectiveness to constitute marriage could not be overcome by a mental reservation on the part of the man, where he entered into the contract, to deceive the woman, or practise fraud upon some third person, so long, at least, as the

²³ A marriage may be either express or implied; it may consist of a formal written instrument signed by the parties, or of an express parol agreement between them; and neither document nor spoken words are indispensable to its existence, for an implied contract of marriage is as binding and effective as one expressed in words or written; and such a contract comes into being whenever the minds of the parties meet in a common understanding of, and consent to, the present and future existence of the relation of husband and wife between them. Adger v. Ackerman, 52 C. C. A. 568, 115 Fed. 124.

All that is required is the agreement of the parties, with an intention that that agreement shall *per se* constitute marriage. They may express the agreement by parol, they may signify it by whatever ceremony their whim or their taste or their religious belief may select. It is the agreement itself, and not the form in which it is couched, which constitutes the contract. Rutledge v. Tunno, 69 S. C. 400, 48 S. E. 297.

²⁴ While parties have contracted a common-law marriage without any solemnization or other formality, apart from the agreement itself, it is not necessary that the agreement should be made before witnesses. Maher v. Maher, 183 Ill. 61, 56 N. E. 124, s. c. subsequent appeal in 204 Ill. 25, 68 N. E. 159. However, it is to be observed that common-law marriages can no longer be contracted in Illinois, because the act of July 1st, 1905, of that state, declares that all common-law marriages thereafter entered into shall be null and void. Wilson v. Cook, 256 Ill. 460, 43 L.R.A.(N.S.) 365, 100 N. E. 222.

²⁵ Pike v. Pike, 112 Ill. App. 243 (common-law marriages have since been abrogated by statute in Illinois, as hereinafter shown); Brisbin v. Huntington, 128 Iowa, 166, 103 N. W. 144, 5 Ann. Cas. 931; Bargna v. Bargna, — Tex. Civ. App. —, L.R.A.1915E.

127 S. W. 1156. These are but illustrations. The cases which have referred to it are very numerous. It was a maxim of the civil law, *Consensus non concubitus facit matrimonium*.

There must be a mutual contract between the parties, and therefore when the relation is plainly notorious and lascivious conduct, no marriage can be held to exist. State v. Kennedy, 207 Mo. 528, 106 S. W. 57.

²⁶ State v. Hansbrough, 181 Mo. 348, 80 S. W. 900.

²⁷ A common-law marriage entered into by a man already married will support prosecution for bigamy as well as if all statutory formalities had been observed. People v. Mendenhall, 119 Mich. 404, 75 Am. St. Rep. 408, 78 N. W. 325, 11 Am. Crim. Rep. 163.

²⁸ Askew v. Dupree, 30 Ga. 173.

²⁹ Graham's Case, 2 Lewin. C. C. 97.

³⁰ Stewart v. Menzies, 8 Clark & F. 309 (Scotch law).

³¹ To constitute marriage by the law of Scotland, the consent must be deliberate and serious, and given mutually with a view and for the purpose of creating thenceforth the relation of husband and wife. Yelverton v. Longworth, 4 Macq. H. L. Cas. 746, 10 Jur. N. S. 1209, 11 L. T. N. S. 118, 13 Week. Rep. 235.

Whether a marriage is claimed upon the theory that it is a declaration of a previous marriage, or that a marriage has been constituted *per verba de futuro cum copula*, or that the instrument itself is *ipso facto* a declaration of marriage, an instrument declaring that the parties have cohabited together as man and wife, and that they are man and wife in the event of birth of children as a result of their relations, is insufficient, as the condition inserted is an insuperable objection to the sufficiency of the declaration. Stewart v. Menzies, supra.

woman acted in the bona fide belief that there was a marriage.³² And while a mere engagement of secrecy was not fatal,³³ no marriage would be predicated of a contract entered into by both parties as a blind.³⁴

2. Rule in several jurisdictions of the United States.

(a) Where repudiated.

In Arkansas it was held that even if the common law upheld informal marriages, it never in that respect became the law of that state, because territorial statutes which prescribed the usual formalities pre-

ceded the express adoption of the common law in general by the territorial legislature,—a position opposed to that taken in Missouri with respect to the same territorial act.³⁵

Maryland rejected the doctrine of consensual marriages on the ground that it never became a part of the common law of England, in view of Reg. v. Millis, and a succession of statutes beginning in colonial days, which were said to indicate that such marriages were never supposed by the legislative body to be valid.³⁶

Massachusetts, in taking a like position before the decision in Reg. v. Millis, gave effect to similar colonial ordinances.³⁷ And

³² By the law of Scotland, if the parties by present words agreed to become husband and wife, the fact that the man was insincere in his statement, intending to deceive either her or the world, or to practise fraud upon some third person, did not deprive the words of their effectiveness as a marriage, if the woman intended a marriage and proceeded thereafter in the bona fide assumption that a marriage was contracted. *Hamilton v. Hamilton*, 9 Clark & F. 327 (Per Lord Brougham).

³³ An engagement of secrecy is perfectly consistent with the marital relation, and it is only evidence against the existence of a marriage when no prudential reasons can be assigned for it, and where everything arising from the very nature of the marriage calls for its publication. *Dalrymple v. Dalrymple*, 2 Hagg. Const. Rep. 64, 17 Eng. Rul. Cas. 11.

³⁴ Of course, where the instrument is shown to have been intended by both parties merely as a blind to enable the man to avoid his engagement to another woman, no marriage can be predicated upon it. *Stewart v. Menzies*, 8 Clark & F. 309 (Scotch law).

³⁵ In *Furth v. Furth*, 97 Ark. 272, 133 S. W. 1037, Ann. Cas. 1912D, 695, the court expressly held that even if a present contract of marriage, followed by cohabitation, was valid according to the common law, which the court doubted, the common law in that respect never obtained in Arkansas. In reaching this conclusion the court attached great weight to the fact that although in 1816, while Arkansas was a part of the Missouri territory, a statute was enacted adopting the common law of England and the general acts of the British Parliament up to the fourth year of James the first, in 1808 statutes relative to the solemnization of marriages were enacted declaring valid marriages theretofore certified by certain persons, and providing that marriages celebrated thereafter could be solemnized by certain enumerated persons, who were to certify the same and cause a certificate to be filed; the court saying that thus it was apparent that before the common law was adopted in that jurisdiction, marriage was regarded as something more than a contract between the parties, and L.R.A.1915E.

that such a contract could not be entered into without being solemnized by some persons authorized by statute to do so. It is to be observed that the effect here given to the express adoption of the common law in the territory of Missouri is exactly contrary to that given by Missouri cases referred to supra, II. b, 1.

³⁶ On the first occasion on which the question was squarely presented to it, the Maryland court, relying largely upon Reg. v. Millis, held that to constitute a lawful marriage in that state there must be superadded to the civil contract some religious ceremony. *Denison v. Denison*, 35 Md. 361, overruling *Cheseldine v. Brewer*, 1 Harr. & M'H. 152, decided in 1739. The court discussed the question at considerable length and arrived at the conclusion that the civil and canon law did not become a part of the law of Maryland except so much of it as was absorbed by the common law of England, and that consensual marriages were not recognized by the law of England, and were therefore not valid in Maryland. The court mentioned in confirmation of this view the fact that, beginning as early as 1718, there had been a succession of statutes in Maryland indicating that no common-law marriage was ever supposed by the legislature to be good.

³⁷ In one of the earliest Massachusetts cases the court said: "When our ancestors left England, and ever since, it is well known that a lawful marriage there must be celebrated before a clergyman in orders, and that all questions of marriage, divorce, and alimony regularly belong to the ordinary. When our ancestors first settled here, smarting under the arbitrary censures of the ecclesiastical courts, they were not disposed to invest their own clergy with any civil powers whatever; but to leave them wholly to the exercise of their pastoral functions. With this impression, in 1646, by an ordinance passed for the due solemnization of marriages, no person is authorized to join together in marriage any persons, but a magistrate, or some other person to be appointed in such places where no magistrate was near. And all persons were forbidden to join themselves in marriage but before some magistrate, or other person

while a subsequent statute in that state declared that no marriage should be void for want of authority on the part of the celebrant, or because of omission of any formality, if the parties or either of them acted in good faith,³⁸ its operation was confined to cases in which the marriage was solemnized by a person who was or

professed to be a person authorized to act.³⁹

North Carolina, in the first instance, declared itself strongly against informal marriages, by what was conceded to be a *dictum*, but later cases are more or less inconsistent with the theory that such marriages are invalid.⁴⁰

authorized as aforesaid. Neither was the magistrate authorized to permit the parties to contract marriage in his presence, unless the intention of marriage had been previously published." *Milford v. Worcester*, 7 Mass. 48, decided in 1810, and therefore long before the decision in *Reg. v. Millis*, before which it was quite generally supposed, as has been shown, that *Dalrymple v. Dalrymple* correctly stated that a marriage was valid in England where there was nothing but the mutual contract of the parties, no minister having intervened.

³⁸ Subsequently a statute was enacted in Massachusetts providing that a marriage is not to be deemed void, and that the validity thereof shall in no way be affected, by want of jurisdiction or authority of the celebrant, or by an omission or informality in the manner of entering the intention of marriage, if the marriage is in other respects lawful and is consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage. This statute was liberally construed so as to include within the category of valid marriages a case where the parties go before a magistrate or minister, make a marriage contract in some form in his presence in the belief that he sanctions and assents to it in his official capacity, and subsequently cohabit as husband and wife, believing that they are legally married, though the magistrate understands the matter differently, and does not intend to act officially in the matter. *Meyers v. Pope*, 110 Mass. 314.

³⁹ It was held, upon the authority of *Milford v. Worcester*, supra, that to constitute a valid marriage by the law of Massachusetts it must be solemnized before a person being or professing to be a justice of the peace or minister of the Gospel. *Thompson v. Thompson*, 114 Mass. 560.

And the doctrine of *Milford v. Worcester* was reiterated and the colonial, provincial, and state statutes, as well as the authorities, were discussed at much greater length, in *Com. v. Munson*, 127 Mass. 459, 34 Am. Rep. 411, holding that no marriage was constituted by a ceremony performed by the man and the woman with whom he had since cohabited, no third person having participated and no civil magistrate or minister of the Gospel, or any person believed to be such, having been present.

⁴⁰ The supreme court of North Carolina in 1836, in a case involving slave marriages, branched out from that precise question and discussed the matter of common-law L.R.A.1915E.

marriages, and while pointing out that the general rule as to consensual marriages was not directly involved and was not, therefore, to be finally passed upon, declared that it did not agree that persons *sui juris* were legally married merely in virtue of their own consent, however exclusively expressed in terms of immediate agreement, unless it was so expressed in the presence of those persons who were designated by law to be witnesses thereto. *State v. Samuel*, 19 N. C. (2 Dev. & B. L.) 177, followed in *State v. Wilson*, 121 N. C. 657, 28 S. E. 416, declaring that there was no such thing in North Carolina as marriage by mere consent, and that therefore marriage before a person supposed to have authority could not be upheld as a common-law marriage. To the same effect is *Cooke v. Cooke*, 61 N. C. (Phill. L.) 583, in which the justice of the peace was without power to act. However, as is shown in the note to *Re Love*, post, 109, failure to obtain the statutory license was held not to render the marriage invalid. And in another case the court seemed to take it for granted that the common law prevailed in North Carolina in holding that, by the common law, marriage could be proved by evidence of cohabitation, reputation, etc. *Jones v. Reddick*, 79 N. C. 290. In other cases, evidence of cohabitation and reputation was held sufficient (see *infra*, part V. of this note). It is worthy of note that in *State v. Samuel*, supra, the court laid considerable stress upon the fact that our courts, unlike ecclesiastical tribunals, had no power to compel the solemnization of marriage. In this connection the court said: "When, however, this function of the spiritual judge was abrogated in England, there arose an exigent necessity that some other fixed mode should be established by which marriage should be publicly celebrated, and some solemn memorial thereof preserved. While as to other contracts, security is provided in various ceremonies and solemnities, a well-regulated state could not leave that of marriage—the most important of all, in reference to the happiness of the parties and their issue, and to the right of succession to estates—to be established or denied upon the loose testimony of perhaps a single witness, speaking entirely from memory, of the words of the parties. In this state there never was a jurisdiction similar to that of the spiritual courts in England; and it is plain from the earliest period of our legislation, and in consequence thereof, it has been constantly required as an essential requisite of a legal marriage, that it should either be celebrated by some

Conversely, the Vermont court eventually repudiated common-law marriages, though originally inclined to uphold them.⁴¹

(b) Where adopted, but abrogated by statute.

In a few jurisdictions the common law of marriage was adopted by the courts, but was later abrogated by statutes. At this point an attempt will be made merely to indicate the jurisdictions in which such a situation exists. The statutes affecting the abrogation are discussed in another connection.⁴² It suffices for the present to say that the common law was adopted by the courts, but abrogated by the legislature, in California,⁴³ Illinois, Kentucky, possibly Louisiana,⁴⁴ Montana to a limited extent, at least,⁴⁵ North Dakota, Oregon, Tennessee, Virginia, Washington, and West Virginia.

person in a sacred office, or be entered into before someone in a public station and judicial trust." It will be recalled that this very situation led a Canadian court to uphold a consensual marriage in *Delpit v. Cote*, supra, II. b, 1.

⁴¹ *Newbury v. Brunswick*, 2 Vt. 151, 19 Am. Dec. 703, proceeded upon the theory that the common law of England recognized marriages *per verba de presenti*. But it was later held that common-law marriages were not valid in Vermont. *Northfield v. Plymouth*, 20 Vt. 582; *Morrill v. Palmer*, 68 Vt. 1, 33 L.R.A. 411, 33 Atl. 828.

⁴² See the note to *Re Love*, post, 109.

⁴³ At one time no marriage could be contracted in California except by complying with the statutory requirement that assumption of the relation follow consent; but compliance with the requirements as to license and solemnization was held unnecessary. However, the legislature has since made license, solemnization, etc., obligatory, as shown in the note to *Re Love*, supra.

⁴⁴ See the reference to the Louisiana cases in the following subdivision. For the rule obtaining in Louisiana territory while under Spanish dominion, see *infra*, II. b, 2, (d).

⁴⁵ The Montana Code, like that of California, before license and solemnization was made essential in the latter, was held to require a mutual and public assumption of the marital relation. *O'Malley v. O'Malley*, 46 Mont. 549, 129 Pac. 501, Ann. Cas. 1914B, 662, citing *Hinckley v. Ayres*, 105 Cal. 357, 38 Pac. 735, which held, however, that marriage was valid without observing the statutory formalities as to license and solemnization. Probably Montana would hold the same if the question were to arise.

⁴⁶ The construction and effect of the statutes are separately treated in the note to *Re Love*, post, 109.

⁴⁷ *Hallett v. Collins*, 10 How. 174, 13 L.R.A.1915E.

(c) Where adopted and retained.

In the majority of jurisdictions in this country marriage by mere consent is upheld, and the statutes⁴⁶ prescribing the customary formalities as to license, celebration, record, and the like, are held merely directory. The various phases of the subject will be found discussed under appropriate headings, and it is here attempted to indicate merely where the common law of marriage prevails. It has been adopted or recognized, and, so far as the cases show, it still obtains, in the United States Supreme court,⁴⁷ Alabama, Arizona, Colorado, District of Columbia,⁴⁸ Florida, Georgia, Hawaii, Idaho, Indiana, Indian Territory, Iowa, Kansas, possibly Louisiana,⁴⁹ Michigan, Minnesota, Mississippi, Missouri, probably Montana with a slight modification,⁵⁰ Nebraska, Nevada, New Hampshire in a limited

L. ed. 376, states that although it was doubted in England whether mutual promises alone were sufficient to constitute marriage, it never has been doubted in this country. Their efficacy was also recognized in Maryland use of *Markley v. Baldwin*, 112 U. S. 490, 28 L. ed. 822, 5 Sup. Ct. Rep. 278. The court was equally divided on the question in *Jewell v. Jewell*, 1 How. 219, 11 L. ed. 108, but it appeared that the court below charged the jury in harmony with the law as laid down by Chancellor Kent above, II. b, 1.

⁴⁸ It was stated *obiter* in *Travers v. Reinhardt*, 25 App. D. C. 567, that a common-law marriage was valid in the District of Columbia.

⁴⁹ Louisiana statutes were held not to render void marriages which did not observe the statutory formalities. *Holmes v. Holmes*, 6 La. 463, 26 Am. Dec. 482; *Hube's Succession*, 20 La. Ann. 97. In stating *obiter* that the Civil Code does not recognize marriages by private agreement, or as resulting from cohabitation as man and wife, the court in *Johnson v. Raphael*, 117 La. 967, 42 So. 470, did not discuss the question nor even refer to the preceding cases, although making statements directly opposed to them. This is more fully commented on in the note to *Re Love*, post, 109. For the rule obtaining while Louisiana was a Spanish colony, see the succeeding subdivision of this note.

⁵⁰ In Montana the Code provides for a marriage by a mutual or public assumption of the marital relation, which was held to require cohabitation as well as mutual consent. *O'Malley v. O'Malley*, 46 Mont. 549, 129 Pac. 501, Ann. Cas. 1914B, 662, citing *Hinckley v. Ayres*, 105 Cal. 357, 38 Pac. 735, holding that while a similar statute was in force in California, compliance therewith was necessary, but that a marriage in accordance therewith was valid without compliance with the requirements as to license and solemnization. The

sense,⁵¹ New Jersey,⁵² New York (except in the years 1902-1907, inclusive, when a statute containing express words of nullity was in force),⁵³ probably North Carolina,⁵⁴ Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina,⁵⁵ Texas,⁵⁶ Wisconsin, and apparently Wyoming.⁵⁷

(d) *In Spanish colonies.*

The United States Supreme Court laid down the rule that, in the Spanish colonies, an actual contract of marriage, made before a civil magistrate, and followed by cohabitation and acknowledgment, was valid.⁵⁸ It was said that such was the rule of the

civil and canon law before the Council of Trent required celebration *in facie ecclesiae*, and that this decree, while adopted by the King of Spain, was not extended to the colonies. This accords with the early Louisiana decisions holding that while the decree of the Council of Trent was adopted in Spain at the request of the Pope, it was not extended to Louisiana, and, indeed, that such an extension would have been impracticable in the early days when access to a priest was not possible for most of the inhabitants. The court appeared inclined to uphold not only marriages before civil magistrates, but also those unions formed upon the mere consent of the parties.⁵⁹

chances are that the Montana court would indorse this holding if the question should be presented.

⁵¹ It was held in *Dunbarton v. Franklin*, 19 N. H. 257, that a contract followed by cohabitation did not constitute marriage, but was merely evidence from which the jury might infer marriage.

⁵² Common-law marriages were upheld in New Jersey. *Pearson v. Howey*, 11 N. J. L. 12. That common-law marriages were recognized in New Jersey is shown by *Goldbeck v. Goldbeck*, 18 N. J. Eq. 42; *Vreeland v. Vreeland*, 18 N. J. Eq. 43; *Applegate v. Applegate*, 45 N. J. Eq. 116, 17 Atl. 293. But there appears to be an inconsistency in these cases as to whether cohabitation and reputation alone were enough to establish a marriage, this inconsistency being more fully referred to in the subdivision of this note relating to cohabitation and reputation. The rule of the New Jersey cases that marriage is a civil contract, and that no ceremonial is indispensably requisite to its creation, was applied in *Travers v. Reinhardt*, 205 U. S. 423, 51 L. ed. 865, 27 Sup. Ct. Rep. 563.

⁵³ That there can be no common-law marriage in New York was the position taken in *Jordan v. Missouri & K. Teleph. Co.* 136 Mo. App. 192, 116 S. W. 432, upon the authority of *Pettit v. Pettit*, 105 App. Div. 312, 93 N. Y. Supp. 1001. The latter case involved a provision effective January 1, 1902, and repealed January 1, 1908, which contained express words of nullity. For a discussion of this and other New York statutes, see the note to *Re Love*, post, 109.

⁵⁴ The North Carolina court originally declared itself against common-law marriages, but it appears to have receded from this position. See above, II. b, 2 (a).

⁵⁵ Marriage in South Carolina was regarded as merely a civil contract, requiring no particular formality, a private agreement between the parties being sufficient. *Fryer v. Fryer*, Rich. Eq. Cas. 85; *Davenport v. Caldwell*, 10 S. C. 317. To the same effect is *Rutledge v. Tunno*, 69 S. C. 400, 48 S. E. 297.

⁵⁶ For the doctrines obtaining while Texas was a Spanish colony, and during the later days of the Republic of Mexico, see the suc-L.R.A.1915E.

ceeding subdivision of this note, where the common law is shown to have superseded the Spanish.

⁵⁷ The Wyoming statute appears not to have abrogated the common law, although the court has not so declared in terms. See the note to *Re Love*, post, 109.

⁵⁸ *Hallett v. Collins*, 10 How. 174, 13 L. ed. 376.

⁵⁹ An early Louisiana case goes into this question rather fully, pointing out that while the decree of the Council of Trent was adopted by Phillip II. of Spain at the request of the Pope, the Kings of Spain nevertheless retained the power to suspend the operation of that portion of it which related to the celebration of marriages, in remote settlements of new colonies yet unprovided with either churches or priests. And in proof that this power was exercised in Louisiana, the court further pointed out that marriages *per verba de presenti* were usual in the remote parts of the Louisiana colony, that one of the Spanish governors was married in that way, and that the commandant who celebrated the marriage in the case involved declared that, on account of there being no priest in the district, he was authorized by the government to celebrate marriages. *Patton v. Philadelphia*, 1 La. Ann. 98. In answer to the argument that there could be no marriage in the dominions of Spain without a sacrament, the court referred to a commentary on the Council of Trent, stating that "the marriages of Catholics living amongst heretics or infidels, where the exercise of the Catholic religion is not tolerated, though contracted *per verba de presenti*, without the presence of the priest, are a real sacrament. I take it for granted that the civil law of the country approves this manner of contracting marriages. Necessity deprives the parties of the accidental minister, but they are themselves the essential ministers, and consequently, in countries where they cannot have the presence of the priest, and where the civil law does not imperatively require it, they are capable of administering the sacrament to each other." The court added that it was also the opinion of St. Thomas of Bellarmine and of many general councils that in all marriages the parties

Not a little litigation arose over marriages occurring in Texas while it was a part of Mexico, whose people, of course, espoused the Romish faith. The church naturally required marriages to be solemnized *in facie ecclesiae*. Whether the law required a ceremony or permitted consensual marriages was a much controverted question. A sparse population, far removed from priests, must have recourse to some expedient to indulge their desire for matrimony. Fearful that an exchange of oral consent would be ineffectual, they resorted to written contracts, termed "marriage bonds." And in judging of their validity the courts seemed to hesitate between a divergence of theory. The earliest Texas case on the question seems, on the whole, to be more consistent with the idea that they were invalid, in holding that inasmuch as Spanish and Mexican usage tolerated intercourse between single persons, evidence of cohabitation and reputation in a state in which the common law prevailed could not be admitted to invalidate a subsequent marriage of one of the parties, solemnized in Texas

while it was a part of Mexico, and according to the Mexican laws and customs.⁶⁰ A stronger case in the negative involved the effect of the act of June 5, 1837, of the Congress of the Republic of Texas, designed to validate such bond marriages, and providing that in cases where parties had intermarried agreeably to the customs of the country, and either husband or wife had died previous to the passage of the act, then all such marriages were declared to be binding and the issue legitimized provided the parties were living together as man and wife at the death of either party. It was held that without such a statute, a bond had no efficacy, and that therefore, where two persons executed, acted upon, and subsequently canceled, a bond before the passage of the act, it was without force to invalidate a subsequent bond entered into by one of the parties, and so acted upon as to be confirmed by the statute.⁶¹ This holding was later followed⁶² in a case involving not only the act of 1837, but also the ordinance of 1836⁶³ and the act of 1841.⁶⁴ Although a later decision

were the ministers of the sacrament, and that the priest simply authenticated the contract and vouchsafed to them the promise of Heaven that they would increase and multiply.

The fact that the decree of the Council of Trent, so far as it affected marriages, was not extended to the territory of Louisiana, was reiterated in *Prevost's Succession*, 4 La. Ann. 347.

⁶⁰ *Smith v. Smith*, 1 Tex. 621, 46 Am. Dec. 121, holding that a marriage contracted in Texas while it was a part of Mexico, and solemnized according to the Spanish law which then governed the country, could not be invalidated by evidence of cohabitation and reputation to establish a former marriage of one of the parties in territory in which the common law permitted marriage by consent and cohabitation. One of the principal reasons for the decision was that, under the law or by customs and usages of Spain, cohabitation between single unmarried persons was tolerated to a great extent in Spain and Mexico, and that to admit such evidence as competent proof of a marriage outside of Mexico, without any knowledge of the foreign laws or usages regulating the marriage union, would be unwarrantable and dangerous to the rights of citizens.

⁶¹ In *Nichols v. Stewart*, 15 Tex. 226, the court, in determining the effect of the statute, held that where two parties entered into a bond, living together but a few months, when they separated, and the woman subsequently entered into a marriage bond with another man, and the first bond was canceled by the parties to it, the statute validating such marriages and legitimating the issue validated the second marriage and rendered a child thereof capable L.R.A.1915E.

of inheriting from the father. The court, in reaching its conclusion, said that the first bond had no validity in the first instance, and as there was no law to sanction such a contract, and none to enforce it, the statute having been enacted after the parties separated, it could be violated without any penalty by either party; and it may be noted that the court further stated on a point not exactly pertinent in this connection that even if the first bond had not been canceled by the parties, it would not have been of any consequence, because the parties were not living together at the time of the death of one of them, as required to make the statute applicable.

⁶² So, in a case of successive marriages of a man by functionaries other than priests of the Catholic church, whose canons, applicable in Mexico, required celebration by a priest, the court referred not only to the statute of 1837, but also to the ordinance of 1836 and the act of 1841, which are set out in the two following footnotes, and stated that they obviously contemplated that the parties were living together at the time of their passage, and it was held on considerations which controlled in *Nichols v. Stewart*, that the statute validated the second marriage, and not the first one, and that therefore the second wife was entitled to maintain an action for divorce and alimony. *Rice v. Rice*, 31 Tex. 174.

⁶³ By an ordinance of the consultation of the 16th of January, 1836, while the Republic was being organized, bond marriages previously contracted were legalized, and officers named to solemnize marriages thereafter. After the organization was completed the act of 1837 was passed.

⁶⁴ The act of 1841 provided: "Whereas many persons heretofore, previous to an

avored the validity of the bond upon the more practical and commendable theory that it was a creature of necessity, and should therefore receive every consideration at the hands of the court,⁶⁵ it had to yield to the earlier cases, chiefly, perhaps, because they were later reaffirmed, although they appear to have been indorsed in the later decisions more because they had been decided than because they were right.⁶⁶ So, notwithstanding a later *dictum* to the contrary,⁶⁷ the Texas supreme court must be regarded as having held the bond marriages in Texas invalid.

However, this question is now obsolete except as to possible cases of pedigree that may arise from marriages occurring before the days of the Republic, for in 1840 the

Congress of the Republic expressly adopted "the common law of England," which was held by the supreme court to mean not the common law as understood in England after the doctrine of consensual marriages had been eliminated from it, but the law which had been declared in the several states of the United States to permit marriages by mere consent.⁶⁸ So, common-law marriages are valid in Texas although the contrary view prevailed at one time in the appellate court, upon the theory that, by validating previous bond marriages, the Congress of the Republic necessarily recognized their invalidity, thus apparently assuming that they were regarded as invalid not only under the Spanish law, but under the com-

act approved June 5, 1837, regulating marriages, and for other purposes, had, for the want of some person legally qualified to celebrate the rites of matrimony, resorted to the practice of marrying by bond, and others have been married by various officers of justice not authorized to celebrate such marriages, and whereas public policy and the interest of families require a legislative action on the subject; therefore, all such marriages are declared legal and valid to all intents and purposes, and the issue of such persons are declared legitimate children and capable of inheritance."

⁶⁵ The principal reason assigned for upholding a marriage by a written contract in present words, in *Sapp v. Newson*, 27 Tex. 537, involving the legitimacy and the right to inherit on the part of the issue, was that in 1830, when the contract was executed, conditions in Texas were such as to render it impossible for the inhabitants to celebrate the rite of matrimony in accordance with the decrees of the church (of Rome), without going beyond the limits of the province and subjecting themselves to great danger; and that therefore it was the duty of the court, upon the highest considerations of public policy, to uphold marriages thus contracted in those times, whenever the consent of the parties and the intention to enter into the state of matrimony and to assume its duties and obligations were clearly shown. The opinion in this case is brief and contains no reference to the earlier decisions.

⁶⁶ In *Rice v. Rice*, 31 Tex. 174, it was held that the ceremonials of the Roman Catholic religion had to be superadded to give validity to the civil contract under the Mexican laws. The court, however, said that the question whether the civil authority of Mexico, under the dominion of which the marriages in question were consummated, had ever changed or altered the law of marriage as it existed before the Council of Trent, did not appear from any evidence or authority adduced on the trial of the cause, and it might rationally be inferred from the usage in Louisiana (reference to which has been made above), which was a L.R.A.1915E.

Spanish colony, that a similar usage obtained in Mexico for a like reason, because the decrees of the Council of Trent upon the subject of marriage had never been adopted and ingrafted into the civil and religious system of its government; but the court held that its predecessors had judicially acknowledged (in *Smith v. Smith*, 1 Tex. 621, 46 Am Dec. 121, and *Nichols v. Stewart*, 15 Tex. 230) that a different rule obtained in Mexico, and that the ceremonials of the Roman Catholic religion were essential to the validity of a marriage.

⁶⁷ Having thus seemingly established the rule that bond marriages were not valid in the early days of Texas unless celebrated as required by the Catholic church, the Texas court in *Lewis v. Ames*, 44 Tex. 319, without reference to the decisions in which that rule was laid down, referred back to the supposedly overruled case of *Sapp v. Newson*, supra, and announced that the true rule was stated in that case, and that it was the duty of the court, upon the highest considerations of public policy, to regard marriages contracted in the early days of Texas as mere civil contracts, and to sustain them whenever the consent of the parties and the intention to enter into the state of matrimony and to assume its duties and obligations was clearly shown. However, this was *dictum*, for the evidence was held insufficient to show that a bond was entered into, or to show such conduct as would warrant an inference of marriage.

⁶⁸ *GRIGSBY v. REIB* shows that by the act of 1840 of the Congress of the Republic of Mexico it was provided that the common law of England, so far as not inconsistent with the Constitution, should remain in force until altered or repealed by the legislature. Inasmuch as this statute, as shown, was enacted in 1840, and as in 1823 the British Parliament had declared void all marriages in which the statutory requirements were not observed, the court was at some pains to determine what was meant by the term "common law" as used in the act referred to, saying that if it was intended to adopt the common law as it was in force in England in 1840, then there

mon law.⁶⁹ This theory, however, was later expressly disapproved.⁷⁰

III. Marriage per verba de presenti.

It has been shown above⁷¹ that according to the canon law before the Council of Trent there were two forms of consensual marriage: one constituted by present consent, and the other by a future engagement, followed by copulation. In jurisdictions in which the common law was held to uphold informal marriages, these differing forms are recognized, although there has been some disposition to discard marriages *per verba de futuro*, as is shown in the succeeding subdivision. Where express present consent is clearly shown, marriage is, in most instances, held to have been constituted. To constitute marriage *de presenti*, the par-

ties must be in the presence of each other when the agreement is entered into, and there must be an agreement to become husband and wife immediately from the time when the mutual consent is given; but it need not be made in the presence of a witness, though without a witness it might be difficult to establish it.⁷² The parties may express the agreement by parol, they may signify it by whatever ceremony their whim or their taste or their religious belief may select; it is the agreement itself, and not the form in which it is couched, which constitutes the contract; and the words used or the ceremony performed are mere evidence of a present intention and agreement of the parties.⁷³ The agreement may be written or oral, with or without witnesses and may be proved like any other contract.⁷⁴ If both parties enter into a mutual

was no common law on the subject of marriage, for none such was in force there. However, the court determined that "our courts have uniformly recognized the existence, in this state, of the common law which permitted marriage without compliance with the statute upon that subject; therefore we conclude that 'the common law of England,' adopted by the Congress of the Republic, was that which was declared by the courts of the different states of the United States," and that therefore an exchange of mutual consent, without ceremony or other formality, was sufficient to constitute parties husband and wife. The doctrines of the common law were applied in *Edelstein v. Brown*, — Tex. Civ. App. —, 95 S. W. 726, affirmed in 100 Tex. 403, 123 Am. St. Rep. 816, 100 S. W. 129, without any allusion to the question as to whether and how the Spanish law was superseded by the common law when the Republic of Texas became one of the United States.

⁶⁹ The Texas court of appeals, without discussion and without the citation of a single authority, expressly laid down the rule in a bigamy case that a marriage was invalid if not solemnized as required by statute. *Dumas v. State*, 14 Tex. App. 464, 46 Am. Rep. 241. This case was approved and its doctrine expressly applied in a civil action involving a claim for damages alleged to have been caused by the nondelivery of a telegram sent to forestall the issuance of a marriage license to the plaintiff's daughter, who was under the age of consent. The position of the court in this case was that the effect of the act of the Congress of the Republic in 1840, adopting the common law, was to adopt it only in so far as it was not inconsistent with the acts of the Congress of the Republic, and that the acts of such Congress passed in 1836, 1837, and 1841, expressly validating bond marriages, must have therefore recognized that they were not valid. The court adding that this legislation had received by common consent a practical

construction excluding inapplicable and inconsistent and unwritten law founded by the immemorial custom and usage of the Britons, and that it never was the intention to adopt this usage in the Republic or state of Texas, and it should be rejected. *Western U. Tele. Co. v. Procter*, 6 Tex. Civ. App. 300, 25 S. W. 811.

⁷⁰ *Dumas v. State*, supra, was expressly disapproved in *Cumby v. Henderson*, 6 Tex. Civ. App. 519, 25 S. W. 673, involving legitimacy and right to inherit, where the argument of the court, briefly outlined, was that Texas was largely peopled by those who came from common-law states; that their ideas of marriage were different from those prevailing in Catholic countries; that accordingly they contracted marriages by bond; that after the independence of Mexico the people showed their conviction that all such unions constituted valid matrimony, by validating them; that the reason for passing the validating act was not because they were invalid at common law, but because they were supposed to be void under the law which prevailed in Texas at the time they were contracted; and that no question as to the effect of such a contract under the common-law system existed. The cases of *Western U. Tele. Co. v. Procter* and *Dumas v. State*, supra, were also disapproved in *Ingersol v. McWillie*, 9 Tex. Civ. App. 543, 30 S. W. 56, which was followed in *Darling v. Dent*, 82 Ark. 76, 100 S. W. 747.

⁷¹ See especially *Dalrymple v. Dalrymple*, supra, II. a.

⁷² *Lord Cranworth in Campbell v. Campbell*, L. R. 1 H. L. Sc. App. Cas. 182.

⁷³ *Fryer v. Fryer*, Rich. Eq. Cas. 85.

⁷⁴ *Bissell v. Bissell*, 55 Barb. 325, 7 Abb. Pr. N. S. 16; *Van Tuyl v. Van Tuyl*, 57 Barb. 235, 8 Abb. Pr. N. S. 6; *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106. In *Ashford v. Metropolitan L. Ins. Co.* 80 Mo. App. 638, the court, without discussion, applied the principle that a valid marriage may be orally contracted between competent parties, to a case in which, following

contract by which they assume toward each other the relation of husband and wife, and they regard this relation as one which is to continue so long as both shall live, and they understand that neither one nor both can rescind the contract or destroy the relation, then they are married in fact.⁷⁵ The parties, in order to constitute the marriage relation *de presenti*, must contemplate that the relation is being created at the precise time when the contract is being made. There can be no contract *per verba de presenti* where the marital status is to become fixed in the future, although there is nothing inconsistent in fixing the status *per verba de presenti*, and agreeing that the marriage then constituted shall be publicly solemnized at a future day.⁷⁶ And while mutual consent is necessary as a general proposition, a woman who enters into an agreement in the belief that she is contracting matrimony is not deprived of her marital rights merely because the man contracted with mental reservations and secretly intended not to marry.⁷⁷ It has been well said in this connection that if a

man, while endeavoring to accomplish a woman's seduction, blunders into matrimony, he has no one but himself to blame.⁷⁸

The above principles essentially respect the distinction which must always be kept in mind between the constitution of marriage and proof of it. On one phase of marriage *de presenti*, however, there is a certain amount of confusion which would not have existed if this distinction had been more uniformly observed. With respect to whether cohabitation is necessary in addition to present consent⁷⁹ there appears to be some difference of opinion, but this difference appears greater on its face than a study of the cases shows it to be. The prevailing rule established by express decisions on the question is that mutual consent only is necessary. If a mutual agreement in fact is clearly established by direct evidence, neither holding out nor cohabitation is necessary to constitute the parties husband and wife. While these circumstances are of considerable probative force in establishing consent, they are not its essential concomitants. This was a prin-

divorce, the parties thereto entered into a verbal contract of marriage.

⁷⁵ State v. Cooper, 103 Mo. 266, 15 S. W. 327.

⁷⁶ A contract *per verba de presenti* is conclusively negated by the fact that the agreement of the parties was to get married on a future day. Sorensen v. Sorensen, 68 Neb. 500, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930. On rehearing (68 Neb. 509, 103 N. W. 455) the court said that this is a correct statement of the law in the sense that a contract in future words is inconsistent with a construction of the language as importing a marriage *de presenti*; and that it was not intended to mean that it is inconsistent for persons to make two contracts, one that they are husband and wife *de presenti*, and another that the marriage should be publicly celebrated at some future time.

In Van Tuyl v. Van Tuyl, 57 Barb. 235, 8 Abb. Pr. N. S. 5, it was contended that if a contract of marriage contemplated that the marriage should at some later time be solemnized in church, it was void because a contract *per verba de presenti* constitutes marriage only when the parties intend that it shall do so without any subsequent ceremony. The court declared that while, if a proposal of marriage is made and the parties understand it as such, and the proposal is accepted, it constitutes a valid contract to marry, still, if there was merely a proposition to cohabit as man and wife, with an assurance of future marriage, it would be a nullity. While this statement ignores the fact that except where the marriage is to become effective only on an express condition, a contract *per verba de futuro* becomes marriage upon the subsequent cohabitation of parties, upon the

theory that the cohabitation occurs upon the faith of the contract and constitutes a then present consent,—it is to be noted that in New York a marriage cannot be constituted *per verba de futuro cum copula*, as is shown in the ensuing subdivision of this note.

⁷⁷ Although in general terms mutual consent is necessary, it is going too far to say that where the parties entered into an ostensibly mutual contract of marriage sufficient on its face to constitute them husband and wife, there must be in fact a mutual intention of becoming such, for if a woman, in good faith, and intending to become a wife, enters into such a contract with the man, the fact that he may secretly intend not to marry, or may have a mental reservation, or act in bad faith, will not affect the legal consequences of their act. Imboden v. St. Louis Union Trust Co. 111 Mo. App. 220, 86 S. W. 263 (suit by woman to claim widow's allowance in estate of deceased man whose will made no provision in her favor).

⁷⁸ Bissell v. Bissell, 55 Barb. 325, 7 Abb. Pr. N. S. 16.

⁷⁹ In a Missouri case it was said that the cases which hold that a contract *per verba de presenti* is insufficient to constitute a marriage unless followed by cohabitation fail to observe the distinction between a contract of marriage and proof of a contract of marriage. Davis v. Stouffer, 132 Mo. App. 555, 112 S. W. 282. Here, after an extended and able review of the authorities, the court holds that while cohabitation may be of value in establishing a contract, it is not necessary to constitute the marital relation where a valid and sufficient contract *per verba de presenti* is shown by direct evidence. And the court,

ciple of the common law, which was accepted in Scotland and supposedly⁸⁰ in England. A contract *per verba de presenti* was regarded as *ipsum matrimonium*.⁸¹ This view is the proper one, for since by "cohabitation" is meant not merely sexual intercourse, but openly living together as husband and wife, as is commonly held,⁸² and since this entails the lapse of time sufficient to enable the public to judge the relations of the parties, the result would be in most instances of marriage by private

consent, that there would be sexual intercourse before the completion of the marriage by "cohabitation as husband and wife," a result exactly contrary to the real purpose of marriage laws. This point was made in a California case, although, it is to be lamented, overridden on a subsequent appeal, when the exigency of a desired result impelled the withdrawal of a principle gratuitously invoked in favor of a woman on a former appeal wherein her case failed on other grounds.⁸³ In other American

in explaining the statement made in *Topper v. Perry*, 197 Mo. 531, 114 Am. St. Rep. 777, 95 S. W. 203, that when the consent to marry is manifested by words *de presenti* a present assumption of the marriage status is necessary, said that such an assumption of the marriage status does not require cohabitation and intercourse, and need be no more than a recognition that by the contract the parties have become and are married, for the purpose of assuming and carrying out the marriage relation. Continuing, the court said that there must be not only the contract, but also the intention that it is then and there to produce the status of marriage; and if both the contract and the intention that it shall constitute *ipsum matrimonium* are present, nothing further is required to render the parties husband and wife.

⁸⁰ See *supra*, II. a.

⁸¹ A statement that cohabitation is evidence of marriage does not mean that it is necessary to constitute marriage *per verba de presenti*; for while it may frequently be of great probative force in establishing the matrimonial consent, the consent alone when established is sufficient to render the parties husband and wife. *Yelverton v. Longworth*, 4 Macq. H. L. Cas. 746, 10 Jur. N. S. 1209, 11 L. T. N. S. 118, 13 Week. Rep. 235.

By the law of Scotland a contract *per verba de presenti* did not require consummation in order to become matrimony, and such a contract *ipso facto et ipso jure* was held to constitute the relation of man and wife. *Dalrymple v. Dalrymple*, 2 Hagg. Consist. Rep. 54, 17 Eng. Rul. Cas. 11; *Lindo v. Belisario*, 1 Hagg. Consist. Rep. 216.

This view was also taken by the House of Lords in *M'Adam v. Walker*, 1 Dow, P. C. 148, and adopted in Canada. *Connolly v. Woolrich*, 11 Lower Can. Jur. 107; *Delpit v. Cote*, Rap. Jud. Quebec 20 C. S. 338.

It was held in *Bell v. Graham*, 13 Moore, P. C. C. N. S. 242, 1 L. T. N. S. 221, 8 Week. Rep. 98, involving a suit for nullity, that a marriage in Scotland *per verba de presenti* was valid and binding where the parties understood that they were contracting *ipsum matrimonium*, and that in such circumstances the fact that the parties did not afterward cohabit in the usual mode was immaterial.

Reed v. Passer, Peake, N. P. Cas. 231, in L.R.A.1915E.

timated that a contract *per verba de presenti* was *ipsum matrimonium*; and Gibbs, Ch. J., said *obiter* in *Lautour v. Teesdale*, 8 Taunt. 830, 2 Marsh. 243, 17 Revised Rep. 518, 12 Eng. Rul. Cas. 729, that a contract *per verba de presenti* was an actual marriage without subsequent cohabitation.

⁸² See *infra*, V.

⁸³ On a first appeal in a California case enunciating the rule that where a contract *per verba de presenti* is complete, its efficacy to constitute marriage is not affected by a collateral agreement to keep the relation secret, the court further held that this was no less true under a statute requiring nonceremonial consent to be followed by mutual assumption of the marital rights, duties, and obligations, since such provision did not imply public cohabitation and recognition. *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345. In this decision it is pointed out that if this provision of the statute means anything more than sexual intercourse, in the majority of cases of nonceremonial marriages, the parties would have intercourse before the marriage was complete, since it could not be complete without public cohabitation. But on a subsequent appeal (79 Cal. 633, 22 Pac. 26, 131) the first appeal having been from a judgment in favor of the woman, who sought to establish the marriage, and the second appeal from the refusal of the trial court to grant a new trial, the court relieved the large estate of the alleged husband, who was a United States senator, from the claims of the woman by reversing the judgment largely upon the theory that while the agreement for secrecy did not affect the consent, the mutual assumption of the relations required by the statute was not effected by mere sexual intercourse without living together as husband and wife, the court holding, therefore, that there was no sufficient consummation of the express contract *per verba de futuro* where it appeared that they secretly occupied the same bed, having no common home and occupying separate dwelling places, concealed the fact that they were husband and wife, and in all things conducted themselves toward the public as unmarried people. In *Sharon v. Hill*, 11 Sawy. 291, 26 Fed. 337, in which the alleged husband had, before his death, sought to enjoin the woman from claiming to be his wife, the court had held that there was no marriage,

cases it has been squarely held that the relation of husband and wife may be created by consent without subsequent cohabitation.⁸⁴

There is some authority to the contrary, but it is found comparatively slight after

upon the ground, among others, that the declarations and certain "Dear wife" letters alleged to have been written by the man were forged. It was held in a later case that since, under the California statute, consent must be followed by the assumption of marital rights, duties, and obligations, a mutual agreement to live apart, when acted upon, vitiates a formal declaration of marriage simultaneously executed, acknowledged, and recorded. *Toon v. Huberty*, 104 Cal. 260, 37 Pac. 944.

⁸⁴ Mutual contract of marriage *per verba de presenti* is *ipsum matrimonium* in this country. *Mathewson v. Phoenix Iron Foundry*, 20 Fed. 281.

An early Kentucky case dealt with this precise question at considerable length, and held that the idea that a marriage *per verba de presenti* was not complete without cohabitation was founded neither on reason nor authority. *Dumaresly v. Fishly*, 3 A. K. Marsh. 368. Declaring that, by the law of nature, the contract of marriage is complete without consummation, and that this was recognized by the common law when it adopted the maxim of the civil law that *consensus, non concubitus, facit matrimonium*, the court pointed out that even in the case of a contract *per verba de futuro*, which is not deemed complete without cohabitation, the cohabitation does not constitute the marriage, and is only evidence of the marriage.

Indeed, the court in *Hulett v. Carey*, 66 Minn. 327, 34 L.R.A. 384, 61 Am. St. Rep. 419, 69 N. W. 31, commenting upon *State v. Worthingham*, 23 Minn. 528, in which it was stated that a mutual agreement *per verba de presenti* to take each other for husband and wife, deliberately made and acted upon by living together professedly in that relation, is sufficient to constitute the marital relation, stated that while this was true, the court should not be regarded as even intimating that if the contract is shown to have been actually made, living together is necessary, and that similar expressions so often used by other courts should not be taken as meaning that cohabitation was necessary, especially as it appeared in most of those cases that the cohabitation had occurred. The rule is that to render competent parties husband and wife, they need only agree in the present tense to be such, no time being contemplated to elapse before the assumption of the status, and that cohabitation is not necessary, and that if it follows, it adds nothing in law, although it may constitute evidence of marriage; and therefore, where a marriage has been clearly constituted by a contract in present words, secrecy does not invalidate the same. *Ibid.* L.R.A.1915E.

discarding the decisions which hold merely that the evidence introduced as to consent and cohabitation was sufficient to constitute marriage, without essaying to pass on the necessity of cohabitation,⁸⁵ and other cases in which, although evidence of cohabitation

Where there has been a mutual exchange of consent *per verba de presenti*, cohabitation as man and wife is not necessary to constitute the marital relation. *Imboden v. St. Louis Union Trust Co.* 111 Mo. App. 228, 86 S. W. 263. See also the Missouri case of *Davis v. Stouffer*, 132 Mo. App. 555, 112 S. W. 282.

In New York, present and mutual consent is sufficient without cohabitation. *Jackson ex dem. Dies v. Winne*, 7 Wend. 47, 22 Am. Dec. 563, and nothing to the contrary is to be inferred from cases declaring that any mutual agreement between the parties to be husband and wife *in presenti*, especially when followed by cohabitation, rendered them husband and wife. Such language was used in *Rose v. Clark*, 8 Paige, 574, and *Van Tuyl v. Van Tuyl*, 57 Barb. 235, 8 Abb. Pr. N. S. 5.

Apparently indorsing the generalization that a contract *per verba de presenti* without cohabitation is sufficient to constitute marriage, the court, in *Guardians of Poor v. Nathans*, 2 Brewst. (Pa.) 149, held that where a contract *per verba de presenti* was sufficient to render the parties husband and wife, its efficacy in that respect was not affected by the doing of acts inconsistent with the marriage relation, after an interruption of their relations.

In the territory of Utah it was held that a common-law marriage prevailed, and that all that was essential was a present agreement, the marriage being complete when there was a full, free, and mutual consent by the parties capable of contracting, though not followed by cohabitation. *United States v. Simpson*, 4 Utah, 227, 7 Pac. 257 (first marriage, in prosecution for polygamy).

The same position was taken in *Hilton v. Roylance*, 25 Utah, 129, 58 L.R.A. 723, 95 Am. St. Rep. 821, 69 Pac. 660, holding that a sealing ceremony between members of the Mormon church, and according to its laws, was shown by the evidence to have been regarded by the parties as constituting them husband and wife for life as well as for eternity, and that therefore it constituted a good marriage by the rules of the common law.

⁸⁵ The effect of such a decision is well illustrated by the Minnesota cases of *Hulett v. Carey*, 66 Minn. 327, 34 L.R.A. 384, 61 Am. St. Rep. 419, 69 N. W. 31, and *State v. Worthingham*, 23 Minn. 528, and the Missouri cases of *Davis v. Stouffer*, 132 Mo. App. 555, 112 S. W. 282, and *Topper v. Perry*, 197 Mo. 531, 114 Am. St. Rep. 777, 95 S. W. 203, where a statement that evidence of both elements was sufficient was said not to mean that cohabitation was nec-

essary. The same applies to the following cases:

Whatever the form of ceremony, or even if all ceremony is dispensed with, if the parties agree presently to take each other for husband and wife, and from that time live together in that relation, proof of these facts is sufficient to constitute proof of a marriage binding on all parties. *Meister v. Moore*, 96 U. S. 76, 24 L. ed. 826; followed in *United States v. Lee Sa Kee*, 3 Haw. Dist. Ct. 265.

If a man and woman in good faith agree to become husband and wife, and this agreement is followed by consistent and notorious matrimonial cohabitation, the relation of husband and wife is lawfully established. *Davis v. Pryor*, 50 C. C. A. 579, 112 Fed. 274.

Where two parties, pursuant to an agreement to that end, openly and publicly enter into the marital relation, and live and cohabit together as man and wife for nine years, except for a short interval, and during that time hold themselves out to the public and are accepted and received by their acquaintances and friends as husband and wife, two children being born to them, it would seem that they had constituted a valid common-law marriage. *Sprung v. Morton*, 182 Fed. 330.

Consent, followed by cohabitation, is sufficient to constitute marriage. *Beggs v. State*, 55 Ala. 108; *Williams v. State*, 54 Ala. 131, 25 Am. Rep. 665; *Farley v. Farley*, 94 Ala. 501, 33 Am. St. Rep. 141, 10 So. 646; *Moore v. Heinecke*, 119 Ala. 627, 24 So. 374; *Tartt v. Negus*, 127 Ala. 301, 28 So. 713; *White v. Hill*, 176 Ala. 480, 58 So. 444.

It was held in the territory of Arizona that no ceremony of marriage was required, and that if a man and woman presently agreed to take each other as husband and wife, and from that time lived together professedly in that relation, such was a valid marriage without ceremony. *United States v. Tenney*, 2 Ariz. 127, 11 Pac. 472.

Consent, followed by cohabitation, is sufficient (*Re Richards*, 133 Cal. 524, 65 Pac. 1034) upon which to base a charge of bigamy (*People v. Beevers*, 99 Cal. 286, 33 Pac. 844, 9 Am. Crim. Rep. 139). It was held in *Re Titcomb*, *Myrick Prob. Ct. Rep.* (Cal.) 55, that an agreement made in good faith to live together as husband and wife, followed by a joint residence, a community of funds, and the bringing up of children, and the holding out to the community at large of honorable relations as married people, constituted the marriage relation even though there was no solemnization. It was said obiter in *Graham v. Bennet*, 2 Cal. 503, that in California marriage was regarded as a civil contract, no form being necessary for its solemnization; and that if it took place between parties able to contract, an open avowal of the intention and an assumption of the relative duties which it imposes on each other were sufficient to render it valid and binding.

Thomas v. Holtzman, 7 Mackey, 62, 41 L.R.A.1915E.

cludes to the universal understanding in this country that a marriage *per verba de presenti*, without the intervention of a clergyman, followed by cohabitation, makes a legitimate marriage. The case itself involved the validity of a slave marriage, a question which is not included in this note.

Mutual consent and cohabitation were held sufficient in Georgia. *Clark v. Cassidy*, 64 Ga. 662; *Dale v. State*, 88 Ga. 552, 15 S. E. 287; *Drawdy v. Hesters*, 130 Ga. 161, 15 L.R.A.(N.S.) 190, 60 S. E. 451.

A marriage is evidenced by a present contract, followed by cohabitation as husband and wife, being known consistently as husband and wife, where the husband wrote letters addressing her as such, represented her as such to his employer in directing that money be sent her, and there was nothing in a long period of years inconsistent with the marriage state. *Elzas v. Elzas*, 171 Ill. 632, 49 N. E. 717. Contract *per verba de præsenti*, followed by cohabitation, is sufficient. *Hutchinson v. Hutchinson*, 196 Ill. 432, 63 N. E. 1023, affirming 96 Ill. App. 52. So, where it appeared that each of the parties, in express language, accepted the other as a spouse, and the evidence showed that they immediately after assumed and thereafter maintained the marriage relations, they were held to have been married when the contract was entered into. *Alden v. Church*, 106 Ill. App. 347.

Contract in *præsenti*, followed by cohabitation, constitutes marriage. *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245; *Smith v. Fuller*, — Iowa, —, 108 N. W. 765; *Re Wittick*, 164 Iowa, 485, 145 N. W. 913.

Present consent, followed by cohabitation, constitutes marriage. *Shorten v. Judd*, 60 Kan. 73, 55 Pac. 286; *Matney v. Linn*, 59 Kan. 613, 54 Pac. 668.

Judge Cooley said that whatever the form of a ceremony, or even where the ceremony is dispensed with, if the parties agree presently to take each other for husband and wife, and from that time live together professedly in that relation, there is a marriage binding upon the parties. *Hutchins v. Kim-mell*, 31 Mich. 126, 18 Am. Rep. 164.

Contract *per verba de præsenti* sufficient to constitute marriage, at least when followed by cohabitation. *Dyer v. Brannock*, 66 Mo. 391, 27 Am. Rep. 359, refusing to pass on the question whether cohabitation was necessary. It was declared in a Federal case that marriage in Missouri may be had by the mutual present consent of two competent persons, made in good faith and followed by cohabitation, without the addition of any prescribed formalities, and may be shown by such evidence as proves that such a marriage actually exists. *Holabird v. Atlantic Mut. L. Ins. Co.* 2 Dill. 166, note, Fed. Cas. No. 6587. And another Federal case held that mutual contract to become husband and wife at the time of the contract, and not at some future time, when followed by cohabitation as husband and wife, constituted a valid marriage according to the laws of Missouri. *United States*

was held necessary, the evidence of express consent was unsatisfactory. Cases of the latter kind especially illustrate the force of the distinction above mentioned, between constitution of marriage and proof of it. They have now and then been regarded as requiring cohabitation in addition to consent, but really they involve nothing more than resorting to the circumstances to show consent when it is not satisfactorily estab-

lished by direct evidence.⁸⁶ To state the point more fully, where the express consent is not shown by indubitable evidence, or where the words which the parties are shown to have exchanged do not manifest an intelligent exchange of consent, evidence of cohabitation and other circumstances is frequently resorted to, not necessarily upon the theory that consent alone is insufficient to constitute marriage, but for the obvious

v. Route, 33 Fed. 246, applying law as enunciated in *Dyer v. Brannock*, 66 Mo. 391, 27 Am. Rep. 359.

While even by the law of nature a mere casual commerce between the sexes does not constitute marriage, permanency is not to be regarded as an essential element of marriage thereunder, and when there is a cohabitation by consent, for an indefinite period of time, for the procreation and bringing up of children, that, in the state of nature, would be a marriage, and, in the absence of all civil and religious institutions, may safely be presumed to be a marriage in the sight of God. *Johnson v. Johnson*, 30 Mo. 72, 77 Am. Dec. 598 (involving an Indian marriage, of which this note does not treat).

In New Jersey the first marriage of the defendant in a prosecution for bigamy need not be shown to be a ceremonial marriage, and he may be convicted upon evidence of a mutual consent, followed by cohabitation and reputation. *State v. Thompson*, 76 N. J. L. 197, 68 Atl. 1068.

In *Reaves v. Reaves*, 15 Okla. 240, 2 L.R.A. (N.S.) 353, 82 Pac. 490, holding that an exchange of mutual consent *per verba de presenti*, followed by cohabitation, was sufficient to constitute marriage, the court did not allude to the question of whether the subsequent cohabitation was an essential element. And *Warren v. Canard*, 30 Okla. 514, 120 Pac. 599, goes no further than to declare that a common-law marriage exists where the parties have agreed with each other to be husband and wife, and pursuant to that agreement have entered into the marital relation; and that in proving such a marriage cohabitation is important evidence which should not be excluded; but the court does not declare that cohabitation is necessary.

In *Newbury v. Brunswick*, 2 Vt. 151, 19 Am. Dec. 703, quoting with approval from early English cases, including *Jesson v. Collins*, 2 Salk. 437, and other cases, that a contract *per verba de presenti* constitutes marriage, the court held only that such a contract, followed by cohabitation, established a marriage, and especially so as marriage was viewed both in England and in Vermont as a civil contract. This case was overruled in *Northfield v. Plymouth*, 20 Vt. 582, and *Morrill v. Palmer*, 68 Vt. 1, 33 L.R.A. 411, 33 Atl. 829, holding that the common law as to marriages does not prevail in Vermont.

⁸⁶ While the mere fact of the indulgence in sexual intercourse is not of itself con-

clusive proof of the marriage, yet it is always a proper subject for consideration after evidence of the agreement to enter into the matrimonial relation. *Coad v. Coad*, 87 Neb. 290, 127 N. W. 455.

Where proof of the contract rests in admissions of the alleged husband, in whose estate the alleged wife is claiming dower, made to a very few persons, and this is fortified only by faint proof in her suit, an instruction that there was no marriage unless, following the alleged contract, the parties cohabited together as man and wife, is not error. *Bishop v. Brittain Invest. Co.* 229 Mo. 699, 129 S. W. 668, Ann. Cas. 1912A, 868. While this principle was referred to in *Topper v. Perry*, 197 Mo. 531, 114 Am. St. Rep. 777, 95 S. W. 203, the only indication of express consent was contained in the woman's testimony, and the existence of the marriage relation was regarded as negated by the circumstances.

In a Nebraska case holding that it is not indispensable that a clergyman or magistrate should be present to authorize and confirm the contract, and that therefore if a contract is made and is followed by celebration and cohabitation it amounts to a valid marriage and is not voidable at the will of either party,—there was no direct testimony of a contract in fact except that of the woman who was suing to have the marriage declared valid and binding, and such evidence, therefore, had to be fortified by inferences arising from the circumstances. *Gibson v. Gibson*, 24 Neb. 394, 39 N. W. 460, followed in *Goodrich v. Cushman*, 34 Neb. 460, 51 N. W. 1041.

And in a Colorado case declaring cohabitation necessary, the remark was merely an aside, and the claim of express consent was not only controverted, but was also ignored by the court. *Taylor v. Taylor*, 10 Colo. App. 303, 50 Pac. 1049, followed in *Klipfel v. Klipfel*, 41 Colo. 40, 124 Am. St. Rep. 96, 92 Pac. 26, where there was no claim of express consent.

And in *Umbenhower v. Labus*, 85 Ohio St. 238, 97 N. E. 832, involving legitimacy and right to inherit from the father, the court seemed to regard the cohabitation and repute, of which there was evidence, as necessary in addition to mutual oral consent, but it is to be observed that the alleged wife herself was the only one who testified to an express marriage contract, and the court expressed some doubt as to its truth. To the same effect are *Nathans's Case*, 2 Brewst. (Pa.) 149, and *Com. v. Stump*, 53 Pa. 132, 91 Am. Dec. 198, in the former the

purpose of ascertaining whether consent was intended. Numerous occasions of resorting to the circumstances where evidence of express consent is lacking are elsewhere shown.⁸⁷

court expressly recognizing that consent alone was sufficient, but upholding the marriage on evidence of cohabitation and reputation, irrespective of the woman's testimony as to express consent; and in the latter case the woman's testimony being expressly rejected.

In *Re Drinkhouse*, 151 Pa. 294, evidence, which was rather limited, as to cohabitation and repute, was merely one species of evidence, there being also admissions and testimony of the woman as to an actual marriage, she claiming the right to share in the distribution of the man's estate.

⁸⁷ See *infra*, V., and also part IV. of the note to *Becker v. Becker*, post, 56.

⁸⁸ Note that, in discussing this question, the Texas court says that for a decision to be authority for the proposition that a marriage is complete by the contract without cohabitation, the case must not embrace in its facts cohabitation or any form of consummation, for it would not then be a case of marriage by contract only; and that if the case does involve cohabitation, any statement that cohabitation is unnecessary is a *dictum*. *GRIGSBY v. REIB*.

That when the consent to marry is manifested by words *de præsenti*, a present assumption of the marriage status is necessary, was declared *obiter* in *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737, quoting from *VanTuyt v. VanTuyt*, 57 Barb. 237, to the effect that marriage is established by proof of a contract *de præsenti*, especially where the contract is followed by cohabitation, without taking note of the fact that such a statement as the latter plainly implies that cohabitation is not necessary, while it is a fact of considerable probative force. However, it is to be observed that common-law marriages can no longer be contracted in Illinois because the act of July 1st, 1905, of that state, declares that all common-law marriages thereafter entered into shall be null and void. *Wilson v. Cook*, 256 Ill. 460, 43 L.R.A.(N.S.) 365, 100 N. E. 222.

In *Lorimer v. Lorimer*, 124 Mich. 631, 83 N. W. 609, the court stated that, in the absence of a valid marriage ceremony, a simple agreement to live together, even though the parties intend to carry out the agreement, is not sufficient to constitute a valid marriage, unless acted upon by living together and cohabiting as husband and wife, although such statement was not essential to a decision of the case. The North Dakota supreme court holds that an express exchange of mutual consent is insufficient in Michigan to constitute the marital relation unless it is followed by an assumption of the marriage relation. *Re Peterson*, 22 N. D. 480, 134 N. W. 751, decided on the L.R.A.1915E.

There are decisions which squarely declare that consent must be followed by cohabitation; but it is found that, for the most part, the few cases in which the statements are not mere *obiter dicta*,⁸⁸ or based on statutes,⁸⁹ either dispose of the matter

authority of *Lorimer v. Lorimer*, supra, and *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164. So far as North Dakota itself is concerned, the case is not important, except possibly in cases of pedigree arising from alleged common-law marriages before 1890, since a statute enacted in that year is held to abrogate the common law of marriages. *Schumacher v. Great Northern R. Co.* 23 N. D. 231, 136 N. W. 85.

In *Taylor v. State*, 52 Miss. 84, 2 Am. Crim. Rep. 13, the court stated, confessedly *obiter*, that consent is insufficient to establish the marriage without cohabitation thereunder as man and wife.

The New Hampshire court goes to the extreme in this respect, declaring not merely that cohabitation and repute must follow a contract of marriage, but also that the contract of marriage followed by cohabitation as husband and wife does not constitute marriage, and is merely evidence from which the jury may infer marriage. *Dunbarton v. Franklin*, 19 N. H. 257, involving a pauper settlement alleged to have been derived from marriage. The court expressly nullified the effect of any language to the contrary to be found in *Londonderry v. Chester*, 2 N. H. 268, 9 Am. Dec. 61, which arose in the same way, upon the ground that the remarks of the court in that case were not called for, inasmuch as a marriage ceremony had been performed by a person acting as a minister, under circumstances which did not authorize him to do so without incurring a penalty under the statute, the court declaring that in such circumstances the marriage was valid as to the parties and the public.

⁸⁹ At one time it was provided by statute in California that consent alone would not constitute marriage, and that it must be followed by a solemnization or by a mutual assumption of marital rights, duties, and obligations. Under this statute cohabitation was held necessary even in the case of a contract *per verba de præsenti*. It was held that there was no assumption of the marriage relation within the meaning of § 55, unless the parties lived together as husband and wife, treated each other in the way usual with married people, and so conducted themselves as to have full repute among their intimate friends and associates as husband and wife. *Re Baldwin*, 162 Cal. 471, 123 Pac. 267. By an amendment to the California Code in 1895 the phrase "or by a mutual assumption of marital rights, duties, or obligations" was eliminated so that thereafter § 55 read: "Consent alone will not constitute marriage; it must be followed by solemnization authorized by this Code." Under such a provision, of course, no marriage was valid unless solemnized by

without discussion,⁹⁰ or are based on considerations inconsistent with the recognition of consensual marriages in any form,⁹¹ or decided largely in reliance upon decisions that cannot be regarded as authority on the point.⁹² Thus, it seems plain that if the parties, with matrimonial intent, solemnly and unmistakably agree then and there to become husband and wife, they *ipso facto*

become such, and that it is only where there is some doubt as to whether consent has been intentionally and intelligently exchanged that resort need be had to the circumstances to establish a marriage. In the nature of things, if the marital status is created at all, it must be by agreement and consent of the parties. The agreement is an affirmative and creative act; the cir-

a person authorized by the statute. *Norman v. Norman*, 121 Cal. 620, 42 L.R.A. 343, 66 Am. St. Rep. 74, 54 Pac. 143.

The Montana Code, like that of California, was held to require a mutual and public assumption of the marital relation. *O'Malley v. O'Malley*, 46 Mont. 549, 129 Pac. 501, Ann. Cas. 1914B, 662.

⁹⁰ Subsequent cohabitation was held, without discussion, necessary to render valid by the common law a marriage by a justice of the peace without a license, as required by statute, in *Ashley v. State*, 109 Ala. 48, 19 So. 917; and likewise where there was solemnization under a license which was void because issued by an unauthorized person, in *Hawkins v. Hawkins*, 142 Ala. 571, 110 Am. St. Rep. 53, 38 So. 640.

⁹¹ In *Carmichael v. State*, 12 Ohio St. 553, in which there was an express contract and cohabitation, the court indicated pretty strongly that it regarded cohabitation as an essential sequence of the consent; for after remarking that it must appear from the acts of the parties (words used on such an occasion being included among the word "acts") that they did join together as husband and wife, the court said: "How this shall appear, in any case in which it is alleged that persons have joined together as husband and wife, without pursuing the mode prescribed by the statute, must depend on the circumstances. There must be a contract of present marriage,—it must appear that the woman was taken as a wife, and that the man was taken as a husband. The circumstances of publicity in entering into the contract, and of cohabitation thereafter as husband and wife, are most important to show the intent with which any words were used, and without such circumstances, under the manifest policy of our laws on the subject, and the habits and feelings of our people, an intent to form the honorable relation of marriage could not be properly found." If by this language the court meant not merely to allude to the practical difficulty of proving marriage without cohabitation, but to take the position that cohabitation is necessary after a contract in present words, it thereby ignores the principle that cohabitation is not necessary, which was the prevalent opinion in England before the decision in *Reg. v. Millis*, and was extensively recognized in this country; and this is unfortunate in view of the fact that, as is shown by the citation of the *Carmichael* Case in the next subdivision, the general understanding of the law in England, as mentioned, and its adoption in the United States, was advanced as a L.R.A.1915E.

reason why the doctrine of *Reg. v. Millis*, that a marriage could not be constituted merely by the unsolemnized consent of the parties, should not be adopted as the law of Ohio.

⁹² It was declared by the United States Supreme Court that at common law, marriage is a civil contract, and may be made *per verba de presenti* without attending ceremonies, religious or civil; but that, upon considerations of public policy, and for the protection of the parties and their children, some public recognition of the marriage is necessary as evidence of its existence. Maryland use of *Markley v. Baldwin*, 112 U. S. 490, 28 L. ed. 822, 5 Sup. Ct. Rep. 278, holding that such recognition was required by the law of Pennsylvania, upon the supposed authority of *Nations's Case*, 2 Brewst. (Pa.) 149, and *Com. v. Stump*, 53 Pa. 132, 91 Am. Dec. 198. In *Nathans's Case* the court expressly recognized that consent alone was sufficient, but ignored the woman's testimony of express consent, and in the *Stump Case*, similar testimony of the alleged wife was rejected as incredible.

Cohabitation has been held necessary in Texas; and while the conclusion was based mainly upon the supposed authority of decisions in other states, which in fact do not so hold, it has been reasserted and appears fixed. It will be observed that the case of *GRIGSBY v. REIB*, upon the theory that in certain decisions referred to, the judicial statement that cohabitation is not essential after a contract *per verba de presenti* is *dictum*, inasmuch as the fact of cohabitation was proved in such cases, expressly takes the position that cohabitation is necessary in order to constitute a marriage, although there be an express contract *per verba de presenti*, and does so upon the authority of cases which are, as a matter of fact, less authoritative than those which are rejected as *dicta*. It is of interest to note that the decisions relied upon as holding cohabitation necessary are: *Tartt v. Negus*, 127 Ala. 301, 28 So. 713, and *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164, declaring merely that consent and cohabitation are sufficient to constitute parties husband and wife, but not holding that cohabitation is essential; *Travers v. Reinhardt*, 205 U. S. 440, 51 L. ed. 873, 27 Sup. Ct. Rep. 563, inferring marital consent from cohabitation and reputation; and *McKenna v. McKenna*, 180 Ill. 577, 54 N. E. 641, in which there was no showing of consent, and it appears not only that the relations of the parties were illicit

cumstances but evidence of consent.⁹³ Circumstances cannot establish a marriage where there is in fact no matrimonial consent or desire, express or implied, and circumstances are valuable in establishing a marriage only so far as they tend to show consent. It is a mistake of principle to require, in addition to consent, evidence of cohabitation, whose sole function is to show consent,—a mistake which seldom has been made.

If, as is so uniformly declared, marriage is a civil contract or social status, and not a sacrament, why should two persons who marry in the presence of a clergyman or magistrate, and thereafter separate for all time, be accorded any greater civil or social rights than persons who separate after an exchange of private consent? The minister's benediction or the magistrate's office, highly desirable as it is, witnesses the union, but does not augment the consent. No, the solemnized marriage is favored merely because of the publicity which it entails; and this leads straight to the question of proving marriage, as distinguished from constituting it, and leaves untouched the proposition that where the express consent is clearly shown, the marriage is established. If this is regarded as undesirable doctrine,

in the beginning, but also that there was no evidence of publicity in their relations, which they apparently regarded as illicit. One other case relied on by the court is *Pegg v. Pegg*, 138 Iowa, 572, 115 N. W. 1027, which, it is true, comes somewhat nearer upholding the proposition to which it is cited, but it seems to fall short of constituting any authority on the question, inasmuch as the gist of the decision is that the relations of the parties were such as to indicate that they were consciously living in illicit relations, and that the express consent exchanged between them was shown by such evidence to have been intended merely as a blind to cover up their illicit relations, and not to have been intended as a marriage contract at all. *GRIGSBY v. REIB* was followed in *Berger v. Kirby*, 105 Tex. 611, 51 L.R.A. (N.S.) 182, 153 S. W. 1130, affirming — Tex. Civ. App. —, 135 S. W. 1122 (upholding charge that common-law marriage exists when a man and woman enter into an agreement to become husband and wife, and, in pursuance of such agreement, live together and cohabit as husband and wife, and hold themselves out to the public as such). And on the authority of the *GRIGSBY CASE*, the court later held that it was error to charge the jury that where parties enter into an unqualified agreement to become then and there husband and wife, the same constitutes a valid marriage contract. *Schwingle v. Keifer*, 105 Tex. 609, 153 S. W. 1132. And it was said in *Melton v. State*, 71 Tex. Crim. Rep. 130, 158 S. W. 550, that to support a conviction of bigamy L.R.A.1915E.

the remedy lies in the entire abrogation of the common law, a course that, in the present age, has something to commend it.

IV. *Marriage per verba de futuro cum copula.*

According to *Dalrymple v. Dalrymple*,⁹⁴ in which the canon law was said to have become the known basis of the matrimonial law of Europe, a promise *de futuro* had, of itself, no legal effect; but if the parties who had exchanged the promise had carnal intercourse, its effect was to interpose a presumption of present consent which converted the engagement into an irregular marriage, and produced all the consequences attributable to that species of matrimonial cohabitation. Once the copula was shown, it was presumed to have taken place in reliance upon the promise. This doctrine was indorsed by other decisions showing that a marriage *per verba de futuro* was, after all, but a species of present consent, having been upheld upon the fiction that at the time of the copula, consent *de presenti* was mutually given by the parties in consequence of the anterior promise.⁹⁵ While the promise was required to be un-

upon the theory that the second alleged marriage was a common-law marriage, there must be not only an exchange of consent, but also cohabitation for a considerable period of time, four months being held insufficient. But it is to be noted that the indictment in the case was for rape under a semblance of marriage, and a conviction of rape was therefore upheld.

⁹³ This is the uniform position of the courts, as shown in the discussion of the effect of cohabitation and reputation *infra*, V.

⁹⁴ *Supra*, II. a. The doctrines of this case are there shown to have become the law in this country, notwithstanding *Reg. v. Millis*, cited in the same connection.

⁹⁵ Consent *de presenti* is essential to a marriage, and marriages established upon a promise with subsequent copula are established upon the fiction that the consent *de presenti* was mutually given by the parties in consequence of the anterior promise. *Stewart v. Menzies*, 2 Robinson, 547.

The effect of the intercourse was to interpose a presumption of present consent at the time of the intercourse, to convert the previous promise *de futuro* into an irregular marriage. *Robb v. Robb*, 20 Ont. Rep. 591.

In *Sim v. Miles*, 8 Sc. Sess. Cas. 1st series, 89, a marriage *per verba de futuro*, followed by copulation, was upheld, though the copulation was preceded by illicit intercourse, one judge placing his decision on general grounds, and another on the ground that the female was an infant when the illicit cohabitation began.

conditional,⁹⁶ it did not have to be made in explicit words,⁹⁷ and where both the promise and the copula were shown, they were held to constitute marriage, and not merely to evidence it.⁹⁸

The instances in which the question has been presented in the American courts are comparatively few. In a great majority of instances an informal marriage is claimed to have been established by an agreement in present words, or sought to be inferred from evidence of cohabitation and reputation. But the doctrine has been recognized in a few jurisdictions,⁹⁹ though there is a disposition to hold that marriage is merely evidenced, and not constituted, by this form of contract,¹⁰⁰ and to require something more than mere copula. It is held that

the parties must actually give themselves to each other in the marriage relation. In other words, there must be cohabitation, and that cohabitation must be matrimonial,¹⁰¹ and this means that the parties must regard the marriage relation as existing.¹⁰² If the parties are conscious of committing an act of fornication, no marriage is thereby constituted.¹⁰³ They must actually dwell together as husband and wife, mutually recognizing each other as such in pursuance of the marriage promise,¹⁰⁴ and actually intending to constitute the relation of husband and wife.¹⁰⁵ This approaches an entire rejection of the doctrine of marriage *per verba de futuro*, since it requires cohabitation, which, together with reputation, would, even if there were

⁹⁶ If the promise be conditioned upon a future event (such as the birth of issue), there is no room for the fiction, and the copula cannot effect the completion or consummation of the prior contract. *Stewart v. Menzies*, supra.

⁹⁷ To establish a marriage *per verba de futuro* it is not necessary that the promise be in explicit words. Affectionate letters showing extended intimate relations, which are such as might be more likely to come from a husband than from a deliberate seducer, were regarded as sufficient by the Scotch law to show a promise of marriage, and, having been followed by copula, sufficient for the success of the woman's action for declarator of marriage and of legitimacy of issue. *Honyman v. Campbell*, 5 Wilson & S. 92.

⁹⁸ *Yelverton v. Longworth*, 4 Macq. H. L. Cas. 746, 10 Jur. N. S. 1209, 11 L. T. N. S. 118, 13 Week. Rep. 235.

⁹⁹ A minor Pennsylvania court expressly held that where words in *futuro* in an agreement to marry are followed by cohabitation, the contract is executed and the marriage is valid. *Comly's Estate*, 19 Pa. Co. Ct. 184.

A marriage *per verba de futuro cum copula* has all the legal effects of a marriage *per verba de presenti*. *Patton v. Philadelphia*, 1 La. Ann. 98.

The case of *Letters v. Cady*, 10 Cal. 533, is decided upon the ground that the evidence was insufficient to establish a marriage *per verba de futuro*, but the court does not take occasion to say that a marriage cannot be contracted in that way, and the inference seems to be that it would regard such a marriage valid under proper facts. But it will be recalled that the common law of marriage has been abrogated in California by statute. See supra, II. b, 2 (b).

At common law where the contract is made *per verba de futuro cum copula*, the copula is presumed to have been allowed on the faith of the marriage promise, and the parties are deemed to have accepted each other as man and wife at the time of the copula. *Port v. Port*, 70 Ill. 484; *Hebblethwaite v. Hepworth*, 98 Ill. 126; *Hiler v. L.R.A.*1915E.

People, 156 Ill. 511, 47 Am. St. Rep. 221, 41 N. E. 181; *Maher v. Maher*, 183 Ill. 61, 56 N. E. 124. The common law of marriages has been abrogated in Illinois by statute, as shown supra, II. b, 2 (b).

It was expressly held in *Simmons v. Simmons*, — Tex. Civ. App. —, 39 S. W. 639, that a promise of marriage *per verba de futuro*, followed by cohabitation as husband and wife, rendered the parties such upon the theory that the copula consummated the engagement, and transmitted the future promise into a present contract; and that the fact that the parties were subsequently ceremonially married did not negative former marriage relations between them, so as to disentitle the woman in a suit for divorce to claim, as a part of the community property, land acquired after cohabitation began, but before the ceremonial marriage.

¹⁰⁰ Cohabitation following a contract *per verba de futuro* is merely evidence of the marriage, and does not constitute the marriage. *Dumaresny v. Fishly*, 3 A. K. Marsh. 368.

The copula does not constitute marriage, but it is taken, when circumstances justify it, as evidence of the performance of the previous promise. *Cuneo v. De Cuneo*, 24 Tex. Civ. App. 436, 59 S. W. 284.

See also *Peck v. Peck*, infra, in this subdivision.

¹⁰¹ *Stoltz v. Doering*, 112 Ill. 284.

¹⁰² *Ibid.*

¹⁰³ *Port v. Port*, 70 Ill. 484.

¹⁰⁴ *Cuneo v. De Cuneo*, 24 Tex. Civ. App. 436, 59 S. W. 284.

¹⁰⁵ On this question, the court said, in *Fryer v. Fryer*, Rich Eq. Cas. 85, "Does the copula, *ipso facto*, perfect the previous agreement, so as to constitute marriage? This, in my opinion, depends entirely upon the intention and the apprehension of the parties. If an agreement be made by words in *futuro*, that the parties will marry; and that the act of their coming together shall, *per se*, signify that they have thereby concluded their contract: there the copula is a performance of the contract, and by perfecting reduces it from an executory into an executed agreement. So where there was no

no express promise, raise a presumption of marriage under the principles set out in the next subdivision of this discussion. And it remains to be noticed that New York has expressly rejected the entire doctrine of marriage *de futuro*,¹⁰⁶ and that the Ohio supreme court refuses to apply it,¹⁰⁷ although it has inadvertently stated excellent reasons for applying it in a case upholding a marriage *per verba de presenti*. The doctrine of marriage *per verba de futuro cum copula* thus seems to be a shadow of its former self, even in the jurisdictions that have not expressly repudiated it as a

whole; and it seems a fair conclusion that the doctrine is nearly, if not quite, obsolete.

V. Habit and repute.

a. Generally.

Closely associated, from a practical viewpoint, with the above doctrines of the marriage contract, is the evidential question of inferring marriage from the conduct of the parties and the repute arising therefrom in the community where they reside. In principle, each question is independent of the other, but the distinction between

express stipulation that the copula should perfect the previous executory agreement, yet if it be evident that the parties understood and intended that act to perfect it, I suppose it must have that effect. But it is of the essence of every contract that the parties shall have a present contracting intention, at the time of perfecting their contract: they must understand that they are making a contract; otherwise no contract is made. I do not say that they must have a full understanding of the legal consequences of the contract they are forming. The contract once made, the consequences are matter of legal obligation, and they must abide by them. . . . The proposition contended for, that copula following promises to marry is marriage, without regard to the present intention of the parties, seems to me unfounded in principle. If it were true, there could be no such thing as an action for seduction. The doctrine of that action is, that where a man promises a woman that if she will be his prostitute now, he will make her his wife hereafter,—to which she assents, and so there are mutual promises, and a mutual agreement,—this does not constitute marriage."

The Rhode Island court held in *Peck v. Peck*, 12 R. I. 485, 34 Am. Rep. 702, that a mere executory agreement to marry does not become consummated by copulation unless the parties so intend; and that it is indispensable to marriage, whether under the statute or at common law, that the parties consent to be husband and wife presently; and though cohabitation following an engagement is evidence of such consent, it is not conclusive, but only *prima facie* evidence of it. In this case, the court held that the evidence showed that the parties after their engagement were looking forward to a formal ceremony to make them husband and wife, and never agreed or consented to become such without it. Commenting on this case, the Rhode Island court in *Wrynn v. Downey*, 27 R. I. 454, 4 L.R.A.(N.S.) 615, 114 Am. St. Rep. 63, 63 Atl. 401, 8 Ann. Cas. 912, involving an action for breach of promise of marriage, stated further that the common law made a contract *per verba de futuro cum copula* evidence of marriage itself, not the basis of an action for breach of promise; that the question in such cases is one of intention purely; that if the inten-

tion is to consummate a marriage, it is marriage and the act is innocent; that if it is not so intended by the parties, the act is criminal in both; and that the presumption that the intercourse is innocent precludes an action for not doing what the presumption says has been done.

¹⁰⁶ The New York court took the position that a contract to marry *per verba de futuro*, followed by cohabitation, did not amount to a valid marriage for the purpose of rendering a child of the parties legitimate,—a conclusion reached after a full discussion of canon and common law of marriages, the court stating that while such situation was, in the early days of England, sufficient to entitle one of the parties to go before an ecclesiastical court and have a decree of marriage declared, it did not of itself constitute marriage and that as the common law had no power to decree a marriage in pursuance of an executory contract our courts had no such power, and a contract *de futuro* was of no effect. *Cheney v. Arnold*, 15 N. Y. 345, 69 Am. Dec. 609, disapproving a *dictum* to the contrary in *Starr v. Peck*, 1 Hill, 270. *Cheney v. Arnold* was approved in *Holmes v. Holmes*, 1 Abb. (U. S.) 525, 1 Sawy. 99, Fed. Cas. No. 6,638, and *Arnold v. Chesbrough*, 7 C. C. A. 508, 20 U. S. App. 87, 58 Fed. 833.

¹⁰⁷ That a contract *per verba de futuro*, followed by cohabitation, does not constitute marriage at common law, is expressly decided after a very forcible discussion on the point in *Duncan v. Duncan*, 10 Ohio St. 181, wherein the court says: "The idea that a contract for a future marriage, followed by cohabitation as husband and wife, is itself a valid marriage at common law, seems to have obtained currency on the credit of remarks made by several elementary writers of distinguished learning and ability, and by certain judges of high character, speaking by way of *obiter dicta*, in cases in which this question was really in no way involved. But the better opinion now seems to be, that these remarks are unsupported by any case actually adjudicated and entitled to be considered as authoritative; and that such a contract never was a good marriage at common law, either in this country or in England; and the mistaken doctrine seems to have originated either in the inadvertent confounding of what might, in the absence

them has now and then been ignored,¹⁰⁸ and a discussion of the evidential question, therefore, seems desirable, although this note is not intended to deal generally with the manner and methods of proving marriage.

An essential sequence of judicial recognition of private consent was the difficulty of proving it. Eyewitness evidence was impossible in the case of clandestine marriage; and in the nature of things, marriage by private consent was a matter of frequent occurrence in the early days when the church, straining to obtain exclusive control of the institution of marriage, appeared

to have no constant idea of its essentials, and when, for a better reason, the people could not be expected to know anything about it. Therefore, when persons were found living together to all appearances as married persons, demeaning themselves as such, and being regarded by their friends and neighbors as husband and wife, the law said that they were to be presumed such, and the law still continues to say so.¹⁰⁹ This, it is to be remembered, is a rule of evidence. Such circumstances do not constitute marriage, but merely supply the defect of proof of consent to which there was no witness,—it is merely evidence

of rebutting evidence, be good presumptive evidence of a marriage, with marriage itself; or from the fact that such a contract *per verba de futuro*, followed by cohabitation, was one of which the canon law, as administered by ecclesiastical courts in England, until restrained by statute, would enforce the specific performance." In this decision the Ohio court relied largely upon Reg. v. Millis, and declared that while the opinion of the eminent jurists of the Kingdom was nearly balanced as to the validity at common law of a marriage contracted by present words, and not in the face of the church, there seems to have been no difference of opinion among them as to the invalidity of a marriage *per verba de futuro*, though followed by cohabitation.

However, when, two years later, the Ohio court was called upon to consider the validity of a contract *per verba de presenti*, in Carmichael v. State, 12 Ohio St. 553, it referred again to Reg. v. Millis and the statement in the opinion of Tindal, Ch. J., that a contract of marriage *per verba de presenti* was a contract indissoluble between the parties themselves, affording to either of the contracting parties, by application to the spiritual court, the power of compelling the solemnization of an actual marriage; but that such contract never constituted a full and complete marriage in itself unless made in the presence and with the intervention of a minister in Holy Orders. This distinction, that is, between a contract which constitutes marriage itself, and one which entitles the parties to go into the ecclesiastical courts and have marriage decreed, which was regarded in the Duncan Case as negating the right to contract marriage *per verba de futuro cum copula*, was avoided when applied to a contract *per verba de presenti* by the statement that "if we could presume that our legislature [in prescribing the forms of marriage] had in view the common law of England, as declared by the judges in Reg. v. Millis, we cannot suppose that, in the absence and abrogation of all ecclesiastical power and authority over civil rights, there would have been a failure to provide some remedy, or to make some provision, in reference to a contract which was so binding as to be 'indissoluble. . . .' The legislature must have proceeded on the idea L.R.A.1915E.

of the entire inapplicability of any such rule of the common law in this state, where ecclesiastical authority binds those only who render a voluntary submission, or, as is more probable, the rule of the common law in the mind of the legislature was that shown by the certainly prevalent opinion in England prior to the decision in Reg. v. Millis, and almost universally adopted in this country." The quoted remarks constitute an excellent statement of the reasons why the court in the Duncan Case could have upheld a contract *per verba de futuro*, followed by cohabitation, since, as is shown in this discussion, the contract *per verba de futuro*, followed by cohabitation, was regarded as constituting marriage by the prevalent opinion in England before the decision in Reg. v. Millis, and the principle has been recognized in this country as a correct principle of law.

¹⁰⁸ See, in addition to the cases hereinafter referred to, those discussed supra, III, in connection with the question whether cohabitation is necessary in addition to express consent *de presenti*.

¹⁰⁹ In addition to the following cases, see those cited in succeeding footnotes.

If a contract in present words is asserted, it is not necessary to prove the contract itself, and it is sufficient if the facts of the case are such as to lead to satisfactory evidence of such a contract having taken place. Upon this principle the acknowledgment of the parties, their conduct toward each other, and the repute consequent upon it, may be sufficient to prove the marriage. Yelverton v. Longworth, 4 Macq. H. L. Cas. 746, 10 Jur. N. S. 1209, 11 L. T. N. S. 118, 13 Week. Rep. 235; Hoggan v. Craigie, Maclean & R. 942.

In the Dysart Peerage Case, L. R. 6 App. Cas. 539, in which a contract of marriage under the Scotch law was claimed, and in which some reliance seems to have been placed upon habit and repute, cohabitation in Scotland having continued for three weeks, and the parties having subsequently gone to England, where they cohabited for a time,—Lord Blackburn said: "I believe that there never has been a marriage by habit and repute established in any case where the period over which the habit and repute extended has been so short a period as three

or four weeks. And, though I am not prepared to lay down as law that even a shorter time might not be, under peculiar circumstances, sufficient, I am not prepared to decide that it would. But I think that habit and repute is not constituted by the parties speaking casually of each other as husband and wife to persons to whom the introduction of the woman as his wife could neither be important nor significant."

The United States Supreme Court lately held that cohabitation and reputation in New Jersey between parties whose ceremonial marriage may have been void in another state for want of a license were the equivalent of a contract in present words, and were as effective as such a contract would have been to render them husband and wife. *Travers v. Reinhardt*, 205 U. S. 423, 51 L. ed. 865, 27 Sup. Ct. Rep. 563.

The California statute declaring that it is a disputable presumption that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage is held to be declaratory of the common law. *Re Baldwin*, 162 Cal. 471, 123 Pac. 267.

In the absence of direct proof of the agreement, it is well settled that facts showing that parties have publicly acknowledged each other as husband and wife, have assumed the marriage rights, duties, and obligations, and have been generally reputed in the place of their residence to be husband and wife, are relevant to prove a contract of marriage between them. *Davis v. Pryor*, 50 C. C. A. 579, 112 Fed. 274.

Marriage may be proved in civil cases by reputation, declarations, and conduct of the parties, and other circumstances accompanying such relation, such as their conversation and letters addressing each other as man and wife; their living together in that relation and being generally reputed to be man and wife; their appearing in respectable society, and being there received as man and wife; the assumption by the woman of the name of the man; their joining as man and wife in the conveyance of her real estate; the acknowledgment and treatment of their children by them as legitimate; and any other conduct indicative of marriage. *Apong v. Marks*, 1 Haw. 50.

Where parties are divorced after living as husband and wife for thirty years, and subsequently become reconciled and resume living together with the intention of continuing the marriage relation, the fact that no ceremony was performed does not negative the marriage relation. *Herald v. Moker*, 257 Ill. 27, 100 N. E. 277.

Marriage may be proved by any species of evidence not prohibited by law which does not presuppose a higher species of evidence within the power of the parties; and cohabitation as man and wife furnishes presumptive evidence of a preceding marriage. *Holmes v. Holmes*, 6 La. 463, 26 Am. Dec. 482; *Hube's Succession*, 20 La. Ann. 97; *Albinet v. Yazoo & M. Valley R. Co.* 107 La. 133, 31 So. 675. And it has been held in Louisiana that reputation was sufficient L.R.A.1915E.

proof of marriage when the laws of Spain were in force in Louisiana territory. *Prevost's Succession*, 4 La. Ann. 347; *Cole v. Langley*, 14 La. Ann. 784.

Speaking *arguendo* the court, in *Barnum v. Barnum*, 42 Md. 251, said that if the parties live together ostensibly as man and wife, demeaning themselves toward each other as such, and especially if they are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married.

If the parties live together and intend to sustain toward each other the relation of husband and wife, they are, in the absence of any impediment fatal to that relationship, legally married. *Eaton v. Eaton*, 66 Neb. 676, 60 L.R.A. 605, 92 N. W. 995, 1 Ann. Cas. 199.

There appears to have been some inconsistency in some of the earlier New Jersey cases as to the efficacy of evidence of cohabitation and reputation. For instance, in *Vreeland v. Vreeland*, 18 N. J. Eq. 43, involving an action for alimony, the court declared that where the fact of marriage is denied in such a case it should appear to the reasonable satisfaction of the court either that a marriage in fact has taken place, or that the woman has been openly treated by the alleged husband as his wife. In *Goldbeck v. Goldbeck*, 18 N. J. Eq. 42, involving an action for divorce, the court took the position that where it is shown that there was no marriage ceremony, proof of cohabitation as man and wife would not prove marriage. But in *Applegate v. Applegate*, 45 N. J. Eq. 116, 17 Atl. 293, the court held that where a woman brings suit for alimony, and the defense is that at the time of her alleged marriage with the defendant she had a husband living, supported by proof of her declarations of such prior marriage, allowing herself to be introduced as the wife of such alleged former husband by him, cohabiting with him for many months in houses rented by him, giving birth to a child which was recognized as his, and visiting and being visited by their friends,—there was abundant proof sustaining the relation of husband and wife, and she was estopped to maintain a suit for alimony against the alleged second husband.

Although in North Carolina it had been doubted whether common-law marriages were valid, it was summarily declared in other cases that evidence of cohabitation, reputation, etc., was competent to establish marriage except in actions of criminal con. *Weaver v. Cryer*, 12 N. C. (1 Dev. L.) 337; *Doe ex dem. Archer v. Haithcock*, 51 N. C. (6 Jones, L.) 421. In *Jones v. Reddick*, 79 N. C. 290 (following the two preceding cases), such evidence was held admissible apparently upon the theory that the common law was in force, and necessarily so in order to render such evidence competent. Other cases holding marriage provable by such evidence are *Jackson v. Rhem*, 59 N. C.

from which is to be inferred that consent which is alone sufficient to constitute the marital relation.¹¹⁰ And such evidence cannot be excluded upon the theory that the testimony of the parties would be the best evidence.¹¹¹ The underlying principles of this doctrine, applied to a case in which there was continued cohabitation after the removal of an impediment to marriage, which existed when the cohabitation began, give rise, under proper facts, to a presump-

tion of renewed consent when the parties became free to marry.¹¹²

b. Nature and essentials of habit.

Our courts have chosen to characterize these circumstances as "cohabitation and reputation," although the Scotch expression of "habit and repute" is truly said to express the real situation better than our own.¹¹³ The loose use of the word "cohab-

(6 Jones, Eq.) 141, and Ferrall v. Broadway, 95 N. C. 551.

In *Schwingle v. Keifer*, — Tex. Civ. App., —, 135 S. W. 194, the court said: "Where there is no direct and positive proof of the contract of marriage, it may be inferred or implied from the consistent conduct of the man and woman and by an uncontroverted reputation in the community in which they live. But whether proved by direct and positive testimony or by circumstances, the essential feature of every marriage is the agreement to live together as man and wife, and it must be proved." For affirmance of this case, see 105 Tex. 609, 153 S. W. 1132.

¹¹⁰ Habit and repute may afford strong, and in Scotland conclusive, evidence that at some unascertained time the parties entered into a contract of marriage; but it can in no case constitute marriage. *Campbell v. Campbell*, L. R. 1 H. L. Sc. App. Cas. 182.

As said in *Fryer v. Fryer*, Rich. Eq. Cas. 85: "The contract of marriage when completely entered into is a fact. Like every other fact, it is susceptible of an infinite variety of proof. It may be proved by those who witnessed it when it took place. It may be proved by the subsequent declarations or acknowledgments of the parties. It may be evidenced by their conduct, and the attitude they maintain towards each other and the world. But there is a clear distinction between the fact, itself, of marriage, and the evidence of that fact." To the same effect is *Rutledge v. Tunno*, 69 S. C. 400, 48 S. E. 297.

Cohabitation and reputation are merely evidence from which marriage may be presumed in a proper case. *Jones v. Jones*, 28 Ark. 19; *White v. White*, 82 Cal. 427, 7 L.R.A. 799, 23 Pac. 276; *Re Baldwin*, 162 Cal. 471, 123 Pac. 267 (holding that the common law in this respect is incorporated into the California statute declaring it to be a disputable presumption that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage); *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Hiler v. People*, 156 Ill. 511, 47 Am. St. Rep. 221, 41 N. E. 181 (*arguendo*); *McKenna v. McKenna*, 180 Ill. 577, 54 N. E. 641; *Maher v. Maher*, 183 Ill. 61, 56 N. E. 124; *Compton v. Benham*, 44 Ind. App. 51, 85 N. E. 365; *Re Wittick*, 164 Iowa, 485, 145 N. W. 913; *Philbrick v. Spangler*, 15 La. Ann. 46; *Re Terry*, 58 Minn. 268, 59 N. W. 1013; *State v. Cooper*, 103 Mo. 266, 15 S. W. 327; *State v. L.R.A.* 1915E.

v. St. John, 94 Mo. App. 229, 68 S. W. 374; *Dunbarton v. Franklin*, 19 N. H. 257; *Collins v. Voorhees*, 47 N. J. Eq. 555, 14 L.R.A. 364, 24 Am. St. Rep. 412, 22 Atl. 1054, affirming 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172; *Re Wallace*, 49 N. J. Eq. 530, 25 Atl. 260; *Re Hamilton*, 76 Hun, 200, 27 N. Y. Supp. 813; *Re Brush*, 25 App. Div. 610, 49 N. Y. Supp. 803; *Tracy v. Frey*, 95 App. Div. 579, 88 N. Y. Supp. 874 (followed in *Tracy v. Kircher* and *Tracy v. Falvey*, both reported by mem. in 96 App. Div. 607, 88 N. Y. Supp. 1188); *Durand v. Durand*, 2 Sweeney, 315; *Newton v. Southworth*, 26 N. Y. Week. Dig. 170, 7 N. Y. S. R. 130; *Grimm's Estate*, 131 Pa. 199, 6 L.R.A. 717, 17 Am. St. Rep. 796, 13 Atl. 1061; *Reading F. Ins. & T. Co.'s Appeal*, 113 Pa. 204, 57 Am. Rep. 448, 6 Atl. 60; *Patterson's Estate*, 237 Pa. 24, 85 Atl. 75; *Wallace's Estate*, 40 Pa. Super. Ct. 595; *Allen v. Hall*, 2 Nott & M'C. 114, 10 Am. Dec. 578 (in which the declaration that proof that the parties lived together as man and wife, if not rebutted, will be conclusive of marriage, is weakened by the fact that the court was less concerned with what will raise the presumption than with what will rebut it, holding that the declarations of the parties are admissible in rebuttal); *Cunco v. De Cunco*, 24 Tex. Civ. App. 436, 59 S. W. 284; *Eldred v. Eldred*, 97 Va. 606, 34 S. E. 477.

¹¹¹ In holding admissible evidence of cohabitation and reputation to establish marriage, set up by the woman as a defense to an action against her as indorser of a note, the court, in answering the contention that such evidence was inadmissible because the testimony of the defendant herself would be the best evidence, declared that the rule which requires the best evidence to be furnished has no application in such a case, since there is no authority for rejecting circumstantial evidence of a fact because it appears the persons are living who saw or were personally cognizant of it, this being just as true of the case in hand as in the case where handwriting may be proved by the testimony of persons who are familiar with it, without calling the writer. *Rockwell v. Tunniciiff*, 62 Barb. 408.

¹¹² This distinctive question is discussed in the note to *People v. Shaw*, post, 87.

¹¹³ The Scotch phrase, "habit and repute," is said to express the true idea better than our own. *Taylor v. Taylor*, 10 Colo. App. 303, 50 Pac. 1049, followed in

itation" has rendered it inapt for this purpose.¹¹⁴ The conduct of the parties, in order to constitute evidence of marital consent, must, generally speaking, be something more than mere living together; it must be an association, consciously and openly, as husband and wife. Secrecy, when unexplained, or coupled with circumstances inconsistent with the marital relation, tends to negative its existence.¹¹⁵ Still, secrecy is not essentially fatal to a claim of marriage,¹¹⁶ and that this is true is indicated both by cases in which secrecy has been justified by a desire to keep the facts from a child by a former marriage,¹¹⁷ and by those in which it is held that a man's repute for celibacy among individuals ignorant of his relations with a woman is not fatal to a claim of marriage based in part on repute of marriage among individuals who know of those relations.¹¹⁸ Likewise, the fact that the man has an abode apart from that where he maintains a woman is a circumstance which, alone and unexplained, is unfavorable to a claim of marriage,¹¹⁹ but is not necessarily inconsistent with

it,¹²⁰ for frequently it is but a means of secrecy. It is merely one of the facts which must be weighed in ascertaining whether, in all probability, there has been a marriage in a particular case.¹²¹

Cohabitation as husband and wife is a manifestation of the parties having consented to contract such relation *inter se*. It is holding forth to the world by the manner of daily life, by conduct, demeanor, and habits, that the man and woman who live together have agreed to take each other in marriage, and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live—by their relatives, neighbors, and acquaintances—to these representations and their continued conduct, then habit and repute arise and attend upon cohabitation. The parties are held and reputed to be husband and wife; and the law of Scotland accepted this combination of circumstances as evidence that consent to marry had been lawfully interchanged.¹²² It is not a mere gratification of sexual passion,¹²³ nor a mere

Klipfel v. Klipfel, 41 Colo. 40, 124 Am. St. Rep. 96, 92 Pac. 26; Yardley's Estate, 75 Pa. 207.

¹¹⁴ The term "cohabiting as husband and wife" is ambiguous, for it may mean cohabitation under the assumption of the relation of husband and wife, or it may as well mean without regard to any such actual relation, in the manner of cohabitation as between husband and wife. Re Boyington, 157 Iowa, 467, 137 N. W. 949. Indeed, the court in this very case stated that there was a well-founded belief in the community that "although cohabiting, they were not husband and wife."

And it was stated in Green's Estate, 5 Pa. Co. Ct. 605, that cohabitation may exist without matrimony, for the purpose of averting suspicion. Such is really not cohabitation as that term is generally understood, but is sheer concubinage.

Cargile v. Wood, 63 Mo. 501, contains the statement that cohabitation may be notoriously illicit.

¹¹⁵ Re Perry, 58 Minn. 268, 59 N. W. 1013; Heminway v. Miller, 87 Minn. 123, 91 N. W. 428; Bishop v. Brittain Invest. Co. 229 Mo. 699, 129 S. W. 668, Ann. Cas. 1912A, 868; Ashford v. Metropolitan L. Ins. Co. 80 Mo. App. 638; Coad v. Coad, 87 Neb. 290, 127 N. W. 456; Fagan v. Fagan, 57 Hun, 592, 32 N. Y. S. R. 994, 11 N. Y. Supp. 748; Hill v. Burger, 3 Bradf. 432. For a full statement of the facts in these cases, see part IV. of the note to Becker v. Becker, post, 56..

¹¹⁶ The fact that general publicity was not given to their relation is not conclusive that the marital relation between them did not exist. Shattuck v. Shattuck, 118 Minn. 60, 136 N. W. 409.

¹¹⁷ Shattuck v. Shattuck, supra; Van-L.R.A.1915E.

Tuyl v. Van Tuyl, 57 Barb. 235, 8 Abb. Pr. N. S. 5.

¹¹⁸ This phase of the question will be presently discussed at greater length in connection with "divided repute."

¹¹⁹ Haley v. Goodheart, 58 N. J. Eq. 368, 44 Atl. 193; Re Brush, 25 App. Div. 610, 49 N. Y. Supp. 803; Callery's Estate, 226 Pa. 469, 75 Atl. 672.

¹²⁰ The fact that the man kept rooms in his own house, which he occupied a portion of the time, at least, is a circumstance bearing upon the question of cohabitation elsewhere with an alleged wife, but is not necessarily inconsistent with it. Wilcox v. Wilcox, 46 Hun, 32.

¹²¹ The facts of the cases are presented in the note to Becker v. Becker, post, 56, and People v. Shaw, post, 87.

¹²² Campbell v. Campbell, L. R. 1 H. L. Sc. App. Cas. 182.

¹²³ In California, where cohabitation is made necessary by statute even in the case of contract *per verba de presenti*, it is held that cohabitation means not simply the gratification of the sexual passion, but means living together and having the same habitation; mere copulation without such cohabitation being insufficient. Sharon v. Sharon, 79 Cal. 670, 22 Pac. 26, 131; Kilburn v. Kilburn, 89 Cal. 46, 23 Am. St. Rep. 447, 26 Pac. 636; People v. Lehmann, 104 Cal. 631, 38 Pac. 422; Hinckley v. Ayres, 105 Cal. 357, 38 Pac. 735. But the fact of an interval between the agreement and the cohabitation does not affect the marriage where there were no illicit relations between the parties in the meantime. Re Ruffino, 116 Cal. 304, 48 Pac. 127.

The evidence must exclude the idea that the union began and that the parties were drawn together merely through the prompt-

casual commerce between the parties,¹²⁴ for no presumption can elevate concubinage of whatever duration to the dignity of marriage;¹²⁵ it must be a matrimonial cohabitation,¹²⁶ entered into with a view to becoming husband and wife.¹²⁷ "The legal idea of cohabitation is that which carries with it a natural belief that it results from marriage only. To cohabit is to live or dwell together, to have the same habitation; so that where one lives and dwells, there does the other live and dwell always with him. The Scotch expression conveys the true idea perhaps better than our own, 'the habit and repute' of marriage. Thus, when we see a man and woman constantly living together,—where one is dwelling, there the other constantly dwells with him,—we obtain the first idea or step in the presumption of marriage; and when we add to this

that the parties so constantly living together are reputed to be man and wife, and so taken and received by all who know them both, we take the second thought or second step in the presumption of the fact of a marriage. Marriage is the cause, these follow as the effect. When the full thought contained in these words, cohabitation and reputation of marriage, is embraced, we discover that an inconstant habitation and a divided reputation of marriage carry with them no full belief of an antecedent marriage as the cause. The irregularity in these elements of evidence is at once a reason to think there is irregularity in the life itself the parties lead, unless attended by independent facts which aid in the proof of marriage. Without concomitant facts to prove marriage, such an irregular cohabitation and partial reputation of mar-

ings of sensuality, for such conditions, even when followed by long cohabitation, although open or publicly acknowledged, can result in nothing but concubinage, the parent of bastardy, the immoral impediment to marriage, and the fruitful source of shame and dishonor. *Powers v. Charbmury*, 35 La. Ann. 630.

¹²⁴ The presumption does not obtain where there is a casual commerce between the sexes without intent upon the part of either to consummate a marital union, and marriage will not be presumed even where, for convenience, the parties hold themselves out as man and wife before third persons, provided their cohabitation has the elements of a purely meretricious relation. *McBean v. McBean*, 37 Or. 195, 61 Pac. 418.

Mere sporadic or incidental recognition of the woman as a wife is insufficient to raise the presumption, and there must be a continued public recognition,—a holding forth to the world by the manner of daily life, by conduct, demeanor, and habit. *Bishop v. Brittain Invest. Co.* 229 Mo. 699, 129 S. W. 668, Ann. Cas. 1912A, 868.

Cohabitation as used in the term "cohabitation and repute" means something more than social intercourse, and is not a mere sojourn, nor a habit of visiting. To cohabit is to live or dwell together, to have the same habitation; so that where one lives the other lives. *Taylor v. Taylor*, 10 Colo. App. 303, 50 Pac. 1049, followed in *Klipfel v. Klipfel*, 41 Colo. 40, 124 Am. St. Rep. 96, 92 Pac. 26.

¹²⁵ This presumption does not sanction voluntary cohabitation, nor elevate concubinage of whatever duration to the dignity of marriage; and when it is said that marriage may be proved by reputation, the meaning is that the acts and conduct of the parties, as established by satisfactory proof, authorize and create the presumption that they were actually married. So, where the parties during the entire cohabitation were apparently living in the observance of the obligations of the contract of marriage, and their acts and conduct are not com-

patible with any other theory than that they were actually married, they must be regarded as married and the offspring as legitimate children. *Blasini v. Blasini*, 30 La. Ann. 1388.

¹²⁶ *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737.

Matrimonial cohabitation is the living together of a man and woman ostensibly as husband and wife; and while this does not necessarily require an announcement further than is given by appearances maintained for the purposes of the parties, there must be sufficient to fairly represent such relation by the manner in which the parties are living together. *Wilcox v. Wilcox*, 46 Hun, 32.

It was declared *arguendo* in *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460, that to presume marriage upon the fact of cohabitation, the cohabitation must be matrimonial and be so begun, it being the character of the cohabitation, and not the fact of cohabitation, which raises the presumption.

In order to raise a presumption of marriage the cohabitation must be such as is consistent with and would naturally result from the marriage relation. *Patterson's Estate*, 237 Pa. 24, 85 Atl. 75.

To constitute a marriage good at common law an express agreement between the parties to take and live with each other as husband and wife is not necessary; for an agreement to do so may be implied from their acts and conduct in mutually recognizing and holding each other out as bound together in the matrimonial state, and proof of such acts and conduct is proof of the marriage agreement. *Renfrow v. Renfrow*, 60 Kan. 277, 72 Am. St. Rep. 350, 56 Pac. 534.

¹²⁷ Where the parties cohabit without an apparent idea of constituting the marital relation, and therefore without any mutual consent to the creation of such relation, they will not be deemed man and wife. *Banks v. Galbraith*, 149 Mo. 529, 51 S. W. 105.

riage avail nothing in the proof of marriage." ¹²⁸

c. Nature and essentials of repute.

Cohabitation or "habit" is circumstantial evidence for or against the existence of marriage. From it persons who know the parties form an opinion as to the existence of the marriage relation. ¹²⁹ This opinion of individuals when crystallized into a collective opinion of the community is the "repute" which is nearly always found to be an evidential companion of "habit." Although based on hearsay, the admissibility of repute appears never to have been questioned, and "its propriety is now too firmly established to be for a moment questionable." ¹³⁰ It has been said that though generally treated by the text writers under the head of hearsay, and though composed of the speech of third persons not under oath, it is considered original evidence, not hearsay; the immediate subject of the inquiry being the concurrence of many voices, which raises a presumption that the fact in which they concur is true. Evidence of reputation is admissible so long as it appears to be general reputation; but so soon as it appears to be based on information imparted to the witness by a single individual, even of the existence of a general reputation, it becomes hearsay and is inadmissible. ¹³¹ Repute has been defined as the understanding among the neighbors and acquaintances with whom the parties associate in their daily life that they are living together as husband and wife, and not in meretricious intercourse; and in its application to the fact of marriage it is more than hearsay, and involves

social conduct and recognition giving character to an admitted and unconcealed cohabitation. ¹³² "It has been well described as the shadow cast by their daily lives."

. . . In the general repute surrounding them, the slow growth of months and years, the resultant picture of forgotten incidents, passing events, habitual and daily conduct, presumably honest, because disinterested, and safer to be trusted because, prone to suspect, we are enabled to see the character of the cohabitation and discern its distinctive features. It is for that reason that such general repute is permitted to be proven. It sums up a multitude of trivial details. It compacts into the brief phrase of a verdict the teaching of many incidents and the conduct of years. It is the average intelligence drawing its conclusion." ¹³³

This verdict of society upon the relations of the parties—a verdict which it is ever ready to render ¹³⁴—must always be received in the light of society's opportunity for observation. ¹³⁵ Consideration must be given the social position of the parties and their opportunities for mingling socially with other persons, and if they were so situated that friendly intercourse with their fellows was necessarily denied them, reputation may be established by comparatively slight evidence. ¹³⁶ About the only requirement of this repute is that it be "uniform,"—a word which covers great difficulties. Like most general principles it requires definition and limitation, and it is here that the courts have had no little trouble. It is easy to say that there must be a repute of marriage among neighbors and friends and acquaintances of the parties, ¹³⁷ or that there must be a consensus of opinion that

¹²⁸ *Yardley's Estate*, 75 Pa. 207.

¹²⁹ In order to constitute evidence from which a marriage may be inferred, the origin of the cohabitation must have been consistent with a matrimonial intent, and the cohabitation must have been of such a character, and the conduct of the parties such, as to lead to the belief in the community that a marriage existed, and thereby to create the reputation of marriage. *Williams v. Herrick*, 21 R. I. 401, 79 Am. St. Rep. 809, 43 Atl. 1036. But see *Pett v. Pett*, 52 Mich. 464, 18 N. W. 220, cited *infra*, V. d.

¹³⁰ 1 *Wigmore*, Ev. 268.

¹³¹ *Boone v. Purnell*, 28 Md. 607, 92 Am. Dec. 713.

¹³² *Taylor v. Taylor*, 10 Colo. App. 303, 50 Pac. 1049.

¹³³ *Finch, J.*, in *Badger v. Badger*, 88 N. Y. 552, 42 Am. Rep. 263.

¹³⁴ The repute must be contemporaneous with the intercourse, and not subsequent, and must be not only undivided, but founded on general, and not singular, opinions, L.R.A.1915E.

being the social verdict upon the parties,—a verdict society seldom fails to give from its means of knowledge. *Eldred v. Eldred*, 97 Va. 606, 34 S. E. 477.

¹³⁵ Reputation consists of the belief and speech of the people who have an opportunity to know the parties and have heard of and observed their manner of living. *Cargile v. Wood*, 63 Mo. 501.

¹³⁶ For instance, where the man was employed in a city fire department, and slept at the fire house six nights in every week, evidence of the man's repeated acknowledgment that the woman was his wife, to the physician, the shopkeeper, and the few visitors who called at their home, is strong evidence of reputation. *Comly's Estate*, 19 Pa. Co. Ct. 184.

¹³⁷ The generalization that the law presumes morality, not immorality, marriage, not concubinage, legitimacy, not bastardy, does not apply to a case of exceptional acts and conduct inconsistent with the marital relation, and there must be a general repute among the neighbors, friends, and acquaint-

the parties are husband and wife,¹³⁸ or, indeed, that the repute must be uniform and undivided,¹³⁹ but it is hard in a particular case to say just who the neighbors, friends, and acquaintances are; what a consensus of opinion is; and when repute is uniform and undivided; or, if divided, what its effect is. For instance, it has been stated on the one hand that divided repute is no evidence at all,¹⁴⁰ and cannot be proved,¹⁴¹ and, on the other hand, it is held that even where the repute, being divided, is insufficient to raise a presumption of marriage, it may be considered by the jury in connection with other circumstances,¹⁴² and is admissible in evidence to corroborate the testimony of one of the parties as to express consent.¹⁴³ This difference, however, may be traceable to an indiscriminate use of the term "divided repute," which fails to distinguish between a conflict of testi-

mony as to the uniformity of repute, and uncontroverted evidence showing a conflict of repute. If, undeniably, it appears that one part of the community was of one opinion, and the remainder of the other, then there is a divided repute in a true sense, and it would seem to have no probative force. But where there is a conflict of testimony as to the general repute in the community,—that is, if some witnesses testify that the parties were generally reputed to be married, and others that they were not, the question is one of credibility merely, and is for the jury,¹⁴⁴ for in such circumstances there is a general repute for or against marriage, accordingly as one set of witnesses or the other is believed.

There is a like conflict in the attitude of the courts toward that phase of divided repute which involves its extent. In what circles and among what individuals or

ances, arising from acts and continued conduct of the parties in holding themselves forth as husband and wife. *Bishop v. Britain Invest. Co.* 229 Mo. 699, 129 S. W. 668, Ann. Cas. 1912A, 868.

¹³⁸ In order to establish marriage by cohabitation and reputation, there must be a consensus of opinion that the man and woman living together are husband and wife; and if the community is divided as to the status of the parties a marriage cannot be presumed. *Schwingle v. Keifer*, — Tex. Civ. App. —, 135 S. W. 194. For affirmation of this case, see 105 Tex. 609, 153 S. W. 1132.

¹³⁹ Reputation must be uniform and undivided; must be permanent, and not changing; must be in good faith, and not built up for the purpose of shielding either party from disgrace or the imputation of improper motives. *Cuneo v. De Cuneo*, 24 Tex. Civ. App. 436, 59 S. W. 284. See also *Schwingle v. Keifer*, supra.

The repute which, with cohabitation, will be proof of marriage, must be uniform and general, and not divided and singular, and cannot be established except by the open, undisguised, and undoubted acts of the parties, which are visible to outsiders. *Quackenbush v. Swortfiguer*, 136 Cal. 149, 68 Pac. 590; *Ashford v. Metropolitan L. Ins. Co.* 80 Mo. App. 638; *Greenawalt v. McEnelley*, 85 Pa. 352; *Patterson's Estate*, 237 Pa. 24, 85 Atl. 75; *Weidenhoft v. Primm*, 16 Wyo. 340, 94 Pac. 453. This is nothing more than axiom, which does not here require the citation of the many cases that indorse it. The value of the cases lies in the manner of its application, which will be presently shown.

¹⁴⁰ "That species of repute which consisted in A, B, and C thinking one thing, and D, E, and F another way, was no evidence on such a subject." Lord Redesdale in *Cunningham v. Cunningham*, 2 Dow. P. C. 482. The reputation which will raise a presumption of marriage must be founded

on general, not on divided or singular, opinion, and where reputation is divided it amounts to no evidence at all. *Barnum v. Barnum*, 42 Md. 251, in which the acts and declarations of the parties and the understanding of friends and relatives were wholly inconsistent with matrimony.

¹⁴¹ That is to say, a divided reputation in the community as to the marriage of persons cannot be proved at all. A reputation either for or against marriage may be proved if uniform, but it must be uniform. *Jackson v. Jackson*, 82 Md. 17, 34 L.R.A. 773, 33 Atl. 317.

¹⁴² It was held in *Greenawalt v. McEnelley*, 85 Pa. 352, that where there was no presumption of marriage arising from cohabitation and reputation, because of a division in the repute, still the facts of such cohabitation and reputation were proper to be taken into consideration by the jury in connection with other facts and circumstances, such as admissions, for instance, in finding whether or not a marriage existed.

¹⁴³ In *Hine's Estate*, 10 Pa. Super. Ct. 124, although there was some evidence of divided repute, and a conflict in the evidence as to cohabitation and repute, and as to whether the relations were illicit in the beginning, the court held that there was sufficient evidence to corroborate the testimony of the woman as to an express contract of marriage.

See also preceding subdivisions of this discussion where circumstantial evidence was admitted to corroborate direct testimony of consent,—especially subdivision III.

¹⁴⁴ *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752.

See also *Davis v. Pryor*, 3 Ind. Terr. 396, 58 S. W. 660, holding that where there is a conflict of evidence as to whether the parties were reputed to be man and wife, it was error to charge that there was a marriage, and the facts should have been submitted to the jury on the question.

classes must it prevail in order to be uniform? It is fundamental that *repute* is a matter of collective understanding, and not individual opinion.¹⁴⁵ It has been said that *repute* may be confined within such narrow limits as not to represent the true situation.¹⁴⁶ This is entirely true, and of course it goes to the effect of the evidence, not to its admissibility. If the true situation is otherwise shown to be contrary to the *repute*, the latter is unavailing,¹⁴⁷ and if they are shown to concur, reputation is merely cumulative evidence. *Repute* limited in extent is usually the concomitant of more or less secrecy, which, unexplained, is an unfavorable factor, though not necessarily fatal to the existence of a marital relation.¹⁴⁸ This is forcibly illustrated by the cases of "double life" where there is what may be termed "unilateral *repute*" of marriage, and involves opposite conclusions drawn respectively by classes or communities, and based upon different facts and circumstances. One knows of the relations of the parties and ascribes to them the marital status; another knows nothing of those relations and commonly regards the

man as a bachelor. This is not the divided *repute* which is no evidence at all of marriage,¹⁴⁹ but is rather a limited *repute* which will be given weight in proportion to its extent. The only cases of a contrary import are, one in which the real decision was upon the ground that a long series of conduct and declarations inconsistent with the marriage relation negated its existence,¹⁵⁰ and one in which the *repute*, although characterized as "divided," was not denied evidential force, but was said to have "correspondingly less evidential value,"¹⁵¹ a result that flows, not from a division, but from a limitation, of *repute*, as above stated. To give effect to a man's reputation for celibacy is to give weight to negative testimony; and as has been well said, in a question affecting the fact of marriage, the opinion of a few neighbors who make up the parties' social circle will outweigh the negative testimony of a thousand citizens who know nothing and care nothing about the matter.¹⁵²

The prevailing view is that such negative testimony is inadmissible in evidence,¹⁵³ being ineffectual to detract from the in-

¹⁴⁵ "It must not be an opinion of A in contradiction to an opinion of B, and of C in opposition to D. It must be founded not on singular, but on general, opinion." Lord Redesdale in *Cunningham v. Cunningham*, *supra*.

The testimony of a single witness that he knew the parties for months and regarded them as married, in a town to which they removed, strangers from another state, is insufficient to establish the marriage by reputation. *Jones v. Hunter*, 2 La. Ann. 254.

¹⁴⁶ As is said in *Green's Estate*, 5 Pa. Co. Ct. 605, cohabitation may exist without matrimony (an erroneous use of the word "cohabitation," by the way), and admissions of marriage may be made to avert suspicion or to secure a temporary convenience; and so, even *repute* may be confined to a class and neighborhood so narrow as to give no real clue to the actual status of the parties affected.

¹⁴⁷ As has been well said, cohabitation and *repute* which are only evidence of marriage, will be more or less convincing according as the cohabitation has been more or less interrupted or the *repute* more or less general; and will not influence the judgment at all if explained away or rebutted by clear proof that the parties were never married. *Fryer v. Fryer*, Rich. Eq. Cas. 85.

¹⁴⁸ This is pointed out *supra*, V. b.

¹⁴⁹ See *supra*, footnote 140.

¹⁵⁰ This is true of *Powers v. Ocharbmury*, 35 La. Ann. 630, in which the court stated that the fact that the man's relatives and intimate friends, from whom he concealed his relations with the woman, regarded him as a bachelor, precluded the *repute* from being general and consistent. The facts of L.R.A.1915E.

this case are noted at length in part IV. of the note to *Becker v. Becker*, post, 56.

For cases in which such a situation was merely recited among many circumstances negating marriage, but was not specially characterized, or regarded as of exceptional importance, see in the note to *Becker v. Becker*, post, 56; *Re Rossignot*, 112 N. Y. Supp. 353; *Yardley's Estate*, 75 Pa. 207; and *Green's Estate*, *supra*.

¹⁵¹ As said in a New Jersey case, where a man cohabits with a woman of more humble sphere of life than he customarily moves in, permitting her friends and acquaintances to believe that they are married, but at the same time both he and she refrain from permitting his friends and relatives, with whom he constantly intermingles and lives, to know of the cohabitation and *repute*, the reputation is divided and correspondingly of less evidential value, for under particular circumstances a man, to preserve the good name of his mistress with her relatives and associates, and to subserve his and her convenience, may be willing that she shall assume among those people a different character from the disgraceful one to which she is really entitled. *Re Wallace*, 49 N. J. Eq. 530, 25 Atl. 260.

¹⁵² *Comly's Estate*, 19 Pa. Co. Ct. 184.

The inefficacy of such negative evidence was expressly recognized in *Goodman v. Goodman*, 4 Jur. N. S. 1220, s. c. subsequent appeal 5 Jur. N. S. 902, 28 L. J. Ch. N. S. 745.

¹⁵³ Testimony tending to show that a man was unmarried is not admissible to disprove marriage. *Bartlett v. Musliner*, 28 Hun, 235.

And it is expressly declared in *Schwingle v. Keifer*, — Tax. Civ. App. —, 135 S. W.

ference of marriage arising from the repute among persons to whom the parties are jointly known,¹⁸⁴ or to create a division of repute which will preclude a presumption of marriage.¹⁸⁵

d. Necessity of concurrence.

The coexistence of habit and repute is accidental. Where there have been unequivocal conduct and utterances, inconsistent with anything but marriage, repute of marriage naturally arises. But a claim that such conduct and utterances do not warrant a presumption of marriage unless the consequent repute is also proved is illogical, for habit is the parent of repute, and to require the latter in all circumstances is to reject evidence of the parent unless corroborated by the child. While the question is an academic one, since there is seldom a dearth of evidence of repute where there is ample evidence of habit, still

the courts have now and then made general statements which might be construed as meaning that evidence of habit, however strong or thoroughly consistent with marriage, is not evidence of it unless supplemented by evidence of repute. The confusion in this respect results from an indiscriminate use of the term "cohabitation,"¹⁸⁶ which is not always employed in a matrimonial sense, instead of the fixed and comprehensive "habit" by which the Scotch law characterizes "matrimonial cohabitation." When, to use the term as the courts sometimes do, the cohabitation is not clearly matrimonial,—when the circumstances are ambiguous or suspicious or the evidence meager,—evidence of repute is quite essential to give character to an ambiguous relation or to colorless circumstances. And it is found that courts have had precisely such a situation in view when requiring more than evidence of cohabitation.¹⁸⁷ To regard this as meaning that

194, that no one should be permitted to testify that a man had the reputation of being a bachelor, when ignorant of the relations upon which others based their testimony as to his reputation of marriage; and that the reputation as to marriage *vel non* must arise where both parties reside, and among those who are cognizant of the cohabitation. For affirmance of this case, see 105 Tex. 609, 153 S. W. 1132.

¹⁸⁴ It was held in *Vincent's Appeal*, 2 Brewst. (Pa.) 239, that where there was a reputation of marriage among the persons to whom the parties were jointly known, any inference of marriage to be drawn therefrom was not affected by the fact that he was known as a bachelor among his personal friends and acquaintances. The court said that difference of rank attending a dubious relation will have effect, but cannot be permitted to overturn his unequivocal and frequent admissions of marriage, their cohabitation and reputation among those to whom they were jointly known, his support of her and his children, his constant recognition of them as the offspring of their reputed relation, and his many and strong expressions of attachment for her and for them.

¹⁸⁵ It was held in a New York case that the repute must be among those people who know of the existence of both parties and of their cohabitation; and that where, for instance, a man leads a double life in separate communities, maintaining a woman as wife for a long period in one community, and living among relatives in another community in an apparent state of celibacy, his reputation as a bachelor among the friends and relatives who did not know of the woman or of his cohabitation with her did not negative the presumption arising from cohabitation and repute in the other community; in other words, that such a unilateral reputation for celibacy does not

constitute a divided repute as to the relations of the parties within the meaning of the rule that to raise a presumption of marriage the repute must be consistent and undivided. *Badger v. Badger*, 88 N. Y. 546, 42 Am. Rep. 263, followed in *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106.

¹⁸⁶ See *supra*, V. b.

¹⁸⁷ In cohabiting as husband and wife the parties must intend to be such, and neither intention nor consent can be inferred from cohabitation alone, no matter how continuous. *Re Boyington*, 157 Iowa, 467, 137 N. W. 949 (in which the court expressly used the term "cohabitation" in the sense of merely living together, and in which many of the circumstances attending their relations were unfavorable to marriage).

In another case declaring that cohabitation alone is insufficient to raise a presumption of marriage, it was said that cohabitation and reputation are at best only presumptive proofs, and that when one of these foundations is withdrawn, what remains is too weak on which to build a presumption; that cohabitation is simply the first step, and that when this is accompanied by an acknowledgment of the matrimonial relation and treating each other as man and wife, and holding one another out to the world as such, there may reasonably be a presumption founded upon all these facts that the intercourse is lawful instead of meretricious; but that "since cohabitation may be notoriously illicit," and known to be so in the neighborhood in which the parties reside, and since in such a case the law would certainly not presume that it furnished any presumption or evidence of marriage, cohabitation and reputation must both exist before the presumption can be raised. *Cargile v. Wood*, 63 Mo. 501. By the above words, "cohabitation may be notoriously illicit," the court clearly shows that it means only that evidence of mere

evidence of cohabitation is in no event sufficient is to lose sight of the distinction between the qualitative and quantitative value of the evidence. There it was used purely in the quantitative sense,—the particular evidence was not strong enough. This sense must also be attached to the term as used in cases which do not expressly so limit it, but in which the circumstances attending the conjuncture of the parties are at best equivocal.¹⁵⁸ In such circumstances, and especially since the distinction between the qualitative and the quantitative was not mentioned, the statement must be given effect in the light of the facts involved; and if intended as a comment on the qualitative value of the evidence, it is just as much a *dictum* as would be a remark indicating that evidence of repute is unneces-

sary in a case where such evidence is present.¹⁵⁹ Any other attitude toward these decisions would result in denying effect to the conduct of the parties, however extensive, wholesome, and obviously matrimonial,—a result that would involve neither good sense nor justice, and would be contrary to the cases in which marriage has been inferred from strong evidence of habit, although the relations of the parties had been impugned in some quarters.¹⁶⁰

The question whether evidence of matrimonial repute alone is sufficient is even less likely to arise than that just discussed. Repute of marriage, aside from cases of specific repute of a marriage in fact,¹⁶¹ can arise only from matrimonial conduct. There are judicial statements that repute alone is sufficient,¹⁶² but they are to all

living together must be supplemented by repute. The case turns on the fact that the relations of the parties were illicit in the beginning, and were not shown to have changed. This case was followed in *Ashford v. Metropolitan L. Ins. Co.* 80 Mo. App. 638, involving an action by a woman upon a life insurance policy on the life of her alleged husband, which was alleged to have been taken out after divorce, and after the parties had subsequently entered into a verbal contract of marriage. The court applied the principle that cohabitation without reputation was insufficient to raise a presumption of marriage, but it is to be noted that the evidence of cohabitation was very unsatisfactory, and could not have raised a favorable repute.

¹⁵⁸ Cohabitation without reputation was declared insufficient in *Arnold v. Chesebrough*, 7 C. C. A. 508, 20 U. S. App. 87, 58 Fed. 833, in which the real decision was on the ground that evidence introduced to show cohabitation indicated that the relations were illicit in the beginning, and that there was hardly an established fact in the record tending to show that they underwent a change.

It was expressly declared in a Pennsylvania case that cohabitation alone was insufficient, and that there must be both cohabitation and reputation in order to establish the presumption of marriage, the court pointing out that in this case the woman lived at the man's house under an original understanding which pointed to her as a housekeeper at least as much as wife. *Com. v. Stump*, 53 Pa. 132, 91 Am. Dec. 198, explaining and limiting *Thorndell v. Morrison*, 25 Pa. 326, as unnecessarily using language to the contrary. The declaration of the *Stump* Case was reiterated in *Smyth's Estate*, 3 Legal Gaz. 203, in which the evidence of cohabitation was practically nullified by the woman's own testimony.

There is a like declaration in *Osborne v. McDonald*, 159 Fed. 791, in which the court said that there was "not a scintilla of evidence tending to prove" a marriage.

Morris v. Morris, 20 Ala. 168, in holding *I.R.A.*1915E.

it unnecessary to pass on the effect of an admission of marriage in an action for divorce, said: "The fact that the parties lived together for many years as man and wife is abundantly proved . . . and this is sufficient proof of marriage in this case." This is merely a remark in passing, and as the case does not show how full or strong the evidence of cohabitation was, it is of no value either way on the present question.

¹⁵⁹ Such a remark was made in *Holmes v. Holmes*, 6 La. 463, 26 Am. Dec. 482, in which the court in its argument spoke in terms of cohabitation and holding out, but distinctly stated at the outset that there was evidence of both habit and repute, and that of habit was very convincing.

¹⁶⁰ In *Peet v. Peet*, 52 Mich. 464, 18 N. W. 220, the court said that upon doubtful facts it ought to presume a lawful marriage rather than a notorious act of immorality, and that while reputation is sometimes very important when a marriage is in doubt, it is only one of the circumstances from which the true relations of the parties may be inferred, and is not in itself a fact which is at all important to the validity of the relation. Applying this principle, the court held that the fact that some persons did not believe the parties were married was not fatal to the presumption arising from cohabitation for twenty years and the birth of thirteen children.

In *Blasini v. Blasini*, 30 La. Ann. 1388, where there was a great amount of evidence of cohabitation and little details which usually accompany it, entirely consistent with marriage, and such as practically to make a negative finding impossible,—the court upheld the marriage although no evidence of general repute appeared to have been introduced and there was some evidence that the relations of the parties had been now and then impugned by different individuals. The court made no express reference to the necessity of repute.

¹⁶¹ For a definition of this term, see the succeeding subdivision.

¹⁶² "The general rule is that reputation is sufficient evidence of marriage, and a party

appearances made inadvertently in the sense of both habit and repute, and are certainly uttered in no discriminating sense, as they occur either in cases in which the contest was solely between direct and circumstantial evidence, or those in which evidence of both habit and repute was present. Even so, there would seem to be no reason in theory why evidence of repute, if of the proper quantitative value, should not be sufficient in the qualitative sense. Repute is a verdict of society, the average intelligence drawing a conclusion¹⁶³ from the conduct of the parties, and this verdict is not likely to be excessively favorable to them, as man in the average is not overzealous to minimize the shortcomings of his fellow, or to give particular effect to the restrictive rules of hearsay. So, if repute of marriage is strong and consistent, a presumption that the conduct was matrimonial is much less violent than some of the presumptions indulged in connection with questions of marriage.¹⁶⁴ And if for any reason, notably the lapse of time,¹⁶⁵ evidence of the conduct and habit of the parties is lacking, repute should be received and given weight according to its strength.

e. Nature of inference or presumption; marriage in fact.

Must the evidence of habit and repute be such as to raise a concrete inference of a specific exchange of consent in terms, or is it sufficient to infer in the abstract that the parties in some manner consented? In theory, the solution of this question starts with the fact that the doctrine of habit and

repute is a natural outgrowth of the clandestine marriage,—a means of proving marriage when, because the consent was exchanged in private, there was not available the direct evidence of the “marriage in fact” of the substantive law, which Professor Wigmore defines as “a marriage which can be evidenced by an eyewitness of the act of exchanging consent.”¹⁶⁶ It might be argued that inasmuch as express consent is the great essential in the substantive law of marriage, no evidence should be regarded as sufficient unless, directly or circumstantially, it establishes express consent. But—if there is any vital difference in practice between the two inferences—the better doctrine would seem to be that since the function of habit and repute is to supply the want of direct evidence of express consent, consistency with that purpose should require only an abstract inference of consent, and not a specific inference of express consent. This would practically mean that consent could be manifested by deeds as well as by words, which is entirely proper. It is the intent and understanding of the parties that determine their status. If the circumstances attending their union show a desire for matrimony, and an understanding that no ceremony was necessary, and there is nothing which negatives marriage, why should not they be deemed husband and wife as much as if they had exchanged express words of consent?

According to the Scotch law habit and repute was not directed to the establishment of the act of consent at some definite time, and consent to be married persons was all

who seeks to impugn a principle so well established ought at least to furnish cases in support of his position.” This statement was summarily made in *Doe ex dem. Fleming v. Fleming*, 4 Bing. 266, in which, however, there was no objection that evidence of cohabitation was necessary; the contention being that while repute was ordinarily sufficient, direct evidence was necessary in the particular case, as it involved the right to inherit. A like contention was made in *Reed v. Passer*, Peake, M. P. Cas. 231, in which the court, in holding indirect evidence proper, used the word “reputation” apparently in no discriminating sense. The general proposition laid down in *Doe ex dem. Fleming v. Fleming*, supra, was approved in *Goodman v. Goodman*, 4 Jur. N. S. 220, s. c. subsequent appeal 5 Jur. N. S. 902, 28 L. J. Ch. N. S. 745, in which there was evidence of both cohabitation and reputation, and there was also a limited negative repute; and in *Lyle v. Ellwood*, L. R. 19 Eq. 106, 44 L. J. Ch. N. S. 164, 23 Week. Rep. 157, which involved a like situation, and in which the opinion as a whole indicated that the court used the word “repute” in the sense of habit and repute. L.R.A.1915E.

¹⁶³ See supra, V. c.

¹⁶⁴ In the following cases marriage was presumed from continued cohabitation after the presumptive death of a former spouse from absence and lapse of time: *Smith v. Fuller*, 138 Iowa, 91, 16 L.R.A.(N.S.) 98, 115 N. W. 912; *Jackson ex dem. Van Buskirk v. Claw*, 18 Johns. 346; *Stringfellow v. Scott*, Rich. Eq. Cas. 109, note.

As to presumptions of death or divorce before the second marriage, and generally as to presumptions arising from marriage, see the notes to *Meggins v. Megginson*, 14 L.R.A. 540; *Smith v. Fuller*, 16 L.R.A.(N.S.) 98, and *Vreeland v. Vreeland*, 34 L.R.A.(N.S.) 940.

¹⁶⁵ In *Prevost's Succession*, 4 La. Ann. 347, the court stated that the marriage occurred while Louisiana was under the Spanish law, which permitted proof of marriage by reputation, and upheld the marriage upon evidence of repute and baptismal certificates of children, in view of the fact that the marriage had occurred a century before, and had never been questioned. To the same effect are *Alloway v. Babineau*, 8 La. Ann. 469, and *Cole v. Langley*, 14 La. Ann. 784.

¹⁶⁶ 3 Wigmore, Ev. § 2082.

that need be presumed; it was the consent, and not the mode of interchanging it, which constituted the marriage;¹⁶⁷ it was sufficient if the facts led to satisfactory evidence of a contract having taken place.¹⁶⁸ This view was expressly indorsed by the United States Supreme Court,¹⁶⁹ and other American courts have expressly declared that it need be inferred only that the parties entered into a contract at some time in the past,¹⁷⁰ and that facts showing an

implied understanding are sufficient.¹⁷¹ Although not expressly invoked, this theory is essentially supported by decisions which hold that where there was an impediment to marriage¹⁷² at the time it was contracted, the fact that one of the parties never knew of its existence or its subsequent removal does not preclude a presumption of consent after such removal, from continued cohabitation of the parties,¹⁷³ and allied decisions inferring consent from continued

¹⁶⁷ Lord Selborne said in *De Thoren v. Atty. Gen. L. R. 1 App. Cas. 686*, that although by the law of Scotland true habit and repute was only a mode of proving marriage, and was not a mode of constituting it, still it was error to suppose that what was called habit and repute was a mere element of proof directed to the establishment of the actual constitution of marriage at some time supposed to be single and definite, though not precisely ascertained by such mutual declarations as would be necessary for the direct proof of a marriage *per verba de presenti*. It was stated that when a true habit and repute was shown, a presumption of marriage from that habit and repute at once arose; and that consent to be married persons was all that need be presumed from such circumstances,—the mutual consent, and not the mode of interchanging it, being that which constituted marriage by the law of Scotland. These statements were made in reply to a contention that inasmuch as the parties had regarded themselves as husband and wife after and by virtue of a ceremony of marriage which was void because of an impediment, there was not and could not have been a subsequent interchange of nuptial consent.

¹⁶⁸ It is not necessary to prove the contract itself, and it is sufficient if the facts of the case are such as to lead to satisfactory evidence of such a contract having taken place; and upon this principle the acknowledgment of the parties, their conduct toward each other, and the repute consequent upon it, may be sufficient to show a marriage. *Hoggan v. Craigie, Maclean & R. 942; Campbell v. Campbell, L. R. 1 H. L. Sc. App. Cas. 182.*

It is not necessary to show the exact time and place of the exchange of consent, and it is enough if the consent is proved to have been interchanged at some indefinite time. *Yelverton v. Longworth, 4 Macq. H. L. Cas. 746, 10 Jur. N. S. 1209, 11 L. T. N. S. 118, 13 Week. Rep. 235.*

¹⁶⁹ The declarations in *Hoggan v. Craigie and Campbell v. Campbell* that it is not necessary to prove the contract itself, and that it is sufficient if the facts of the case are such as lead to satisfactory evidence of such a contract having taken place, were approved in *Travers v. Reinhardt, 205 U. S. 423, 51 L. ed. 865, 27 Sup. Ct. Rep. 563.*

¹⁷⁰ It may from the actions of the parties, their visible relations to each other and their representation to others, be inferred that at some previous time they had entered

into a contract of marriage; and that is as far as proof of cohabitation and repute goes; it is circumstantial evidence tending to establish a previously existing fact, and such proof may be as satisfactory as, and often more satisfactory than, the much more limited direct evidence which it is ordinarily possible to produce. *Re Hamilton, 76 Hun, 200, 27 N. Y. Supp. 813.*

¹⁷¹ It was held in Virginia that to render applicable a statute providing that where colored persons had "undertaken and agreed to occupy the relation" of husband and wife, and should be cohabiting together at the time of the passage of the act, they should be deemed husband and wife, it was not necessary to prove that the parties expressly agreed to live together as husband and wife, and that circumstances, that is, cohabitation and reputation, tending to show an implied understanding of that sort, were almost as satisfactory as the direct testimony of unimpeached witnesses. *Francis v. Francis, 31 Gratt. 283.* It is to be noted that the court also held in this case that although the statute was intended mainly to establish the marital relations between colored persons who, before their emancipation, had lived together as husband and wife, though they could not then legally contract marriage, it also applied to colored persons who had been living together apparently in that relation though they were born free.

In this connection it is interesting to note that circumstances tending to show an implied understanding that the parties were occupying the marital relations were held sufficient to render positive proof of an express agreement to occupy that relation unnecessary for the purpose of rendering applicable a statute providing that where colored persons had undertaken and agreed to occupy the relation of husband and wife, and should be cohabiting together as such at the time of the passage of the act, they should be deemed husband and wife, the court further holding in effect that cohabitation and reputation were such circumstances as warranted the implication of consent or understanding. *Francis v. Francis, supra.*

¹⁷² The presumption of marriage from continued cohabitation following the removal of an impediment is fully discussed from all angles, including the present one, in the note to *People v. Shaw, post, 87.*

¹⁷³ *Compton v. Benham, 44 Ind. App. 51, 85 N. E. 365; Busch v. Supreme Tent, K. M. W. 81 Mo. App. 562; Re Wells, 123 App.*

cohabitation after the presumptive death of a former spouse, following a protracted absence without being heard from.¹⁷⁴ In both cases express consent after the removal of the impediment is negated by the fact that there was no occasion for it, and yet the courts presume marriage. This gives effect to implied consent as clearly as does a decision which expressly so declares,¹⁷⁵ and such cases would be authority for the proposition that consent may be inferred even where it appears from the admissions of the parties or otherwise that there was no specific express consent. There is little authority against this proposition. The Michigan and Illinois cases inconsistent with it have been noted.¹⁷⁶ Wisconsin holds that there must be a marriage in fact, and that while express consent may be inferred from circumstances, the inference is

that it was exchanged when the cohabitation began, and if it is shown that there was then no express consent, it cannot be inferred from the mere continuance of cohabitation without something to show a change of relations.¹⁷⁷

From a practical view point, it is not certain that the difference between the two forms of inference is vital, for, after all, the courts stand ready to accord marital rights to persons whose general conduct indicates good morals and matrimonial desire, even though it means the injection of a principle to justify a result under particular facts, rather than a resort to principle to show what the correct result is. Furthermore, there is no great obstacle to inferring express consent from ordinary facts,¹⁷⁸ and the truth of this is not better shown than by the readiness of the courts

Div 79, 108 N. Y. Supp. 164, affirmed without opinion in 194 N. Y. 548, 87 N. E. 1129; Thewlis's Estate, 217 Pa. 307, 66 Atl. 519; Davis v. Whitlock, 90 S. C. 233, 73 S. E. 171, Ann. Cas. 1913D, 538. See also Robinson v. Ruprecht, *infra*.

In *Poole v. People*, 24 Colo. 510, 65 Am. St. Rep. 245, 52 Pac. 1025, it was presumed that from and after the removal of the impediment the parties were husband and wife, although no ceremony was performed.

Contra, *Re Fitzgibbons*, 162 Mich. 416, 139 Am. St. Rep. 570, 127 N. W. 313, holding that the fact that the parties did not know of the removal of the impediment negatives any occasion for new consent, and therefore precludes a presumption of such renewed consent. To the same effect is *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737, which was, however, practically nullified in this respect in *Robinson v. Ruprecht*, 191 Ill. 424, 61 N. E. 631, in which like circumstances were regarded as favorable to marriage, and in which the court makes the customary futile attempt to distinguish the first case instead of overruling it in express terms. The doctrine of *Cartwright v. McGown* was verbally approved, but carefully avoided by presuming a divorce before the second marriage, in *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322, 68 N. E. 81.

¹⁷⁴ For cases of this kind see the note to *People v. Shaw*, post, 87.

¹⁷⁵ Express consent is unnecessary after the removal of the impediment; consent may be expressed by conduct as effectively as by words. *University of Michigan v. McGuckin*, 62 Neb. 489, 57 L.R.A. 917, 87 N. W. 180, on rehearing 64 Neb. 300, 89 N. W. 778.

¹⁷⁶ See *Re Fitzgibbons* and *Cartwright v. McGown*, *supra*.

¹⁷⁷ The Wisconsin court expressly declares that there must be a marriage in fact. It takes the position that, in an action for dower at least, there must be proof of a marriage in fact; and that while this L.R.A.1915E.

may be established by evidence of cohabitation and reputation, such evidence must be sufficient to establish the fact of a lawful marriage between the parties. *Williams v. Williams*, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98. Pursuing the subject further the court says that every lawful marriage must have been entered into by the parties at some particular date or time, and that it cannot in any case be the simple result of cohabitation or the continued conduct of the parties, which ordinarily accompany the marriage state, and that, as a general rule, when a marriage is sought to be proved by conduct, cohabitation, and repute, the date of the marriage in fact, which such conduct and repute tend to establish, is the date of the commencement of such conduct and repute, and not afterwards. From this the court draws the conclusion that, when the evidence shows that, at the time of the commencement of the cohabitation and conduct from which it is sought to prove a marriage in fact, there was in fact no such marriage, the mere continuance of such cohabitation and conduct, without something more to indicate that there had been a change in the relations of the parties to each other, would not be sufficient to show a marriage in fact subsequent to the commencement of such cohabitation and conduct.

In *Thompson v. Nims*, 83 Wis. 261, 17 L.R.A. 847, 53 N. W. 502, it was held that although there was no direct evidence that the parties promised to assume the relations of husband and wife, the circumstances were sufficient to justify the finding that there was a marriage in fact where there was evidence that a man and woman left her parents' house with trunks and bedding, he declaring that they were going to be married, visited the relatives of both as such, and continued the relations for several years; and that the woman assumed and always went by the man's name and bore an untarnished reputation.

¹⁷⁸ While cohabitation and repute do not make marriage, and there can be no mar-

to presume a ceremonial marriage where the substantive common law has been abrogated, —a topic discussed in the next subdivision.

f. Effect of abrogation of substantive common law.

The absolute dissociation of the evidential theory of habit and repute from the substantive doctrine of marriage in fact is most forcibly illustrated by the fact that habit and repute are received as evidence of marriage even where the substantive common law has been rejected by the courts or abrogated by statute.¹⁷⁹ The fact that the statutes provide for record of marriage does not exclude evidence of habit and repute; the record is not regarded as the best evidence. The statement that the effect of such provision is even to require a closer scrutiny of the evidence of habit and repute¹⁸⁰ is not a happy one. The abstract probative force of habit and repute is not weakened by the fact that the statute provides evidence to prove the same situation. *A fortiori*, the mere fact that a statute

abrogates the common law of nonceremonial marriages does not destroy the evidential force of habit and repute. It has been said that notwithstanding the declaration of the Louisiana Code that such marriages only are recognized by law as are contracted and solemnized according to the rules which it prescribes, still, in the interest of persons who were the issue of marriages of which no direct proof could be adduced, and in the interest of legitimacy, courts have somewhat relaxed the rigor of the precept and have sanctioned the rule which allows proof of marriage by reputation, long cohabitation, and other circumstantial evidence.¹⁸¹ The inference which such evidence raises is necessarily one of ceremonial marriage, for no other is valid where the substantive common law has been abrogated. A court may, of course, fail to infer a ceremonial marriage where the sole claim is of a nonceremonial marriage which might be inferred but for its statutory invalidity.¹⁸² That there is no inherent obstacle to an inference of ceremonial marriage a few early decisions bear witness.¹⁸³ These are fortified by cases which,

riage without the mutual consent of the parties, yet cohabitation as man and wife, the rearing of children, the recognition of the relation by the parties themselves and by their friends and relatives, and their declarations and conduct holding themselves out to the world as husband and wife, are manifestations of the parties having consented to contract that relation *inter se*, and, therefore, circumstances from which it may be inferred as a fact that a marriage has been entered into. *Moore v. Heineke*, 119 Ala. 627, 24 So. 374 (alleged prior marriage of man seeking to probate will of wife by subsequent marriage).

In *United States v. Simpson*, 4 Utah, 227, 7 Pac. 257, the court stated that proof that two parties have treated each other as husband and wife, have lived together as such, and have held each other out to the world as such, is sufficient to enable a court or jury to find that at some previous time the parties did, as a fact, consent to be married; that is, that they did as a fact agree to be husband and wife, though the real holding appears to have been that the marriage may be proved by the declarations of one of the parties.

¹⁷⁹ The present discussion is concerned merely with the fact that the common law does not prevail in certain jurisdictions. The construction and effect of statutes to abrogate the common law is discussed in the note to *Re Love*, post, 109.

Generally as to the effect of statutes upon common-law marriage, see the note to *Reaves v. Reaves*, 2 L.R.A.(N.S.) 353.

As to the effect upon solemnized marriages of the absence of the statutory license, see the note to *Landry v. Bellanger*, 15 L.R.A.(N.S.) 463.

¹⁸⁰ The Nebraska court, in a case involving L.R.A.1915E.

ing an alleged marriage in fact by express consent, stated that since the legislature has prescribed certain forms of marriage, and although it has not thereby abrogated the substantive common law, proof adduced in support of a common-law marriage should be more closely scrutinized. *Sorensen v. Sorensen*, 68 Neb. 500, 100 N. W. 930.

¹⁸¹ *Powers v. Charbmury*, 35 La. Ann. 630.

It is well said in *Blasini v. Blasini*, 30 La. Ann. 1388, that "it is meet, it is decent, that it should be celebrated with such publicity and with such solemnities as would leave no defect of proof that the parties were able to contract, that they were willing to contract, that they actually did contract. The presence of the civil magistrate or the minister of religion, and of kindred and friends, is eminently proper; and the license gives assurance of the absence of all legal obstacles. But the law does not require written evidence of the marriage, nor the testimony of those who were present and witnessed the ceremony; nor does it avoid the contract for want of a license."

¹⁸² *Wilson v. Cook*, 256 Ill. 460, 43 L.R.A.(N.S.) 365, 100 N. E. 222, holding that continued cohabitation after the removal of the impediment raised no presumption of common-law marriage, since the abrogation of the common law by statute. However, the contention of counsel in this case appears to have been confined to the presumption of a common-law marriage.

¹⁸³ If a person sets up a ceremonial marriage, failure to prove the same does not warrant the conclusion that subsequent cohabitation was concubinage, and, failing to establish the marriage ceremony satisfactorily, the party may establish the same

while not speaking in terms of ceremonial marriage, hold in general terms that the evidential force of habit and repute has sur-

vived the abrogation of the substantive common law.¹⁸⁴ There is no authority worthy of the name opposed¹⁸⁵ to this view. In

by cohabitation and reputation. *James v. Mickey*, 26 S. C. 270, 2 S. E. 130.

Assuming, but not conceding, the correctness of earlier Tennessee decisions holding that the common law was abrogated by a statute in that state, the court said in *Johnson v. Johnson*, 1 Coldw. 626, that a marriage legal under the statute would be presumed from cohabitation and reputation, and although the contest was between the parties in relation to property, it is to be observed that the court said that the presumption would be indulged for all civil purposes under the facts of the case, which showed that the parties had cohabited for some twenty-five years as husband and wife, and that the man was seeking to deny the same for his own pecuniary benefit. However, the court really placed its decision upon the ground that the man was estopped to deny the marriage after twenty-five years of cohabitation, and in this respect it was indorsed in *Smith v. North Memphis Sav. Bank*, 115 Tenn. 12, 89 S. W. 392, holding, in an action by a woman to establish her rights as widow in a deceased's estate, that since the deceased, if alive, would have been estopped to deny that the woman was his wife, his personal representative was estopped to controvert her rights as widow and distributee of the decedent.

The fact that the court in *Stevenson v. McCreary*, 12 Smedes & M. 9, 51 Am. Dec. 102, had in mind a ceremonial rather than a common-law marriage is shown by the fact that it held a charge by the trial court too strong, in that it authorized the jury to find from proof of cohabitation and reputation that a marriage had taken place notwithstanding the proof that no marriage was solemnized.

The ceremonial marriage required by the Maryland laws may be inferred from evidence of general reputation, cohabitation, and acknowledgment. *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752.

Evidence of general reputation was held admissible for the purpose of proving marriage, in *Boone v. Purnell*, 28 Md. 607, 97 Am. Dec. 713, although later Maryland decisions held common-law marriages invalid in that state. It was to be noted that in the Boone Case the court was particularly concerned with the distinction between evidence of general reputation, and testimony of a witness amounting to hearsay.

That the probative force of habit and repute is not necessarily destroyed by holding consensual marriages void is recognized in *Redgrave v. Redgrave*, 38 Md. 93, holding that presumption of a legal marriage arises from cohabitation and reputation, and expressly alluding to the decision against common-law marriages in *Denison v. Denison*, 35 Md. 361, saying that "in that case the question presented was, not upon facts from which legal marriage could be presumed, but whether lawful marriage could

be contracted in this state merely *per verba de presenti*, or *per verba de futuro cum copula*."

¹⁸⁴ A presumption of marriage was drawn from evidence of habit and repute after nonceremonial marriages had been declared void by statute, in *Goodman v. Goodman*, 4 Jur. N. S. 1220, a. c. subsequent appeal 5 Jur. N. S. 902, 28 L. J. Ch. N. S. 745; *Doe ex dem. Fleming v. Fleming*, 4 Bing. 266, 12 J. B. Moore, 500, 5 L. J. C. P. 169, 29 Revised Rep. 562; *Lyle v. Ellwood*, L. R. 19 Eq. 106, 44 L. J. Ch. N. S. 164, 23 Week. Rep. 157.

Long cohabitation was characterized in *Newburyport v. Boothbay*, 9 Mass. 414, involving the pauper settlement of a child, as one unusual evidence of marriage, although common-law marriages were not valid in Massachusetts, as is shown in the note to *Re Love*, post, 109, relating to the effect of statutes.

In *Knower v. Wesson*, 13 Met. 143, the court held that if there was any doubt of the admissibility of evidence of general repute and cohabitation, the objection was wholly removed by statutes enacted in 1840 and 1841, and that under such statutes it is not necessary that the testimony come from members or connections of the family, but that it may come from anyone who knows the circumstances.

In *Mitchell v. Mitchell*, 11 Vt. 134, involving an action for divorce, the court admitted proof of the marriage by reputation, accompanied by proof of the death of the magistrate alleged to have solemnized the same, and of the examination of the records of the town in which the magistrate resided, without disclosing a record of marriage. And it was held that marriage might be proved by evidence of cohabitation and reputation in an action involving the legitimacy of a child and its derivative pauper settlement. *Northfield v. Vershire*, 33 Vt. 110. But it is to be noted that these decisions were rendered after the validity of common-law marriages was recognized in *Newbury v. Brunswick*, 2 Vt. 151, 19 Am. Dec. 703, and before that case was overruled in *Northfield v. Plymouth*, 20 Vt. 582, and *Morrill v. Palmer*, 68 Vt. 1, 33 L.R.A. 411, 33 Atl. 829, holding that the common law does not prevail in Vermont. This renders it clearly a matter of speculation whether the Vermont court would hold evidence of cohabitation and reputation sufficient to raise an inference of marriage. The most that can be said is that the rule has since been recognized in a case in which a decision on the point was unnecessary,—namely, *Frederick v. Morse*, — Vt. —, 92 Atl. 16.

¹⁸⁵ Although, as stated supra, II. b, 2, there is some doubt as to whether the common law prevails in North Carolina, there having been several opinions in the negative, it was apparently regarded in one case as

a few instances the opposite position was inadvertently taken after the abrogation of the substantive common law, but this was afterwards corrected¹⁸⁶ by the method so often adopted of evading the erroneous decisions instead of expressly overruling them. The most striking example of this is afforded by the history of the question in the

Washington supreme court, which first took a position adverse to the efficacy of evidence of habit and repute, and years later squarely took the contrary view, praising a generality employed in the first case, instead of expressly overruling it on the point decided.¹⁸⁷

in force, and necessarily so for the purpose of rendering evidence of cohabitation and reputation competent to establish marriage. *Jones v. Reddick*, 79 N. C. 290, declaring that in all Christian states, especially the American states, which have a common origin and a constitutional community of rights, it was presumed that the common law prevailed and that the same proofs which were sufficient to establish the fact of marriage in one state would likewise be sufficient to establish the same in another state, and that as such evidence would have been sufficient to establish the marriage in North Carolina by the common law, it would be presumed sufficient in Georgia to show that the parties were married according to its laws. In this case the court relied upon summary declarations in earlier cases that evidence of cohabitation, reputation, etc., was competent to establish marriage except in actions of crim. con. *Weaver v. Cryer*, 12 N. C. (1 Dev. L.) 337; *Doe ex dem. Archer v. Haitcock*, 51 N. C. (6 Jones, L.) 421. Other cases holding such evidence competent to prove marriage are *Jackson v. Rhem*, 59 N. C. (6 Jones, Eq.) 141, and *Ferrall v. Broadway*, 95 N. C. 551.

¹⁸⁶ The Kentucky court at first declared that since the statute declaring void all marriages not solemnized or contracted in the presence of an authorized person or society, there could be no such thing as legal marriage by cohabitation and reputation alone. *Robinson v. Redd*, 19 Ky. L. Rep. 1422, 43 S. W. 435; *Klenke v. Noonan*, 118 Ky. 436, 81 S. W. 241 (thus using language which confuses the substantive and evidential doctrines). But afterwards, the court without discussion upheld a marriage upon just such proof in *Bartee v. Edmunds*, 29 Ky. L. Rep. 872, 96 S. W. 535, and *Lindsey v. Smith*, 131 Ky. 176, 114 S. W. 779. The query presents itself whether the court did not have in mind the establishment of a ceremonial marriage by such evidence, there having been some testimony introduced as to the ceremony. In *Caldwell v. Williams*, — Ky. —, 118 S. W. 932, the court likewise held without discussion that although there was no record evidence of the marriage nor testimony of eyewitnesses, the relationship was established in view of the fact that marriage may be proved by reputation as well as by record. In *Beverlin v. Beverlin*, 29 W. Va. 732, 3 S. E. 36 (cited in the note to *People v. Shaw*, post 87), the fact that the common law had been abrogated by statute in West Virginia was the principal reason for holding that cohabitation and repu-

tation following the death of the woman's first husband were insufficient to establish a consent to marriage or a ratification of the previous marriage between the parties. But, without reference to the foregoing case, and without discussion, the same court, in *Suter v. Suter*, 68 W. Va. 690, 70 S. E. 705, Ann. Cas. 1912B, 405, involving the legitimacy of a child and his right to inherit, stated that the evidence from circumstances, reputation, conduct of the parties, and cohabitation apparently matrimonial, was sufficient to establish a marriage between the parents, and to raise the presumption that it was legally performed.

¹⁸⁷ In this connection it is interesting to note *Re McLaughlin*, 4 Wash. 570, 16 L.R.A. 699, 30 Pac. 651, holding, on the ground that the common law is abrogated by statute in Washington, that cohabitation following the removal of the impediment by a divorce between the woman and her first husband was insufficient to raise a presumption of marriage, although it appeared that the parties married in the belief that the first husband was dead, and, upon learning that he was still alive, separated until the divorce was obtained, and then resumed cohabitation. The court, in the course of its discussion containing an extended review of the authorities, voiced without questioning the generality that whether common-law marriages are recognized or not, evidence of cohabitation and repute is admissible as tending to show a valid marriage, and is sufficient, unless contradicted, to establish marriage even within states where common-law marriages are not recognized. Whether or not the court regarded this as good law, the fact remains that the court did not apply it, although the presumption arising from cohabitation and reputation resides in the desire of the courts to accord the marital relation to persons who have shown a matrimonial desire and conduct consistent with matrimony, and have lived together in good faith in the belief that they were married. And when to this consideration is added a reminder that cohabitation and reputation do not constitute marriage, but are merely evidence of marriage, it would not seem unreasonable to suppose that, under proper circumstances, cohabitation and reputation will raise the presumption of ceremonial marriage after the removal of the impediment.

These remarks also apply to *Re Smith*, 4 Wash. 702, 17 L.R.A. 573, 30 Pac. 1059, citing *Re McLaughlin*.

So, another Washington case stated that though it was clearly established that the parties had always held themselves out as

husband and wife after they came to Washington, following their marriage in California, which was invalid under a statute forbidding miscegenation, the court said that it regarded the cohabitation "as largely immaterial, as marriages under the common law do not, and did not, obtain here, and it was only relevant as some evidence of a prior marriage," although the case seems to be decided upon the ground that the relations between the parties were willfully illicit. *Stans v. Baitey*, 9 Wash. 115, 37 Pac. 316. That the court in deciding the case did not have in mind the fact that cohabitation and reputation are merely evidence of marriage, and that a presumption may arise therefrom that a valid ceremonial marriage was contracted, was indicated by the statement of the court that the bare fact that the parties cohabited in California was insufficient, standing alone, to establish a common-law marriage.

The *McLaughlin* Case was followed in *Re Wilbur*, 14 Wash. 242, 44 Pac. 262, involving the right of the woman and her children to share in the distribution of her alleged husband's estate, and holding that a marriage between a white man and an Indian woman, according to the Indian custom, was not valid, although the man cohabited with her as his wife, and continually, openly, and publicly acknowledged the children to be his legitimate sons.

With this reluctance to presume in favor of matrimony the Washington court would have been quite consistent in *Canadian & A. Mortg. & T. Co. v. Bloomer*, 14 Wash. 491, 45 Pac. 34, but for the effect which it gave to cohabitation between a mortgagor's alleged wife and another man, when, ignoring the universal presumption in favor of the continuance of matrimony once established, the court held, in a foreclosure suit in which the mortgagor defended upon the ground of the nonjoinder of the wife, that the presumption of a continuance of the marriage relation, shown to have once existed, is overcome by proof that for more than thirty years the mortgagor and the woman had lived in different states, and had had no communication with, or knowledge of, one another for at least ten years, and that the alleged wife had for many years been living with another man and going by his name.

Having thus unmistakably taken its position, the Washington court then proceeded to ignore it by holding a ceremonial marriage established by evidence which, it is entirely probable, would have been held insufficient under like circumstances even by those courts whose efforts have been on the side of upholding common-law marriages. This was done in a case involving a suit by a woman against her alleged husband for divorce, in which the testimony of the woman that there was some sort of ceremony was of the vaguest kind, and in which it appeared that they separated after two years, and the evidence as to their cohabitation as man and wife was most meager, and consisted of little more than references

to occasional equivocal remarks upon the part of the man which might be construed as acknowledging her as his wife. After referring to the dispute as to the marriage ceremony and to the evidence as to cohabitation, the court, without reference to the earlier cases in which the abrogation of the common law was held fatal, although referring to the fact that the common law did not prevail where this marriage was alleged to have been contracted, said that the intendment of the law is to presume from such testimony that a valid marriage existed, and that when such facts appear in evidence the burden of proof is cast upon the party denying it to clearly show the contrary. And then the court proceeded to lay down the general proposition that a valid marriage may be presumed to exist from general reputation among the acquaintances of the parties that such is the fact, when that reputation is accompanied by their cohabitation, and arises from their holding themselves out to the world as occupying that relation to which the law refers when marriage is mentioned. The court expressly comments on the fact that plaintiff sought to prove not a common-law marriage, but a ceremonial marriage, and from that point proceeds with the discussion of the effect of testimony. *Summerville v. Summerville*, 31 Wash. 411, 72 Pac. 84.

The *Summerville* Case is approved in *Shank v. Wilson*, 33 Wash. 612, 74 Pac. 812, involving a woman's claim as widow against an intestate's estate, and laying down the proposition that it is well-established law, not necessitating the citation of authority, that the proof of continual cohabitation of a man and woman, and of a continual assertion that the marriage relation exists, and proof of such conduct as is consistent with the marriage relation, raise the presumption, in those states where the common-law marriage itself is not held to be a legal marriage, that the ceremonial or legal marriage has preceded the acts mentioned; and holding further that this presumption of marriage is not affected by a subsequent ceremonial marriage. This holding was referred to as authoritative in *Potts v. Potts*, 81 Wash. 27, 142 Pac. 448.

The next step is taken in *Nelson v. Carlson*, 48 Wash. 651, 94 Pac. 477, where the court makes capital of the generality referred to in *Re McLaughlin*, *supra*, and holds on the strength of it that a valid marriage may be established by evidence of cohabitation and reputation, although a common-law marriage is not valid. It was insisted in the *Nelson* Case that the party asserting the marriage was relying only on a common-law marriage in Colorado. The court said that this was a mistake, as he was attempting to show a valid marriage between the parties, although no direct evidence of any formal ceremony, certificate of marriage, or official record was offered.

In *Potter v. Potter*, 45 Wash. 401, 88 Pac. 625, involving an action for divorce, and in which there was a square conflict in the evidence as to a ceremonial marriage,

g. Proceedings in which available.

It remains to be noted that there are purposes for which evidence of habit and repute will not be received, or, at least, not regarded as sufficient to warrant an inference of marriage. The exceptions most uniformly observed are prosecutions for bigamy and actions of crim. con., and these exceptions are founded upon a decision of Lord Mansfield in 1767,¹⁸⁸ in an action of crim. con., in which an attempt to prove an actual marriage failed inasmuch as the register or books of the chapel where it was claimed to have been solemnized could not be admitted in evidence because the clergyman who officiated was transported, and the clerk who was present was dead. Lord Mansfield held proof of an actual marriage or "marriage in fact" necessary, and though expressly refraining from declaring what might be sufficient evidence of a marriage in fact, held that proof of cohabitation, reputation, and acknowledgment was insufficient. He alluded to a rule that proof of a marriage was necessary in a prosecution for bigamy, and stated that crim. con., was a sort of criminal action, and that there was no other way to punish the crime at common law. Another consideration influencing the decision was the possibility of persons being held liable on evidence made by the plaintiff. Speaking of these exceptions, Professor Wigmore says that although time usually vindicated Lord Mansfield in

his innovations in the substantive law, it did not fall to his lot to find such vindication in matters of evidence. "Rarely did he make any real contribution to its theory or its practice; not infrequently he helped to obscure it; and in several respects he created in scorn of precedent rules which merely encumbered the law of evidence with unnecessary and impolitic restrictions. One of these was the rule requiring proof of a 'marriage in fact' in bigamy and criminal conversation."¹⁸⁹ Pursuing the subject further Professor Wigmore says that the first reason assigned for the decision, that of the criminal nature of crim. con., stands or falls with the general policy of establishing a special rule for criminal cases; and that as to the second reason,—that is, the possibility of a man recovering damages for the seduction of his mistress, to whose chastity he could claim no right,—that it is doubtful whether there is any need of exercising special vigilance in behalf of a defendant whose conceded conduct deprives him of honorable sympathy. However, the courts seem somewhat disposed to follow in Lord Mansfield's footsteps. Numerous unquestioning allusions are made to this exception, in cases in which crim. con. is not involved. These need not be noticed as they are of no binding effect. Of the few American cases in which the action of crim. con. was actually involved, the greater number refused to give effect to habit and repute,¹⁹⁰ and this view was extended in one case to

it was contended under the law as established in *Re McLaughlin*, supra, that no common-law marriage would be held legal, and therefore, although there was evidence of cohabitation and reputation, there was no legal marriage proven. The court avoided this difficulty by merely remarking that in such a conflict of testimony it is well established that a ceremonial marriage may be proven by circumstances, such as the cohabitation of persons as husband and wife, their reputation and recognition as such in society; and that when such circumstances are shown, the presumption of marriage exists, and the burden is upon the party denying the marriage to show that the ceremony had never been performed. (Citing *Summerville v. Summerville*, supra.)

In the next case the court makes a very unsatisfactory attempt to dispose of *Re McLaughlin*, as well as the *Wilbur Case*, with the brief remark that they simply hold that a common-law marriage is not valid in Washington. *Weatherall v. Weatherall*, 56 Wash. 344, 105 Pac. 822. Here also the court refers to the generality employed in the *McLaughlin Case*, and states that its logic has been liberally applied in later cases to uphold the marriage relation where the parties have lived together as husband and wife, and held themselves out to the L.R.A.1915E.

public as sustaining that relation, and remarking that in such cases the law will, in favor of morality and decency, presume a legal marriage, again lays down the proposition that while a common-law marriage is invalid in Washington, evidence of cohabitation and reputation is admissible for the purpose of raising a legal presumption of a prior ceremonial marriage.

¹⁸⁸ *Morris v. Miller*, 4 Burr. 2057, followed in *Birt v. Barlow*, 1 Dougl. K. B. 171.

¹⁸⁹ 3 Wigmore, Ev. § 2084.

¹⁹⁰ *Kibby v. Rucker*, 1 A. K. Marsh. 391.

It was held in *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164, that in a suit for crim. con. an actual marriage must be proved, and that evidence of cohabitation and reputation was insufficient, for otherwise such testimony would tend to fix upon the woman a charge of adultery.

In an action for crim. con., cohabitation, reputation, admissions, and holding out are insufficient evidence of marriage to maintain the suit. *Dann v. Kingdom*, 1 Thomp. & O. 492.

In *Frederick v. Morse*, — Vt. —, 92 Atl. 16, the court recognized the rule that evidence of cohabitation and reputation are not competent proof of marriage in an action for crim. con., but held such evidence admissible in the case to substantiate the plaintiff's testimony as to the marriage

an action on a promissory note given in settlement of an action of crim. con.¹⁹¹ Pennsylvania is apparently the only jurisdiction which favors habit and repute in such a proceeding.¹⁹²

A distinction has sometimes been made between an action of crim. con. and one for merely enticing away the wife,¹⁹³ upon the ground that to presume marriage in an action of crim. con. is to presume adultery,—an offense which is included by some courts in the list of exceptions to the doctrine of habit and repute, as will be presently shown.

As to the exception in bigamy cases, Professor Wigmore has this to say: "Whatever peculiarity there is to the offense of bigamy points indeed to a looser rather than a stricter rule as appropriate. What is the peculiar immorality of the offense of bigamy? Usually, it is the deception of the other party to the marriage, by leading her (or him) into a void and unsanctioned relation and by afterwards deserting for another; as well as the injury to the progeny by placing them in the world without the rights of legitimate children. Now this deception and desertion and social wrong are equally consummated by a relation appearing in habit and repute to be a marriage, even though it be not a valid one. The moral meanness of that man, and the social consequences of his misconduct, are

equally reprehensible; whether or not his first marriage could be proved by an eyewitness, and whether the marriage was legally binding or not. If it was not, it ought to have been. That the law of evidence, instead of applying the equitable maxim that what ought to have been done will be treated as having been done, should let him go free of the charge of bigamy, precisely because he did not do the honest and lawful thing, is a singular instance of *hæret in cortice*. As the rule of evidence is confessedly based on a moral tenderness for the accused, it would seem that this moral tenderness should not be shown to a person whose conduct is equally reprehensible in any case. The most meritorious opponent in a civil case, whether it be a wife, or heirs, or creditors, may be deprived of his alleged rights upon proof of marriage not consisting in eyewitness testimony. It is a scandal to be more cautious and tender in favor of an opponent in that particular criminal charge in which the opponent has placed himself on a level of moral meanness below that of the least meritorious opponent in any civil case."¹⁹⁴ In this country the few cases actually involving the question are about evenly divided. Those which accord¹⁹⁵ with Lord Mansfield apply the rule without discussion. Those giving

ceremony, which was supplemented by a production of the certificate and proof of the official signature, etc.

¹⁹¹In *McGowan v. Bush*, 17 Tex. 195, it was suggested that evidence of cohabitation and reputation, as distinguished from direct evidence, was inadmissible to prove marriage in an action on a promissory note given in settlement of an action of crim. con. with the payee's alleged wife, upon the theory that the same kind of evidence was necessary as would be required to sustain an action of crim. con., although the point appears not to have been necessary to the decision of the case, because not put in issue by the pleadings.

¹⁹²The case of *Durning v. Hastings*, 183 Pa. 210, 38 Atl. 627, was apparently intended to stand for the proposition that in an action of crim. con. the marriage may be established by cohabitation, reputation, and general surroundings, although the supreme court did nothing but affirm without discussion the trial court's charge, which although indicating that there was evidence that a minister had married persons of the same names as those whose marriage was in dispute, and that the question was one of identity, stated broadly that actual proof of marriage was not necessary to establish marriage, and that the same could be proved by cohabitation, reputation, and general surroundings indicating a reasonable probability of marriage, no allusion being made to the fact that an action of crim. con. is generally regarded as an exception to the L.R.A.1915E.

rule that marriage may be proved by circumstantial evidence in civil actions.

In *Forney v. Hallacher*, 8 Serg. & R. 159, 11 Am. Dec. 590, it was held that while there must be an actual marriage, the same may be proved by circumstances.

¹⁹³A distinction has been made between an action on crim. con. and an action for enticing away the wife, for it is said that an action for crim. con. necessarily involves adultery, and that therefore direct proof is necessary; but that an action for enticing away the plaintiff's wife is a recognized action wholly distinct from one for crim. con., and that the issue is narrower, and that therefore the proof of marriage is not requisite, cohabitation and repute and the defendant's admissions being sufficient to establish the relation. *Perry v. Lovejoy*, 49 Mich. 529, 14 N. W. 485.

Cohabitation and reputation are sufficient to establish marriage in an action for enticing away the plaintiff's wife, direct proof of an actual marriage being unnecessary. *Scherpf v. Szadeczky*, 4 E. D. Smith, 110.

¹⁹⁴3 Wigmore, Ev. § 2084.

¹⁹⁵*Green v. State*, 21 Fla. 403, 58 Am. Rep. 670; *Arnold v. State*, 53 Ga. 574 (statutory offense of marrying the wife of another); *Hiler v. People*, 166 Ill. 511, 47 Am. St. Rep. 221, 41 N. E. 181 (reciting the fact that the Illinois statute provided that, in a prosecution for bigamy, it should not be necessary to prove either of the marriages by record evidence, but that the same might be proved by such evidence as

effect¹⁹⁶ to habit and repute in bigamy cases give the matter more extended consideration. Of those taking the latter view, Missouri takes care to limit it by making the inference one of fact, to be drawn by the jury,¹⁹⁷ rather than one of law. There

is also a tendency to extend the exception to other sexual or marital offenses,¹⁹⁸ such as adultery and incest, but here and there is found a dissent.

There is also authority for the proposition that evidence of habit and repute cannot

be admissible to prove a marriage in other cases); *Damon's Case*, 6 Me. 148 (attention is also directed to *State v. Hodgskins*, 19 Me. 155, 36 Am. Dec. 742, holding that proof of a ceremony, followed by a long period of cohabitation, is insufficient evidence of marriage in a prosecution for adultery, without showing the authority of the person who performed the ceremony).

A Minnesota case goes still further and holds not only that evidence of cohabitation and repute, conduct of the parties, birth of children, and admissions is not alone sufficient to prove marriage in a prosecution for bigamy, but also that where direct evidence of the first marriage falls short of proving by itself a marriage, evidence of cohabitation, repute, etc., is not admissible as corroborative evidence to supply the defect in the direct evidence. But see *Frederick v. Morse*, — Vt. —, 92 Atl. 16.

¹⁹⁶ *Langtry v. State*, 30 Ala. 536 (disapproving *Morris v. Miller*, 4 Burr. 2057, and overruling *Ford v. Ford*, 4 Ala. 142), followed in *Moore v. Heineke*, 119 Ala. 627, 24 So. 374 (involving alleged successive marriages in the civil suit); *Bynon v. State*, 117 Ala. 80, 67 Am. St. Rep. 163, 23 So. 640; *State v. Gonce*, 79 Mo. 600, 4 Am. Crim. Rep. 68; *State v. Ulrich*, 110 Mo. 350, 19 S. W. 656; *State v. Cooper*, 103 Mo. 266, 15 S. W. 327; *Swartz v. State*, 13 Ohio C. C. 62, 7 Ohio C. D. 43 (holding that the first marriage of the defendant in a prosecution for bigamy could be established by evidence of cohabitation and reputation where, as in that case, it was strong enough to establish marriage beyond a reasonable doubt, notwithstanding the fact that the relations of the parties before they began living and cohabiting together were illicit); *State v. Hilton*, 3 Rich. L. 434, 45 Am. Dec. 783.

The Texas court of appeals held that while general reputation alone was insufficient, still, when taken in connection with cohabitation and admissions, it was competent evidence to establish a *prima facie* case of marriage in a prosecution for bigamy, and that whenever such evidence established beyond a reasonable doubt the existence of the fact of a valid first marriage, then it was sufficient in that regard to sustain a verdict and a judgment for bigamy. *Dumas v. State*, 14 Tex. App. 464, 46 Am. Rep. 241. The court further held that a provision of the Texas statute that in trials for offenses constituting unlawful marriage, proof of marriage by mere reputation should not be sufficient, did not affect the mere admissibility for this purpose of evidence of reputation when fortified by cohabitation and admissions. In the opinion in this case it was said that inasmuch as the American L.R.A.1915E.

people are migratory in their habits, and very many foreign-born citizens are married in their native countries, it will frequently be an impossible task to prove such marriages by direct evidence.

In *United States v. Simpson*, 4 Utah, 227, 7 Pac. 257, involving a prosecution for polygamy, the court held the declarations of the parties admissible to prove the first marriage, and stated that evidence of cohabitation and reputation could be introduced for the same purpose, but did not allude to the general rule that in such a proceeding the marriage must be established by direct evidence.

¹⁹⁷ Even in a prosecution for bigamy, the first marriage may be established by cohabitation and reputation, but the inference of marriage to be drawn from the circumstances is combated by the presumption of innocence, and in such case, the presumption of marriage is not one of law, but must be drawn by the jury. *State v. Cooper*, 103 Mo. 266, 15 S. W. 327.

Hence, evidence of cohabitation, recognition of the parties by their friends and acquaintances as husband and wife, and holding themselves out as such for a period of twenty years, were held insufficient to show a contract of marriage, and thus overcome the presumption of innocence to be indulged in favor of the accused. *State v. Hansbrough*, 181 Mo. 348, 80 S. W. 900.

¹⁹⁸ It was held in *State v. Hodgskins*, 19 Me. 155, 36 Am. Dec. 742, that the marriage of the defendant in a prosecution for adultery could not be established by evidence of habit and repute. To the same effect is *Com. v. Littlejohn*, 15 Mass. 163, involving an indictment of two persons for lascivious intercourse, one of them being married.

In a prosecution for adultery or lascivious cohabitation where proof of marriage is essential to a conviction, the marriage must be shown by direct evidence, and cannot be established by evidence of habit and repute. *State v. Coffee*, 39 Mo. App. 56. And even if evidence of the latter sort were admissible and sufficient for the purpose, it would be error to charge that such facts constituted marriage; such fact raising but a presumption of marriage, and the question being one for the jury. *State v. St. John*, 94 Mo. App. 229, 68 S. W. 374.

In New Hampshire it was stated that in a prosecution for adultery with a married woman, the marriage must be established by direct evidence, and that cohabitation and reputation, being indirect, were insufficient to establish the same; but this was a *dictum*, because direct evidence was present in the case. *State v. Winkley*, 14 N. H. 480.

In *Com. v. Gamble*, 36 Pa. Super. Ct. 146, involving a prosecution for adultery, the

prevail against the presumption of innocence of bigamy, even in a civil case where two alleged marriages are involved.¹⁹⁹ Upon this theory habit and repute have been denied force in actions for annulment of marriage upon the ground of a previous marriage, and for a divorce upon the ground of adultery, where the defendant is claimed

to have married the other party to the adultery.²⁰⁰ This explains away what has been termed the conflict of authorities as to the effect of habit and repute in an action for divorce. There is nothing inherent in such action which impels the courts to deny effect to habit and repute, as is shown by cases in which a divorce is sought upon

court held that while it might be that a marriage could be inferred in a criminal case from cohabitation, reputation, and attendant circumstances, still the presumption of innocence of a man accused of adultery with another woman is not overcome by any presumption of marriage arising from prior cohabitation and reputation between the accused and another woman. The court said that it might be that a case could arise "wherein the cohabitation, reputation, and attendant circumstances would so strongly and convincingly show that fact as to warrant the jury in finding that the presumption in favor of the defendant's innocence of the adulterous intercourse charged in the indictment had been overcome. But we can conceive of no criminal case wherein it would be within the province of the court to charge the jury that the latter presumption was conclusively rebutted by proof of prior cohabitation, and reputation of marriage with another woman."

In a prosecution for adultery it is necessary to prove a marriage in fact, and reputation and cohabitation alone are not sufficient. *State v. Rood*, 12 Vt. 396 (this proposition was admitted by the prosecution).

While it was held in *State v. Roswell*, 6 Conn. 446, that in a prosecution for incest with a daughter, evidence of cohabitation and reputation was insufficient to establish the marriage of her mother and the defendant, the exact contrary was held in *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410, and a substantially contrary conclusion was reached in *Ewell v. State*, 6 Yerg. 364, 27 Am. Dec. 480, holding that in a prosecution for incest with a brother's daughter, the marriage of the brother's parents, and also of the daughter's parents, might be proved by circumstances.

In *Cook v. State*, supra, holding that marriage may be established by habit and repute in a prosecution for adultery, the court said that if a marriage in fact, in a criminal prosecution, must be proved by the production of witnesses, the result would be that in many cases conviction could not be had; adding that "the witnesses could not be produced, for they die, or, in this unsettled age and country, are soon scattered in inaccessible places."

In *West v. State*, 1 Wis. 209, involving an indictment of a married man for seduction, it was held that his marriage could be proved by habit and repute.

It was held in *State v. Tillinghast*, 25 R. I. 391, 56 Atl. 181, that while evidence of cohabitation and reputation is not sufficient to establish marriage in a criminal prosecution.

tion for nonsupport, it is admissible in corroboration of direct evidence of a ceremonial marriage.

A statute providing that in a trial for offenses under the head of "unlawful marriages," proof of marriage by mere reputation shall not be sufficient, does not prevent the proof of marriage in that manner, in a prosecution for assault alleged to have grown out of a dispute concerning the defendant's alleged wife. *Jackson v. State*, 8 Tex. App. 60.

¹⁹⁹ The presumption arising from habit and repute will not prevail where, by prevailing, it would render one of the parties guilty of bigamy; at least, where the habit and repute relied on, if it existed at all, must have existed in the community which not only knew of the prior marriage, but also knew the other spouse, who lived therein. *Re Baldwin*, 162 Cal. 471, 123 Pac. 267 (legitimacy of child and right to inherit). See also *Perry v. Lovejoy*, 49 Mich. 529, 14 N. W. 485, supra.

²⁰⁰ The presumption of marriage from cohabitation and repute yields to the presumption of innocence of the woman in contracting a second marriage, in a suit to annul the latter, for the presumption of innocence of bigamy arises although the party is not on trial for the offense. *Waddingham v. Waddingham*, 21 Mo. App. 609.

The presumption from cohabitation and repute does not arise when its result would be to fasten upon one of the parties the crime of bigamy; and therefore, no presumption arises of the marriage of the plaintiff and defendant in a suit for divorce, instituted upon the ground of adultery on the part of the man with another woman, whom he has married. *Case v. Case*, 17 Cal. 598.

No presumption of marriage between parties to a cohabitation arises from cohabitation and reputation, in an action between the parties for divorce, where the defendant during such cohabitation had a lawful spouse living, since the presumption of marriage arising from such circumstances is overcome by the presumption of innocence of the crime of bigamy which would have been committed by a marriage between the parties. *Moore v. Moore*, 102 Tenn. 148, 52 S. W. 778.

Attention is also directed to *Poultney v. Fair Haven, Brayton (Vt.)* 185, involving an application for the removal of a pauper and his wife from one town to another, and holding that where the husband had testified that he was lawfully married to the woman, an earlier marriage between her and another man could not be shown by cohabita-

grounds other than adultery,²⁰¹ or upon the ground of mere adultery,²⁰² especially where the same is not an offense.²⁰³ This, of course, relates to the sufficiency of the evidence to indicate the ultimate rights of the parties. For the purposes of temporary alimony less evidence is required.²⁰⁴

These civil cases in which the presumption of noncriminality prevails do not, of

course, deny all effect to evidence of habit and repute, as is done in actions of crim. con. They rather hold that its effect is nullified by stronger presumption. For most civil purposes marriage may be established by evidence of habit and repute.²⁰⁵ This principle has become so well established that it is now generally adopted without discussion. L. A. W.

tion and reputation, the court saying that although cohabitation and reputation would be sufficient to charge the alleged first husband, it was not proper evidence to disprove that she was the wife of the man with whom she was living.

In *Collins v. Collins*, 80 N. Y. 1, in which the marriage was ceremonial and the parties entered into it in the belief that the woman's divorce from her first husband was valid, the court alluded to a conflict of authority on the question whether, in an action for divorce, marriage must be proved by direct evidence, and, apparently, in leaning toward the affirmative, intimated strongly that in such an action, as in a prosecution for adultery or crim. con., the mere fact of cohabitation after the death of the first husband would be insufficient to establish the marriage of the parties to the action, distinguishing cases in which property rights were involved,—although the court refused to pass on such an important question where the appeal involved nothing but a motion for temporary alimony. This was a suit for divorce *a vinculo*, which can be decreed in New York only on the ground of adultery.

²⁰¹ Habit and repute was given effect in actions for divorce upon the ground of—

Cruelty: *Burns v. Burns*, 13 Fla. 369; *Wright v. Wright*, 6 Tex. 3.

Desertion: *Summerville v. Summerville*, 31 Wash. 411, 72 Pac. 84.

Grounds not stated: *Trimble v. Trimble*, 2 Ind. 76; *Mitchell v. Mitchell*, 11 Vt. 134.

²⁰² Evidence of cohabitation, reputation, and acknowledgment is admissible to prove marriage between the parties to an action for divorce. *Cunéo v. De Cunéo*, 24 Tex. Civ. App. 436, 59 S. W. 284 (apparently upon the ground of mere adultery).

²⁰³ *White v. White*, 82 Cal. 427, 7 L.R.A. 799, 23 Pac. 276 (proof of marriage between the plaintiff and the defendant, where the alleged offense was not in remarrying, but in mere adultery, which was not an offense in California).

²⁰⁴ It is not necessary to prove the marriage as fully on an application for temporary alimony as is necessary to sustain a final decree. *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345; *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460; *Vincent v. Vincent*, 16 Daly, 534, 17 N. Y. Supp. 497.

²⁰⁵ In answer to the contention that direct evidence was necessary, as the case was one of inheritance, the court said in *Doe ex dem. Fleming v. Fleming*, 4 Bing. 266: "The general rule is that reputation is sufficient evidence of marriage, and a party who

seeks to impugn a principle so well established ought at least to furnish cases in support of his position."

Habit and repute was also given effect in the following cases under circumstances parenthetically indicated: *Adger v. Ackerman*, 52 C. C. A. 568, 115 Fed. 124 (inheritance); *Hammick v. Bronson*, 5 Day, 200 (joinder of husband and wife in ejectment); *Miller v. White*, 80 Ill. 580 (suit by wife in respect to property of which her husband had been a tenant); *Bowers v. Van Winkle*, 41 Ind. 432 (prior marriage rendering applicable statute forbidding married woman from alienating real estate acquired by virtue of prior marriage); *Cox v. Rash*, 82 Ind. 519 (inheritance); *Crozier v. Gano*, 1 Bibb, 257 (joinder of husband and wife in detinue); *Chiles v. Drake*, 2 Met. (Ky.) 146, 74 Am. Dec. 406 (action for causing death of husband); *Hobdy v. Jones*, 2 La. Ann. 944 (*obiter* in action of slander in charging concubinage and adultery); *Powers v. Charbmury*, 35 La. Ann. 630 (right of sister of alleged widow to the latter's community rights); *Taylor v. Robinson*, 29 Me. 323 (slander in charging concubinage); *Boone v. Purnell*, 28 Md. 607, 92 Am. Dec. 713 (inheritance); *Proctor v. Bigelow*, 38 Mich. 282 (dower); *Peet v. Peet*, 52 Mich. 464, 18 N. W. 220 (right of alleged widow in estate of husband); *Henderson v. Cargill*, 31 Miss. 367 (legitimacy of children and right to share in estate of brother); *Boatman v. Curry*, 25 Mo. 433 (joinder of husband in suit respecting wife's property); *Pettingill v. McGregor*, 12 N. H. 179 (marriage of the defendant in an action of breach of promise, to another than the plaintiff); *Stevens v. Reed*, 37 N. H. 49 (dower); *Westfield v. Warren*, 8 N. J. L. 249, and *East Windsor v. Montgomery*, 9 N. J. L. 39 (both involving derivative pauper settlement of alleged wife); *Fenton v. Reed*, 4 Johns. 52, 4 Am. Dec. 244 (right to annuity by virtue of alleged husband's membership in society); *Jenkins v. Bisbee*, 1 Edw. Ch. 377 (creditor's suit to reach property in hands of debtor's alleged wife); *Van Gelder v. Post*, 2 Edw. Ch. 577 (dower); *Weaver v. Cryer*, 12 N. C. (1 Dev. L.) 337 (joinder of alleged husband of owner of chattels in action of trover); *Doe ex dem. Archer v. Haithcock*, 51 N. C. (6 Jones, L.) 421 (coverture as affecting deed of woman whose husband's prior marriage was sought to be proved by habit and repute); *Jones v. Reddick*, 79 N. C. 290 (inheritance); *Lawrence R. Co. v. Cobb*, 35 Ohio St. 94 (coverture as affecting statute of limitations); *Bruner v. Briggs*, 39 Ohio St.

478 (curtesy); *Umbenhower v. Labus*, 85 Ohio St. 238, 97 N. E. 832 (inheritance); *Richard v. Brehm*, 73 Pa. 140, 13 Am. Rep. 733 (curtesy); *Tarpley v. Poage*, 2 Tex. 139 (action on a promissory note alleged to have been given for land conveyed to the alleged wife of the maker); *Jordan v. Johnson*, — Tex. Civ. App. —, 155 S. W. 1194 (inheritance); *Weidenhott v. Primm*, 16 Wyo. 340, 94 Pac. 453 (right of woman as widow in man's estate).

WISCONSIN SUPREME COURT.

ELIZABETH BECKER, Resp't.,

v.

* CHARLES BECKER, Appt.

(153 Wis. 226, 140 N. W. 1082.)

Marriage — common law — validity.

Where by statute marriage is a civil contract, a so-called common-law marriage by present consent, consummation, and holding out is valid, although the statute requires for a marriage a license and solemnization before a civil officer or clergyman.

(April 8, 1913.)

A PPEAL by defendant from a judgment of the Circuit Court for Milwaukee County in plaintiff's favor in an action for a divorce. Affirmed.

The facts are stated in the opinion.

Mr. Horace B. Walmsley, with Messrs. Rubin & Zabel, for appellant:

The cohabitation alone, which exists in this case, does not make a marriage.

Lanham v. Lanham, 136 Wis. 360, 17 L.R.A.(N.S.) 804, 128 Am. St. Rep. 1085, 117 N. W. 787; *Severa v. Beranak*, 138 Wis. 144, 119 N. W. 814.

There must be "an actual contract of marriage" at a time when the parties are both free to marry.

Williams v. Williams, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98; *Spencer v. Pollock*, 83 Wis. 215, 17 L.R.A. 848, 53 N. W. 490; *Thompson v. Nims*, 83 Wis. 261, 17 L.R.A. 847, 53 N. W. 502.

Mr. Julius E. Roehr, for respondent:

Any language or conduct which is clear and unambiguous is sufficient to form a binding compact.

Williams v. Williams, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98; *State v. Bittick*, 103 Mo. 183, 11 L.R.A. 587, 23 Am. St. Rep. 869, 15 S. W. 325; *Re McLaughlin*, 4 Wash. 570, 16 L.R.A. 699, 30 Pac. 651; *Morrill v. Palmer*, 68 Vt. 1, 33 L.R.A. 411, 33 Atl. 829; *Atlantic City R. Co. v. Goodin*, 62 N. J. L. 394, 45 L.R.A. 671, 72 Am. St. Rep.

Note. — See note, post, 60.
L.R.A.1915E.

652, 42 Atl. 333, 5 Am. Neg. Rep. 407; *University of Michigan v. McGuckin*, 62 Neb. 489, 57 L.R.A. 917, 87 N. W. 180; *Herald v. Moker*, 257 Ill. 27, 100 N. E. 277.

Common-law marriages, like regular marriages, if valid where entered into, will be valid everywhere, even in countries and states not permitting such marriages to be entered into within their own borders.

Travers v. Reinhardt, 205 U. S. 423, 51 L. ed. 865, 27 Sup. Ct. Rep. 563; *Darling v. Dent*, 82 Ark. 76, 100 S. W. 747; *Maryland use of Markley v. Baldwin*, 112 U. S. 490, 23 L. ed. 822, 5 Sup. Ct. Rep. 278; *State v. Bittick*, 103 Mo. 183, 11 L.R.A. 587, 23 Am. St. Rep. 869, 15 S. W. 325; *People v. Mendenhall*, 119 Mich. 404, 75 Am. St. Rep. 408, 78 N. W. 325, 11 Am. Crim. Rep. 163; *Atlantic City R. Co. v. Goodin*, 62 N. J. L. 394, 45 L.R.A. 671, 72 Am. St. Rep. 652, 42 Atl. 333, 5 Am. Neg. Rep. 407; *Heymann v. Heymann*, 218 Ill. 636, 75 N. E. 1079; *Lando v. Lando*, 112 Minn. 257, 30 L.R.A.(N.S.) 940, 127 N. W. 1125; *Scrimshire v. Scrimshire*, 2 Hagg. Consist. Rep. 395; *Herbert v. Herbert*, 2 Hagg. Const. Rep. 263; *State v. Ziehfeld*, 23 Nev. 304, 34 L.R.A. 784, 62 Am. St. Rep. 806, 46 Pac. 802; *Farley v. Farley*, 94 Ala. 501, 33 Am. St. Rep. 141, 10 So. 646; *Norman v. Norman*, 121 Cal. 620, 42 L.R.A. 343, 66 Am. St. Rep. 74, 54 Pac. 143; *Morrill v. Palmer*, 68 Vt. 1, 33 L.R.A. 411, 33 Atl. 829; *Com. v. Munson*, 127 Mass. 459, 34 Am. Rep. 411; *Bynon v. State*, 117 Ala. 80, 67 Am. St. Rep. 163, 23 So. 640; *Poole v. People*, 24 Colo. 510, 65 Am. St. Rep. 245, 52 Pac. 1025; *Smith v. Smith*, 84 Ga. 440, 8 L.R.A. 362, 11 S. E. 496; *Teter v. Teter*, 101 Ind. 129, 51 Am. Rep. 742; *Renfrow v. Renfrow*, 60 Kan. 277, 72 Am. St. Rep. 350, 56 Pac. 534; *Clark v. Clark*, 52 N. J. Eq. 650, 30 Atl. 81; *Peck v. Peck*, 12 R. I. 485, 34 Am. Rep. 702; *Rooker v. Rooker*, 3 Swabey & T. 526, 33 L. J. Prob. N. S. 42, 9 Jur. N. S. 1329, 12 Week. Rep. 807; *Reg. v. Millis*, 10 Clark & F. 534, 8 Jur. 717, 17 Eng. Rul. Cas. 66; *Meister v. Moore*, 96 U. S. 76, 24 L. ed. 826; *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677; *Carmichael v. State*, 12 Ohio St. 553; *Williams v. Williams*, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98; *Spencer v. Pollock*, 83 Wis. 215, 17 L.R.A. 848, 53 N. W. 490; *Thompson v. Nims*, 83 Wis. 261, 17 L.R.A. 847, 53 N. W. 502; *Lanham v. Lanham*, 136 Wis. 360, 17 L.R.A.(N.S.) 804, 128 Am. St. Rep. 1085, 117 N. W. 787; *Severa v. Beranak*, 138 Wis. 144, 119 N. W. 814.

Timlin, J., delivered the opinion of the court:

The respondent had a judgment for divorce and alimony against the appellant in

the circuit court, and upon this appeal appellant raises the point that there was no marriage. The circuit court upon sufficient evidence found: "That on or about August 15, 1898, at Milwaukee, Wisconsin, the plaintiff and the defendant agreed to take one another as husband and wife, and lawfully became husband and wife, and subsequently, and from the time of the making of such contract, and up to about the 10th day of May, 1911, the plaintiff and the defendant lived and cohabited together, and were known in the community in which they lived, in the city of Milwaukee, in the state of Wisconsin, as husband and wife, and during said time the defendant at all times represented and held out that the plaintiff was his wife, and the plaintiff represented and held out that the defendant was her husband." This, we take it, fairly means that an oral contract of marriage *per verba de presenti* was made between the parties and consummated by cohabitation and corroborated by holding themselves out to the public as husband and wife. No question of the competency of the parties is made.

The appeal fairly raises the question of the validity of such marriage, because if there was no marriage there could not be alimony. 2 Bishop, Marr. Div. & Sep. § 855, and cases cited. This is in harmony with our statute law wherein § 2361, Wis. Stat., provides for support of the wife or minor children and suit money during the pendency of an action for annulment of marriage, while alimony is authorized only in actions for divorce. Id. § 2364.

The causes for which an action to annul the marriage may be brought are specified in § 2351, Id., and cover void as well as voidable marriages, but no annulment suit is authorized by statute upon the ground of failure to obtain a marriage license or to solemnize or celebrate the marriage before a civil officer or a clergyman as required by §§ 2331-2339g, Id. The question whether there may be in this state a marriage legally valid and binding when resting only upon an oral agreement entered into by competent parties without witness or ceremony of any kind, to then take each other for husband and wife, consummated by cohabitation and by holding themselves out to the public as married, has never heretofore been directly presented to this court for decision.

In *Martin v. Ryan*, 2 Pinney (Wis.) 24, one sued for an antenuptial debt of his alleged wife attempted to escape liability on the ground that the person who officiated at the alleged marriage as a minister of the gospel had not filed his credentials of ordination as required by statute. Among other reasons for holding this plea insuffi-

cient, the court said *arguendo* that, after the ceremony, the parties thereunto lived together as man and wife, and Martin had recognized the woman as his wife before the world. There was in this case a ceremony. *Williams v. Williams*, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98, was an action brought to recover dower, the plaintiff resting her right upon the claim that she was the widow of one Williams. There was a formal or ceremonial marriage contract between the plaintiff and said Williams on May 9, 1870, but this was alleged to be void because plaintiff was at the time the lawful wife of one Jones, from whom she had been divorced by a judgment of the circuit court for Kenosha county in November, 1870. The plaintiff contended that this decree of divorce did not conclusively establish that she had ever been lawfully married to Jones, and that, in fact, she had not, because Jones had a lawful wife living at the time plaintiff was married to him, and who was still living. These were apparently all formal or ceremonial marriages, but in answer to a contention of the plaintiff's counsel that a valid marriage should be presumed to have taken place between the plaintiff and Williams after she secured the divorce from Jones, and in declining to so hold because the relations between the plaintiff and Jones were hypothetically unlawful and meretricious, the court said: "The law of this state declares that marriage is a civil contract (§ 2328, Rev. Stat. 1878), and there is no statute law which points out in what manner the contract must be entered into to render it valid. It need not be in writing or in the presence of witnesses, but there must be an agreement between the parties that they will hold toward each other the relation of husband and wife, with all the responsibilities and duties which the law attaches to such relation, otherwise there can be no lawful marriage." This case came up again in 63 Wis. 58, 53 Am. Rep. 253, 23 N. W. 110, where it was ruled that the divorce judgment did not estop the plaintiff from showing she was never legally married to Jones because at the time of her supposed marriage to him he had a wife living, hence that she was entitled to dower as the lawful wife of Williams. In *Spencer v. Pollock*, 83 Wis. 215, 17 L.R.A. 848, 53 N. W. 490, there was a proceeding to determine the descent of lands, and a claim that the deceased owner left surviving him a widow. The finding of the circuit court was to the effect that the relations between deceased and this claimant were meretricious in their inception, and this decision was affirmed. True, it is rather assumed that no ceremonial marriage was requisite; this court saying

after referring to the testimony: "From this testimony it is claimed that a common-law marriage is proven." A decision that there was no valid marriage at common law or otherwise does not expressly cover the question here presented. In *Thompson v. Nims*, 83 Wis. 261, 17 L.R.A. 847, 53 N. W. 502, there was an appeal from a judgment of the circuit court adjudging Julia L. Nims, since deceased, to be the widow and only heir at law of one Thompson, deceased intestate. It was shown that the claimant and Thompson left the house of her father and mother apparently with the full knowledge and consent of the latter, with household goods, declaring that they were to be married. They stopped that day at a hotel, and after arriving there Thompson went out and returned with a person whom the claimant believed was a minister. The court did not allow the claimant to testify as to what further took place with reference to the marriage contract, and no other witness was produced. She further testified that this person remained in the room about half an hour, that after that time she had always borne the name of Mrs. Thompson, and that she and Thompson lived together and held themselves forth as husband and wife. This testimony tended to prove that some ceremony of marriage took place before a person thought to be a clergyman. It was sufficient to support the judgment below. This court in the opinion repeated what was said in *Williams v. Williams*, supra, and went further: "This agreement is a fact to be proven. It may be proven by circumstantial evidence as many other facts are proven. In this case there is no direct evidence that these parties promised to assume the relations of husband and wife, but the circumstances proven seem to us very persuasive and to justify the finding that there was a marriage in fact."

In *Lanham v. Lanham*, 136 Wis. 360, 17 L.R.A. (N.S.) 804, 128 Am. St. Rep. 1085, 117 N. W. 787, there was an application by the woman for her support out of the estate of one Lanham, deceased, based on the claim that she was the widow of said deceased. She was married to the deceased by ceremony before a justice of the peace at Menominee, Michigan, and returned with Lanham to Wisconsin to reside; the parties immediately assumed the relations of husband and wife, and lived and cohabited together until Lanham's death. This marriage was within one year from the date of her divorce from one Sherman, and forbidden by statute, and it was held invalid. The marriage was further attempted to be upheld on the ground that there was a common-law marriage resulting from the fact that the parties lived and cohabited to-

gether as husband and wife for about six months after the expiration of the year, and after her disability to contract marriage had ended. This court, assuming apparently that there could be such a thing as a valid "common-law marriage," held the evidence insufficient to establish that form of marriage. In *Severa v. Beranak*, 138 Wis. 144, 119 N. W. 814, the question came up with reference to a marriage contracted within a year after divorce, and therefore invalid. The court below held there was a common-law marriage between the parties. This decision was reversed, this court saying: "The conclusion that there was a common-law marriage between the parties under the facts aforesaid cannot be upheld."

These decisions clearly indicate that the judges of this court understood that a valid marriage contract could be made by mere private oral agreement between parties competent, if consummated by cohabitation as husband and wife and corroborated by holding themselves forth to the public as married. The same status grew out of a contract so made, performed, and corroborated as resulted from a formal or public solemnization of the contract before an officer or a clergyman, and the statutes on the subject have not since been changed in any respect material to this question. It may not be out of place, however, for me to notice the law on this subject elsewhere.

In Kent's Commentaries, which has stood for a long time as a reliable text-book on American law, it is said: "If the contract be made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage in the absence of all civil regulations to the contrary, and which the parties (being competent as to age and consent) cannot dissolve, and it is equally binding as if made *in facie ecclesie*." 2 Kent, Com. 14th ed. p. 87. That part of the sentence relating to contracts for the future has been disapproved in *Cheney v. Arnold*, 15 N. Y. 345, 69 Am. Dec. 609, and in other cases. The law as determined by the instant case is affirmatively stated as applied to the facts before the court, and much narrower than the foregoing quotation. It is unnecessary to negative questions not argued and not before the court on this appeal. Whether such a marriage would be upheld where there was no consummation by cohabitation or corroboration by holding themselves out as married, we are not called upon to decide. Blackstone states the law on this subject more cautiously as follows: "Any contract made *per verba de presenti*, or in words of the present tense, and in case of

cohabitation *per verba de futuro*, also, between persons able to contract, was before the late act deemed a valid marriage to many purposes; and the parties might be compelled in the spiritual courts to celebrate it *in facie ecclesiae*. But these verbal contracts are now of no force to compel a future marriage. Neither is any marriage at present valid that is not celebrated in some parish church or public chapel, unless by dispensation from the archbishop of Canterbury." [1 Bl. Com. 439.]

For an instance where the parties to an informal or irregular marriage contract were cited before the ecclesiastical court, and required to have a regular marriage ceremony performed, see *Baxter v. Buckley*, 1 Lee, Eccl. Rep. 42. It would be impractical to review the great number of cases in the courts of this country upon this point. They are well summed up and the cases collected in 26 Cyc. 837, 838, note 59, Id. 840, and note 74, and reach back to a very early period in our history.

"In pursuance of the rules just stated, and of the statutes in many states declaring marriage to be a civil contract, it is held that a valid common-law marriage may be constituted by a mutual agreement between two parties who are both capable of entering into marriage, and as to whom no impediments exist, whereby they presently undertake and contract to become husband and wife, and mutually promise to continue that relation permanently, and thereupon assume their marital duties and cohabit together."

"Statutes requiring marriages to be solemnized in a particular manner or before certain authorized persons, or under a license, although they may impose penalties for nonobservance, are generally construed as directory only, in so far as this, that a marriage valid at common law, but not celebrated in accordance with the requirements of the statute, will be held valid and binding unless expressly declared void by the statute." Id. 840.

After these American courts had become committed to this view of the "common law," the highest court of England in the year 1844, in *Reg. v. Millis*, 10 Clark & F. 534, 8 Jur. 717, 17 Eng. Rul. Cas. 66, by an equal division affirming an equal division below, decided against the existence of any such rule in the common law of that country. This was followed in *Beamish v. Beamish*, 9 H. L. Cas. 274, 11 Ir. C. L. Rep. 514, 8 Jur. N. S. 770, 5 L. T. N. S. 97, and it is now established as the rule of the common law in the place of the origin of that law.

These cases are severely criticized by Mr. Bishop in 1 Bishop on Marriage, Divorce, & L.R.A.1915E.

Separation, §§ 400 to 422, where the position of the courts of Massachusetts, Maryland, and Maine on this question is also referred to. In *Milford v. Worcester*, 7 Mass. 48 (1810), a marriage by oral agreement of the parties, although consummated, was held void and insufficient to confer upon the woman a legal settlement in the town in which the alleged husband was domiciled. Considering apparently the expediency of recognizing such marriages, the court advised young women of honor to shun the man "who prates about marriage condemned by human laws, as good in the sight of heaven. This cant, she may be assured, is a pretext for seduction." This is worthy of consideration, but is not entitled to great weight in interpreting a statute which declares marriage a civil contract. Besides, the cases come before the courts after the harm is done, and it cannot be very inequitable to hold the seducer to his contract. The lessons of the past are not to be lightly disregarded, and almost every people have some mode of recognizing these informal marriages. The laws of the Jewish people upon this subject received great consideration, experts were examined, and the works of the learned Maimonides and the Beth Joseph consulted in *Lindo v. Belisario*, 1 Hagg. Consist. Rep. 216, Id. Appendix p. 7, and it was thought that under both the Jewish and the canon law such marriages were recognized. By the canon law as it existed before the Council of Trent in 1563 (*Hist. Council of Trent, Brent's Trans. [1675] p. 707*), and after that in those countries which denied the authority of that council, this private contract of marriage was recognized and upheld.

Phillimore, in chapter 7 of vol. 1, 2d edition, of his learned treatise on Ecclesiastical Law, says that although this law desired marriages to be solemnized openly, it did not consider such public solemnization essential to the validity of the bond, and cites the learned and much-quoted opinion in *Dalrymple v. Dalrymple*, 2 Hagg. Consist. Rep. 54, 17 Eng. Rul. Cas. 11, to the same effect. Sometimes the equities are worked out by permitting a suit for annulling such marriage in which the marriage obtains a partial recognition, or a formal marriage may be decreed, as by the Code Napoléon, which by § 165 requires that marriage be celebrated before a civil officer, but further specifies who may impeach an informal or irregular marriage, and by § 201 provides that a marriage which has been declared null draws after it nevertheless civil consequences as well with regard to the married parties as to their children when the marriage has been contracted in good faith. By the German Civil Code a

marriage is declared void if not entered into with the prescribed ceremonial. Section 1317. But the invalidity of marriage upon this ground is established by means of an action for nullity (*Nichtigkeitsklagen*), and the voidable marriage is valid to all intents and purposes until avoided by such a suit. Id. §§ 1324, 1329. Indeed, the notion of an inferior sort of contract made without ceremony, good when fully executed, but otherwise without enforceable obligation, runs through all law. It is reflected in the ancient Roman "*pactum*," "*sponsio*," and "*jusjurandum*," as well as in our law, which at different stages of its growth required for the validity of certain contracts the ceremonial of a seal, livery of seisin, signature or writing, earnest money, etc. This is also observable in the Codes mentioned, and in Walton's Civil Law in Spain and

Spanish America, arts. 1216, 1223, and 1225. So that where the statute law declares marriage a civil contract, although the duties and obligations arising from such contract and the status thereby created are fixed by law, there are many precedents, reasons, and analogies for the rule that, in the absence of statute expressly declaring such marriage invalid, an informal contract of marriage,—i. e., one made between competent parties without the legal ceremonies, and in the absence of the clergyman or civil officer,—is, when consummated by cohabitation, valid and binding upon the parties.

It follows that the judgment of the Circuit Court should be affirmed.

Siebecke, J., took no part.

Note.—*Sufficiency of words and conduct to constitute common-law marriage, or of circumstantial evidence to imply marriage.*

- I. In general, 60.
- II. Marriage *per verba de presenti*, 62.
- III. Marriage *per verba de futuro cum copula*, 70.
- IV. Habit and repute, 72.

I. In general.

The general principles relating to non-ceremonial marriages are clearly and firmly fixed.¹ Without the intervention of a clergyman or magistrate, persons may constitute² themselves husband and wife by the exchange of words of consent. When not affirmatively shown, consent may be evidenced by the acts and conduct of the parties. These things are a matter of certainty. But difficulties are encountered in applying the principles to a particular state of facts,—in ascertaining whether, in a par-

ticular instance, the marriage relation shall be held to exist. The ultimate requirement is marital consent, the trying question whether it was in fact expressly exchanged or circumstantially manifested. Sir William Scott said in the leading case of *Dalrymple v. Dalrymple* (1811),³ whose great opinion lays down the principles which have become the basis of our common law: "It is said that it must be a deliberate contract. It is, I presume, implied in all contracts that the parties have taken that time for consideration which they thought necessary, be that time more or less, for nowhere is there assigned a particular *tempus deliberandi* for the marriage contract, any more than for any other contract. It is said that it must be serious; so surely must be all contracts; they must not be the sports of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatever; at the same time it is to be presumed that serious expressions applied to contracts of so serious a nature as the disposal of a man or woman for life have a serious import. It is not to be presumed *a priori* that a man is sporting with such dangerous playthings as marriage engagements. Again, it is said that the *animus contrahentium* must be regarded. Is that peculiar to the marriage contract? It is in the intention of the parties that the substance of every species of contract subsists, and what is beyond or adverse to their intent does not belong to the contract. But then that intention is to be collected (primarily at least) from the words in which it is expressed; and in some systems of law, as in our own, it is pretty exclusively so to be collected. You are not

¹ These are discussed at length in the note to *Grigsby v. Reib*, ante, 8.

² A difference in view as to whether papers bearing a declaration or contract of marriage by the parties are deemed to constitute the marriage, or to merely be evidence of the same, was alluded to in *Dalrymple v. Dalrymple* (1811) 2 Hagg. Consist. Rep. 54, 17 Eng. Rul. Cas. 11, but the court said that the distinction was not very material in its effect, because if it were to be considered that such papers so qualified were to be treated only as evidences, yet, if free from all possible impeachments, they made full faith of the marriage, they sustained it as effectually as if, according to other ideas, they directly constituted it; and that they had then become *præsumptiones juris et de jure*, which established the same conclusion although in another way.
L.R.A.1915E.

³ 2 Hagg. Consist. Rep. 54, 17 Eng. Rul. Cas. 11.

to travel out of the intention expressed by the words, to substitute an intention totally different and possibly inconsistent with the words. By the matrimonial law of Scotland a latitude is allowed, which to us (if we [the consistory court] had any right to exercise a judgment on the institutions of other countries with which they are well satisfied) might appear somewhat hazardous, of substituting another serious intention than that which the words express, to be proved by evidence extrinsic, and totally, as we phrase it, *dehors* the instrument."

It is impossible to fix a standard by which the evidence of a marriage should be measured in every case. If what has been said and done evidences an intention to assume the marriage status, it is sufficient whatever be the form of expression used.⁴ And even if the words do not *ex vi termini* import marriage, they are sufficient where it is otherwise shown that they were used with

matrimonial intent. In short, if the intent is good, the parties are not to suffer because they may have been lacking in vocabulary, or unfortunate in the choice of words.⁵ Of course, there are certain qualities which the contract must have, such as unconditionally⁶ and mutuality⁷ for their absence affirmatively indicates nonconsent.

Likewise, where express consent is not made to appear, the acts of the parties may be resorted to, and if they show matrimonial intent, an inference of marriage may be drawn.⁸ Indeed, it has been said that the acts of the parties showing their own conception of their relations are the best test of the legality of those relations.⁹ It may appear that the parties knew that they were not husband and wife and that they strove merely to keep up an outward appearance of marriage.¹⁰ Their conduct on the other hand may be such as to indicate moral purity and marital intent, and if so it is given

⁴ *Herald v. Moker*, 257 Ill. 27, 100 N. E. 277. (It is to be observed that common-law marriages can no longer be contracted in Illinois, because the act of July 1st of 1905, of that state, declares that all common-law marriages thereafter entered into should be null and void. *Wilson v. Cook*, 256 Ill. 460, 43 L.R.A.(N.S.) 365, 100 N. E. 222.)

All that is essential to establish the marriage relation in Nebraska is that the parties, being of legal capacity, freely consent thereto; and their consent need not be expressed in any especial manner or by any prescribed form of words, but may be sufficiently evidenced by any clear and unambiguous language or conduct. *University of Michigan v. McGuckin*, 62 Neb. 489, 57 L.R.A. 917, 87 N. W. 180, reaffirmed on rehearing in 64 Neb. 300, 89 N. W. 778, followed in *Brisbin v. Huntington*, 128 Iowa, 166, 103 N. W. 144, 5 Ann. Cas. 931.

⁵ Nothing more is needed than that, in language which is mutually understood or in any mode declaratory of intention, the parties accept each other as husband and wife; and where the words do not of their natural meaning or by common use amount to matrimony, yet, if the parties intend marriage and if their intention sufficiently appears, they are inseparably man and wife not only before God, but also before man. *Dickerson v. Brown*, 49 Miss. 357.

The law does not require the agreement to be couched in the formal language of the learned or of business people; and if the court can be satisfied that the persons assumed all the relations of married people, with the honest purpose of living together as man and wife, the relation would thereby become as firmly fixed as though the most rigid formality of marriage had been observed by the parties. *Porter v. United States*, 7 Ind. Terr. 616, 104 S. W. 855 (right of woman to testify against alleged husband in prosecution for crime). L.R.A.1915E.

⁶ A mutual contract to live together "so long as mutual affections shall exist" is insufficient as a marriage contract. *Peck v. Peck*, 155 Mass. 479, 30 N. E. 74.

⁷ The fact that a man believed in common-law marriages is of no probative force in establishing such a marriage as a basis for allowing the woman's claim to dower in his estate, for the fact that he believed in them is no sign that he entered into one. *Bishop v. Britain Invest. Co.* 229 Mo. 699, 129 S. W. 668, Ann. Cas. 1912A, 868. It takes two to make a bargain, and such evidence, of course, has still less a tendency to prove the other party's consent.

The fact that a letter written to a woman with whom the writer was cohabiting was not delivered until two years after it was written is sufficient to prevent it from becoming a contract of marriage between them, at least before its delivery. *Stewart v. Menzies* (1841) 8 Clark & F. 309 (Scotch law).

See also footnotes 18, 19, 20, and 21.

⁸ The interchange of matrimonial consent which constitutes marriage may be proved by the acknowledgment of the parties, whether it is made after the event or whether oral or written, or by the subsequent cohabitation of the parties avowedly as husband and wife. *Yelverton v. Longworth* (1874) 4 Macq. H. L. Cas. 746, 10 Jur. N. S. 1209, 11 L. T. N. S. 118, 13 Week. Rep. 235.

See also part V. of the note to *Grigsby v. Reib*, ante, 33.

⁹ Acts of the parties showing their own conception of their mutual relations are the best test of the legality of a marriage of the celebration of which no proof has been or can be adduced. *Mazzei v. Gruis*, 128 La. 860, 55 So. 555.

¹⁰ Mere appearance to the world and habit and repute did not necessarily make a marriage by the law of Scotland, if it could be sufficiently inferred that the con-

full effect, although one of the parties may claim never to have been married,—for such a claim will be deemed, unless the contrary appears, to refer to a ceremonial marriage in accordance with statute and general custom. 11

tract of marriage had never truly been formed by the consent of the parties. No marriage was deemed to have been contracted where it appeared that the circumstances on which the belief of others might be founded, or which led to the inference, were permitted or arranged for the purpose of disguise and appearance only, and that the parties privately knew that no tie actually existed between them. *Robertson v. Crawford* (1840) 3 Beav. 102.

11 The testimony of the mother in a bastardy proceeding, that she was never married to the father of the child, is not conclusive against the existence of a common-law marriage, where her testimony is merely a general conclusion, and there is nothing to show that she did not mean that they had never entered into a formal marital contract solemnized through the intervention of some minister or magistrate authorized to celebrate it. *State v. Worthingham*, 23 Minn. 528.

12 It was said *obiter* in *Lindo v. Belisario* (1795) 1 Hagg. Consist. Rep. 216, that present words by which each takes the other for his or her spouse, spoken in the presence of two witnesses, and accompanied by delivery of a ring, would constitute complete marriage according to the law of nature.

See also *BECKER v. BECKER*.

Where a man who kept a woman in his house as mistress, she bearing him children, and he at all times recognizing that their relations might terminate in matrimony, finally after several years called servants to witness his marriage with her, declared that she was his wife, and her children his, and she gave him her hand and courtesied in assent, and acquaintances afterward congratulated her as his wife,—it was held that such constituted a complete marriage by present consent. *M'Adam v. Walker* (1813) 1 Dowl. P. C. 148.

A writing signed in the presence of two witnesses, and stating that the parties "do hereby acknowledge themselves before the following witnesses to be man and wife," was a good marriage at common law *per verba de presenti*. *Mathewson v. Phoenix Iron Foundry*, 20 Fed. 281.

Open living together as man and wife in pursuance of a mutual contract to that end was said in *Sprung v. Morton*, 182 Fed. 330, to be sufficient to constitute the parties husband and wife, even though an earlier ceremony by which they were sought to be united in marriage was invalid.

Where, after divorce for the husband's adultery, the parties agreed in the presence of witnesses to "let the past be the past, and from that time on they would again live together as man and wife," and from L.R.A.1915E.

II. *Marriage per verba de presenti*.

There are comparatively few instances of mutual unambiguous consent, by which each party in terms takes the other as a spouse, 12 in addition to the attempted but

that time on they did so live together,—it was held that this constituted a valid marriage at common law in Alabama, where it is required not only that the parties agree but that they cohabit as man and wife thereafter. *Mickle v. State*, — Ala. —, 21 So. 66 (competency of the woman as a witness against the man). For Alabama cases holding that cohabitation must follow a void ceremony, see part III. of the note to *Grigsby v. Reib*, ante, 23.

The words "I now take you for my wife" and "I now take you for my husband," supplemented by a contemporaneous statement of the man that "from this night we are husband and wife," were regarded as a contract *per verba de presenti* in *Hutchinson v. Hutchinson*, 196 Ill. 432, 63 N. E. 1023, affirming 96 Ill. App. 52.

It appears not to have been questioned that a contract reading, "Contract of marriage between. . . . Believing a marriage contract to be perfectly lawful, we do hereby agree to be husband and wife, and to hereafter live together as such" (signed), was in form sufficient to constitute a common-law marriage, and the question raised in the case was as to the necessity for cohabitation and holding out following the contract *per verba de presenti*, which was answered in the negative. *Hulett v. Carey*, 66 Minn. 327, 34 L.R.A. 384, 61 Am. St. Rep. 419, 69 N. W. 31.

A mutual agreement to marry each other made by parties competent to marry, in the presence of witnesses, together with a written agreement to the same effect signed by the parties and the witnesses, is sufficient to make a valid common-law marriage. *State v. Bittick*, 103 Mo. 183, 11 L.R.A. 587, 23 Am. St. Rep. 869, 15 S. W. 325 (prosecution for taking away female under age of eighteen years for purpose of concubinage).

That contemporaneous statements of the parties, that "I take this woman (man) from this time to be my wife (husband)," were sufficient as mutual consent *de presenti*, which constitutes a valid marriage in common law, seems not to have been questioned in *Imboden v. St. Louis Union Trust Co.* 111 Mo. App. 220, 86 S. W. 263.

It has been held that a mutual contract of marriage between a decedent and a woman claiming to share in his estate as widow is not established by testimony of the woman that, although they lived together in illicit relations for a time, they entered into a contract of marriage before her mother, who read the marriage ceremony of the Episcopal church to them, each answering the questions appearing therein; but it does not appear whether the questions were answered in the affirmative or negative,

invalid ceremonial marriages, which are considered at the close of this division of this note. More often ambiguous expressions which require explanation by circumstances are used. This fact has led to some confusion as to the necessity of cohabitation following express consent. The correct rule appears¹³ to be that consent alone is sufficient, cohabitation being necessary only to indicate consent when not otherwise shown, —to explain the sense in which ambiguous

words are used. For instance, where the parties merely use such terms as "live together,"¹⁴ or "bind us together,"¹⁵ or words which are merely permissive,¹⁶ the circumstances must be examined to ascertain the understanding of the parties, which is the criterion.¹⁷ The same is true where the words are merely declaratory,¹⁸ or take the form of an introduction, or of a registration at a hotel.¹⁹ Such a declaration is generally unilateral²⁰ and does not there-

and, when the woman was asked as a witness if she took the man as her husband, and he took her as his wife, she testified evasively that they answered the questions propounded in the service. *Weidenhott v. Primm*, 16 Wyo. 340, 94 Pac. 453. Although the court lays particular stress upon the fact that the nature of the answers to the questions was not established, it is to be observed that the court was clearly influenced in making its decision by the fact that there was evidence tending to show that the woman's reputation for veracity was bad, and by the further fact that the marital relation was negated by the general conduct and relations of the parties, including an adverse repute and evidence that after their separation the woman had sustained illicit relations with another man. However, if the woman's testimony as to the marriage were to be believed, and if the case were in general such as would constrain a court to uphold the marriage if possible, it is thought that in most jurisdictions, and probably in Wyoming, the fact that the answers to the questions were not shown would not be regarded as negating marriage.

¹³ See part III. of the note to *Grigsby v. Reib*, ante, 23.

¹⁴ Where the agreement was not to live together as husband and wife, but merely to live together, and the man never held the woman out to the world as his wife, and their repute negated marriage, it was held that there was no marriage which would disentitle the man to take under a provision of his father's will giving him a home on the farm so long as he should stay unmarried. *Soper v. Halsey*, 85 Hun, 464, 33 N. Y. Supp. 105.

¹⁵ That the court in *Re Drea*, 9 Pa. Co. Ct. 559, regarded as ineffectual a man's remark accompanying a ring which he handed to a woman, "That is to bind you and I together as long as we live," and her reply, "That is all right," is indicated by its statement that the man did not say how the ring was to bind them together, — whether in the marriage tie or in cohabitation without the wedding celebration.

¹⁶ A statement by a man to a woman that she could come and be his wife, and her reply that she would go, do not constitute a contract of marriage *per verba de præsenti*. *Marks v. Marks*, 108 Ill. App. 371.

¹⁷ A woman who testifies in an action by her to establish her right as widow in community property, that the alleged hus-

band came to her a perfect stranger and proposed marriage, that she went and lived with him after their second meeting, and that she later tired of the relation and "stopped being his wife," and "was not his wife from then on," thereby indicates that she did not regard herself as a lawful wife, and she cannot establish the marriage relation upon the theory that his proposal and her acceptance constituted an express exchange of consent, especially where it appears that she had previously lived in illicit relations with another man and that her conduct and her cohabitation and her relations with the alleged husband were inconsistent with marriage. *Schwingle v. Keifer*, — Tex. Civ. App. —, 135 S. W. 194.

¹⁸ A writing signed by a man and reading that it is to certify that a named woman "is my true and beloved wife, whom I love, honor, and cherish," is in no sense a contract of marriage, but is at the most evidence of a recognition of a status then existing, and constitutes therefore merely a circumstance to be considered in connection with other circumstances on the existence of a marriage. *Bates v. Bates*, 7 Misc. 547, 27 N. Y. Supp. 872.

¹⁹ Neither an agreement nor the requisite cohabitation under the California statute is shown by the fact that on a short trip the parties registered on a boat and at hotels as man and wife, he introducing her as his wife on the boat, since the introduction and the registration as man and wife, while some evidence, were insufficient to constitute a contract, and the mere sleeping together on a boat and in hotels on a short trip does not make the parties habitants of the boat or hotel so as to render their association together cohabitation and consummation. *People v. Lehmann*, 104 Cal. 631, 38 Pac. 422 (defense to action for seduction under promise of marriage). By an amendment to the California Code in 1895, the phrase, "or by a mutual assumption of marital rights, duties, or obligations," was eliminated, so that thereafter § 55 read: "Consent alone will not constitute marriage; it must be followed by solemnization authorized by this Code." Under such a provision, of course, no marriage was valid unless solemnized by a person authorized by the statute. *Norman v. Norman*, 121 Cal. 620, 42 L.R.A. 343, 66 Am. St. Rep. 74, 54 Pac. 143.

²⁰ A woman's consent to sexual intercourse upon the statement that they are

fore satisfy the requirement that both parties must consent.²¹ However, unqualified words of present consent need not be used by both parties. If, for instance, the words of the woman do not show unqualified consent to the man's suggestions of marriage, the circumstances may show that whatever words she did use were employed by her in

the sense of present marriage.²² Indeed, the woman may assent by acts unaccompanied by words; this is indicated by the cases in which the man suggests marriage in present terms and there follows an immediate assumption of the marriage relation under circumstances implying that she is consenting to present marriage,²³ and not merely

man and wife "before God and man" does not amount to a present contract of marriage on her part. *McKenna v. McKenna*, 180 Ill. 577, 54 N. E. 641.

A finding that no common-law marriage was contracted was upheld in *Topper v. Perry*, 197 Mo. 531, 114 Am. St. Rep. 777, 95 S. W. 203, involving the right of an alleged widow and a posthumous child to share in the father's estate as against his next of kin, where it appeared by the woman's own testimony that the parties were engaged and that the man wished to enjoy "marriage relations" with her, and upon her refusal until marriage, he declared that they were just as much man and wife as if a ceremony had been performed, whereupon she consented to such relations; and it further appeared that they did not openly live together until six months later, that they were regarded in the neighborhood as having improper relations, and that after living together two months the alleged husband was shot by her son by a former marriage because he would not have a ceremony performed, and that she at all times regarded a ceremony as necessary. The court intimated, at least, that the alleged contract between the parties was not mutual, but was, like that in *McKenna v. McKenna*, supra, merely a declaration on the part of the man that the parties were husband and wife, accompanied with no similar language on the part of the woman, and no assent on her part apparently but consent to sexual intercourse, and, as is shown above, upheld a finding that the cohabitation and repute were not sufficient to raise an inference of marriage.

²¹ Where, so far as the evidence showed, only the man used contractual words, stating that he took the woman as his wife, it was held that there was no marriage *per verba de presenti*. *Graham's Case* (1837) 2 Lewin, C. C. 97 (prosecution for bigamy).

And it was held by a minor Pennsylvania court that where a woman had been ceremonially married to a man during the lifetime of his first wife, words used by the second after he had obtained a divorce from the first wife, amounting to nothing more than an expression of a wish for continued relations, which had been ostensibly marital, were insufficient as mutual consent where they elicited no reply from him, even if they amounted to a consent on her part. *Weitzel v. Central Lodge*, A. O. U. W. 1 Pa. Dist. R. 143.

²² Even if the acts of the parties, when the man called a woman's children into a room in which the man and woman were, and stated to them that he and their

mother had decided to live together as man and wife, and that he wished to leave everything to her and her heirs upon his death, and she replied that it suited her, are, standing alone, insufficient to show a present contract of marriage, yet where they lived together as man and wife, and after the birth of a child entered into another marriage contract which contained express language of the present marriage, they thus showed that they understood what they said in the first instance to be a legal contract of marriage, and therefore there was held to be a contract of marriage at common law. *Davis v. Stouffer*, 132 Mo. App. 555, 112 S. W. 282.

An erroneous decision in which the circumstances showed unquestionably that the parties desired and intended marriage occurred in one of the earliest Pennsylvania cases on the question, in which the relations had been illegal, although apparently not wilfully illicit, in the beginning, and the parties having been advised by their lawyer to contract a marriage, the man thereupon said in the lawyer's presence, "I take you for my wife," and the woman, upon being advised that she should say the same, declared, "To be sure he is my husband good enough." It was held that her words were not a present consent, but referred to the past illegal relation, and therefore did not constitute a valid marriage *per verba de presenti*. *Hantz v. Sealy*, 6 Binn. 405.

²³ Where it appears that the parties set a certain day for the marriage and that on that day the woman started with the man, at his request, for the purpose of getting a license; that he later made an excuse for not getting it that day; that on the evening of the same day the man called at the woman's house and, after assuring her that it "was all right," and saying that he was "a man, no boy," occupied the same bed with her that night, and thereafter lived and cohabited with her and introduced her to his friends as his wife, the presumption against vice, and in favor of innocence, applies, and there is an inference that there was a present contract of marriage on the day in question. *Plattner v. Plattner*, 116 Mo. App. 405, 91 S. W. 457 (suit against the alleged husband for divorce and alimony).

Although the relations between the parties were illicit in the beginning, and although there was testimony that the woman went by her maiden name until the death of the man; that she received a conveyance in such name, and that the man made numerous conveyances describing himself

to sexual intercourse.²⁴ The fact that in such a situation the woman may have regarded a ceremony as necessary does not negative the existence of the marriage status where she yielded after being assured by the man that no ceremony was necessary.²⁵ Such a circumstance really shows that her

original purpose was matrimonial,—an initial situation which often moves a court to view the other circumstances less critically.

The force of present words is not overcome by a supplemental agreement for a future ceremony which is anticipated by the

man and wife to constitute a common-law marriage,—especially so where there were no meretricious relations between the parties before the contract and there was no impediment to a marriage. *Heymann v. Heymann*, 218 Ill. 636, 75 N. E. 1079 (wife's suit for separate maintenance). So the marriage relation was held to exist where the man paid the woman attentions for several months and finally proposed marriage and was accepted, the parties set a date for the marriage, and the man persuaded the woman to waive the ceremony as he did not believe in marriage ceremonies, and on the day appointed the woman left home stating that she was to be married on that day, and after meeting the man he placed a ring upon her finger stating, "This is your wedding ring; we are married. . . . I will live with you and take care of you all the days of my life as my wife," and she assented, and he thereupon took her to a boarding house where he represented her to be his wife, having engaged board in advance for himself and wife, and they there cohabited for about five weeks, after which he abandoned her and soon married another woman, who knew of the relations between the parties. *Bissell v. Bissell*, 55 Barb. 325, 7 Abb. Pr. N. S. 16 (action for divorce). See also *Vincent v. Vincent*, 16 Daly, 534, 17 N. Y. Supp. 497, *infra*. So a finding of marriage was upheld where, following the death of the man's wife, both his attempted intimacy with, and offers of marriage to, a woman who had lived as seamstress in his family, were repulsed by her upon the ground that she regarded a ceremonial marriage as essential, but, upon his representation that if they should make a marriage agreement; her cohabitation with him would be as binding as if a ceremonial marriage had been performed, she finally consented to receive him as her husband, and they secretly cohabited for a time at the family home, after which she removed to another town to a house provided by him, where she assumed another name, but at times represented the man to be her husband, the reason for the secrecy avowedly being his desire to keep the fact from his children by the first wife. *Van Tuyl v. Van Tuyl*, 57 Barb. 235, 8 Abb. Pr. N. S. 5 (claim of alleged widow and her children in the father's estate). Consent between persons whose cohabitation and reputation were consistent with marriage, and who began living together with the consent of the woman's parents, after the man had proposed marriage and assured her that the ceremonial marriage which she had requested was unnecessary, is

as a bachelor, evidence that after the continuance of the illicit relations for a time the man said that he was tired of that way of living, and proposed that they should live together as husband and wife, to which the woman assented, and that, although no marriage ceremony was performed, they lived together as husband and wife and regarded each other as such, he introducing her as his wife and each treating the other as a spouse, was held sufficient to go to the jury on the question of a marriage contract. *Lorimer v. Lorimer*, 124 Mich. 631, 83 N. W. 609, involving an action by the woman to enforce rights as widow against the man's heirs. The court answered the contention that *Clancy v. Clancy*, 66 Mich. 202, 33 N. W. 889, was conclusive against the theory of the marital relations, by not answering it at all, and instead launching the general statement that it was long ago decided in this state, in *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164, that a marriage ceremony was not necessary to constitute a valid marriage, and after the review of numerous authorities from other jurisdictions, adding that the Michigan courts have gone a long way to sustain the validity of a marriage where an agreement to live and cohabit together as husband and wife has been made and acted upon. The majority opinion in the *Clancy* Case holds a contract of concubinage, and not of marriage, to have been made by a writing whereby the parties mutually, and jointly from thenceforth and forever agreed to live as man and wife, but each party retained the right to buy, sell, and transfer their respective properties without question of the other party (action by the wife for separate maintenance). The dissenting and correct opinion in the case states that the majority proceeded upon the theory that matrimony was negated by the use of the word "man" rather than "husband," and also propounds the query, which is indeed significant, as to why, if this contract was intended as one of concubinage, and not of marriage, the rights of each in the separate property belonging to the other should have been reserved and retained.

²⁴ See *McKenna v. McKenna*, 180 Ill. 577, 54 N. E. 641, and *Topper v. Perry*, 197 Mo. 531, 114 Am. St. Rep. 777, 95 S. W. 203, — *supra* footnote 20.

²⁵ The statement of the man, "I give you my word of honor we can stay man and wife. I am your husband, and I am satisfied," accompanied by a statement that no ceremony was necessary, made to allay her express doubts, was held to be a contract *per verba de presenti*, and when followed by cohabitation and holding out as L.R.A.1915E.

parties merely as a confirmation of an informal marriage.²⁶ Conversely, words which of themselves imply futurity are given effect as forming a present contract accordingly as the circumstances show them to have been used in a present sense,²⁷ or to have been understood as postponing the crea-

tion of the marriage status.²⁸ An express future condition, however, is absolutely fatal to a claim of marriage, and cannot be explained away by circumstances. It shows mental reservations which are incompatible with consent. This is true whether the condition relates to the creation of the marriage

not negated by the facts that she originally seemed to regard a ceremony as necessary, and that when, after the man's death, she married for the third time, she represented herself as the widow of her first husband. *Re Janney*, 2 Pa. Dist. R. 145.

It is not essential that the parties use formal words, and it is sufficient if they understand they are consenting to marriage and if they willingly do so. *Com. v. Haylow*, 17 Pa. Super. Ct. 541, holding evidence sufficient to establish marriage in proceedings for divorce where it showed that the man produced a marriage license, which was introduced in evidence, that he stated that that was sufficient, a ceremony being unnecessary, that the woman acted upon the faith of such statement (on the trial she, by her testimony, unconsciously corroborated the claim of good faith), that they cohabited for some four years and he introduced her as his wife and was received by her neighbors as such, that after they separated he continued for a time to contribute to her support, addressed letters to her as his wife, and finally signed a paper reading, "I herewith agree to pay my wife the sum of \$25 per month as long as I live separated from her."

The effect of cohabitation for fourteen years, when the man died, and unqualified reputation among all persons in the community during that time, is not, where the woman, having been assured that a ceremony was unnecessary, consented to an informal marriage and apparently believed in its efficacy, overcome by the fact that she would have preferred a ceremonial marriage and the fact that she described herself as the widow of a prior husband upon her subsequent marriage for the third time. *Re Janney*, supra. The court said that at the most such a representation might indicate that she may have doubted the validity of a union which her whole previous conduct had indicated to be marital.

²⁶ In *Guardians of Poor v. Nathans*, 2 Brewst. (Pa.) 149, the court upheld a contract of marriage in present words although the woman wanted a ceremonial marriage, and the man promised to have one as soon as his father died, where, although the woman may have had some doubt as to the legal effect of a marriage by present words, there was no doubt that she regarded herself as the wife of the man in morals and before God.

A man's words, "I will take you for my wife," his question as to whether the woman was satisfied, and her reply, "Yes," were regarded in *Re Hines*, 10 Pa. Super. Ct. 124, to have been intended as a present contract of marriage, in view of the subae-

quent conduct of the parties, including declarations, cohabitation, and reputation of marriage, although it appeared that at the time of the marriage the man promised to have a ceremony performed, saying that he could not afford it at that time.

²⁷ Where it appeared that a man first satisfied himself, by personal inquiry, of the validity of a divorce between a woman and her former husband, and that he formally proposed to her and was as formally accepted, and at a later day he said to her, "Would you be willing to marry me in this way, that you and I are to live together until death separate us; I take you to be my wife, and you take me to be your husband?" and she replied, "Yes, sir; until death separate us," and then the man said, "Are you willing for that?" and the woman answered, "I guess I would be; but don't you think we had better be married by a minister?" and the man met this objection by saying, "It is just as lawful in this state as if we were married by a minister; all the ministers in creation cannot make you happy or make you do what is right; but if we live together and do what is right, we are just as lawfully married as if a dozen ministers married us,"—it was held that, where it appeared that the woman was convinced by the man's argument and she accepted his offer by immediately commencing to cohabit with him, this was a sufficient present contract of marriage, the court saying in response to the objection that the woman did not say, "I take you," but that she said, "I will be willing to take you," that this was a narrow distinction on which to hang the character of the woman and the legitimacy of her children; and as a further ground for upholding the marriage, the court held that a contract *per verba de futuro* followed by cohabitation as man and wife constitutes a valid marriage. *Re Comly*, 19 Pa. Co. Ct. 184.

²⁸ Testimony of a woman that the man stated that they would be married after a certain event, and that after the event she asked to have the ceremony performed and he always put her off, and that she lived with him as wife some ten years and supposed she was going to be his wife, and expected he would be man enough to keep his word, and that she continuously performed the duties of a wife and cohabited with him although she knew it was a breach of propriety, indicates that the agreement did not constitute a common-law marriage, and she cannot maintain a suit to affirm a common-law marriage. *Judson v. Judson*, 147 Mich. 518, 111 N. W. 78. The court it seems discussed this case from the standpoint of whether there was a contract *per verba de presenti*, and did not allude to

status,²⁹ or to the duration of the relations of the parties.³⁰ On the other hand, a provision for secrecy is an explainable circumstance; while on its face unfavorable to, it does not necessarily negative, marriage.³¹

The clearest instances of unqualified consent are afforded by attempted ceremonial

marriages in which some prescribed element is lacking. In jurisdictions³² in which the statutes prescribing forms and ceremonies are not held to preclude a marriage by informal consent,³³ the courts uphold, under common-law principles, an ostensibly ceremonial marriage,³⁴ whether the same fails

the theory of a contract *per verba de futuro cum copula*.

²⁹ It was held that no present declaration of marriage *ipso facto* was made by a letter to a woman which read: "You and I having lived together as man and wife for some time, I hereby declare you to be my lawful wife in the event of a child being born in consequence of the present connection between us." *Stewart v. Menzies* (1841) 8 Clark & F. 309 (Scotch law).

³⁰ In *State v. Ta-cha-na-tah*, 64 N. C. 614, the court said that even if it should be true that by the law of North Carolina a marriage *per verba de presenti* followed by cohabitation, but not involving any ceremony, was to be deemed a valid marriage (as to which the court expressed no opinion), yet mere cohabitation with an understanding that it may cease at pleasure, as is customary with Indians, could not constitute a marriage according to the laws of the state.

See also *Peck v. Peck*, 155, Mass. 479, 30 N. E. 74, *supra*, I.

³¹ The efficacy of a mutual agreement of marriage to constitute the parties husband and wife is not necessarily affected by an agreement to keep the marriage secret. *Imboden v. St. Louis Union Trust Co.* 111 Mo. App. 220, 86 S. W. 263. Upon a subsequent appeal in this case (128 Mo. App. 555, 107 S. W. 400) a judgment against the party claiming the marriage was affirmed upon the ground that the evidence was insufficient to establish a common-law marriage.

Although it may be evidence that no marriage ever took place, an agreement to keep a marriage secret does not invalidate it where it has been fairly constituted by a clear contract *per verba de presenti*. *Hulett v. Carey*, 66 Minn. 327, 34 L.R.A. 384, 61 Am. St. Rep. 419, 69 N. W. 31.

That secrecy is unfavorable to an inference of marriage from cohabitation and reputation, although not conclusive against it, see *infra*, IV. and also part V. of the note to *Grigsby v. Reib*, *ante*, 31, 33.

In the leading case on this question, decided by the consistory court of London according to the Scottish law, the *lex loci contractus*, a marriage *per verba de presenti* was held to have been contracted where there were in evidence three papers executed by the parties, the first of which contained mutual promises of marriage subscribed by both parties and indorsed "a sacred promise," the second of which read: "I hereby declare Johanna Gordon is my lawful wife; and I hereby acknowledge John William Henry Dalrymple as my lawful husband," signed by the parties, and the third of L.R.A.1915E.

which reiterated Dalrymple's declaration in the second, accompanied with a promise "that he will acknowledge Miss Gordon as his lawful wife the moment he has it in his power," and her promise that "nothing but the greatest necessity (necessity which . . . situation alone can justify) shall ever force her to declare this marriage," signed by him and also by her, describing herself as "J. Gordon, now J. Dalrymple,"—supplemented by letters hinting at sexual intercourse between the parties, couched in the most affectionate terms, referring to the respective parties as husband and wife, and further evidence of other acts of the parties consistent with marriage, though the man subsequently appeared desirous of withdrawing from the relation, and finally married another woman. *Dalrymple v. Dalrymple* (1811) 2 Hagg. Consist. Rep. 54, 17 Eng. Rul. Cas. 11.

A letter written to a single woman who had borne two children by the writer, which was directed outside in her maiden name and inside as to the writer's wife, and which read: "I hereby solemnly declare that you are my lawful wife, though for particular reasons I wish our marriage to be kept private for the present," was held to constitute a marriage where the woman knew of the same and assented to it by going to live with the man, bearing him more children, although the writer delivered the paper, with the statement that it would please and satisfy her, to his law agent, whom he directed to keep it secret until his, the writer's, death, and always represented himself to his relatives as being a single man, the court saying that the law agent was under the circumstances a sort of agent for both parties, holding the paper as well for the wife as for the husband. *Hamilton v. Hamilton* (1842) 9 Clark & F. 327.

³² These are enumerated in subdivision II. b, 2, of the note to *Grigsby v. Reib*, *ante*, 17.

³³ As to the effect of such statutes to abrogate the common law, see the note to *Re Love*, *post*, 109.

³⁴ A marriage good at common law was held to have been effected by a "sealing" ceremony between members of the Mormon church, and according to its laws, the parties being shown to have understood it, as constituting them husband and wife for life as well as for eternity. *Hilton v. Roylance*, 25 Utah, 120; 58 L.R.A. 723, 95 Am. St. Rep. 821, 69 Pac. 600 (rights of alleged widow in man's estate).

In this connection, attention is directed to *Riddle v. Riddle*, 26 Utah, 268, 72 Pac. 1081, holding that, although the parties

as such because no license was obtained,³⁵ or for want of authority³⁶ or territorial jurisdiction³⁷ of the celebrant, or because

he did not understand that he was acting officially.³⁸ Indeed, a common-law marriage may be predicated of a mere sham ceremo-

could have become husband and wife by mere agreement, the common law could not be invoked to uphold a marriage between a man and his fourth wife after his first and legal wife had died, where, after the death of the first, he cohabited not only with the other two wives, but also with the fourth, obviously with the idea that the fourth marriage was not monogamous.

³⁵ A marriage ceremony performed in Pennsylvania by a justice of the peace without the license required by statute was regarded in *Ollschlager v. Widmer*, 55 Or. 145, 105 Pac. 717, in which there was evidence of cohabitation and conduct consistent with the marital relation, as constituting a valid marriage at common law in Pennsylvania, the court citing several Pennsylvania decisions laying down the common law for that state (right of alleged widow to share of the man's estate).

And it seems to be taken for granted in *Galveston, H. & S. A. R. Co. v. Cody*, 20 Tex. Civ. App. 520, 50 S. W. 135, that, where the marriage is regular except for the omission of the license, the parties become husband and wife by virtue of the common law (action for causing death of alleged husband).

In *Burks v. State*, 50 Tex. Crim. Rep. 47, 94 S. W. 1040, involving a prosecution for bigamy, the court held, in respect to the first marriage, that although there was no license, the parties to a ceremonial marriage became husband and wife by virtue of the common law.

A ceremonial marriage without the statutory license, followed by cohabitation, was held sufficient in *Chapman v. Chapman*, 11 Tex. Civ. App. 392, 82 S. W. 564, subsequent appeal 16 Tex. Civ. App. 382, 41 S. W. 533 (right as between wife and woman whom the man subsequently married to administer on his estate).

Generally, as to the effect upon a solemnized marriage of the absence of the statutory license, see note to *Landry v. Bellanger*, 15 L.R.A.(N.S.) 463, supplementing in part the note to *Reaves v. Reaves*, 2 L.R.A.(N.S.) 353.

³⁶ Apparently having in mind a common-law marriage, the court in *Ross v. Sparks*, 81 N. J. Eq. 117, 88 Atl. 384, affirmed without opinion in 81 N. J. Eq. 211, 88 Atl. 385, held that even though the minister may not have been one whom the statute authorized to solemnize marriages, the parties were constituted husband and wife where they in the home, and in the presence of the woman's parents, stood before the clergyman in question for the purpose of being married while the marriage ceremony was performed, and thereafter lived together as husband and wife in the home of her parents.

Mutual exchange of consent through a form or ceremony conducted by an Indian preacher, in the Indian country, between L.R.A.1915E.

two persons who went there for the purpose of having the ceremony performed, was held to constitute a valid marriage, not as an Indian marriage, but as a common-law marriage, although the parties were told that the Indian had no authority to solemnize marriages, and they did not subsequently cohabit as husband and wife. *Davis v. Davis*, 7 Daly, 308, affirming 1 Abb. N. C. 140 (which therefore denied a decree for divorce and alimony in favor of the wife against another man, whom she subsequently married during the lifetime of the first).

Consent to become husband and wife before a functionary who has not statutory authority to solemnize marriages, followed by cohabitation, constitutes a valid common-law marriage. *Carmichael v. State*, 12 Ohio St. 553 (bigamy).

The fact that the preacher who performed the ceremony was not authorized to perform marriages does not prevent the parties from becoming husband and wife. *Holder v. State*, 35 Tex. Crim. Rep. 19, 29 S. W. 793 (involving first marriage of defendant in prosecution for adultery).

A ceremony before a justice of the peace who had no authority was assumed to be sufficient as a common-law marriage, and to give the woman a derivative settlement, in *Newbury v. Brunswick*, 2 Vt. 151, 19 Am. Dec. 703. This decision in favor of common-law marriages was later overruled on the point in *Northfield v. Plymouth*, 20 Vt. 582, and *Morrill v. Palmer*, 68 Vt. 1, 33 L.R.A. 411, 33 Atl. 829.

³⁷ A marriage ceremony by a justice of the peace outside his own county, followed by cohabitation, was held as sufficient to constitute the parties husband and wife as if the ceremony had been performed in the justice's own county, in *People v. Girdler*, 65 Mich. 68, 31 N. W. 624, involving the marriage of a woman in the prosecution of adultery against her and another man.

And in *Pearson v. Howey*, 11 N. J. L. 12, the court upheld a marriage celebrated by a justice of the peace in territory beyond that in which he was commissioned, upon two grounds, one of which was that the common law prevailed in New Jersey.

In *Simon v. State*, 31 Tex. Crim. Rep. 186, 37 Am. St. Rep. 802, 20 S. W. 399, 716, the court stated *obiter* that a marriage by a justice of the peace out of his jurisdiction, upon a license issued in his jurisdiction, was a good common-law marriage.

³⁸ Where the parties go before a magistrate or minister and go through what they in good faith regard the form of ceremony, in the belief that it is sanctioned by such functionary, although the latter did not so understand it, and did not intend to act in the matter, a marriage will be deemed to have taken place, where the statute provides that the validity of no marriage shall be affected by want of jurisdiction of the

nial³⁰ which the woman is led to believe a valid marriage. Her good faith in the premises gives color to the situation, and is the ruling factor in ascertaining whether a marriage was created.³¹ The purpose or proceeding for which a marriage is thus sought to be established seems not to matter. From the above references it appears that the in-

valid ceremony will be given just as much effect in a prosecution for bigamy or adultery as in an action for dower. The only reluctance which the courts have manifested in seeing a valid marriage in such a situation is shown in cases in which the trickster seeks to take advantage of the sham in order to escape conviction for seduction or rape.⁴¹

celebrant, or omission or informality in the manner of entering into the intention of marriage, if the marriage is in other respects lawful, and is consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage. *Meyers v. Pope*, 110 Mass. 314.

³⁰ Though a marriage ceremony solemnized by a person whom the woman supposed to be a minister was a sham, still if the parties during that ceremony agreed to take each other as husband and wife, the same was a good common-law marriage, and the man cannot be convicted of seduction. *People v. Loomis*, 106 Mich. 250, 64 N. W. 18.

In *Jackson ex dem. Dies v. Winne*, 7 Wend. 47, 22 Am. Dec. 563, there was held to be such consent as rendered the parties husband and wife, and their child capable of inheriting from the father, where, bastardy proceedings having been instituted against the father, the parties went before a justice of the peace to get married; the latter recited the marriage ceremony, although the man remained silent throughout it, never cohabited with the first, married another girl three days later, who was with child, and after the death of the second married a third, with whom he lived and had three children, to whom he willed the property in controversy, and the first wife eventually married another man.

³¹ Evidence that a ceremony was performed by a person whom the man represented to the woman as a justice of the peace, that they thereafter lived together as husband and wife, and held themselves out as such, justified the finding that there was manifested by the parties an intent to live together as man and wife, and, that intention having been carried out, they sustained the relation of husband and wife so as to render the husband subject to a prosecution for bigamy when he married again. *State v. Thompson*, 76 N. J. L. 197, 68 Atl. 1068.

Where the doctrine of common-law marriage prevails the fact that a marriage ceremony was performed between the parties by a person who was represented to the woman, and was believed by her, to be a minister, is a sufficient second marriage to support an indictment of the man for bigamy, irrespective of whether such person was a minister or not. *Hayes v. People*, 25 N. Y. 390, 82 Am. Dec. 364.

Mutual words of marriage in *præsenti*, interchanged in the presence of a person who professed to be a minister and to perform a marriage ceremony, and who was L.R.A.1916E.

regarded as such by the woman, followed by cohabitation for some two months, were held in *Herz v. Herz*, 34 Misc. 125, 69 N. Y. Supp. 478, to be a legal common-law marriage, which warranted the annulment of a subsequent marriage by the woman, at the suit of the other party thereto.

So a common-law marriage, at least, was held to be shown by evidence that the parties were engaged, that the man appeared with a person whom the woman took to be a minister, who performed the marriage ceremony between the parties, reading from a paper which they claimed and which she believed to be a marriage license, and that after the ceremony the parties lived together as husband and wife, she being introduced to his relatives as such, both joining the same church and representing themselves and being regarded by the members as husband and wife, and by other circumstances consistent with the marital relation. *Harlan v. Harlan*, — Tex. Civ. App. —, 125 S. W. 950 (action by woman for divorce and homestead).

⁴¹ No common-law marriage under which a man can escape conviction of seduction will be held to have occurred where the girl joined him as a result of his advertisement, and he, after several excuses and delays, promised to marry her when they reached a certain city, and, upon their arrival, produced false papers and assured her that they constituted a marriage between them, and she a day or two later learned of their falsity, discontinued their relations, and took steps resulting in his arrest. *People v. Adams*, 162 Mich. 371, 127 N. W. 354. In reaching its conclusion, the court laid particular stress upon the fact that the defendant set up the marriage in defense to the prosecution against him.

In *Lon Lee v. State*, 44 Tex. Crim. Rep. 354, 61 L.R.A. 904, 72 S. W. 1005, involving a prosecution for rape alleged to have been committed by means of a sham marriage, in which the defendant contended that the marriage was valid at common law even though the person represented to be a minister was not such, the court laid down the proposition that a common-law marriage is not effected where a man, without any intent of consummating a marriage, procures the consent of a woman to casual and occasional cohabitation by means of a sham marriage, she living at the home of her parents, and not with him, and he never holding her out to the world as his wife. In reaching the conclusion, the court stated that the mere agreement to live as husband and wife is not sufficient unless there is an intention to become such fol-

This results actually or essentially from the application of the doctrine that a wrongdoer cannot take advantage of his own wrong.

III. Marriage *per verba de futuro cum copula*.

The doctrine of marriage *per verba de futuro cum copula*⁴² as originally formulated left considerable to the imagination, and has received little exposition in the comparatively few modern cases in which it has been invoked. The fact that in recent years it has not been often invoked may perhaps be ascribed to the fact that a situation in which a claim could be based upon it might also constitute the basis of a civil or criminal action for breach of promise, seduction, or rape. And the practical difficulty of telling whether in a specific case a man may have consummated a marriage or committed

seduction under promise of marriage has led some courts to frown upon alleged contracts *per verba de futuro cum copula*. Then, too, the modern tendency is to modify the original notion of consummation. The promise phase of the question presents little or no difficulty,⁴³ but the original idea that mere copula on the faith of the promise was sufficient to change the promise into present consent has been subjected to marked qualification. Mere copula has generally been regarded as insufficient. While it is sometimes stated in a general way, in accordance with the declarations in earlier Scotch cases, that if, following the promise, the parties have copula, they will, in the absence of evidence to the contrary, be presumed thereby to have transformed the promise into a contract of present marriage,⁴⁴ it is found that as a matter of fact the courts resort to the surrounding circumstances to ascertain the intent of the parties at the time of cop-

lowed by cohabitation,—a point as to which a contrary conclusion had been previously reached by other Texas courts, as shown in the note to *Grigsby v. Reib*, ante, 8. A strong dissenting opinion was filed in the case in question. The court also held that the fact that the man knew that the marriage was a sham showed that there was not mutual consent, and that this showing, fortified by the fact that there was only occasional intercourse afterwards, and not cohabitation as man and wife, indicated that there was no intention on his part to marry, thus running counter to numerous decisions holding that the fact that a fraud was practised upon the woman, and that the man made a mental reservation, does not prevent them from becoming man and wife any more than would a mental reservation upon the part of one of the parties to a marriage celebrated in all respects as required by statute. Perhaps this decision is to be accounted for by the desire of the court to do justice in the case, that is, by convicting the defendant of rape as a punishment for his conduct with the prosecutrix, and still leave the woman whom the defendant had subsequently married his lawful wife, and the issue of the marriage legitimate,—an end for which the courts always avowedly aspire.

⁴² For the principles, see part IV. of the note to *Grigsby v. Reib*, ante, 31.

⁴³ In addition to *Re Comly*, 19 Pa. Co. Ct. 184, in the preceding subdivision of this discussion, reference may be had to the following cases:

It is insufficient to write a letter to the woman reading: "You and I having lived together as man and wife for some time, I hereby declare you to be my lawful wife in the event of a child being born in consequence of the present connection betwixt us," the condition being objectionable. *Stewart v. Menzies* (1841) 8 Clark & F. 309 (Scotch law).
L.R.A.1915E.

And it is not sufficient to agree to present cohabitation and a future regular marriage when more convenient, or when a wife dies, or when a ceremony can be performed. *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737, *Maheir v. Maheir*, 183 Ill. 61, 56 N. E. 124, s. c. subsequent appeal 204 Ill. 25, 68 N. E. 150.

No marriage *per verba de futuro cum copula* will be inferred where it appears that the relations of the parties were clandestine and illicit in the beginning, and the only promise of marriage claimed is the man's statement that he had a little trouble on his mind and when that was settled he would marry the woman, and this was followed by a continuation of their relations as before without living together openly. *Turpin v. Public Administrator*, 2 Bradf. 424.

It was doubted in *Marks v. Marks*, 108 Ill. App. 371, whether a man's statement to a woman that she could come and be his wife, and her reply that she would come, amounted even to a contract *per verba de futuro*.

A promise may be proved either by direct or circumstantial evidence,—direct evidence by testimony of witnesses who heard the promise given, or direct evidence in writing in the hand of the party giving it,—or circumstantial evidence shown by the testimony of witnesses or by writing. *Honyman v. Campbell* (1831) 5 Wilson & S. 92; *Yelverton v. Longworth* (1874) 4 Macq. H. L. Cas. 746, 10 Jur. N. S. 1209, 11 L. T. N. S. 118, 13 Week. Rep. 235.

⁴⁴ The law raises the presumption that by the act of copula the parties then and there intended to consummate their existing agreement to marry, and the same is therefore in effect a contract *per verba de presenti* at the time of the consummation. *Sorensen v. Sorensen*, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455.

ula.⁴⁵ This makes it doubtful whether less circumstantial evidence will be accepted where the future promise is shown than is necessary to raise a presumption of marriage from habit and repute⁴⁶ where no express words of any sort are used. Certainly mere indiscretions or consciously illicit

intercourse will not consummate a promise.⁴⁷ And while an interval of time between the promise and the copula is not fatal,⁴⁸ there must be something more than intermittent cohabitation or occasional acts of intercourse.⁴⁹ Indeed, it seems fairly clear that there must be an extended matri-

The point is merely that if, after agreeing to marry at some future time, the parties have copula, they will, in the absence of any evidence to the contrary, be presumed to have become actually married by taking each other for husband and wife, and to have changed the future promise to marry to one of present marriage. *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737.

⁴⁵ Where the contract *de futuro* is followed by copula, no marriage is constituted where the parties at no time, either by their words or conduct, regarded the marriage relation as existing, and frequently expressed regret that they were living in a state of fornication. *Port v. Port*, 70 Ill. 484.

Even in the case of a contract *de futuro* followed by cohabitation, there is no marriage where it is shown that the cohabitation was in fact not matrimonial, the reputation as to the relation of the parties being divided in the neighborhood, and it appearing that the parties themselves understood and declared that they were not married. *Hebblethwaite v. Hepworth*, 98 Ill. 126.

It was held that there was no marriage between a woman and her alleged second husband, where, having followed her first husband from another state, she did not live with him, but became clandestinely intimate with the second man under a promise of marriage, and, the latter having gone abroad, she married a third man thinking that her husband was dead, but left him upon learning that she was mistaken, and again lived with the second man, instituting a suit for divorce against the husband, obtaining credit as the wife of the second, and bearing him a child which he recognized as his, but thereafter leaving him because he did not marry her as he promised, and because she thought she was not his wife for want of a ceremony. *Re Beverson*, 47 Cal. 621 (woman claiming rights as widow in estate of second man).

An allegation of an agreement to live together "as man and wife," followed by cohabitation, was held not to show a marriage in *Letters v. Cady*, 10 Cal. 533, especially in view of the fact that the plaintiff, who was claiming a distributive share as widow in the man's estate, did not sue in her marital name, except under an alias, the court saying that the inference was that the arrangement between the parties was intended to be merely temporary, and not marital.

No common-law marriage is shown by evidence that the woman was visited frequently by the man, and that she bore him L.R.A.1915E.

a child, as did another woman under like conditions; that the woman never claimed that they were married, that they did not live together as husband and wife, and that he promised to marry her if she would follow him to another state, but died about ten days after they arrived at the state of destination. *Moore v. Flack*, 77 Neb. 52, 108 N. W. 143 (contest between the children as to rights in the father's estate).

Sufficient evidence to entitle a woman suing her alleged husband for divorce, to have the question of their marriage submitted to the jury, appears where she testifies that after they became engaged she yielded to his embraces and became pregnant; that while she was in such condition they fled to the island of Cuba; that he introduced her and spoke of her as his wife at hotels on the way, on shipboard, and at hotels after arriving in Cuba; and that he deserted her there shortly before the child was born. *Burnett v. Burnett*, — Tex. Civ. App. —, 83 S. W. 238. The court employed the general term "common-law marriage" without characterizing it as a marriage *per verba de futuro* or otherwise, but it seems that if any marriage at all appears from the testimony, it would be a marriage *per verba de futuro*, unless the court had in mind the principles as to cohabitation and reputation, and regarded a mere finding of marriage sufficient without a finding of an express exchange of consent.

⁴⁶ See the following subdivision of this discussion.

⁴⁷ But where the parties do not give themselves to each other in consummation of the promise, and rather indulge in acts of illicit intercourse, no marriage will be deemed to have been constituted, even for the purpose of legitimating issue of such relation. *Stoltz v. Doering*, 112 Ill. 234.

⁴⁸ An interval of some time, for instance eight months, between the promise and the copula, is not fatal to the alleged marriage. *Sim v. Miles* (1829) 8 Sc. Sess. Cas. 1st series, 89.

⁴⁹ Intermittent cohabitation following an unfulfilled promise for a future ceremonial marriage does not establish a marriage. *Re Callery*, 226 Pa. 469, 75 Atl. 672.

Occasional acts of intercourse following a contract to marry in the future are insufficient as a consummation of a contract *per verba de futuro*, either where, during the period covered by such acts of intercourse, the parties had set the day for a future marriage in accordance with the statute, or where the parties did not live together as husband and wife and did no other act which was a public recognition of a marriage. *Sorensen v. Sorensen*, 68 Neb. 500,

monial cohabitation which entails living together and holding out as husband and wife.

From a survey of the cases it seems extremely doubtful whether an act of sexual intercourse, even if it took place concededly on the faith of the promise, would be a sufficient consummation. While, if both parties were shown to have acted with the understanding that they were consummating marriage, the situation would indicate the consent essential to marriage, it appears to be no longer true that consent will be presumed from the unexplained act.

IV. *Habit and repute.*

The practical application of the evidential doctrine that where no express consent is shown marriage may be inferred from the conduct of the parties and their standing in the community⁵⁰ yields few general working rules. Each case presents its own problem. The joint history of the parties must

be minutely examined, weighing a word here, construing an act there; to ascertain just what was the understanding of the parties,—the ultimate test in each instance. The cases range from honest cohabitation with pure motives to open and shameless fornication. Those on either extreme present little difficulty, but as the inquiry approaches mean ground there appears a conflict of acts from which the court must see the true situation,⁵¹ when the true situation is the ultimate question, as it nearly always appears to be on the surface. Sometimes, however, a reading between the lines discloses more of an attempt to declare what the true situation ought to have been than to determine what it really was. Sometimes a court, in order to reach a particular result in the interest of legitimacy or for some similar purpose, is found to attach less weight to an unfavorable fact, or more to a favorable one, than would possibly have been given it under a different stress.⁵²

94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455.

⁵⁰ For a discussion of the theories attending this doctrine, see part V. of the note to *Grigsby v. Reib*, ante, 33.

⁵¹ In this connection it was said in *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752: "The probative force of such evidence will vary according to the circumstances with which it is connected. . . . Suppose it is shown that a man and a woman lived together as husband and wife for many years, and continued this connection until it was dissolved by the death of one of them; that their deportment on all occasions was that of married people; that they acknowledged each other as husband and wife; that they were received in society as such, and were generally so reputed and esteemed, and that to all external appearance their lives were upright, moral, and irreproachable. This body of facts would lead any impartial mind irresistibly to the conclusion that they were married. The suggestion that they had been living in sin and dishonor would be justly rejected as irrational and scandalous. The necessary inference then would be that their union originated under the circumstances which the law required to make it valid. . . . Circumstances less favorable would also establish it, but not so conclusively. The lower the standard of rectitude of the parties, the less improbable would it be that they would lead a life of shame. And so we may say that the weaker the general reputation of marriage, the less would be its effect in producing the conviction that it really existed. And matters of suspicion, if not satisfactorily explained, would, in proportion to their gravity, weaken the proposed inference, and might defeat it altogether."

Each case must depend upon its own facts and attending circumstances. Those

L.R.A.1915E.

circumstances or shadows which usually attend the lives of those who have assumed the marriage relation are important in determining the question of whether a marriage does or does not exist. The conduct and bearing of the parties are regarded by their friends and relatives and by those with whom they associate. Introducing each other as husband and wife, and holding each other out to the world as such, are circumstances of more or less weight, as they have relation to the length of time the parties have lived together and the like. These are circumstances or shadows which we know, by observation, almost universally attend the married state, and are always expected to attend it, and their presence or absence is highly important in determining whether a marriage without ceremony has been entered into." *Laurence v. Laurence*, 164 Ill. 367, 45 N. E. 1071.

⁵² An excellent illustration of the length to which the courts will sometimes go in spelling out a marriage from circumstances, when impressed that justice would best be subserved by the results which the finding of a marriage would entail, is to be found in the majority and dissenting opinions in *Coad v. Coad*, 87 Neb. 290, 127 N. W. 456, involving an action for divorce and alimony by an alleged wife. Prefacing its review of the evidence with its enunciation of what may be termed a doctrine to the effect that if one party induces the other to believe in good faith that the contract is made and is binding, the law will hold the party taking such advantage to the full terms of the agreement, as in other cases, and that if one party to the agreement is known by the other to rely upon the contract in good faith, the latter will be bound by it,—the prevailing opinion found the marriage state to have existed between the parties from the following recital of facts: While there was a square

And this has no doubt happened more frequently than clearly appears.

Generally speaking, the inclination of the courts is to favor marriage whenever possible. This is a statement which does not particularly require substantiation, for it is a purpose which the great majority of courts avow. Where the "shadow cast by

the daily lives" of the parties shows nothing of the lewd or the impure, where their acts and words do not conceivably differ from what is to be expected of married persons, where they have been accepted by society as husband and wife,—the courts stand ready to accord them that status.⁵³ It has been said that the evidence which would

conflict in the testimony of the parties as to an express contract of marriage, and there was other testimony and documentary evidence that at the time of the alleged contract the defendant was confined with injuries to his home, a considerable distance from the place at which the plaintiff claimed the contract had been made, it appeared that the defendant knew the plaintiff as a child, in later years sought her out, and while her marriage with another was still subsisting, furnished her money to enable her to travel for her health, and corresponded with her. After she obtained a divorce, and after the date of the alleged express contract of marriage, he visited her frequently and informally, and subsequently took her and her mother to his own house, and during the whole time furnished money to maintain the household. Neither held the other out even to their most intimate acquaintances as husband and wife, and although they employed affectionate terms in their voluminous correspondence, neither ever referred to the other therein as husband or wife, he addressing her in her former name although he did on one or two occasions refer to her mother as "mother." There was also in evidence a receipt reluctantly signed by the plaintiff and acknowledging receipt of certain money in full satisfaction of all claims against the defendant and of any promise made or anything said or done by him to her. The majority said that, although it could not give the parties a certificate of high moral character, it would be against the presumptions of law and against public morals to hold that the marriage relation did not exist. The minority stated that, while the defendant's immorality in the premises was so shocking as to disentitle him to any consideration in equity, which the evidence did not require the court to give him,—still, if the evidence did not show a marriage, the plaintiff was not entitled to relief merely because the defendant had violated the laws of God and man. Declaring that there was no marriage, the minority brought out the additional facts that subsequently to the alleged contract, the plaintiff never went to the defendant's home except to obtain money, and that she remained over night on two or three occasions, but not occupying his room; that the house to which he took the plaintiff and her mother was not his home, but a house belonging to him in a city 35 miles away; that she stated to the defendant's housekeeper that he had promised to marry her (the plaintiff), but never claimed to be his wife; that her letters addressed him as "Mr. Coad;" that L.R.A.1915E.

the plaintiff's testimony that the defendant wished to keep the marriage a secret until he finished his business relations with his brother was met by uncontradicted evidence that he had severed such relations years before; and that her objection to signing the release was not that it ignored her status, but that if she signed he would no longer support her and her mother.

Another good illustration is afforded by *Re Spink*, 62 Misc. 158, 116 N. Y. Supp. 267, in which it appeared to be the general repute in the neighborhood where the parties lived, that they were not married, the court saying that it would hesitate to find the contract of marriage were it not for the facts that alleged statements, declarations, and acts as to the marriage were followed by the birth of a child, and that when it was about to be born the alleged husband requested a neighbor to go for a physician, stating that his wife was about to be confined, it further appearing that the child bore his name, always addressed him as "papa," and so long as the father lived was treated in every way as a legitimate child.

Attention is also directed to *Re Strauss*, 14 Pa. Co. Ct. 593, in which the trial court's finding of marriage, notwithstanding the relations of the parties were illicit in the beginning, was affirmed by a divided court, which wrote two opinions representing the conflicting views, each presenting the facts best calculated to support the view therein taken.

⁵³A marriage may be inferred, at least in an action involving the legitimacy of issue, from proof of cohabitation and general reputation among the acquaintances and friends of the parties; their treatment of each other; their speaking, concerning and addressing each other in the presence of third parties as husband and wife; their christening the offspring of their union as their children; the conferring of the name of the father upon the son; the son's recognition and treatment by both parties as their child; and their desire both before they live together and afterwards for a matrimonial, rather than an illicit, association,—where almost all the acts and conduct of the parties were consistent with marriage covering several years, and such acts and declarations as might be regarded as inconsistent with marriage were few and isolated. *Adger v. Ackerman*, 52 C. G. A. 568, 115 Fed. 124.

Where an accused in a prosecution for bastardy stated in the presence of a magistrate that he was legally married to the woman in question, and that he would take

his wife and child to live with him, which he accordingly did, holding her out as his wife until his death, six years later, it was held that there were such cohabitation and recognition as would sustain a finding of marriage and thus entitle the wife and child to share in his estate, under the law of Ohio which controlled the case, and which, in the absence of a showing to the contrary, was presumed to be the common law. *Klenke v. Noonan*, 118 Ky. 436, 81 S. W. 241.

A presumption of marriage which will entitle a woman to take under a man's will arises where it is shown that the parties lived together for a period of over ten years; that they were considered in the community as man and wife; that he held her up publicly and constantly, during all that time, as his wife; that they exchanged visits with respectable families; that they sojourned, on two different occasions, in the testator's family in another state, and did so as husband and wife; and where several of the witnesses who were more or less intimately acquainted with the parties, and who testified to their good conduct and behavior, state that they never heard the fact of their marriage disputed before. *Philbrick v. Spangler*, 15 La. Ann. 46.

Testimony of a son that his father and mother lived together and brought up a large family, treated each other on all occasions as husband and wife, were so reputed in the family and by others, addressed each other as such, and jointly signed papers in that relation, is sufficient to establish the marriage in an action by the wife for dower. *Proctor v. Bigelow*, 38 Mich. 282.

Testimony that the parties were reported to have been married, that they thereafter lived together as husband and wife and had one child, whom they called daughter, and that they held themselves out and were regarded in the community as husband and wife, sufficiently establishes marriage and the heirship of the child, so as to render admissible in evidence a deed by the child, of property which had belonged to her father. *Hoffman v. Simpson*, 110 Mich. 133, 67 N. W. 1107.

Where there was no sexual intercourse between the parties until the time when the contract of marriage is alleged to have been made, and, after the woman obtained a divorce from her former husband, the parties lived together, being understood by their landlord to be man and wife, and where the man wrote to his relatives avowing his affection for the woman, although not stating that she was his wife or that he had married her, and informed one of his close friends that he intended to marry her, and two witnesses testified as to cohabitation and demeanor, and their opinion that the parties were husband and wife, a finding of marriage was upheld although their relations were attended with some secrecy and other incidents which negative marriage. *Shattuck v. Shattuck*, 118 Minn. L.R.A.1915E.

60; 136 N. W. 409 (suit to establish rights as widow in alleged husband's estate).

The acts of the parties shown in *Nelson v. Jones*, 245 Mo. 579, 151 S. W. 80, were held sufficient to constitute a common-law marriage, where for several years they openly held themselves forth to the world in the neighborhood of their acquaintances and kinsfolk, by the manner of their daily life, by conduct, demeanor, and habit, as man and wife, the community accepted them as such, children were born to them, and they established a home to which the man took his child by his first wife, and reared her with knowledge both of the first wife and her relatives.

In *Pettingill v. McGregor*, 12 N. H. 179, involving an action on a promise of marriage made by a woman before her alleged marriage to another, there was held to be sufficient evidence to go to the jury on the question of marriage with such other, where it appeared that, having promised and apparently prepared to marry the plaintiff on a certain day, the girl left her father's house with another man on the night of the preceding day, that they returned together some nine days later and attended church together where her friends worshipped, that for a time she resided with the man's sister, later going elsewhere to board, that while so boarding the man usually accompanied her to church, sat with her, dined with her, and on several instances was seen leaving her place of sojourn at an early hour after having spent the evening there, and that when the officers serving the writ in the case inquired of her where her husband was, she replied that he was working on the railroad, which was true of the alleged husband. See also the *Missouri* case of *Plattner v. Plattner*, II. *supra*.

In *Mullaney v. Mullaney*, 65 N. J. Eq. 384, 54 Atl. 1086, involving a woman's suit for appointment as administrator of the estate of her alleged deceased husband, it was declared that, although there was no ceremonial marriage, the connection between the parties was matrimonial, and not meretricious, where, in addition to the widow's testimony as to a verbal agreement of marriage, it appeared that during the twenty years the parties lived together they regarded each other and were treated by their friends, relatives, and business associates as man and wife, that in correspondence they recognized each other as such, that a child was born to them, and that an inscription over his grave represented him to be their son.

There was held to be sufficient evidence of a marriage *de presenti*, where it showed that about a year after the death of his first wife, a man introduced as his wife a young lady who had resided in his family as housekeeper, that at the expiration of about the ordinary period of gestation thereafter a child was born to them, that he cohabited with her for eleven years, and held her out to the world as his wife, that the children of the first marriage, even after growing up, recognized the second

induce a finding against marriage in such a situation should be so overwhelming as to leave no doubt of the fact,⁵⁴ although such a statement is obviously for the guidance of the court rather than for the jury.⁵⁵

wife as their stepmother, that the man entered the names of the children of the second marriage in the family Bible in his own hand, as he had done in the case of the children of the first marriage, and that a general reputation existed with all those who were acquainted with the family that the parties were husband and wife. *Re Taylor*, 9 Paige, 611 (legitimacy).

Where the parties lived together for twenty years as husband and wife, having publicly represented themselves to be such, and having been so considered and acknowledged by their acquaintances, she bearing his name, being called his wife in a deed which they both executed and in all their dealings with each other in respect to the property conveyed, and recognizing the relation of husband and wife as existing between them; they are to be regarded as having that relation to each other in respect to the property as much so as if an actual marriage ceremony had been proved. *Hicks v. Cochran*, 4 Edw. Ch. 107 (effect of joint deed to the parties as husband and wife).

Cohabitation, acknowledgment, reputation, and the birth of children, covering a period of ten years, until the man's death, may raise an inference of marriage, although a claimed ceremonial marriage is shown not to have taken place. *Tummalty v. Tummalty*, 3 Bradf. 369 (contest over estate of deceased husband as between his sister and his alleged widow).

In *Grotgen v. Grotgen*, 3 Bradf. 373, involving a woman's claim as widow in the estate of a man, it was held that there was sufficient evidence to raise the presumption of marriage where the parties lived openly as man and wife for four years, when the man died, and they had three children, and were understood by their friends and associates as such, although it was admitted that there was no ceremonial marriage.

Where the plaintiff in an action for breach of promise of marriage alleged that there was constant and exclusive cohabitation between herself and the man for sixteen years, she bearing him five children, that they lived in a hired house and maintained a family for four years, and for the remainder of the period they lived in hired apartments, and that she had always been known as his wife and recognized by him as such, it was held that such facts raised a presumption of marriage, which, unless repelled, disentitled the plaintiff to an order of arrest. *Durand v. Durand*, 2 Sweeny, 315.

Constant cohabitation for two years, and until the man's death, accompanied by acknowledgment of the woman as his wife, and addressing and speaking of her as such in the presence of friends and acquaintances, L.R.A.1915E.

The presumption of marriage must, of course, yield to the assertion of both parties that the relation was one of open concubinage,⁵⁶ or to one party's admission of non-marriage when fortified by strong circum-

and their general reputation among neighbors and tradesmen with whom they associated, was held sufficient evidence of marriage to warrant the woman as widow in administering upon the alleged husband's estate. *Re Brice*, 11 Phila. 98.

Where a soldier on furlough came to the mother of his deceased wife and asked for one of the latter's sisters in marriage, and was refused, and, having requested another sister to accompany them while they went to be married, and having been refused, he and the second sister left, were gone ten days, and on their return stated that they had been married in another state, and they cohabited for a short time, until his return to the army, and were recognized as man and wife by her family, and he was shortly after killed in battle, and she, was thereafter recognized as his widow by her immediate family and the neighbors and also by the Confederate military authorities, and the child of that marriage was raised together with his children by his former marriage, it was held that there was sufficient evidence to establish a marriage by cohabitation and reputation. *Womack v. Tankersley*, 78 Va. 242 (legitimacy of child and right to inherit).

⁵⁴ In *Jackson v. Rhem*, 59 N. C. (6 Jones, Eq.) 141, the court said that when a man and woman lived together for many years, treating each other as husband and wife, and were so reputed in the neighborhood where they lived during all the time in which they cohabited, and where they had children, which were treated by the parents as legitimate up to the time of the latter's death, the testimony which would induce a court to declare against the marriage of the parties, and thereby to bastardize their issue after their death, ought to be so overwhelming as to leave not a doubt about the fact.

⁵⁵ It is error to charge the jury that where there has been cohabitation for many years, followed by the birth of children, the evidence, to refute the presumption of marriage and render the issue legitimate, must be overwhelming. While this rule as announced in the *Jackson Case* is all right for the guidance of the court, the jury is to decide the existence of a marriage from a preponderance of the evidence, without instructions as to the weight to be given any particular phase of it. *Ferrall v. Broadway*, 95 N. C. 551.

⁵⁶ The presumption of marriage arising from reputation and long cohabitation must yield to positive evidence to the contrary, as, for instance, where the relation was that of open concubinage and the reputation of a marriage was a mistaken one; and this is especially true where the presumption is invoked by a creditor as against

stances,⁵⁷ but it will prevail over such an admission where it may well have been made with reference to a ceremonial marriage; and

the denial of both parties that the relation existed. *Benavis v. Barba*, 32 La. Ann. 1264.

⁵⁷ The presumption of marriage from cohabiting as husband and wife during two summers at a public resort was held to be overcome by the fact that the parties lived in town under an assumed name and were not known to be husband and wife, and by the woman's admission that they did not bear that relation. *Davis v. Brown*, 1 Redf. 259.

⁵⁸ Cohabitation for nearly forty years, and reputation during all that time as husband and wife, in conjunction with the woman receiving conveyances of land as the man's wife, and describing herself as such in her will, which, in naming the man as residuary legatee, characterized him as husband, were apparently regarded in *Richard v. Brehm*, 73 Pa. 140, 13 Am. Rep. 733, as sufficient evidence of marriage, the court saying that the effect of this cohabitation and reputation was not overcome by declarations of the man on one or two occasions that they were not married, since, in view of the circumstances and other statements of the man, he must be regarded as having meant that they were not ceremonially married.

A like attitude was taken where a reporter testified that, upon being interviewed by him, following the alleged husband's death, the alleged wife stated that she had not been married to him, and that she was in great distress as a consequence. *Re Comly*, 19 Pa. Co. Ct. 184. On this point the court said: "Her own account was that she told the witness she had never been married to the decedent by a minister. It is unfortunate that the reporter was not cross-examined as to his own conception of what constitutes a valid marriage. He may have shared the notion which prevails in a large class in society, that a union which is not solemnized by a religious rite is meretricious, and have taken it for granted, when the claimant told him she had not been married by a clergyman, that she meant to say that she had not been married at all. It is also quite possible that at this trying moment the claimant was harassed with a doubt which had never visited her before. She was alone in the world; the dead body of her husband was in the keeping of those who were strangers to her, and it was suddenly suggested that, as his wife, she was entitled to demand its custody. How should she prove the marriage which gave her that right, and which, in her faith in her husband's assertions, she had always believed had existed. She had no witness but herself, and she might have doubted her competency, even if she had known the process by which she could bring forward her evidence."

The above Pennsylvania decisions really discredit *Re Bott*, 10 Pa. Dist. R. 122, in L.R.A.1915E.

is not shown to have been uttered with the idea of negating broadly the existence of the marital status.⁵⁹ The fact that the

which the presumption of marriage arising from the very strong evidence that the parties conducted themselves as husband and wife, declared themselves to be and were commonly reputed to be such, that the members of their respective families visited them and always regarded them as sustaining a matrimonial relation, that their child was named for the father, and that when the mother became unfit to care for the child because of her profligate behavior, he took it to his own mother, and that by his will the father left his whole estate to the child,—was held to have been overcome by the woman's admissions on the witness stand and elsewhere that she lived with the decedent in reliance upon his promise to marry her, and that no marriage had ever taken place. The court alluded to the fact that the express words of marriage exchanged by the parties were *in futuro*, and not *in presenti*, and it seems to be inferred from this that the relations of the parties were illicit in the beginning. The court remarked that the cohabitation of the parties, the man's repeated acknowledgment of the woman as his wife and her children as his, and their reputation as husband and wife, might be sufficient to overcome the fact that there was no proof of an actual marriage, were it not for the claimant's own admission made on the witness stand and to her brother that they were not married, a fact which has been regarded in other cases as not fatal. This unfortunate decision it would seem may be accounted for upon any or all of three considerations: That it proceeds upon a subconscious assumption of the court that a contract *per verba de futuro cum copula* does not constitute a valid marriage in Pennsylvania; that the inference necessary to be drawn from cohabitation and reputation must be one of an express exchange of consent, rather than the broader and less specific inference that upon the facts the marriage status will be deemed to have existed, the former inference being one which would be overcome by an affirmative showing that no express consent was exchanged, and the latter inference being one which might survive such an affirmative showing (on this point see part V. c. of the note to *Grigsby v. Reib*, ante, 44); or that, inasmuch as the question arose in a suit by the woman to establish a claim as widow in the man's estate, and inasmuch as the father had devised all the property to the child, whose right could not therefore be jeopardized by a finding of non-marriage, some reason should be found for denying the right to participate in the estate on the part of the woman, who had become a loose character. However, to suppose that the court gave any weight to the first consideration is to indulge a supposition which is opposed to an express holding in *Re Comly*, supra.

woman was a prostitute tends to impair the evidence of cohabitation,⁶⁰ and when one of the parties during the term of the alleged habit and repute is shown to have been cohabiting with a third person under like repute, the existence of a marriage cannot be presumed in either case.⁶⁰

Where the relations of the parties are illicit in their inception, an attempt to establish a marriage between them is encountered by an almost universal presumption that such a relation continues illicit, unless the contrary is made to appear.⁶¹ This re-

quires proof of a change to a legal relation, even in a case of legitimacy, and although the law labors to declare the legitimacy of a child wherever possible.⁶² The change may be established by circumstantial evidence,⁶³ but the circumstances must be such as to exclude the presumption that the original relation continued, and to prove satisfactorily that it was changed to matrimonial union by mutual consent.⁶⁴ And while this is sometimes expressed in words that may be taken to imply the necessity of an inference of express consent, probably in

⁶⁰ Proof that the woman during the time of the cohabitation with the man was a common prostitute would necessarily greatly weaken the probative force of the evidence of cohabitation, and it is therefore error to exclude evidence to that effect. *Warren v. Canard*, 30 Okla. 514, 120 Pac. 599.

⁶⁰ *Klipfel v. Klipfel*, 41 Colo. 40, 124 Am. St. Rep. 96, 92 Pac. 26.

⁶¹ *Arnold v. Chesebrough*, 7 C. C. A. 508, 20 U. S. App. 87, 58 Fed. 833; *White v. White*, 82 Cal. 427, 7 L.R.A. 799, 23 Pac. 276; *Klipfel v. Klipfel*, supra; *Drawdy v. Hesters*, 130 Ga. 161, 15 L.R.A.(N.S.) 190, 60 S. E. 451; *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322, 68 N. E. 81; *Pike v. Pike*, 112 Ill. App. 243; *Re Boyington*, 157 Iowa, 467, 137 N. W. 949; *Cram v. Burnham*, 5 Me. 213, 17 Am. Dec. 218; *Barnum v. Barnum*, 42 Md. 251; *Re Terry*, 58 Minn. 268, 59 N. W. 1013; *Cargile v. Wood*, 63 Mo. 501; *Badger v. Badger*, 88 N. Y. 546, 42 Am. Rep. 263; *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677; *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106; *Foster v. Hawley*, 8 Hun, 68; *Moller v. Sommer*, 86 Misc. 110, 149 N. Y. Supp. 103, affirmed without opinion, 150 N. Y. Supp. 1097; *Re Stanley*, 1 N. Y. S. R. 325; *Clark v. Barney*, 24 Okla. 455, 103 Pac. 598; *Re Hunt*, 86 Pa. 294; *Reading F. Ins. & T. Co.'s Appeal*, 113 Pa. 204, 57 Am. Rep. 448, 6 Atl. 60; *Re Patterson*, 237 Pa. 24, 85 Atl. 75; *Com. v. Gamble*, 36 Pa. Super. Ct. 146; *Henry v. Taylor*, 16 S. D. 424, 93 N. W. 641; *Fryer v. Fryer*, Rich. Eq. Cas. 85; *Schwingle v. Keifer*, — Tex. Civ. App. —, 135 S. W. 194; *Williams v. Williams*, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98; *Lanham v. Lanham*, 136 Wis. 360, 17 L.R.A.(N.S.) 804, 128 Am. St. Rep. 1085, 117 N. W. 787; *Weidenhoft v. Primm*, 16 Wyo. 340, 94 Pac. 453.

The Arkansas court takes the view that the matter of the continuance of illicit relations is a matter of proof, and not of presumption; and that the burden of proof to establish marriage between persons whose relations were originally illicit is upon the person asserting the marriage. *O'Neill v. Davis*, 88 Ark. 196, 113 S. W. 1027.

And in stating that the presumption that cohabitation illicit in its inception continues such is not a presumption of law, but L.R.A.1915E.

one of fact for the consideration of the jury, the court in *State v. Worthingham*, 23 Minn. 528, goes into a question which seems to have been seldom judicially discussed, and to reach a conclusion which is at variance with the unquestioned custom of most courts.

⁶² *Eldred v. Eldred*, 97 Va. 606, 34 S. E. 477.

The fact that the original relations of the parties may have been illicit is immaterial provided there be sufficient evidence that a contract of marriage was thereafter made. *Travers v. Reinhardt*, 25 App. D. C. 567 (decided according to the law of New Jersey).

⁶³ The presumption may be overcome by direct or circumstantial evidence affirmatively showing that, pending the illicit relation, the parties entered into an agreement to become husband and wife, and thereafter continued the cohabitation in the new relation. *Drawdy v. Hesters*, 130 Ga. 161, 15 L.R.A.(N.S.) 190, 60 S. E. 451.

The fact that the evil purpose of the parties subsequently changed, and that the cohabitation lost its wrongful character and became matrimonial in intent and character, may be shown by proof direct or circumstantial. *Robinson v. Ruprecht*, 191 Ill. 424, 61 N. E. 631; *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322, 68 N. E. 81.

⁶⁴ *Compton v. Benham*, — Ind. App. —, 85 N. E. 365; *Cuneo v. De Cuneo*, 24 Tex. Civ. App. 436, 59 S. W. 284.

Proof of a subsequent actual marriage is necessary; and while such marriage may be shown by circumstances, they must be such as to exclude the inference or presumption that the illicit relation continued. *Bates v. Bates*, 7 Misc. 547, 27 N. Y. Supp. 872.

The following cases show a resort to circumstances to ascertain whether there was any change:

Where the first connection between the parties was illicit, and the woman twice a year made affidavits that she was a widow, for the purpose of securing a pension which was payable to her during widowhood, it was found as a fact that no marriage had taken place, although the parties held themselves out to society in a general way as husband and wife. *Robertson v. Crawford* (1840) 3 Beav. 102.

A marriage between a man and his house-

keeper was held to be established although they never had any marriage ceremony performed, and illicit intercourse began between them within one week after she came into his house without any promise of marriage, and, for several years thereafter, and until their removal to another place, she was not regarded in the community as his wife, where several children were born to them, and after their removal she was treated by him in all respects as his wife, and so introduced by him to the people of the community, and so regarded and treated by all their acquaintances in the limited circle in which they moved. *White v. White*, 82 Cal. 427, 7 L.R.A. 799, 23 Pac. 276.

Where the parties to an illicit intercourse of which a child was born never cohabited together as man and wife, and seldom had sexual intercourse after the birth of the child, although a subsequent contract of marriage was claimed, and the man contributed very little to the support of the wife and child, and there was no repute in the community that the parties were husband and wife, it was held that there was no proof that the parties assumed the marital rights, duties, or obligations, as the California statute requires them to do, following the alleged mutual agreement of marriage between the parties. *Kilburn v. Kilburn*, 89 Cal. 46, 23 Am. St. Rep. 447, 26 Pac. 636 (action for divorce between the parties to the alleged marriage). There is no assumption of the marriage relation within the meaning of the California statute unless the parties live together as husband and wife, treat each other in the usual way with married people, and so conduct themselves as to have full repute among their intimate friends and associates to be husband and wife. *Re Baldwin*, 162 Cal. 471, 123 Pac. 267; *Hinckley v. Ayres*, 105 Cal. 357, 38 Pac. 735. The facts and result in the *Kilburn* Case are substantially duplicated in the *Nebraska* case of *Moore v. Flack*, supra, III.

In *Shorten v. Judd*, 60 Kan. 73, 55 Pac. 286, involving the legitimacy of issue, there was considerable testimony negating a marriage relation, including the fact that the parties did not treat each other or hold each other out as husband and wife, and the woman made no claim to be the man's wife until more than a year after his death, but there was some evidence tending to show a marriage, and the court did not feel justified in setting aside a finding of a jury that there had been a marriage.

In *Caujolle v. Ferrie*, 23 N. Y. 90, the presumption in favor of marriage and of the legitimacy of issue derived from circumstances, although there were circumstances of a contrary bearing, was given effect over the presumption that intercourse illicit in its origin continued to be such, although there was nothing to show when or how the change in the relation of the parties occurred.

Attention is also directed to *Hynes v. L.R.A.* 1915E.

McDermott, 91 N. Y. 451, 43 Am. Rep. 677, where, although the relations of the parties were illicit in the beginning, being, however, under a promise of marriage by the man, and although a mutual contract of marriage between them in England was invalid under the laws of that country, the court, in view of such promise and an intent to live together as husband and wife, and subsequent cohabitation in that apparent relation, presumed the marriage from their continued cohabitation and holding out as husband and wife after their removal to France, whose laws were presumably like those of New York (right of widow and child to share in estate).

But in *Harbeck v. Harbeck*, 102 N. Y. 214, 7 N. E. 408, in which the relations of the parties were illicit in the beginning, and there was no direct evidence of a subsequent contract of marriage between the parties, the court held that a finding by the trial court that they were not man and wife would not, in view of a conflict of the evidence, be disturbed on appeal, although they assumed the character of husband and wife and reported themselves in that relation to their associates and others, and there was enough in their conduct *prima facie* to entitle them to the civil rights which attach to that character.

Cohabitation meretricious in the beginning is not sufficiently shown to have become matrimonial where, although the parties cohabited for twenty years and the man referred to the woman in the presence of strangers in his own name with "Mrs." prefixed, and he is shown to have addressed two letters to her in the same name, it appears that she used his name only as a matter of necessity to obtain comfortable maintenance and suitable quarters, that she stated to her sister that she had never been married to him although she had been truer than many wives, and it further appears that she was practically excluded from the acquaintance of his relatives and friends, she apparently having willingly submitted, and he neglected to show her any of the attentions usual in married life, such as making calls or visits with her or taking her to places of amusement, and that their companionship was restricted to their own apartment. *Fagan v. Fagan*, 57 Hun. 592, 11 N. Y. Supp. 748 (action of undisclosed nature between the parties).

Where a physician debauched a girl in his office under promise of marriage, their illicit connections continued and resulted in pregnancy, and on a subsequent date she took up her residence with him in his house and lived with him as his wife, being regarded and recognized by friends and acquaintances as such, and he introduced and represented her as such, gave her a wedding ring bearing their initials and the date, she having on that date demanded of him ceremonial marriage in fulfilment of the promise, but he, professing to be an unbeliever, said to her, "We will now live together; you are my wife and every-

most instances, if the point were squarely presented, an implied consent would be held sufficient.⁶⁵ Certainly it is not necessary to say just when and where the change occurred.⁶⁶ It has been said that, inasmuch as the law and all of its presumptions dep-

recate illegal, and favor lawful, relations, slight circumstances may be sufficient to establish a change from an illegal to a lawful relation.⁶⁷ This cannot be asserted as a fixed rule for the amount of evidence necessary should depend upon the circumstances

one will know it, and we are exactly the same as if we were married by a minister," it was held that the marriage was established by every species of evidence (meaning apparently both by an express contract and by cohabitation and repute). *Vincent v. Vincent*, 18 Daly, 534, 17 N. Y. Supp. 497. While the court spoke in this connection in such a manner as to indicate that it might regard such evidence as sufficient to establish a marriage for any purpose, it is to be noted that upon the authority of *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460, the court prefaces its opinion with a recital that the question arose on a motion for alimony *pendente lite* in an action for divorce, and that in such a preliminary contest the fact of marriage need not be established with the clearness and conclusiveness exacted of proof as the basis of a final adjudication upon the rights of parties, and that it suffices on such an application if the putative wife make out a reasonably plain case of the existence of the marital relation.

No marriage will be presumed from cohabitation for several years, the birth of a child which the man recognized as his, and evidence that he at times declared the woman to be, and introduced her as, his wife, and that on one occasion she signed as wife a deed executed by him, where the relations between them were meretricious in the beginning, and there was not only a difference of opinion in the neighborhood as to their status, but also contradictory declarations on their part, and the woman, who is shown to have previously been the mistress of another man, does not testify to any marriage contract, and does not testify in chief at all, the question arising in a suit by her to establish a claim as widow in his estate. *Reading F. Ins. & T. Co.'s Appeal*, 113 Pa. 204, 57 Am. Rep. 448, 6 Atl. 60.

Where it appears that the man was a proprietor of a house of ill fame, and that the woman for several years kept the house and was paid therefor, and it appears from an earlier action by the woman against the man for a breach of promise of marriage, and from her testimony in a criminal prosecution against him for living in illicit relations with her, that their relations were illicit in the beginning, the mere continuance of their relations, though extending over a period of twenty-five years, raises no presumption of marriage, although there was some reputation of marriage between them. *Cuneo v. De Cuneo*, 24 Tex. Civ. App. 436, 59 S. W. 284.

In *Weidenhoff v. Primm*, 16 Wyo. 340, 94 Pac. 453, in which the cohabitation of L.R.A.1915E.

the parties was illicit in the beginning, and it appears that the parties were generally reputed not to be man and wife, the court unfortunately stated that the fact that the parties cohabited after an alleged contract of marriage to which the woman testified did not of itself overcome the presumption that such relations continued to be meretricious. While the court held in another connection that the contract of marriage was not sufficiently established, the remark alluded to seems to assume for the purposes of the argument that there was competent evidence of an express marriage contract. At any rate it is pertinent to repeat what has been said before, that slight evidence is regarded as sufficient to establish a change of relation, and in view of this the court must have meant that continued cohabitation after an alleged contract which is not satisfactorily shown to have involved an express exchange of consent is insufficient of itself to establish the relation of man and wife.

⁶⁵ For a discussion of these different inferences and the distinction between them, see subdivision V. e, of the note to *Grigsby v. Reib*, ante, 44.

⁶⁶ In order to render circumstances sufficient to establish a change from an illicit to a legal relation, it is not indispensable that the time and place of the change be shown. *Adger v. Ackerman*, 52 C. C. A. 568, 115 Fed. 124.

In this connection it was said by Finch, J., in *Badger v. Badger*, 88 N. Y. 546, 42 Am. Rep. 263: "Very often the changed character of the cohabitation is indicated by facts and circumstances which explain the cause, and locate the period of the change, so that in spite of the illicit origin the subsequent intercourse is deemed matrimonial. . . . But a change may occur and be satisfactorily established although the precise time or occasion cannot be clearly ascertained. If the facts show that there was or must have been a change; that the illicit beginning has become transformed into a cohabitation matrimonial in its character, it is not imperative that we should be able to say precisely when or exactly why the change occurred."

⁶⁷ *Adger v. Ackerman*, supra.

It is held that slight circumstances are sufficient to show a change in the minds of the parties respecting their connection, and to raise a presumption that meretricious relations became matrimonial by the consent of the parties. *Edelstein v. Brown*, — Tex. Civ. App. —, 95 S. W. 1126, affirmed in 100 Tex. 403, 123 Am. St. Rep. 816, 100 S. W. 129.

of a particular case. For instance, it takes more evidence to warrant an inference of change to a lawful relation where the original relation was a wanton abandonment to fornication, than where it involved a matrimonial desire⁶⁸ such as is frequently found in the case of cohabitation both before and after the removal of an impediment to marriage.⁶⁹

It has also been said that mere habit and repute is insufficient to indicate a change.⁷⁰ While this may be true where the relation begins under circumstances which show that the parties intended them to be terminable at will,⁷¹ its untruth as a general proposition is indicated by cases expressly passing on the point,⁷² and the numerous others referred to in this discussion, which seem to

proceed upon the assumption that habit and repute are sufficient.

It has been shown elsewhere that neither secrecy nor a double life, *ex proprio vigore*, precludes a presumption of marriage, upon the theory that the one is entirely inconsistent with cohabitation, and the other materially divides the repute;⁷³ they are, nevertheless, unfavorable facts which must be taken into consideration as one constituent of the entire body of circumstances. Secrecy which may result from the parties never appearing together, or from the holding out of the woman as a servant in the man's household, is given effect according to the surrounding circumstances tending to indicate the causes responsible for it.⁷⁴ Likewise, the fact that the man maintained a

⁶⁸ Where the relation is originally meretricious, without matrimonial intent or desire, as distinguished from being merely unlawful, the said relation is presumed to continue, and it requires strong evidence to establish a change. But where the parties have manifested a desire to form a matrimonial union, the presumption will be rebutted, so as to make the question one of fact, by the slightest circumstance; and mere cohabitation without any apparent change after the parties have the right to contract a valid marriage will suffice to justify a submission of the question of marriage to the jury. *Prince v. Edwards*, 175 Ala. 532, 57 So. 714.

⁶⁹ As to the effect of continued cohabitation following the removal of the impediment, see the note to *People v. Shaw*, post, 87.

⁷⁰ When the relation between a man and a woman is illicit in its inception, it is presumed to continue so until a change of relation is proved, and mere continued cohabitation and reputation are not sufficient evidence of a change. *Marks v. Marks*, 108 Ill. App. 371.

⁷¹ Cohabitation under a contract to live together "so long as mutual affections shall exist," which is insufficient as a marriage contract, relates to the illegal contract under which it began, and raises no presumption of marriage. *Peck v. Peck*, 155 Mass. 479, 30 N. E. 74.

⁷² To overcome this presumption it is sufficient to show that the acts and declarations of the parties, their reputation as married people, and the circumstances surrounding them in their daily life, are such as naturally lead to the conclusion that, although they began to live together as man and mistress, they finally agreed to live together as man and wife. *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106.

In *Re Physick*, 2 Brewst. (Pa.) 179, the presumption of continuance of the illicit nature of which the relations of the parties partook in the beginning was held to be overcome by cohabitation, reputation, and holding out.

Although the connection between the L.R.A.1915E.

parties was in the beginning illicit, still marriage may be proved by the conduct of the parties where the habit and repute introduced to show that the marriage status has been assumed are uniform and undivided. *White v. White*, 82 Cal. 427, 7 L.R.A. 799, 23 Pac. 276.

⁷³ See subdivisions a and b of part V. of the note to *Grigsby v. Reib*, ante, 33, 36.

⁷⁴ It has been held that there was no common-law marriage where the man was white and the woman black, and it appeared that neither of the parties assumed the marriage relation toward the other, a fact evidenced by their living in the same household, he in the capacity of a master and she to all appearances a servant, and he never accompanied her in public as a husband or represented her to be his wife, and it appeared that he made a transfer in her favor using her maiden name, and that she used the same name in making a transfer herself, that she complained that her wages were insufficient, there being at the best but a conflict of evidence as to admissions and declarations of the parties as to their being husband and wife. *Laurence v. Laurence*, 164 Ill. 367, 45 N. E. 1071.

Where it appears that the parties were together only intermittently for a period of years, and that instead of cohabiting as husband and wife and holding themselves out to the world as such, there was a constant effort to conceal what they must have believed was an illicit cohabitation, and that the reputation was at least divided, there is not sufficient proof of marriage. *McKenna v. McKenna*, 180 Ill. 577, 54 N. E. 641.

It being consent, and not cohabitation, which constitutes the marriage, no marriage will be inferred where, although the parties cohabited and lived in the same house, the woman was to all appearances merely a housekeeper, and the parties never pretended to be husband and wife, and did not treat each other as such, and were never so reputed among their acquaintances, and where the man made a deed to the woman in her own name, and their offspring bore the mother's name, and no

separate abode and was known by his friends and relatives as a single man is not control-

ling, but is weighed in the light of the joint history of the parties.⁷⁵ The question is

claim of marriage was made until ten years after the father's death. *Brisbin v. Huntington*, 128 Iowa, 166, 103 N. W. 144, 5 Ann. Cas. 931 (rights of children in father's estate).

Where the woman first came to the man's home as housekeeper, and their relations, although continuing for a considerable period, were at all times seriously questioned, it was held that no marriage was established. *Cross v. Cross*, 55 Mich. 280, 21 N. W. 309.

Where the relations are illicit in their inception, and are kept concealed from relatives and all except servants and physicians, and it appears that the parties at no time regard themselves as married, it will be held that no marriage exists. *Re Terry*, 58 Minn. 268, 59 N. W. 1013 (suit by woman to claim widow's rights in man's property, as against his next of kin.)

A marriage contract cannot be presumed from occasional admissions and declarations, and from cohabitation secretly conducted, as, for instance, where the woman always goes under a maiden name, and the parties are spoken of as uncle and niece, and for several years, while they are living in different flats and boarding houses, they ostensibly occupy adjoining rooms and studiously avoid disclosing their true relation. *Heminway v. Miller*, 87 Minn. 123, 91 N. W. 428, declaring that secrecy is an unfavorable element when marriage is sought to be established by evidence of habit and repute.

As was said in a Missouri case, a maiden lady who, on a secret so-called marriage, assumed in the household and among its visitors and in the neighborhood the name of a widow, thereby living an admitted lie, who allowed her putative husband to borrow money and convey real estate as a single man without protest, who, years after his death, claims dower in a valuable estate that has passed to an innocent purchaser, who two years after the marriage took a chattel mortgage in her maiden name from him, whose marriage was never solemnized or made public by rites of church, the ceremony of a civil magistrate, or by public record, who defiantly, though of mature years and self-asserted intellectuality, ignored public opinion and the conventionalities of the law, ought not to complain if that law requires substantial proof and a high standard of it to establish marriage. *Bishop v. Brittain Invest. Co.* 229 Mo. 699, 129 S. W. 668, Ann. Cas. 1912A, 868.

Where the parties were itinerants, the man a great part of the time going under an assumed name and having no occupation, unless occasional horse trades should be so considered, and it appears from the testimony of the woman and of other witnesses that the parties concealed their relations at different times and places, and there is other evidence to show that there was no general repute of marriage, there is L.R.A.1916E.

not sufficient evidence of reputation which must fortify evidence of cohabitation to establish a marriage. *Ashford v. Metropolitan L. Ins. Co.* 80 Mo. App. 638 (action by beneficiary on insurance policy on life of alleged husband; upon a subsequent appeal a judgment in favor of beneficiary was affirmed upon the ground that her right as against the insurer was not dependent upon her status as wife of the insured).

Where the relations of the parties were more or less clandestine, the occasions upon which the man spoke of the woman as his wife were few and exceptional, their conduct was so inconsistent with the marital relation as to make it appear that they did not believe themselves to be husband and wife, and where the man, when on his deathbed, dictated a will with his expiring breath in which she was named in her maiden name, and she listened to proceedings for the probate of the will without claiming to be his wife, it was held that they were not husband and wife, although children were born of the relation. *Hill v. Burger*, 3 Bradf. 432.

No marriage is shown by a man's acknowledgment of a woman as his wife in the presence of others, and by their living together as man and wife for one week prior to his death, where their intention was to have a marriage ceremony performed the next week and this was prevented by his death. *Re Grimm*, 131 Pa. 199, 6 L.R.A. 717, 17 Am. St. Rep. 796, 18 Atl. 1061 (claim as widow of share of property of deceased).

No marriage relation between a white man of loose habits and his colored servant, whom he characterized in his will as "the free black woman," naming her, can be presumed, so as to entitle her to dower in his estate, from his sexual relations with her, where it appears that he never appeared with her at public places, that he made many conveyances of real estate in which she did not join as wife, and that in the community he was regarded as a bachelor. *Rutledge v. Tunno*, 69 S. C. 400, 48 S. E. 297.

A woman cannot establish her right to community property upon the theory that her marriage is sufficiently evidenced by cohabitation and reputation, where it appears not only that she did not regard her relations with the man as marital, but also that she lived as a paid servant in his house, that the repute of marriage was at least divided, and that she used and was addressed by her maiden name, which she attached to conveyances executed by her. *Schwingle v. Keifer*, — Tex. Civ. App. —, 135 S. W. 194.

⁷⁵ It was held that there was no marriage where it appears that the woman went to the man's room for the night, following their first meeting; that the repute as husband and wife was divided; that although they registered at hotels as man

and wife, he never introduced her to his relatives as wife, and he represented her to his cronies as his mistress; that after the birth of a child (whose legitimacy was in issue) the mother deserted the father and went to live with another man; that the woman's mother recovered a default judgment against the man for seduction of her daughter, and that neither she nor the child made any claim upon his estate until fourteen years after his death. *Arnold v. Chesebrough*, 7 C. C. A. 508, 20 U. S. App. 87; 58 Fed. 833.

Where the man led two lives, in one of which with his business acquaintances, friends, and club associates he passed for a bachelor, and in the other, among his employees, near neighbors, and friends of the woman he occupied the attitude of a married man, recognizing and introducing the woman as his wife, and where there is a long series of acts all inconsistent with the marriage relation, such as failure to mention the woman to his family, and his statement in conveyances and in his will, made when he knew death was at hand, that he was unmarried,—the marriage relation will be deemed not to have existed. *Powers v. Charbmury*, 35 La. Ann. 630.

Haley v. Goodheart, 58 N. J. Eq. 368, 44 Atl. 193, involving legitimacy and inheritance, held that there was no marriage between a dissipated and indolent son of rich parents, and a girl known to the police as fast, where her vague testimony of a ceremonial marriage had no direct corroboration whatever, and was negatived by a course of conduct wholly inconsistent with marriage, during which neither acted nor were known as husband and wife, he only occasionally sharing her bed at a boarding house where he maintained her, she at times acting as barmaid in a saloon and frequenting other like resorts, and where during the sickness which caused his premature death he not even communicated with her, and in expressing compassion for those whom he would leave behind at death, he mentioned neither her nor their child.

Where the repute is confined to casual acquaintances, and the man's intimate friends at no time had been introduced to the woman as wife, and he always attended the social functions among them without her, and none of the relatives of the man knew of any marriage relation, which was claimed to exist for some fifteen years, and the man subsequently married another woman by a ceremonial marriage, and issue was born thereof, it was held, in a contest over his estate, that there was no common-law marriage. *Re Rossignot*, 112 N. Y. Supp. 353. But see the New York case of *Badger v. Badger*, cited in subdivision V. c. of the note to *Grigsby v. Reib*, ante, 39.

Mutual consent following illicit intercourse between a man and his deceased wife's maid servant may be found to have been given where, upon discovering that she was pregnant as the result of the il-

legal intercourse, he took her to a house to live, which he had prepared for the purpose, consistently let it be known to all persons who knew of their relations that they were husband and wife, and, although he lived apart from her at first and visited her only occasionally, and was regarded by his business associates and friends who did not know of the relations as a bachelor, finally took up his abode with the woman and lived there until his death, although in his will he made a small bequest to her in the name which she bore before assuming his. *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106 (suit for dower).

Where the relations of the parties were meretricious in the beginning, there was held to be insufficient evidence of a change in their character where, although there was some evidence of a matrimonial reputation among their friends, it appeared that these friends were inmates and frequenters of houses of ill repute at which the woman lived and at which the man visited her, and that he had a home with his sisters, that the woman had a child by another man whose name he bore, that on occasions when she had been arrested she gave a fictitious name, that she at no time claimed to be his wife, did not go to him in his last sickness, and after his death sought admission to his home to view the body merely upon the ground that she was a friend to whom he had been kind. *Re Brush*, 25 App. Div. 610, 49 N. Y. Supp. 803 (suit by alleged widow for appointment as administratrix).

Where a man engaged rooms and board for a woman whom he represented as his wife, though both were known under a fictitious name, although he visited her only twice or three times a week, maintained a place of abode and took his meals elsewhere, was known to his personal friends and acquaintances as a bachelor, the presumption of marriage arising from cohabitation and repute among the persons to whom they were jointly known, and his correspondence with her, in which, although he never used the term "wife," he expressed great affection for her, great sorrow at the death of their child, and great solicitude for her comfort and welfare, speaking generally in terms which were more consistent with the theory that she was a wife than that she was a concubine,—is not affected by the fact that he was so much absent from her, that his personal friends and relatives did not know of her existence, and that he led what is generally termed a double life, where press of business assigned by him as a reason for such absence was accepted both by the woman and the people in the community where she lived, who knew of their relations, and where he represented himself to them as her husband, and even produced a false certificate of marriage to allay the suspicions of the woman with whom she lived, and especially where, due to the difference in the strata of society from which the two came, it was regarded as essen-

always one of the preponderating effect of the evidence as a whole.

So it is with the fact of the separation of the parties or the remarriage of one of them. If, while their relations subsisted, the habit and repute were such as raise a presumption of marriage, it would appear error to say that the presumption is overcome by separation and marriage to a third person,⁷⁶ for like conduct on the part of

persons ceremonially married is not so uncommon as to make it appear improbable that persons who have cohabited could not have had a matrimonial intent during the subsistence of their relations merely because they separated and one of them remarried. It is probably more nearly correct to say that such a circumstance may overcome the prima facie case arising from habit and repute, but does not prevent the

tial to his success in his calling, that the people of refinement and culture with whom that calling brought him in contact should not know of their relations. *Re Vincent's Appeal*, 2 Brewst. (Pa.) 202.

But it was held that there was no marriage relation so as to entitle the alleged wife to share as widow in the alleged husband's estate where, although before certain persons she assumed his name and was suffered to hold him out and introduce him as husband, he was reputed among his friends and acquaintances as a bachelor, having a separate residence which was in the district where he voted, and from which he was buried; the woman lived elsewhere, and was not known by the man's name by her landlord, and no storekeeper from the neighborhood was shown to have known her by such a name; and to those who knew of her through him, he called her his "shirt maker," and excused his absence from his own residence while sojourning with her as a visit to a neighboring city. *Re Yardley*, 75 Pa. 207.

Where the acquaintance of the parties began at a sporting house, and the parties continued to visit houses of assignation for a considerable time after their relations began, and the woman repeatedly admitted that she was the man's mistress, and it is shown that she frequently importuned him for the performance of a marriage ceremony, and that she had friendly relations with a mistress of the man, who divided his time between the two, living at a separate abode himself, and the only repute of marriage between the parties was at the hotel where he kept her, and where they used a fictitious name, it was held that there was no presumption of marriage, especially in view of the fact that any tendency of the evidence to establish marriage was negated by the fact that the woman negotiated for settlement and settled with the man on the basis of illicit relations, and thereafter resumed her maiden name. *Re Callery*, 226 Pa. 469, 75 Atl. 672.

A finding that there was no marriage between a deceased and a woman prosecuting a claim as widow against his estate will not be disturbed on appeal when based on evidence that the man was dissipated and lived on a weekly allowance from his father's estate; that he met the woman at a house of ill fame which she conducted; that they lived together at times at houses conducted by her; that his home was at his mother's house, to which he went short-

ly before his death and from which he was buried; that to his kindred and friends he was known as a single man and she as his mistress, though she was addressed as his wife by, and was introduced as such to, persons furnishing supplies to their place of abode; that she dealt in real estate in her maiden name, kept her bank account in the name of the man from whom she was divorced, and loaned money to the deceased and received securities from him in her maiden name; that two years before his death he made a will naming her as "my intended wife," and that there was nothing in their relations to show that they regarded them as matrimonial. *Re Patterson*, 237 Pa. 24, 85 Atl. 75.

In *Re Green*, 5 Pa. Co. Ct. 605, it was held that there was no marriage between a deceased and a woman claiming to participate as a widow in the distribution of his estate, where, the man having thrown a ring into her lap with the remark, "That is to bind you and I together as long as we live," she responding, "That is all right," the married life of the parties being alleged to have begun at that time, it appears that the parties cohabited for sixteen years, and that during the whole of this time the man's recognized home was with his parents, where he was uniformly known in the community as a single man, and that she lived in another community where she was as commonly known by the name of her first husband as by that of the deceased; that she was sometimes addressed by her maiden name, that she bore two children, the baptismal record of whom showed them to be illegitimate and the children of different fathers, and that she was arrested for a crime to which coverture would have been a defense, but was not interposed.

⁷⁶ It has been said that the presumption of marriage arising from cohabitation and repute falls before actual proof of a subsequent marriage by one of the parties with a third person. *Norman v. Goode*, 113 Ga. 121, 38 S. E. 317; *Maher v. Maher*, 183 Ill. 61, 56 N. E. 124 (at least when preceded by a separation of the parties without apparent cause). But, as stated in the text, this appears to be error.

The presumption of marriage from cohabitation, holding out, reputation, and the birth of children, covering a period of thirty years, is overcome by proof that the parties separated and shortly after both married other parties by ceremonial marriages, since to hold otherwise would be to

jury from making it the basis of a finding of marriage.⁷⁷ However, it seems that in practice such a circumstance is seldom given special attention, and the marriage

relation is found to have existed or not where such a circumstance is involved, according to the combined effect of the entire circumstances.⁷⁸

presume that both parties committed bigamy. *Newton v. Southworth*, 43 Hun, 639, 7 N. Y. S. R. 130 (involving a contest as to the distribution of the surplus from a foreclosure sale under a mortgage executed by the parties while cohabiting).

⁷⁷ The prima facie case arising from cohabitation and repute is overcome by evidence of a permanent separation of the parties without apparent cause, and a subsequent marriage between one of the parties and a third person; but the evidence of cohabitation and repute still remains evidence from which the jury may infer a marriage. *Moore v. Heineke*, 119 Ala. 627, 24 So. 374 (alleged first marriage of man seeking to probate will of wife by subsequent marriage).

⁷⁸ Though the parties may have at times held themselves out as man and wife, where it appears that they did so for the purpose of deceiving others, and that the woman abandoned the husband, lived apart from him for six years and until his death, and that during that period she made no attempt to resume the relation or be known or recognized as his wife, supporting herself, and applying for employment in her maiden name, no marriage contract will be deemed to have existed. *Re Maher*, 204 Ill. 25, 68 N. E. 159 (second appeal; right in property as widow).

Where the circumstances are substantially conclusive that the parties were married, the additional fact that the parties afterwards separate and one of them marries another is not controlling. *Smith v. Fuller*, — Iowa, —, 108 N. W. 765.

The presumption of marriage from cohabitation may be rebutted by evidence of separation and the subsequent ceremonial marriage of one of the parties to a third person. *Jones v. Jones*, 45 Md. 144, involving legitimacy of issue. On second appeal in 48 Md. 391, 30 Am. Rep. 466, the court added that where the presumption of a lawful marriage founded simply upon habit and repute is met by the counter presumption of innocence in contracting a second marriage, the former must give way, and the law then requires that the first alleged marriage as a natural fact shall be established by more direct proof.

But where, after the parties had lived together for twenty years and had thirteen children, they separated, and the woman, during the man's life, married another man who lived with her nearly three years and then married another woman while the first was still living, the doctrine that the separation of the parties and the remarriage of one of them overcome the presumption of cohabitation and repute seems not to have suggested itself, and the court held L.R.A.1916E.

that there was a marriage between the parties who cohabited so long, and that, this being so, the second marriage was void and the third valid, so as to give the female party to it the right to share as widow in the husband's estate as against his heirs. *Peet v. Peet*, 52 Mich. 464, 18 N. W. 220.

The fact that after entering into a present contract of marriage with a woman, the man cohabited with her but three weeks, and then joined an expedition of exploration, and upon his return, five years later, married another woman, does not necessarily negative his good faith and matrimonial intent in entering into the contract. *Dyer v. Brannock*, 66 Mo. 391, 27 Am. Rep. 359.

A common-law marriage which entitled the second husband of a party thereto, whom she married during its subsistence, to a decree annulling the second marriage, was held to have been contracted where the first husband testified that when he and the woman were occupying the same cell in jail, they contracted to live together as man and wife, and it appeared that when both were liberated they lived together in various places; that the woman registered at hotels as his wife and wrote letters signed in the same manner and addressed to him as husband; that her personal effects bore initials the last of which was like his; and that she declared to various people that they were husband and wife, and that numerous people knew her as his wife. *Reynoldson v. Reynoldson*, 96 Neb. 270, 147 N. W. 844.

Applegate v. Applegate, 45 N. J. Eq. 116, 17 Atl. 293, seemed to proceed upon the assumption that an alleged first marriage was established, although the exact holding was that a woman is estopped to maintain a suit for alimony where the defense is that, at the time of the alleged marriage with the defendant, she had a husband living, and this is supported by proof of declarations by her of the prior marriage, allowing herself to be introduced as the wife of the alleged former husband, cohabiting with him for many months in houses rented by him, giving birth to a child which was recognized as his, and visiting and being visited by their friends.

The evidential value of cohabitation and repute is impaired by evidence that there was an abrupt separation of the parties, and that they lived apart for a long time without the pursuit of either by the other. *Re Wallace*, 49 N. J. Eq. 530, 25 Atl. 260.

In a suit by a wife's alleged second husband to annul their marriage because of the woman's previous marriage, the court, although intimating that more evidence of the first marriage might have been neces-

sary if a child had been born of the second, presumed the first marriage, of which a child was born, where it appeared that the cohabitation of the parties thereto was connubial from the beginning, and that they lived together as man and wife for several years, were known as such, and acknowledged the relation by their daily actions and express declarations to all persons with whom they came in contact, and it was held that the testimony of both of such parties denying the marriage did not forestall such presumption, as both were financially interested in sustaining the second marriage. *Stevens v. Stevens*, 56 N. J. Eq. 498, 38 Atl. 460.

In *Clayton v. Wardell*, 4 N. Y. 230, involving the legitimacy of a child whose mother was alleged to have had a first husband living when she married the child's father, it was held that there was insufficient evidence of the alleged first marriage where it appeared that the alleged first husband was arrested under the bastardy act as father of a child with which she was pregnant, that he gave a recognition and no further proceedings were had, that after the birth of the child he cohabited with her at her mother's home though contributing nothing to her support, that his friends seemed to regard them as married while hers regarded their relations as disreputable, that the child lived about eleven months, after which the parties separated, entering into a separation agreement which characterized them as husband and wife, and shortly afterwards the woman married the father of the child whose legitimacy was in question.

In *Caujolle v. Ferrie*, 23 N. Y. 90, in which the right to appointment as administrator depended upon legitimacy, the court held that the presumption and charity of the law were in the applicant's favor, and upheld a finding of marriage though none was directly proved, where, the mother having become with child by the father, he desired to marry her, and although his parents appeared to have no objection to his association with her as mistress, they forbade the marriage, and he thereupon abandoned his home and severed all relation with his parents, declared and caused to be recorded his purpose to solemnize the marriage, and cohabited with her as a wife, although there were circumstances negating marriage, such as an entry of the word "null" upon the record of the declaration of purpose to marry, made in accordance with a French ordinance, a separation of the parents after the birth of the child, no correspondence between them during the remainder of the father's life, the omission in the record of the child's baptism of a statement that it was legitimate, though such a statement would have been in accordance with the usage at the time and place, the abandonment of the child by both parents for several years, the use by the mother of her maiden name, L.R.A.1915E.

and her designation of the child as her nephew, although she declared on her deathbed that the child was legitimate and entitled to inheritance.

In *Chamberlain v. Chamberlain*, 71 N. Y. 423, involving a contest as to a man's estate, between the respective descendants of children borne to him by two different women, the presumption of marriage from his cohabitation with the first woman was held to fall before countervailing evidence, where it arose from evidence that the man called her his wife and treated her as such while they lived together, that the relatives of both on many occasions stated that they were married, that after their separation he stated that she was his wife, she signed a conveyance of his property at the request of the purchaser, and at her solicitation he signed articles of apprenticeship of their son,—and where the countervailing evidence showed that they lived together only two or three years, after which he again received as housekeeper a woman who had previously acted for him as such, that the first woman had two illegitimate children by two different men, with one of whom at least she had lived and cohabited for some time, that neither record nor direct evidence was presented to show an actual marriage between her and the deceased, that upon the separation of the parties no articles of separation were executed, that she lived until his death, but made no claim upon him before his death, and asserted no right to his pension after his death, that he was openly married to the housekeeper by ceremony, brought her to his house and lived with her for thirty-five years, until his death, she bearing him three children, whose names were entered as his children in the family Bible, which contained no entry of the name of the child borne by the first woman.

In *Re Rossignot*, 112 N. Y. Supp. 353, the court took the position that where, on one hand, a nonceremonial, unwitnessed marriage is relied upon and attempted to be established by repute and declarations of one of the parties, who is dead, and, on the other hand, a later formal ceremony with another person is established beyond doubt, from which issue sprang, the court should not be hedged with presumptions, but should come to its conclusion by weighing the evidence and giving effect to its preponderance.

The subsequent ceremonial marriage of the man followed by cohabitation until his death was regarded as a weighty circumstance in *Re Stanley*, 1 N. Y. S. R. 325, for refusing to presume a marriage from continued relations following a divorce in favor of the woman's first husband, the contest being between the two alleged widows of the deceased.

Where, as between a young man and a girl to whom he was attentive, but with whom he did not live, there was no repute of marriage, unless the inclination of a

Likewise, a ceremonial marriage is not necessarily inconsistent with a prior common-law marriage between the same parties.⁷⁹ Its effect depends upon whether

from all the circumstances it appears that the ceremony was resorted to in confirmation of a prior marriage,⁸⁰ or upon the theory that the relation

few people to regard the parties as married may be called a partial reputé, and the girl became pregnant by him, but claims not to have told her mother that there was any marriage until after the birth of the child, and the man, upon being apprehended for bastardy, escaped from the officer and went to another state where he secreted himself, and the girl afterwards married another man with whom she cohabited for some thirty years, retained her maiden name until such marriage, and did not tell the child of her relations with the first man that the latter was his father for many years, it was held that, although the woman, for the purpose of obtaining the estate of the first man after his decease, claimed that there was a formal exchange of consent between them, the evidence was insufficient to establish such marriage. *Re Peterson*, 22 N. D. 480, 134 N. W. 751. It is to be noted that this case involved an alleged common-law marriage in Michigan, and was decided according to the laws of that state.

In *Swartz v. State*, 13 Ohio C. C. 62, 7 Ohio C. D. 43, although the relations between the parties were illicit in the beginning, and the parties separated after living together for some nine or ten years, and the question arose in connection with the sufficiency of evidence to establish the first marriage in a prosecution for bigamy, the court held, in view of the fact that after the illicit relations had existed for a time, the parties became members of the same household, had children, conducted themselves consistently as husband and wife, and bore a strong and uniform reputation of being married, that they were to be regarded as having been married.

In *McBean v. McBean*, 37 Or. 195, 61 Pac. 418, the court refused to presume a marriage where a government interpreter had relations with an Indian woman, which, like the relations of officers of a garrison and other Indian women thereabout, were apparently meretricious, and where he subsequently took her to a fort where he lived with her for some two or three years, bearing some reputé of being married to her, and subsequently left her and was married to another woman by a priest of the Catholic Church, whose tenets forbid a priest to marry a person already married.

Declaring that cohabitation and reputation are not marriage, but are simply evidence of marriage, the court in *Re Wallace*, 40 Pa. Super. Ct. 595, seemed to think cohabitation and reputation might be sufficient to establish a marriage which would render invalid a subsequent ceremonial marriage of one of the parties, but held that the evidence in the particular case was insufficient to establish the same. L.R.A.1915E.

Where the relations of the parties were illicit in the beginning, their declarations of marriage were general and unsubstantiated, and were obviously intended as a cover for such relations, their reputé was divided in the community in which they lived, and the parties separated; the woman subsequently marrying another,—it was held that no marriage could be presumed which would disentitle the woman to share in the estate of the man whom she subsequently married. *Fryer v. Fryer*, Rich. Eq. Cas. 85. The separation and remarriage were characterized in this case as strong circumstances, but it seems safe to say that their absence would not have changed the result.

See also the Texas case of *Burnett v. Burnett*, supra, III.

⁷⁹ A subsequent ceremonial marriage between the parties is not inconsistent with a prior common-law marriage, and it does not necessarily overcome the presumption thereof which arises from matrimonial cohabitation, the declaration and conduct of the parties, and their reputation. *Adger v. Ackerman*, 52 C. C. A. 568, 115 Fed. 124.

⁸⁰ Where the cohabitation of the parties began when, returning from a drive, they were overheard to recognize the fact of marriage between them, and they continued to cohabit, although only intermittently at first, openly declared themselves to be husband and wife, and were received by their friends and relatives as such, a marriage was presumed between them notwithstanding a subsequent ceremonial marriage between them preceded by an antenuptial contract and followed by their living together at the man's home, where, according to his statement, they would have previously lived together but for the objection of his family; and therefore the woman was held entitled to a distributive share in the man's estate notwithstanding a provision in the antenuptial contract which would have deprived her thereof but for the presumptive marriage. *Betsinger v. Chapman*, 88 N. Y. 487.

Another New York case held that secret cohabitation, pregnancy, and birth, followed by immediate solemnization and public cohabitation for life, would seem to furnish considerable evidence that the parties had agreed before the connection which resulted in pregnancy to consider themselves as married in fact. *Starr v. Peck*, 1 Hill, 270, holding, therefore, that a marriage in fact before the birth of a child, so as to render it legitimate, might, notwithstanding a ceremonial marriage after that event, be found from evidence showing that the parents at the beginning of their

of husband and wife had not theretofore existed.⁸¹

L. A. W.

intimacy intended to marry, that the father followed the sea and because of delay did not return until after the child was born, that upon his return the parties were married, and that they cohabited as man and wife thereafter for many years.

Where a woman joined a man's household intending marriage, although she at first refused to enter the relation because of his drunkenness, it was held that their relation should be deemed to have become matrimonial where, having removed elsewhere, and the man having apparently overcome his habits, they lived together and held themselves out as man and wife, she joining in conveyances as his wife; and it was further held that where all this occurred before the passing of a statute which would have rendered their subsequent marriage void because they were cousins, their matrimonial relationship was not affected by the fact that a subsequent ceremony was performed between them which was void under the statute. *Re Wittick*, — Iowa, —, 145 N. W. 913.

⁸¹ Where the subsequent ceremonial marriage is attended by circumstances indicating that the parties did not regard the marital relation as previously existing, such circumstances must be weighed against the presumption, although it arises from facts otherwise sufficient to warrant an inference of consent. And it is error to instruct the jury that they may infer a marriage from cohabitation and reputation irrespective of subsequent acts and conduct on the part of the parties to the contrary, and that if there was unqualified cohabitation as husband and wife, and repute of marriage, the fact that after their relations had continued for some time, the parties entered into what was substantially an antenuptial contract, and thereafter were ceremonially married, had no effect to negative the existence of the marital relation previous to that time. *Adair v. Mette*, 156 Mo. 496, 57 S. W. 551.

No marriage will be deemed to have existed where there is only slight evidence of repute, and there seems to have been considerable doubt as to their relations, among people in the community, and where, although the evidence shows that there was cohabitation and that parties referred to each other as husband and wife, these facts can be accounted for upon the theory that they wished to conceal their illicit relations from the woman's daughter of ten years, who lived with them. *Williams v. Williams*, 259 Mo. 242, 168 S. W. 616 (suit for dower). The court appeared to regard evidence that the man stated at different times that he and the woman were "already married in the eyes of God" less as evidence of the marriage than as evidence that their relations were being questioned by relatives and neighbors, thus affecting the repute.

L.R.A.1915E.

ILLINOIS SUPREME COURT.

PEOPLE OF THE STATE OF ILLINOIS v.

JOHN L. SHAW, Plff. in Err.

(259 Ill. 544, 192 N. E. 1031.)

Marriage — divorce on substituted service — remarriage — effect.

1. The marriage of a woman against whom a foreign divorce has been granted upon service by publication, which is not recognized as valid by the state of her domicile, is invalid everywhere, and will not support a charge of bigamy against the other party to the ceremony, who abandoned her and married another woman.

Same — cohabitation under invalid ceremony — effect.

2. Cohabitation in a state where the marriage would have been valid, of a couple who went through a marriage ceremony in the state of the domicile of the woman, against whom a foreign divorce had been granted on substituted service, which was not recognized as valid at such domicile, will not constitute a valid common-law marriage, if the parties relied on the ceremony, and did not contemplate a common-law marriage.

(Dunn and Farmer, JJ., dissent.)

(October 28, 1913.)

ERROR to the Criminal Court for Cook County to review a judgment convicting defendant of bigamy. Reversed.

The facts are stated in the opinion.

Messrs. A. L. Hougen, O. J. Taylor, Jr., and Hall & Holly, for plaintiff in error:

In bigamy the state must show a lawful marriage in force at the time of the alleged bigamous marriage.

5 Cyc. 689; *Canale v. People*, 177 Ill. 219, 52 N. E. 310.

A strong presumption is indulged in favor of the last marriage.

Potter v. Clapp, 203 Ill. 592, 96 Am. St. Rep. 322, 68 N. E. 81; *Schmisser v. Beatrice*, 147 Ill. 210, 35 N. E. 525.

The law of the place where a marriage is celebrated governs the validity of the marriage. A marriage void where celebrated is void everywhere.

Canale v. People, 177 Ill. 219, 52 N. E. 310; *Weinberg v. State*, 25 Wis. 370; *Re Chace*, 26 R. I. 351, 69 L.R.A. 493, 58 Atl. 978, 3 Ann. Cas. 1050.

Where one of the parties to a marriage has a spouse living, the marriage is absolutely void, without any judicial proceeding declaring it void.

Note. — See note, post, 91.

Canale v. People, 177 Ill. 219, 52 N. E. 310; Potter v. Clapp, 203 Ill. 592, 96 Am. St. Rep. 322, 68 N. E. 81; Schmisser v. Beatrice, 147 Ill. 210, 35 N. E. 525.

By the law of the state of New York a divorce decree entered in another state against a nonresident defendant in an action where the defendant was not personally served with process, and did not appear, is absolutely null and void, and does not change the marital status of such defendant; and a marriage in New York state by such defendant is bigamous, and is null and void.

People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; O'Dea v. O'Dea, 101 N. Y. 23, 4 N. E. 110; Williams v. Williams, 130 N. Y. 193, 14 L.R.A. 220, 27 Am. St. Rep. 517, 29 N. E. 98; Rigney v. Rigney, 127 N. Y. 408, 24 Am. St. Rep. 462, 28 N. E. 405; Kerr v. Kerr, 41 N. Y. 272; Hoffman v. Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; De Meli v. De Meli, 120 N. Y. 485, 17 Am. St. Rep. 652, 24 N. E. 996; Winston v. Winston, 165 N. Y. 553, 59 N. E. 273; Haddock v. Haddock, 178 N. Y. 557, 70 N. E. 1099.

Divorce decrees procured by fraud or perjury are, of course, void everywhere.

Dunham v. Dunham, 162 Ill. 589, 35 L.R.A. 70, 44 N. E. 841.

Where, in a prosecution of a man for bigamy, it appears that the alleged first wife had theretofore been married, the state must show that such former marriage of the alleged wife had been terminated by death or divorce before her marriage to defendant.

Reynolds v. State, 58 Neb. 49, 78 N. W. 483, 11 Am. Crim. Rep. 159.

Mr. Edward Day, with Messrs. P. J. Lucey, Attorney General, George P. Ramsey, Assistant Attorney General, and Macclay Hoyne, for defendant in error:

After 1900, the plaintiff in error and Helen Shaw became and were residents and citizens of Illinois, and so remained until after the marriage of plaintiff in error to Lenore Smith, and the marital status of each at that time must be determined by the law of Illinois.

Lynn v. Sentel, 183 Ill. 382, 75 Am. St. Rep. 110, 55 N. E. 838; Dunham v. Dunham, 162 Ill. 589, 35 L.R.A. 70, 44 N. E. 841.

The courts of Illinois give full faith and credit to the divorce decree of Edward Olson from Helen Olson obtained in California, and recognize her, while domiciled in Illinois, as no longer his wife, and Edward Olson no longer her husband.

Dunham v. Dunham, supra; Knowlton v. Knowlton, 155 Ill. 158, 39 N. E. 595; L.R.A.1915E.

Rendleman v. Rendleman, 118 Ill. 257, 8 N. E. 773.

John L. Shaw being a resident of Illinois at the time of marriage and Helen Shaw becoming a resident, their cohabitation and holding themselves out as husband and wife in Illinois raise a presumption that they agreed to become husband and wife after the removal of the disability of Helen by moving to Illinois.

Poole v. People, 24 Colo. 510, 65 Am. St. Rep. 245, 52 Pac. 1025; Wenning v. Teeple, 144 Ind. 189, 41 N. E. 600; Stein v. Stein, 66 Ill. App. 526; Blanchard v. Lambert, 43 Iowa, 228, 22 Am. Rep. 245; Williams v. Kilburn, 88 Mich. 279, 50 N. W. 293; Teter v. Teter, 88 Ind. 494.

By contracting this second marriage believing she had been divorced, it is presumed they desired matrimony, and not an illicit relation, and therefore this consent to matrimony continued after their removal into Illinois, where her divorce is valid.

State v. Worthingham, 23 Minn. 528; Collins v. Voorhees, 47 N. J. Eq. 315, 14 L.R.A. 366, 20 Atl. 676.

What is known as a "common-law" marriage was and is recognized as lawful in Illinois, if contracted prior to July 1, 1909, and this was sufficient to declare a second marriage while such common-law wife was living, void, and hence the party so marrying a second time guilty of bigamy.

Reeves v. Reeves, 54 Ill. 332; Laurence v. Laurence, 164 Ill. 367, 45 N. E. 1071.

The statute defining bigamy does not use the words "lawful husband or wife living," but only the words "a former husband or wife living," and provides that the evidence of the marriages, or either of them, may be the same as is admissible to prove a marriage in any other case.

Lowery v. People, 172 Ill. 466, 64 Am. St. Rep. 50, 50 N. E. 165, 11 Am. Crim. Rep. 169.

It is discretionary as to the kind of evidence the state's attorney uses to prove a marriage, and the evidence of defendant's admissions that they were married, supported by proof of cohabitation and reputation as husband and wife, is sufficient to establish a marriage in Illinois.

Jackson v. People, 3 Ill. 232; Reeves v. Reeves, 54 Ill. 332; Lowery v. People, 172 Ill. 466, 64 Am. St. Rep. 50, 50 N. E. 165, 11 Am. Crim. Rep. 169; Miles v. United States, 103 U. S. 304, 26 L. ed. 481.

A marriage legal at common law is valid and binding in this state.

Hiler v. People, 156 Ill. 511, 47 Am. St. Rep. 221, 41 N. E. 181; Harman v. Harman, 16 Ill. 85; Miller v. White, 80 Ill. 580; Lowry v. Coster, 91 Ill. 182.

A marriage formally solemnized in an-

other state is presumed to have been legal and lawful until an adverse party proves it unlawful.

Jones v. Gilbert, 135 Ill. 27, 25 N. E. 566; *Laurence v. Laurence*, 164 Ill. 367, 45 N. E. 1071; *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322, 68 N. E. 81; *Land v. Land*, 206 Ill. 298, 99 Am. St. Rep. 171, 68 N. E. 1109; *Patterson v. Gaines*, 6 How. 550, 12 L. ed. 553; *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *Raynham v. Canton*, 3 Pick. 293; *Lancot v. State*, 98 Wis. 136, 67 Am. St. Rep. 800, 73 N. W. 575.

Helen Olson having been married to Edward Olson, and he having been absent from her without any knowledge of him on her part, for eleven years, her second marriage will be presumed lawful, and she not guilty of bigamy in New York.

Johnson v. Johnson, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232; *Coal Run Coal Co. v. Jones*, 127 Ill. 379, 8 N. E. 865; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Boulken v. McIntire*, 119 Ind. 574, 12 Am. St. Rep. 453, 21 N. E. 445; *Randlett v. Rice*, 141 Mass. 385, 6 N. E. 238; *Schmisseur v. Beatrice*, 147 Ill. 210, 35 N. E. 525; *Dixon v. People*, 18 Mich. 88.

The marriage of Helen Olson in New York to plaintiff in error, in 1900, was not bigamous, and hence not void, irrespective of the validity of the California divorce in that state, because Edward Olson had been absent from her for more than five years, and was not known to her to be living.

Jones v. Zoller, 32 Hun, 280; *Jackson v. Jackson*, 94 Cal. 446, 29 Pac. 957.

The divorce obtained in California by Edward Olson from Helen Olson, in 1892, while he was a permanent and legal resident there, being valid under the laws of that state, is valid everywhere, although obtained on publication service, and she, living apart from him, without his fault, had the same domicile as he had.

Cheely v. Clayton, 130 U. S. 701, 705, 28 L. ed. 298, 299, 4 Sup. Ct. Rep. 328; *Hunt v. Hunt*, 72 N. Y. 218, 28 Am. Rep. 129; *Burien v. Shannon*, 115 Mass. 438; *Ather-ton v. Atherton*, 181 U. S. 155, 163, 45 L. ed. 794, 799, 21 Sup. Ct. Rep. 544.

The proof that a formal marriage took place raises the presumption that the parties thereto were competent in New York as well as elsewhere.

Fleming v. People, 27 N. Y. 329; *People v. Calder*, 30 Mich. 85; *United States v. Green*, 98 Fed. 63; *Wilkie v. Collins*, 48 L.R.A.1915E.

Miss. 496; 19 Am. & Eng. Enc. Law, 2d ed. 1203.

Cooke, J., delivered the opinion of the court:

John L. Shaw, the plaintiff in error, was, by the verdict of a jury in the criminal court of Cook county, found guilty of bigamy, and was sentenced to the penitentiary for an indeterminate period. He has sued out this writ of error to reverse the judgment of the criminal court.

The principal ground relied upon for reversal is that the evidence failed to show that the plaintiff in error was guilty of bigamy. The evidence shows that on September 19, 1900, plaintiff in error and Helen Olson went through the ceremony of marriage in New York city, and that thereafter, on November 28, 1910, without having obtained a divorce from Helen, and while she was still living, plaintiff in error married Lenore Smith in the city of Chicago. The defense was that the alleged marriage of plaintiff in error to Helen Olson was null and void because she then had a husband living, from whom she had not been divorced.

It appears from the evidence that Helen Olson, whose maiden name was Helen Schneider, was on September 4, 1888, married to Edward Olson, and thereafter lived with him in Chicago as his wife until April 27, 1889, when she left him. On January 30, 1890, she brought a suit against him in the circuit court of Cook county for separate maintenance, alleging that she was obliged to leave him on account of his extreme and repeated cruelty towards her. Olson appeared and filed an answer denying the charges contained in her bill, and an order was entered by the court requiring him to pay temporary alimony. Shortly after the entry of this order Helen Olson applied to the court for a writ of ne exeat, which was issued, but Olson left the state of Illinois and went to California before the writ could be served upon him. Nothing further was done in that suit until June, 1892, when it was dismissed for want of prosecution. In the summer of 1890 Helen Olson left Chicago, and took up her residence in New York city, where she resided until after her alleged marriage to plaintiff in error. While she was living in New York city, and on November 23, 1892, Edward Olson obtained a decree of divorce in the superior court of the city and county of San Francisco, in the state of California, on the ground that Helen Olson had deserted and abandoned him. The service

upon the dedendant in that proceeding was had by publication, and she did not appear in the suit.

Plaintiff in error offered in evidence decisions rendered by the court of appeals of the state of New York, which hold that where the defendant in a suit for divorce in a foreign state is not a resident of such state, and is not personally served with process in the state where the court is sitting, and does not appear in the suit, a decree in such suit granting a divorce is null and void for all purposes within the state of New York so far as the defendant is concerned, and the defendant, notwithstanding such decree, remains a married person.

Plaintiff in error contends that by reason of the foregoing facts his alleged marriage to Helen Olson in New York city on September 19, 1900, was null and void, and that he therefore did not commit the crime of bigamy by marrying Lenore Smith on November 28, 1910. Counsel for the state contend that Helen Olson and plaintiff in error were residents of Illinois at the time of their marriage, and were in the state of New York temporarily at that time. It is not necessary to determine what effect, if any, that would have on the validity of that marriage, as it conclusively appears from the evidence that Helen Olson was at that time, and had been for several years, a resident of the state of New York. Under the laws of New York this marriage was void (*People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274; *O'Dea v. O'Dea*, 101 N. Y. 23, 4 N. E. 110; *Williams v. Williams*, 130 N. Y. 193, 14 L.R.A. 220, 27 Am. St. Rep. 517, 29 N. E. 98), and as the law of New York must control as to the validity of the marriage (*McDeed v. McDeed*, 67 Ill. 545; *Canale v. People*, 177 Ill. 219, 52 N. E. 310; *Reifschneider v. Reifschneider*, 241 Ill. 92, 89 N. E. 255), it must be held to be void in this state. His marriage with Helen Olson being invalid because of her inability to enter into the contract, plaintiff in error did not commit bigamy by his later marriage with Lenore Smith.

Some months after the marriage of plaintiff in error and Helen Olson they removed from New York to this state and cohabited together here for almost ten years, and it is contended on the part of the people that this ratification of the ceremony of marriage performed in the state of New York constituted a common-law marriage. There is nothing in the record which indicates that these parties contemplated or desired a common-law marriage, or that they entered into such a contract. Their cohabitation was pursuant to the ceremony of marriage performed in New York, and it does not appear that either of them doubted the

validity of that marriage until after their separation.

The judgment of the Criminal Court is reversed.

Dunn and Farmer, JJ., dissenting:

The marriage of Helen Olson and the plaintiff in error in 1900 was entered into in perfect good faith by both parties. The relation they assumed was not meretricious, but was intended to be matrimonial. She had been divorced from her former husband for nearly eight years. The decree of divorce was not recognized by the courts of New York, but it was valid in Illinois and many other states. *Knowlton v. Knowlton*, 155 Ill. 158, 39 N. E. 595; *Dunham v. Dunham*, 162 Ill. 589, 35 L.R.A. 70, 44 N. E. 841; *Harding v. Alden*, 9 Me. 140, 23 Am. Dec. 549; *Loker v. Gerald*, 157 Mass. 42, 16 L.R.A. 497, 34 Am. St. Rep. 252, 31 N. E. 709; *Van Orsdal v. Van Orsdal*, 67 Iowa, 35, 24 N. W. 579; *Gould v. Crow*, 57 Mo. 200; *Thurston v. Thurston*, 58 Minn. 279, 59 N. W. 1017; *Douglas v. Teller*, 53 Wash. 695, 102 Pac. 761. In this state she was competent to contract a marriage. When she and the plaintiff in error came to Illinois, a few months after their marriage, neither was under any disability here to marry, and a common-law marriage was lawful. It was the law of this state prior to the amendment of the marriage act, in 1905, which declared common-law marriages void, that "if parties to a marriage, in the beginning, desire and intend marriage in good faith, as a matter of fact, but an impediment exists, and the desire and intention continue after the impediment is removed, and the parties continue in the relation of husband and wife and cohabit as such, it is sufficient proof of a marriage." *Manning v. Spurek*, 199 Ill. 447, 65 N. E. 342; *Robinson v. Ruprecht*, 191 Ill. 424, 61 N. E. 631; *Land v. Land*, 206 Ill. 286, 99 Am. St. Rep. 171, 68 N. E. 1109. In the case last cited the parties were married during the pendency of a divorce suit by the woman, after the hearing, but before the decree was entered, believing that the decree had been rendered, and that their marriage was lawful. A decree was subsequently entered, the parties continued to cohabit with matrimonial intent, and the marriage was held valid. Had Helen Olson died on November 28, 1910, the day the plaintiff in error married Lenore Smith, he would have been entitled, under the decisions cited, to the surviving husband's interest in her estate. Being the husband of one woman, it was bigamy for him to marry another, and in our judgment he was properly convicted.

Note. — Inference or presumption of marriage from continued cohabitation following removal of impediment.

Supplementing the note to Chamberlain v. Chamberlain, 3 L.R.A.(N.S.) 244.

Continued cohabitation after the removal of an impediment to marriage, between parties whose relations began while the impediment existed, has afforded an extensive field for the application of the doctrine that marriage may be inferred from habit and repute where no express consent¹ is directly shown. The doctrine itself and the attendant theories are pretty well settled.² Its application in this respect is, as shown in the note in 3 L.R.A.(N.S.) 244, which this one supplements, attended by the same difficulties that crop up in its application generally,—³ the distinctiveness of the facts of each case, and the fact that the solution

always depends upon the intent and understanding of the parties, which are to be gathered from the circumstances as a whole. The results are not unlike those announced in Texas under the Spanish law of putative marriages.⁴

There has been considerable discussion of the question whether mere continued cohabitation following the removal of the impediment is sufficient to raise an inference of marriage, or whether there must be some particular incident or circumstance to indicate that when the parties were free to marry, they consciously changed their relations from illicit to legal. This depends upon attending circumstances. It has been said that consent after the removal of the impediment may be proved by habit and repute,⁵ but this does not mean that the inference is a necessary one in every case. Habit and repute must be considered in connection with the entire joint history of the

¹ Where an express contract, after a divorce from the first wife, is relied upon to constitute the marital relation between a man and another woman whom he ceremonially married before the removal of the impediment, words of the alleged second wife which amount to nothing more than an express wish for a continuance of their relations in view of the divorce are insufficient where they elicited no reply from him, even if they could be construed to manifest consent on her part. *Weitzel v. Central Lodge No. 19, A. O. U. W.* 1 Pa. Dist. R. 143.

² For the theories underlying this doctrine, see part V. of the note to *Grigsby v. Reib*, ante, 33.

³ For the general application, see part IV. of the note to *Becker v. Becker*, ante, 72.

⁴ This law was applied in Texas to a marriage contracted while that state was a part of Mexico, in *Smith v. Smith*, 1 Tex. 621, 46 Am. Dec. 121, holding a widow entitled to letters of administration as against the child of an alleged former marriage of the deceased. The court declared that by the Spanish law a woman who was ceremonially married to a man in ignorance of the fact that he had a wife living was invested with all the rights of a lawful wife so long as such ignorance continued, and that this status, called a putative marriage, became converted into true matrimony by the impediment ceasing to exist; and for the purpose of applying this principle, the court presumed a divorce from the first wife, who had also remarried. Though the court spoke in these general terms, it relied upon a commentary on the Spanish law, which contained the statement that after the death of the first wife the second might elect whether to live with the husband or to leave him and marry another, thus suggesting that probably the mere removal of the impediment was not sufficient to convert the relations into true marriage, and that there must be a continuance of the relations to render the marriage complete, L.R.A.1915E.

a point not necessary to the decision of the case, as there was cohabitation until the husband's death. The court added that good faith was always presumed to exist, and that whoever would impede its effect must prove that it did not exist; and that to make the good faith perfect, it was necessary that the marriage should have been celebrated with the prescribed solemnities, that the spouses should have been ignorant of the annulling vice, and their ignorance excusable. For a fuller discussion of the Spanish law and its effect, see subdivision II. b, 2 (d) of the note to *Grigsby v. Reib*, ante, 20.

The case of *Morgan v. Morgan*, 1 Tex. Civ. App. 315, 21 S. W. 154, involving a putative marriage, illustrates that it was regarded as something different from the marriage relation, and as having reference to the consequences rather than to the nature of cohabitation, in holding that a woman who marries a man without knowledge that he has a lawful wife living, his divorce being invalid, is entitled to a community interest in the property acquired while they live together, even as against the lawful wife.

Knowledge of the man's previous marriage disentitled the woman to any property rights as a putative wife. *Chapman v. Chapman*, 16 Tex. Civ. App. 382, 41 S. W. 533.

⁵ It was held in *Campbell v. Campbell*, L. R. 1 H. L. Sc. App. Cas. 182, that, although the relations of the parties were adulterous in the beginning, they might become matrimonial by consent after the removal of the impediment, and that such consent might be evidenced by habit and repute.

The marriage of two persons one of whom has a spouse living, by present consent and cohabitation following the death of such spouse, may be proved by habit and repute. *Holabird v. Atlantic Mut. L. Ins. Co.* 2 Dill. 166, note, Fed. Cas. No. 6,587.

parties. The original purpose of the parties, their desire for matrimony, and their good faith in entering the relation, materially affect the probative force of continued cohabitation. There are various aspects of the original intent of the parties. They may have had reason for believing that no impediment existed.⁶ They may have known that an impediment existed, and still have had a desire for true matrimony. Cohabitation in the latter situation is surely less reprehensible than sheer concubinage,⁷ where, perhaps, the unmarried person sees a measure of safety in the impediment.

⁶ This difference has been given expression as a well-defined distinction between illicit relations forbidden because of an undisclosed disability on the part of one of the parties thereto, and such relations as are mutually meretricious, involving on the part of the woman knowledge that their character is not, and is not intended to be, matrimonial, but of a wanton and lustful nature. *Townsend v. Van Buskirk*, 33 Misc. 287, 68 N. Y. Supp. 512; *Re Wells*, 123 App. Div. 79, 103 N. Y. Supp. 164, affirmed without opinion in 194 N. Y. 548, 87 N. E. 1129.

⁷ The presumption as to the continuance of illicit relations is somewhat weakened by the fact that, although the man had a former wife living, the parties really desired matrimony and shunned the relation of concubinage, and the cohabitation began with an understanding that they should be married as soon as the impediment was removed. *State v. Worthingham*, 23 Minn. 528.

⁸ Where the parties entered into a marriage contract and lived together with matrimonial intent, though one of them had a spouse living, their cohabitation as husband and wife after the death of such spouse, and after they learned of his death, warranted the inference that the parties renewed their matrimonial pledges and entered into a new understanding that they were thenceforth husband and wife in law as well as in fact. *Prince v. Edwards*, 175 Ala. 532, 57 So. 714 (testator's alleged widow claiming right to act as administratrix as against his mother).

Where parties enter into a marriage while one of them has a spouse living, with a manifest desire and intention to live in a matrimonial union rather than in a state of concubinage, and the obstacle to their marriage is subsequently removed, their continued cohabitation raises a presumption of an actual marriage immediately after the removal of the obstacle, and warrants a finding to that effect. *Adger v. Ackerman*, 52 C. C. A. 568, 115 Fed. 124.

If the parties begin cohabitation in good faith and with the obvious desire for a matrimonial relation, though there is an impediment to their marriage, and with an understanding that they are to be married as soon as the impediment is removed, no express agreement to marry need be made after the removal of the impediment, in L.R.A.1915E.

Where the circumstances are such as to show or imply that the parties by their union intended or even desired an honest union, although one of them had a spouse living, the law will respect their purpose by inferring consent from mere continued cohabitation consistent with marriage, although there are no special circumstances to indicate that the parties expressly renewed their consent or changed their mode of living after the removal of the impediment.⁸ Indeed, the fact that the parties made no new arrangement after the death of the first spouse may be a circumstance in their favor, in that it may indicate that they did not

order to warrant the finding of a common-law marriage. *University of Michigan v. McGuckin*, 62 Neb. 489, 57 L.R.A. 917, 87 N. W. 180. Upon rehearing in this case this specific point was more fully discussed, and in reaffirming its previous conclusion the court declared that the ultimate fact is not that the parties made a formal promise or contract, but that they mutually consented to a lawful social relation, and that this consent may be expressed by conduct as effectively as by words. 64 Neb. 300, 89 N. W. 778. The specific holding on the facts was that, although the beginning of the connection was meretricious, each of the parties having a lawful spouse then living, there was sufficient evidence of a lawful marriage where the parties, while the woman was acting as the man's housekeeper, agreed to marry as soon as the woman obtained a divorce, and after the same was decreed they began to cohabit, and again agreed to marry when the man obtained a divorce, and where after he obtained the same, the parties not only for a long term of years continued to live together as husband and wife, and to enjoy the repute of that relation, but also continuously represented themselves to the public as such, and five children were born of the union, whom the parents unitedly represented to the public and caused to be baptised into the church as the children of lawful wedlock; and the fact that no explicit verbal agreement to marry was made after obtaining the divorce is immaterial.

Where parties innocently married, believing that the woman's former husband, who had deserted her, was dead, the fact that they afterward learned that he was still alive did not prevent the continuance of their original legal intent, and their continuing to live together as husband and wife, holding each other out as such until after the death of the first husband, was held to constitute "a relation to which the law attaches all the legal rights, obligations, and disqualifications which flow from a marriage entered into according to the forms of law;" and it was therefore held that the woman was not entitled to a pension as widow of the first husband, and especially so in view of the fact that she did not apply for the pension until fourteen years after his death, and that after she

regard a ceremony as necessary, thus bespeaking good faith in the beginning, whereas a public marriage would be likely to create a scandal,⁹ and might possibly, though not necessarily, show a consciousness that the previous relations were not lawful.¹⁰ A prima facie indication of good faith is found where the relations of the par-

ties did not begin until after the former spouse had been absent for a considerable time,¹¹ and especially where the absence had continued sufficiently long to raise a presumption of death, although it was afterward learned that the former spouse died while the relations in question subsisted.¹² This point is, of course, entirely distinct

did apply she bought and conveyed property, using as her own the family name of the second husband. *United States v. Hays*, 20 Fed. 710, decided avowedly in accordance with the Missouri laws and upon the authority of *Holabird v. Atlantic Mut. L. Ins. Co.* 2 Dill. 187, note; *Fed. Cas. No. 6,587*, and *Dyer v. Brannock*, 66 Mo. 401, 27 Am. Rep. 359.

The New Jersey court lays it down as a correct rule that when the parties have intended marriage, being ignorant of an existing impediment, all that is to be established by cohabitation apparently matrimonial, subsequently to the removal of the impediment, is the carrying into effect by the parties of the original purpose; but that when the original purpose was to live in adultery, the evidence, under similar circumstances, must be sufficient to show an abandonment of such purpose and the execution of a new one. *Collins v. Voorhees*, 47 N. J. Eq. 555, 14 L.R.A. 364, 24 Am. St. Rep. 412, 22 Atl. 1054.

⁹ So, in *Bergdoll's Estate*, 20 Pa. Co. Ct. 577, in which the parties were ceremonially married, and it appears that both desired matrimony, it was held that their continued cohabitation after divorce from or death of the woman's first husband raised a presumption of exchange of consent, where their acts and declarations and conduct were such that the court said of them that some may have been consistent with a meretricious alliance, but that all of them together were repugnant to the very notion of such a thing. The court pointed out that if the parties had gone through another ceremony of marriage after the removal of the impediment, that, in itself, would have been a scandal (right of woman as widow in alleged husband's estate).

¹⁰ The fact that a ceremonial marriage between persons who have cohabited is not necessarily inconsistent with a previous marital relation between them is discussed in part IV. of the note to *Becker v. Becker*, ante, 72.

¹¹ The Iowa court held that even if a woman's second marriage was void because she had a husband living, a marriage would be deemed to have taken place after the death of such husband, where the parties continued thereafter as before to treat each other and hold each other out as husband and wife, and nine years had intervened between the separation and the second marriage, during which the first husband lived with another woman as his wife,—circumstances held sufficient to warrant an inference of divorce. *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245. The facts emphasized by the court were that "during

this time Blanchard introduced the plaintiff as his wife; he called her 'Ma' when speaking to one of the family; when speaking to strangers he called her 'his wife.' They lived happily together and treated each other with mutual respect. During the last illness of deceased, which lasted about ten months, the plaintiff sat up with and waited on him, and in all respects treated him as a lady would her husband. She was treated in the community with respect, and was recognized as the wife of the deceased. Blanchard made a will in which he mentions plaintiff as his wife and bequeathes to her the homestead . . . provided she remains his widow." The phase of this case which relates to the presumption of divorce does not come within the scope of this discussion, and is treated in the notes to *Meggins v. Megginson*, 14 L.R.A. 540; *Smith v. Fuller*, 16 L.R.A. (N.S.) 98; and *Vreeland v. Vreeland*, 34 L.R.A. (N.S.) 940.

¹² Where a man was married to a woman who afterward went away and was not heard from for more than seven years, after which a presumption of her death arose, and, after the expiration of seven years, he contracted marriage with another woman, the relationship between him and the second woman is not that of concubinage, even though it develops that the first wife is not in fact dead; and until the fact that the first wife is still alive becomes known to the parties, and some steps are taken to annul the second marriage, the marriage state between the man and the second wife is not an unlawful relationship, and the parties thereto have a status which confers rights recognized by law, in many senses the second wife being regarded as lawful. *Grand Lodge, K. P. v. Barnard*, 9 Ga. App. 71, 70 S. E. 678.

So, where, the woman's first husband having disappeared, and his disappearance having continued for a period of five years, she made diligent, but unavailing, inquiries as to his whereabouts, and, believing him dead, entered into a ceremonial marriage with the defendant, and upon being informed of his death at a later day, the parties continued to cohabit as husband and wife for some eleven years, when the defendant abandoned her, it was held that such facts were sufficient to support a judgment in favor of the wife for separation and alimony. *Taylor v. Taylor*, 173 N. Y. 266, 65 N. E. 1098. See also *United States v. Hays*, supra.

Upon the ground that in *Blanchard v. Lambert*, supra, the woman was said to have had a right to suppose that the first husband had obtained a divorce, that case was distinguished in *Barnes v. Barnes*, 90

from the presumption of the termination by death or divorce of the first marriage before the second was contracted.¹³

A suggestion of initial desire for matrimony is also contained in the beginning of relations under a ceremonial marriage which the impediment invalidates.¹⁴ It has been said that a person must either have intended a lawful marriage or the contrary, and that if it is possible to conceive that he planned to defy the laws of society, it is not easy to conceive that he should at the same time pay the nicest deference to those laws by having a ceremony performed in the first instance, and otherwise conforming to the obligations of matrimony and the exactions of society.¹⁵ While this may be good theory for the purpose of a beneficent presumption under favorable facts, it loses sight of the fact that more often than one cares to contemplate the

ceremonial marriage is resorted to as a cover for relations adulterous in fact, in a community which does not know of the first spouse. So, like that of other favorable circumstances, the ceremony's effect is merely a *prima facie* one, and ultimately depends upon the attending conditions. Where the marriage is not shown to have been solemnized in bad faith, consent after the removal of the impediment may be inferred from continued matrimonial cohabitation.¹⁶ A stronger case for the inference is afforded where, in addition to a ceremonial marriage, there is a supplemental showing of good faith,¹⁷ either by the cessation and resumption of cohabitation after the removal of the impediment,¹⁸ or by indications that the parties expressly welcomed the removal of the impediment, and took advantage of it either in express words,¹⁹ or

Iowa, 282, 57 S. W. 851, in which a contrary conclusion was reached, it appearing that the woman, claiming a share in the alleged second husband's estate, as in the *Blanchard Case*, had no reason to believe the first husband dead or divorced, and that the second abandoned her long before his death.

¹³ This question is discussed in the notes to *Meggins v. Meggins*; *Smith v. Fuller*; and *Vreeland v. Vreeland*,—*supra*, dealing generally with presumptions arising from marriage.

¹⁴ See *Smith v. Smith*, 1 Tex. 621, 46 Am. Dec. 121, *supra*, stating that while good faith will be presumed wherever possible, still to make it perfect there must be present certain enumerated features, including the fact of a ceremonial marriage.

¹⁵ *Bergdoll's Estate*, *supra*.

¹⁶ Where a man and a married woman were married by a justice of the peace, and four years later, when the woman had adopted his faith, they were married by a clergyman, and they openly cohabited for thirty-six years, when the woman died, the death occurring eighteen years after the first husband's death, it was held without discussion that they were husband and wife, at least after the first husband's death, and that therefore the second husband was entitled to share in the woman's estate. *Geiger v. Ryan*, 123 App. Div. 722, 108 N. Y. Supp. 13.

¹⁷ Where the parties in good faith attempt to enter into a legal marriage contract by procuring a license and a solemnization of marriage in a legal way, the woman supposing her prior marriage to another man dissolved, and where the parties thereafter live together and hold themselves out as man and wife, and the woman's husband thereafter obtains a divorce and the parties continue to live as husband and wife and hold themselves out to the public as sustaining that relation, they are deemed to have been husband and wife from the time the husband obtained such divorce, although no ceremony is thereafter performed. *Poole L.R.A.*1915E.

v. People, 24 Colo. 510, 65 Am. St. Rep. 245, 52 Pac. 1025 (prosecution for failing to support wife).

¹⁸ Where two months after an attempted marriage apparently ceremonial, the man's first wife died, and the parties to the attempted marriage afterward separated, but later became reconciled, a marriage either ceremonial or common law, though neither was directly proven, was inferred from the reconciliation and the fact that thereafter the parties consistently conducted themselves as husband and wife, repeatedly and solemnly declaring themselves as such, and being reputed among their friends and neighbors as bearing that relation, and having children recognized as such; and the fact that the wife was buried in the husband's lot, and characterized as wife on the headstone,—the court saying that the case was especially one for a finding of marriage in view of the fact that it involved the legitimacy of the children and their right to inherit. *Staiger's Estate*, 7 Pa. Dist. R. 351.

¹⁹ Where the parties were ceremonially married and cohabited for ten years after the death of the man's first wife, and until the woman left him, it was held that the parties renewed their consent after removal of the impediment, where during their cohabitation the man repeatedly represented her as his wife, and she, after the removal of the impediment, demanded a remarriage and the man bought and gave her a wedding ring, declaring that he thus married her a second time, and that the ring would take the place of a marriage certificate. *Topham's Estate*, 28 Pa. Co. Ct. 374 (right of woman as widow in alleged husband's estate). Here, of course, there was not only continued cohabitation, but an express renewal by consent.

A contrary and insupportable decision is found in a very early Pennsylvania case in which there was a ceremonial marriage, and the statement of facts by the court recites that the man "had another wife liv-

by proceeding upon the assumption that a new ceremony was unnecessary.³⁰

The necessity of supplementing evidence of mere continued cohabitation by showing some specific act which indicates renewed consent, or at least a consciousness that a

change for the better has been worked by the removal of the impediment,³¹ is most frequently encountered where the relations were illicit in their inception. Such a situation brings into operation the presumption that the illicit relation continues

ing, from whom he had been separated according to his own notion effectually, but without any effect whatever in law," although it was not shown that the woman knew of the former marriage, and it appeared that, after the man obtained a divorce from his first wife, the parties, having been advised by their lawyer to celebrate another marriage, exchanged consent then and there, the man saying, "I take you for my wife," and the woman, upon being told to say the same, declared, "to be sure he is my husband good enough." It was held that, inasmuch as the woman's words were not in the present, they referred to the past illegal marriage, and were insufficient to constitute the parties husband and wife, although it is to be further noted that it appeared that they cohabited together, signed papers as husband and wife, and for anything that appears conducted themselves as such. *Hantz v. Sealy*, 6 Binn. 406. While it is possibly true that the words of the woman are subject to the construction given them, it is after all the intention of the parties that count, and, in view of the fact that it is obvious that they were attempting then and there to contract a marriage upon the advice of their lawyer, and the woman to all appearances was attempting to declare herself as instructed, it would seem as if she were having a heavy punishment imposed upon her for failing to choose the best words to work the result sought. It is further to be observed that the court disposed of the question rather hastily, looking at it merely from the standpoint of whether the words were sufficient *ex vi termini* to constitute a contract *per verba de presenti*, and in no way alluded, or had its attention called, to the rule that cohabitation following the removal of the impediment raises a presumption of marriage. It would seem from a survey of the cases discussed in this connection, that the facts presented in the *Hantz Case* would be sufficient to satisfy not only the rule that where the parties are ceremonially married in good faith, cohabitation after the removal of the impediment raises a presumption of marriage, but also the rule that where the parties enter the relation in bad faith (assuming that the parties did so in this case, which does not appear), they will be deemed to have become husband and wife after the removal of the impediment, where there is evidence of a change in their relation warranting an inference of an exchange of consent, or evidence tending to show an express exchange of consent, for which the declarations of the parties before the lawyer would seem amply sufficient.

The case of *Thewlis's Estate*, 217 Pa. 307, 66 Atl. 519, attempted to distinguish *Hantz v. Sealy* upon the ground that the woman L.R.A.1915E.

"appears to have left the man after his divorce from the wife, and, without asserting a marriage, sued him in her unmarried name for a legacy which had been left to her by a testator of whose will the defendant was executor, the defense being, *inter alia*, that the suit could not be maintained because the plaintiff was the wife of the defendant. What was said by the court with regard to the marriage was said with reference to the facts thus disclosed by the evidence."

³⁰ Where a deserted wife pending her suit for divorce went through a marriage ceremony with another man, and after obtaining a divorce, and inisiting upon another ceremony, began to cohabit with such other man upon the faith of his representation that he had taken good counsel and that another ceremony was unnecessary, it was held that an intent to assume the marital relations was evidenced by the formal marriage ceremony solemnized between the parties, and that therefore there was a valid marriage between them without a new ceremony, and that the woman's remedy for desertion was not therefore an action for breach of contract of marriage, but a suit instituted as a deserted wife. *Williams v. Kilburn*, 88 Mich. 279, 50 N. W. 293.

³¹ Although the parties had illicit intercourse before the woman obtained a divorce from her first husband, there is sufficient evidence of a change in their relations thereafter to warrant a finding that they made a marriage agreement, where it appears that the man was an important witness in behalf of the woman in her divorce suit, that he furnished the money to pay her lawyer, that after the divorce was obtained he consented to the woman taking his name, thenceforth recognized her as his wife, introduced her to the public as such, and lived and cohabited with her as such until her death, about seven years. *Edelstein v. Brown*, — Tex. Civ. App. —, 95 S. W. 1126, affirmed in 100 Tex. 403, 123 Am. St. Rep. 816, 100 S. W. 129 (involving suit by children against father to obtain mother's share of community property). While the court used terms which indicated that a finding of an express agreement of marriage was warranted under the facts, it did not indicate that such a finding was necessary, and to all appearances had no such idea in mind when it said that the evidence was sufficient to justify the jury in finding that the parties immediately upon the granting of the divorce repented of their course and agreed to become husband and wife, and were so held out by each other, and were so regarded by their neighbors and friends, and in law were husband and wife.

In *Bowman v. Bowman*, 24 Ill. App. 165,

unchanged unless the contrary is made to appear.²² But this does not mean that a change of relations must be affirmatively established in all cases, although the courts now and then use general terms of a contrary import. There appears a readiness to infer consent from mere continued co-

habitation after the removal of the impediment, although the relations were originally illicit, where the cohabitation and its attendant circumstances are strongly and consistently indicative of marriage.²³ The denial of effect of continued cohabitation to evidence a change from illicit relations

it appeared that the parties had lived together in illicit relations, but that the man desired to legitimate the children born to them, and professed love for the woman. The woman's claim that after the man had obtained a divorce from his former wife, he immediately came to her and they entered into a contract of marriage, was upheld where telegrams and letters written immediately after the divorce by the man to the woman, and other circumstances, showed that the man regarded his position as changed, and that he regarded himself as free, the court saying that he needed no freedom to meet her in a continuance of the impure relations, and that as between them it was important only as permitting him to enter at once upon a pure one. It would seem that this case would stand the test of the doctrine of *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737.

See *supra*, *Collins v. Voorhees*, 47 N. J. Eq. 555, 14 L.R.A. 364, 24 Am. St. Rep. 412, 22 Atl. 1054.

²² The nature and general effect of this presumption are discussed in part IV. of the note to *Becker v. Becker*, ante, 72.

²³ A presumption of marriage from cohabitation and repute, between parties who emigrated to Texas after the man's first wife had not been heard of for four years, a period held to raise a presumption of her death, was indulged in *Yates v. Houston*, 3 Tex. 493, involving the claim of the alleged second wife to the community property after the husband's death, although the relations of the parties were illicit in the beginning, having been begun in another state with knowledge by both parties that they were illicit, and apparently without ceremony. Alluding to the presumption of the continuance of illicit relations, the court said that it would be urging the presumption to an unreasonable extent to suppose that the unlawful character of the connection was unsusceptible of change, and that when all legal disabilities had ceased to operate, they would voluntarily decline all the honors, advantages, and rights of the matrimony, and prefer an association disgraceful to both parties. It should be further noted that the court emphasized the fact that the relation of the parties throughout their residence in Texas was wholly consistent with the marriage relation, the court saying that the family on its arrival in Texas was required to accredit its good character and habits, and that it must be presumed that this was done, and that the parties were duly certified to be man and wife, this being evident from the official census in which they were classed as man and wife.

In *Re Garner*, 59 Misc. 116, 112 N. Y. L.R.A. 1915E.

Supp. 212, in which a divorce in favor of the woman's first husband forbade her to marry during his life, and it appeared that shortly after the divorce she began to cohabit with another man as his wife, that they recognized each other as husband and wife, and were recognized as such by their friends and relatives, and that children were born to them, the relations continuing until the man's death, twelve years later, it was held, although no exchange of express consent between the parties was shown, and although the first husband was not shown to have died, that there was sufficient evidence of a marriage to entitle the wife to propound the second husband's will in favor of herself and children, as against his brothers and sisters, who had at all times recognized them as husband and wife, the court making no allusion to any presumptive death of the first husband, and apparently acting in pursuance of the general proposition that where intercourse is illicit at first, and subsequently assumes a matrimonial character, and is surrounded by the evidences of a valid marriage, a question as to the existence of the marriage arises, and it becomes necessary to weigh the presumption arising from the meretricious character of the connection in its origin with the presumption arising from the subsequent acknowledgment, declarations, repute, etc., and to decide whether all the circumstances taken together are sufficient evidence of marriage.

The fact that in *Van Dusan v. Van Dusan*, *infra*, a party to the marriage was contesting its validity, was apparently regarded as rendering those cases distinctive in *Barker v. Valentine*, 125 Mich. 336, 61 L.R.A. 787, 84 Am. St. Rep. 578, 84 N. W. 297, involving a contest between a sister of the deceased husband and his alleged widow, as to the proceeds of an insurance policy which had been made payable to the latter as "wife," the sister contesting the validity of the marriage. The *Barker* Case held that cohabitation after the removal of the impediment by death of the man's former wife was sufficient to constitute a lawful marriage, where they continued to live together seven years after the death of the former wife, during which time he procured the insurance on his life, making her the beneficiary and calling her wife, and they were regarded and treated by their relatives and neighbors as husband and wife, it further appearing that the man was ill a long time before his death, and that during that time the woman continued to treat him as a wife and took in boarders to support him. It did not appear that the wife knew of any impediment to the marriage until after the

is for the most part confined to cases in which it is of little quantitative value, either because the parties are shown to have been sexual perverts who would probably care little for matrimony,²⁴ because

it is of itself inconsistent with the matrimonial relation or a belief that it existed,²⁵ or because subsequent events, such as the separation of the parties and the remarriage of one of them, negative previous

husband's death, and it was claimed that the cohabitation commenced under a ceremonial marriage, although there was no proof touching that point except the fact that he introduced her as his wife and stated that they had been married. It thus appears from the Michigan cases that, as has been said before, the test is in the last analysis as to just how the parties themselves regarded their relation, and possibly it is also true that, in view of the distinction apparently alluded to in *Barker v. Valentine*, less evidence of the marriage is required where its validity is not being contested by a party thereto, than where the attack is being made by a party.

See also *University of Michigan v. McGuckin*, 62 Neb. 489, 57 L.R.A. 917, 87 N. W. 180, rehearing in, 64 Neb. 300, 89 N. W. 778, *supra*.

²⁴ Where a female servant bore a child as the result of criminal intercourse with her master during the life of his wife, and after the wife's death the other two cohabited for several years, the court refused to presume a contract of marriage after the death of the wife, especially where, after the death of the wife, the man also cohabited with another woman, as to his marriage with whom the reputé was as strong as it was with respect to a marriage with the other woman. *Klipfel v. Klipfel*, 41 Colo. 40, 124 Am. St. Rep. 96, 92 Pac. 26.

²⁵ Cohabitation known to be adulterous in its origin, because the man had a former wife living, cannot ripen into marriage by cohabitation after the death of such wife, where it is in evidence that the nature and circumstances of their connection were made known to the neighborhood, and that neither party made any secret of the facts from which its criminality was apparent, and where the marriage is being asserted by the man as a basis upon which to found property rights, such as suing upon a note made payable to the alleged wife. *Cram v. Burnham*, 5 Me. 213, 17 Am. Dec. 218.

Likewise, where no marriage was ever solemnized between the parties, and it appears that the woman was reluctant to live with the man because she knew he had a wife living, and that throughout their relations she was conscious that they were not married and sought to have a ceremony performed, it was held that inasmuch as the parties did not avail themselves of the opportunity to contract a marriage after the man obtained a divorce from his first wife, the relation between them was not that of marriage so as to sustain the woman's action for divorce. *Van Dusan v. Van Dusan*, 97 Mich. 70, 56 N. W. 234, cited in the note in 3 L.R.A. (N.S.) 244.

In *Odd Fellows Ben. Asso. v. Carpenter*, 17 R. I. 720, 24 Atl. 578, involving the L.R.A.1915E.

claim of an alleged widow to a life benefit fund after the death of her alleged husband, and showing that while a former husband was alive she had acted as housekeeper for the deceased, and after the first husband's death continued so to act, it was held that no common-law marriage could be presumed, where the most favorable view of the evidence to her showed the fact of cohabitation between the parties for a period of about five months, until the man's death, contradictory statements made by him as to whether the woman was his wife, and a will made by him in which he recognized her as his wife, the latter being accounted for by the court by the fact that a serious unpleasantness had arisen between the deceased and his children growing out of his relations with the woman.

In *Wright v. Wright*, 48 How. Pr. 1, several of the New York cases on this point are fully reviewed, and the principles which they lay down indorsed, but the court held that where the relations were meretricious in the beginning, and resulted in the birth of children before the first wife died, the mere fact that after the death of the wife the alleged second wife lived almost continuously with the man in his own house was not such a change as raised the presumption of marriage, where the evidence showed that their intercourse was clandestine, that she was not known as his wife, having been introduced by him as such but four times in sixteen years, and they had no common reputation of marriage.

Of course, where a woman enters into illicit relations with a man, and both know that her husband is living and undivorced, no presumption of marriage which will entitle her to claim property as widow of the alleged second husband will be presumed from the mere continuance of their relations after the first husband obtains a divorce, where both know of the divorce, but have no marriage solemnized, and they continue to live together in circumstances which do not indicate a desire for matrimony. *Lewis v. Ames*, 44 Tex. 338.

Where a mormon, the husband of three wives, continued to cohabit with the two plural wives after the death of the first and legal wife, it was held that, although he introduced one of the plural wives as his wife, both before and after the death of the legal wife, no inference of marriage at common law with either of them could be inferred from the continued cohabitation with both. *Riddle v. Riddle*, 26 Utah, 268, 72 Pac. 1081.

In *Blanks v. Southern R. Co.* 82 Miss. 703, 35 So. 370, in which, after the parties had cohabited about a year, the first husband appeared and objected, but disappeared and was never seen again, and the parties con-

marital relations.²⁶ The evidence must point to at least a desire for marriage, for, as has been aptly stated in this connection, a man or woman cannot acquire the rights of a husband or wife by survivorship.²⁷ Evidence of continued cohabitation has also been denied effect in a suit by the party to both alleged marriages, who urges it as a basis of a claim of property rights in his favor.²⁸

In a very few instances it has been expressly held that the circumstances must be such as to raise an inference that the illicit relation was changed to matrimony by express consent,²⁹ but they do not harmonize with the numerous cases cited in this connection which appear to proceed upon the presumption that consent implied

continued cohabitation until the second husband was killed ten years later, it was held without allusion to the question of actual or presumptive death of the first husband, and without discussion of the question from any angle, that the cohabitation was unlawful when it began, and was presumed to have continued so, and that no marriage would be held to exist even if the relations of the parties were such that but for the first marriage they would establish a common-law marriage (action by woman for causing death of alleged second husband.)

²⁶ No marriage between parties to an illicit relation beginning while the woman's husband was alive will be presumed where, although their relations continued after the latter obtained a divorce, the man subsequently separated from her, and ceremonially married another woman with whom he lived until his death. *Re Stanley*, 1 N. Y. S. R. 325.

In *Foster v. Hawley*, 8 Hun, 68, it was held that where an illicit relation is formed on the faith of a man's promise to make the woman his wife whenever the impediment of his previous marriage shall be removed, cannot be changed into matrimony merely by the removal of that impediment, and their mere continuance of the same mode of life as theretofore, and that where there was cohabitation for twenty years before the removal of the impediment, there must be affirmative proof of a change in their relation other than their continued cohabitation, and especially so where the parties ultimately separated and married others (suit as widow to contest probate of alleged husband's will).

Generally, as to the effect upon habit and repute of the separation and remarriage of the parties, see part IV. of the note to *Becker v. Becker*, ante, 72.

²⁷ This forcible epigram was employed in *Foster v. Hawley*, supra.

²⁸ In *Clark v. Barney*, 24 Okla. 455, 103 Pac. 598, in which, although there was a ceremonial marriage between the parties, both knew that the man had an undivorced wife living, the continued cohabitation of the parties, following the latter's death shortly after such marriage raised no presumption of consent without actual proof of a change of the relation from adultery to marriage, in an action by a party to the first marriage to establish homestead rights after the death of the other party to the alleged second marriage. To the same effect is *Cram v. Burnham*, 5 Me. 213, 17 Am. Dec. 218, supra.

L.R.A.1915E.

See also *Blanks v. Southern R. Co.* supra.

²⁹ In *O'Neill v. Davis*, 98 Ark. 196, 113 S. W. 1027, wherein the parties, beginning their relations without a ceremony of marriage, cohabited together for fourteen years, when the man's wife obtained a divorce, the court denied the woman the dower and homestead rights of a widow, upon the ground that there was no evidence that the parties entered into any present agreement to take each other for husband and wife after the divorce, and that their continued cohabitation after the divorce did not prove that they changed their intent, which previously was to live together without being married, and that the concomitants of their illicit relations were not sufficient to prove that when they were at liberty to marry they embraced the opportunity. However, it did appear in this case that both before and after the divorce the parties lived together and acted in the roles of hosts and guests as husband and wife.

Holding that a marriage in fact must be established, although stating that such a marriage in fact may be presumed from the circumstances of cohabitation, reputation, etc., the court in *Williams v. Williams*, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98, laid down the general proposition that, if it appears that the parties cohabited in consequence of a marriage which was void because one of them had a spouse living, and not in consequence of any marriage between them after the impediment was removed by divorce, such cohabitation would necessarily negative any inference that they had contracted any marriage in fact after the divorce. To this the court adds that, however ignorant the man may have been of the fact that the woman had another husband living at the time he married her, such marriage was absolutely void as to him, notwithstanding his ignorance and good faith; and that he could make her his lawful wife only by some marriage in fact after the divorce of her former husband. However true the latter proposition may be, the other propositions seem doubtful; for to hold that cohabitation in good faith and as husband and wife, in pursuance of a ceremony which was in fact void because of an impediment, negatives the making of a subsequent agreement upon which the cohabitation must be based, is to place persons who originally enter into the relations in good faith in a worse position, or at least in as bad a position as those who enter into it with a consciousness that it is meretricious, since it requires a new agreement whose necessity is not known, and it seems also to be rea-

by matrimonial conduct is sufficient.³⁰ Essential, even if unintentional; support is given the idea that the inference must be of express consent, by certain Indiana, Michigan, and Illinois decisions holding that where the parties never knew of the removal of the impediment, there was no oc-

casion for renewed consent, and no presumption thereof could be indulged in any event.³¹ However, these unjust decisions must be rejected, for that in Illinois has been greatly weakened by the subsequent course of the Illinois courts as shown in the preceding reference, and all are square-

reasoning in a circle, inasmuch as it means that before cohabitation following the removal of the impediment may become evidence of a new consent, there must be established a new consent upon the faith of which the parties cohabited. If express consent is shown, the evidence of cohabitation serves no purpose, for consent alone is sufficient; and if express consent is not shown, evidence of cohabitation and reputation is denied efficacy by holding that it does not constitute evidence of marriage unless based upon a new consent, which is itself sufficient to constitute marriage. To say that the relations of the parties were illicit in the beginning, and were presumed to continue such in the absence of proof to the contrary, is one thing; but it is quite another thing to say that cohabitation in pursuance of a void ceremony is a continuance of illicit relations, although the parties may have entered into the marriage contract in good faith. For it is quite reasonable to suppose that the parties may have believed in the efficacy of the ceremony.

It was held in *Spencer v. Pollock*, 83 Wis. 215, 17 L.R.A. 848, 53 N. W. 490, largely upon the authority of *Williams v. Williams*, supra, that no common-law marriage which would entitle the grantee of a woman and her child to establish a claim to real estate as against her alleged husband's collateral heirs was shown by testimony that she and her alleged husband, following her objection that she would have to have a divorce from her first husband, and his assurance that it was not necessary after the husband's absence for three years, made an agreement to live together as man and wife, followed by actual living together under the agreement until his death, where it also appeared that the man promised that he would take care of her if she would behave herself; and that they would get married in the future, which they never tried to do; and that after his death she made a claim against his estate and recovered for personal services. The court said that these circumstances pointed to illicit cohabitation, rather than cohabitation as husband and wife, and the lack of evidence to show a change in their relations was, of course, regarded fatal.

³⁰ Generally, as to whether the presumption arising from habit and repute is concretely of express consent, or abstractly of consent manifested by conduct, see subdivision V. e of the note to *Grigsby v. Reib*, ante, 44.

³¹ In an Indiana case in which the contest was between the collateral heirs of the alleged wife, and the children of the alleged husband by a former marriage, the court L.R.A.1915E.

held that where the alleged wife believed that her marriage with the man was valid, and she died without knowledge of the former wife's divorce, and where the parties had continued after such divorce to live together as before, there arose a presumption that no valid marriage was ever contracted, which precluded a verdict finding that the marriage relation existed. *Compton v. Benham*, — Ind. App. —, 85 N. E. 365. In reaching its conclusion the court said: "Eliza A. Yeoman [the alleged wife] had no reason to think that a new contract was necessary for the reason that her relationship with Dr. Benham [the alleged husband] was due to a marriage entered into in the belief that it was a valid and subsisting marriage. Why should she be presumed to have done a thing the necessity of which had never been made known to her? But, as for Dr. Benham, it is an admitted fact that personal service was had on him in the bringing of the divorce action. The excuse of ignorance is not open to him or those claiming through him. Yet in the face of that knowledge he continued his conduct and actions just the same as before. It would be a legitimate inference that he intended the relationship to continue the same as before the divorce. There was no overt act or expression on his part showing any change of the relation between himself and Eliza A. Yeoman which flowed from the void contract of marriage."

The fact that a man twice married did not, at the time of his death, know that his first wife was dead, renders impossible, as a matter of fact, the mutual consent which is necessary to sustain his second ceremonial marriage upon the theory that after the death of his first wife their continued cohabitation raised an inference of renewed consent. *Re Fitzgibbons*, 162 Mich. 416; 139 Am. St. Rep. 570, 127 N. W. 313, holding that, although the second marriage was ceremonial, and was entered into by the woman in the erroneous belief that the man had obtained a divorce from his first wife, and although they cohabited as husband and wife, conveyed property, and represented themselves and were understood generally to be husband and wife, they cannot be deemed to have sustained that relation where there was no change in their mode of living or otherwise that warrants the inference that they in fact renewed their mutual consent after the death of the first wife, of which the man had no knowledge, so as to entitle the second wife to claim as widow rights in his estate as against a child of the first marriage. *Re Fitzgibbons*, supra, reaffirming *Barker v. Valentine*.

The Illinois supreme court has not al-

ways been consistent. In the case of *Robinson v. Ruprecht*, 191 Ill. 424, 61 N. E. 631, the court, in order to hold children legitimate, drew an inference of marriage between persons whose relations were initially illicit, having been entered into without pretense of marriage, although the inference was based solely upon a continuance of cohabitation following the removal of the impediment. Both had living spouses not only when their relations began, but also two years later, when a ceremony of marriage was solemnized between them, and both believed upon reasonable grounds, and died in the belief, that the woman was a widow at the time their relations commenced, but the man, at least, knew that his first wife was living. They cohabited some eighteen years, and until the death of the woman, which occurred about a year after that of the first husband, and some fourteen years after that of the first wife, which took place two years after the ceremony, of which the parties were expressly informed. The court said that as the parties knew of the death of the first wife, and as their subsequent conduct was inconsistent with anything but the marital relation, their cohabitation must be taken as having been matrimonial in the intent and belief of both of them; and that inasmuch as the parties died in the belief that the death of the first husband preceded the ceremony, the presumption of marriage from cohabitation became applicable to their relation in aid of the legitimacy of their children, and that it was proper to find that the parties intermarried sometime within the year intervening between the woman's death and the earlier death of her first husband. These facts constituted a perfect stage setting for overruling *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737, in which the court, apparently moved by a desire to deny the husband of a deceased daughter of an alleged marriage the right, as against collateral heirs of her father, to claim the latter's property as heir of a deceased child which the daughter had borne him, refused to presume the alleged marriage upon the ground that both parties' ignorance of the divorce of the first wife, and the woman's ignorance that the impediment ever existed, negatived subsequent consent upon the theory that, having supposed their marriage valid from the beginning, there was no occasion for new consent after the removal of the impediment. The specific holding was that where a man entered into a valid marriage with a woman with whom he lived but a year, and about a year and a half after leaving her, entered into an ostensible marriage with another woman, with whom he cohabited as wife, establishing a repute of the marriage, which continued for a period of twenty-five years, and until the death of the woman, notwithstanding the first wife obtained a divorce within three years after the husband left her, there was no presumption that the man and the woman with whom he afterwards cohabited entered into a marriage contract after the L.R.A.1915E.

divorce was obtained, notwithstanding the woman did not know of the previous marriage. Ignoring, as said before, the fact that to all intents the husband had a bona fide desire for matrimony, and the fact that the wife certainly thought the marriage state existed, a ceremony having been performed, the court went so far as to say that, since the woman did not know of the divorce or marriage, she could not have consented to a second marriage contract after the first wife obtained the divorce, and that, of course, it could not be presumed to the contrary, and that if the man wished to change their relation to matrimony after the divorce was obtained, he could have easily done so by causing another ceremony to be performed, and the fact that he held the woman out as his wife did not supply the deficiency in that respect. A further point made by the court was that the fact that the woman had no knowledge of the invalidity of her marriage, and that therefore the cohabitation on her part was not criminal, could not validate the assumed marriage even as to her, since if valid as to her it must be equally valid as to him; but that it could not be valid as to him, and therefore the contract was not mutually binding, and was void for want of mutuality. The length to which the court went in overriding centuries of doctrines to the contrary may be well indicated by the following language: "Not knowing of the former marriage, she could have had no reason for desiring a second marriage. If she regarded herself as the lawful wife of Lewis, it would be a violent presumption to hold that she assented to a second informal marriage. If she knew of the prior marriage, then her cohabitation with Lewis was meretricious in its inception, and could only be changed after the disability of Lewis was removed, and then only by the mutual consent of both. If she had notice of the illegality of her marriage after the divorce, and cohabited with Lewis after that without a new marriage, it was criminal. If she desired to make her subsequent connection with him lawful, she no doubt would have insisted upon a public or statutory marriage, so as to preserve the evidence of the same. . . . If the cohabitation was in its inception illicit, the presumption of the innocence and morality of the parties is at once rebutted and overcome, and without proof of a change in their relation to each other, it will be presumed that the continuance of the connection of the parties is of the same character." This makes it clear that the basic idea of the decision is that where parties live together as husband and wife when there is an impediment to their marriage, their relations are illicit irrespective of whether they regard their relation as one of fornication, or whether they have a bona fide desire for marriage.

It is to be observed that the court in *Robinson v. Ruprecht* labored to distinguish *Cartwright v. McGown* because it was decided on that ground, and in the next breath proceeded to presume marriage in the case

ly opposed to more numerous decisions making ignorance of the impediment and its removal a circumstance favorable to marriage.²² Furthermore, they violate the

maxim that the law favors matrimony, not concubinage, and are in this respect antitheses of cases which presume death from absence during the cohabitation, and pre-

then before it upon the ground that the parties died in the erroneous belief that the impediment ceased before their ceremony. In such circumstances, Cartwright v. McGown should be regarded as overruled, for the only ground of distinction seems to be that the child whose legitimacy was involved in Cartwright v. McGown was dead, as was also her only child, and to urge such a ground would be unjustly to ascribe to a court less reluctance in fixing the stigma of bastardy upon the dead than upon the living.

A subsequent Illinois case laid down the general rule that if parties to a marriage, in the beginning, desire and intend marriage in good faith, as a matter of fact, but an impediment exists and the desire and intention continue after the impediment is removed, and the parties continue in the relation of husband and wife and cohabit as such, it is a sufficient proof of marriage. Manning v. Spurck, 199 Ill. 447, 65 N. E. 342, holding that where a marriage was solemnized between persons in good faith who believed that the husband had obtained a valid divorce from his former wife (a situation which, in its origin, is clearly most favorable to the presumption), and they lived together publicly as man and wife for twenty-five years, the continuation of their relations after the death of the first wife constituted evidence of a valid common-law marriage, even though the divorce was void. The only reference in this case to Cartwright v. McGown is the quotation of this generality there enunciated: "Where both parties are married in the honest belief, founded on an apparently good reason, that they are capable of entering into the marriage contract, when, in fact, one of them is not, if they continue to cohabit as man and wife after the removal of the impediment to their lawful union, the law will presume a common-law marriage by the acts of the parties, in the absence of any evidence to prevent such presumption." Although confusing, it is interesting to observe that the following reference disclosed that in a later case the Illinois court manifests apparent consistency with Cartwright v. McGown, and reciprocally avoids the effect of Robinson v. Ruprecht and Manning v. Spurck by citing them to a mere generality.

This was done in Potter v. Clapp, 203 Ill. 592, 96 Am. St. Rep. 322, 68 N. E. 81, involving the woman's right to dower and homestead as against the man's children by a former marriage, where the parties, having lived together for a time, were ceremonially married after the death of the woman's first husband, and, following a subsequent divorce in favor of the man's first wife, of whose existence the woman did not know, they cohabited as man and wife until his death, which occurred ten

years after the divorce. The court held that the fact that the man knew that he had a wife living made the relation between the parties meretricious, and that the ceremonial marriage was void. But here the court took a further step than was taken in Cartwright v. McGown, and held that the husband would be deemed to have obtained a divorce from his first wife before the ceremonial marriage with the second, conformably to the principle that where a second marriage in fact is shown, the law raises a strong presumption in favor of its legality, and if a former spouse is shown to have been living at the time, a previous divorce will be presumed. Having, as shown in the preceding reference, avoided the effect of Cartwright v. McGown in Manning v. Spurck by referring to a generality enunciated in the former, the court reciprocated in Potter v. Clapp by citing Robinson v. Ruprecht and Manning v. Spurck to mere general propositions. And it may be further noted that in stating the reasons for the rise of the presumption, the court stated facts that would probably have been regarded as ample in those two cases for raising a presumption of consent after the removal of the impediment. As to presumptions of divorce or death before the second marriage, see the notes to Megginson v. Megginson, 14 L.R.A. 540; Smith v. Fuller, 16 L.R.A. (N.S.) 98; and Vreeland v. Vreeland, 34 L.R.A. (N.S.) 940.

²² The fact that the wife did not know of the husband's former marriage until shortly before his death has been regarded in New York as an element in her favor where she was laying claim to an interest in his estate. *Re Wells*, 123 App. Div. 79, 108 N. Y. Supp. 164, affirmed without opinion in 194 N. Y. 548, 87 N. E. 1129. In this case it appears that, five years before the first wife's death, the parties began their relations by a religious ceremony, with matrimonial intent, and that they cohabited together until the man's death fifteen years later, and that their relations, conduct, and reputation as husband and wife were unequivocal, the court holding that, although no ceremonial marriage after the first wife's death was shown by the evidence, "it conclusively shows that a common-law marriage did take place immediately upon the removal of the impediment," although the husband did not know of the first wife's death.

So, the circumstance that the woman did not know of the man's former marriage was considered as a strong element in her favor as explaining why neither a ceremonial marriage nor a mutual exchange of consent occurred after the removal of the impediment, in *Thewlis's Estate*, 217 Pa. 307, 66 Atl. 519, involving distribution of the man's estate, wherein it was held that where the parties cohabited together as

sume consent from continued cohabitation after the impediment was thus presumptively removed.³³

A presumption of marriage in fact is essentially indulged without comment upon

its general necessity, by presuming a ceremonial marriage, in those jurisdictions in which the substantive common law is not in force. As elsewhere shown, the general doctrine of habit and repute is an eviden-

husband and wife until the man's death, and were regarded as such in the community where they lived, the first wife having died thirteen years before the man, the court indulged a presumption of exchange of consent after the removal of the impediment, and it was further held as an alternative that it could also be presumed that the first wife was divorced, in view of the fact that both parties to the first marriage married other persons after their separation.

The fact that the woman did not, until separation from the alleged husband; know of his previous marriage, was regarded as a circumstance in her favor in *Townsend v. Van Buskirk*, 33 Misc. 287, 68 N. Y. Supp. 512, which involved the legitimacy of issue, and in which a marriage was inferred from continued cohabitation; reputation, holding out, and declarations which were apparently inconsistent with anything but the marriage relation, where the cohabitation continued for some twenty years, five of which followed the first wife's death, the court laying special emphasis upon the fact that during such five years the husband, upon being chided for attention paid to other women, said that: "we will try and live different. . . . We will try and live happy together again, and do all that lay in both our power for the sake of our children. I will be a true and faithful husband to you until death," and that she replied that she would be a wife to him and a mother to their children. The court said that no better or more conclusive evidence of a purpose to make their relations matrimonial thenceforth could be conceived, thus possibly indicating that this was to be regarded as express consent after the removal of the impediment. But it would seem to be little more than a circumstance to be considered with other circumstances to raise the inference of renewed consent, since it was made while the wife was ignorant not only of the fact that the impediment had been removed, but also that there had ever been an impediment, and was said by the husband more as an expression of remorse for his infidelity and as a statement of his purpose to continue their relations as before, than as an express contract of marriage in present.

In *Davis v. Whitlock*, 90 S. O. 233, 73 S. E. 171, Ann. Cas. 1913D, 588, holding that continued cohabitation following the death of the first husband rendered the parties husband and wife where they were married in good faith after the first husband had deserted the wife and she had heard nothing from him for a period exceeding that from which a presumption of death was created by statute, and the second husband did not know of her previous marriage, the court acted upon the principle that where the parties proceed in ignorance

of the impediment, continued cohabitation after its removal, and it seems without having learned of its existence or removal, is sufficient to establish marriage as carrying out the original purpose, unlike the case where the original relation is consciously adulterous, it being declared necessary in such a case to show an abandonment of that relation and the formation of a matrimonial union (suit by husband for annulment).

So, in *Donnelly v. Donnelly*, 8 B. Mon. 113, in which the court inferred a marriage from cohabitation as man and wife openly after the death of the first wife, the court emphasized the fact that it did not appear that the woman knew of the man's prior marriage.

Where a woman entered into a ceremonial marriage without knowledge until the man's death that he had a living wife, and after the latter's death the parties continued as before to live and act in all respects as husband and wife, it was held that such continued cohabitation was a public acknowledgment of a lawful marriage, which would entitle the wife to sue as beneficiary in a policy of life insurance on the husband's life. *Busch v. Supreme Tent*, K. M. 81 Mo. App. 562. In this case the court regarded the wife's continued ignorance up to the time of the husband's death, of the existence of the impediment, as a circumstance in her favor, and also declared that the question whether the husband at the time of the ceremony of marriage was aware of his capacity to enter into the contract was not an essential inquiry in judging the legal effect of his continued deportment as a lawful husband, and his continued acknowledgment of her as his lawful wife after his disability had been removed by the death of the former wife. The material question was stated to be, what, after the removal of the impediment, did he intend her and the public to understand by his ostentation of the status of husband and wife? The court added that in contracts implied from conduct as well as in those created by express agreement, the law imputes to the promisor that intent which a reasonable construction must ascribe to his acts or words.

³³ Continued cohabitation for twenty-seven years, and the birth of children, accompanied by repute and evidence of good character of the parties, following the presumptive death of the husband's first wife from seven years' absence, without being heard from, were held in a New York case involving dower to raise a presumption of marriage, although the court remarked in the course of its opinion that a jury could have found that the cohabitation was meretricious, apparently because both parties seemed to have been aware of the impedi-

tial one and; in theory, is unaffected by the abrogation of the substantive common law.⁸⁴ There are cases in which the courts of such jurisdictions appear to have taken it

for granted at first that no presumption of consent after the removal of the impediment could be drawn from continued cohabitation.⁸⁵ The possibility of presuming a cere-

ment. *Jackson ex dem. Van Buskirk v. Claw*, 18 Johns. 346, decided on the authority of *Fenton v. Reed*, 4 Johns. 52, 4 Am. Dec. 244, which is set out in the note in 3 L.R.A.(N.S.) 244, which the present note supplements.

In *Stringfellow v. Scott*, Rich Eq. Cas. 109, note, in which the relations of the parties were adulterous in the beginning, and it seemed consciously so on the part of both parties, it was held that the jury might infer a marriage contract after the man's first wife was presumed from absence and lapse of time to be dead, from the evidence of cohabitation and conduct of the parties thereafter, though it was distinctly stated that, in order to warrant a finding of marriage, the jury ought to be satisfied that there was actually an agreement or understanding between the parties after the death of the first wife.

In *Smith v. Fuller*, 138 Iowa, 91, 16 L.R.A.(N.S.) 98, 115 N. W. 912, involving a suit for dower, it was held that the continuance of the marital relation without interruption after the lapse of the period from which a statutory presumption of death arose rendered the marriage presumptively valid. See also *Staiger's Estate*, 7 Pa. Dist. R. 351, supra.

⁸⁴ See subdivision V. f of the note to *Grigaby v. Reib*, ante, 47.

⁸⁵ (The following cases announced this view, but they should be read only in connection with the discussion referred to in the preceding footnote.)

Continuing the marriage relation after the removal of an obstacle which renders the contract void is without effect to establish a presumption of common-law marriage, where, as in Illinois, common-law marriages are declared null and void by statute. *Wilson v. Cook*, 256 Ill. 460, 43 L.R.A.(N.S.) 365, 100 N. E. 222 (in this case it appears that the contention of counsel as to the presumption was confined to common-law marriage; and if so the decision is quite correct, for it is obvious that the abrogation of the substantive common law would preclude a presumption of common-law marriage).

To the same effect is *Harris v. Harris*, 85 Ky. 49, 8 S. W. 549. Under a provision in the Kentucky statute that the cohabitation of emancipated slaves might be legalized by their declaration before the county clerk that they had been, and desired to continue, living together as husband and wife, it was held that their continuance of cohabitation after emancipation without the declaration prescribed did not constitute the marital relation in view of the fact that the common law had been repealed by a statute providing that all marriages should be void when not solemnized in the presence of an authorized person or society. *Estill v. Rogers*, 1 Bush, 62; *Stewart v. Munchandler*, 2 Bush, 278. *Contracts in effect are later Kentucky L.R.A.1915E.*

cases cited in part V. of the note to *Grigaby v. Reib*, ante, 38, holding, notwithstanding the abrogation of the substantive common law, that marriage may be inferred from habit and repute.

Cohabitation between parties who went through a form of marriage before the man's divorce from his former wife became absolute was held insufficient to raise an inference of a new contract after the removal of the impediment under the Georgia law, where the same was not satisfactorily shown to differ from the Massachusetts law, which does not recognize common-law marriages. *Com. v. Stevens*, 196 Mass. 280, 124 Am. St. Rep. 555, 82 N. E. 33.

In a state which does not recognize common-law marriages, parties who cohabit with matrimonial intent will not be deemed to have entered into a new contract while transiently across the line in a bordering state whose laws recognize common-law marriages, as, for instance, where the parties were twice in each other's state, once for three days and once for a week. *Norcross v. Norcross*, 153 Mass. 425, 29 N. E. 506.

In *Jones v. Jones*, 28 Ark. 19, in which it appeared that the parties lived together, and held themselves out and were regarded in the community as man and wife for a period of years after the death of the husband's first wife, the court, in holding that there was no marriage, made no mention of the rule as to a presumptive new contract after the removal of the impediment, and the point seems not to have been urged. That the substantive common law is not in force in Arkansas is shown in subdivision II. b, 2, of the note to *Grigaby v. Reib*, ante, 17.

In a case involving the New York statute by which the substantive common law was temporarily abrogated, it was held that cohabitation following the removal of the impediment, without complying with the statutory requirements, was ineffective to render the parties husband and wife. *Earle v. Earle*, 141 App. Div. 611, 126 N. Y. Supp. 917 (marriage after decree of divorce was rendered, but before it was perfected).

The idea which underlies this decision is exactly contrary to a suggestion in *Re Hinman*, 147 App. Div. 459, 131 N. Y. Supp. 661, affirmed in 208 N. Y. 653, 99 N. E. 1303, that a statute invalidating all marriages not contracted in statutory form should not, unless necessary, be construed to destroy the presumption of marriage, and that it was still permissible under proper facts to presume a legal marriage which conforms to statutory requirements. However, the report in the appellate division states that the statutory inhibition was repealed, and the common law reinstated, by chap. 742, Laws 1907, effective January 1, 1908. The court of appeals did not pass on this point.

And it has been intimated that where the

monial marriage³⁶ seems not to have suggested itself in these instances. But where that possibility has been urged, a complete change of position has occurred, and courts

which at first refused to give effect to continued cohabitation, where the substantive common law was abrogated, subsequently took a substantially contrary position.³⁷

relations of the parties began while common-law marriages were declared void by statute, a marriage could be inferred from cohabitation and repute after the statute was so amended as to reinstate common-law marriages. *Re Smith*, 74 Misc. 11, 133 N. Y. Supp. 730, holding, however, that the evidence was insufficient to establish such a subsequent marriage.

Upon the theory that there could be no common-law marriage in New York according to *Pettit v. Pettit*, 105 App. Div. 312, 93 N. Y. Supp. 1001, the court in *Jordan v. Missouri & K. Teleph. Co.* 136 Mo. App. 192, 116 S. W. 432, held that where a woman married a man after an interlocutory decree annulling her first marriage with another, but before final decree, her second marriage was void, and cohabitation after the final decree did not alter their relations in New York so as to incapacitate the man from marrying another woman in Missouri, and thus disentitle her to maintain an action for negligently causing his death.

³⁶ In *Bull v. Bull*, 29 Tex. Civ. App. 364, 68 S. W. 727, in which there was cohabitation for some thirteen years as husband and wife, the same continuing several years after the death of the woman's first husband, the court presumed "a good statutory or common-law marriage between" the parties after the unquestioned removal of the impediment, and in reaching its conclusion the court said that, before holding the woman disentitled to share the homestead property acquired during the cohabitation of the parties, and thus deprive an aged woman of her home for the few remaining years of her life, every reasonable presumption in favor of her innocence should be indulged (the court stated the nature of the presumption it would indulge without stating that a presumption of a marriage in fact was necessary).

³⁷ In this connection it is interesting to note that in *Re McLaughlin*, 4 Wash. 570, 16 L.R.A. 699, 30 Pac. 651, a case in which the conduct of the parties was such as would ordinarily make it especially favorable to the application of the presumption, the court appeared to assume that the abrogation of the common law prevented the application of the presumption, and devoted itself to the question whether the statute had in fact abrogated the common law; and yet in one part of its opinion it seems to accept as good law the generality that whether common-law marriages are recognized or not, evidence of cohabitation and repute is admissible as tending to show a valid marriage, and that unless contradicted would establish marriage even within those states where common-law marriages are not recognized.

Re McLaughlin was followed in *Re Smith*, 4 Wash. 702, 17 L.R.A. 573, 30 Pac. 1059, L.R.A.1915E.

and *Kelly v. Kitsap County*, 5 Wash. 521, 32 Pac. 554.

And in *Stans v. Baitey*, 9 Wash. 115, 37 Pac. 316, holding that cohabitation and reputation which were clearly established, between parties in Washington following their marriage in California, which was invalid under a statute forbidding miscegenation, the decision seems to be placed on the ground that the relations of the parties were consciously illicit, and were not shown to have changed, although the court states, in the course of its opinion that the evidence of cohabitation and reputation was largely immaterial, "as marriages under the common law do not, and did not, obtain here, and it was only relevant as some evidence of a prior marriage."

It is interesting in view of *Summerville v. Summerville*, 31 Wash. 411, 72 Pac. 84, which involved no impediment, but held meager and indefinite evidence as to some sort of ceremony, which was squarely disputed, but supplemented by evidence of cohabitation, sufficient evidence of a valid marriage where the common law did not prevail, to speculate whether the Washington court would now hold that cohabitation and reputation following the removal of the impediment would constitute competent evidence of a ceremonial marriage after the impediment was removed. So, also, of *Shank v. Wilson*, 33 Wash. 612, 74 Pac. 812, following the *Summerville* Case, and laying down the proposition that proof of continual cohabitation and of a continual assertion that a marriage relation exists, and proof of such conduct as is consistent with the marriage relation, raise the presumption, in those states where the common-law marriage itself is not held to be a legal marriage, that the ceremonial or legal marriage has preceded the acts mentioned. The *Shank* and *Summerville* Cases were followed in *Potts v. Potts*, 81 Wash. 27, 142 Pac. 448. The generality recited in *Re McLaughlin*, supra, but ignored in the conclusion, is made the basis of the decision in *Nelson v. Carlson*, 48 Wash. 651, 94 Pac. 477, holding that cohabitation and reputation are competent to establish marriage even where the common law has been abrogated.

In *Potter v. Potter*, 45 Wash. 401, 88 Pac. 625, in which there was a square conflict of testimony as to a ceremonial marriage, and there was also evidence of cohabitation and reputation, the court disposed of the contention that under the rule of *Re McLaughlin*, supra, the evidence was insufficient, inasmuch as common-law marriages were illegal, by remarking that in such a conflict of testimony it is well established that the ceremonial marriage may be proven by circumstances such as the cohabitation of persons as husband and wife, and their reputation and recognition

Even if a ceremonial marriage could not be presumed, continued cohabitation in common-law territory after removal from a jurisdiction in which an informal contract between the parties was invalid would raise a presumption of marriage.³⁴ The impediment in such case (to marriage by inform-

al consent) is merely a statutory provision, as to form of marriage, and is of less consequence, certainly from a moral standpoint, than that of a prior marriage. In such a case it would seem that marriage might be presumed from evidence of less probative force than is required in the case of remar-

as such in society; and that from such evidence arises a presumption of marriage which will stand in the absence of countervailing proof.

It now becomes interesting to note that according to *Weatherall v. Weatherall*, 56 Wash. 344, 105 Pac. 822, the case of *Re McLaughlin* (also the *Kelly Case* and *Re Wilbur*, 14 Wash. 242, 44 Pac. 262) holds only that a common-law marriage is invalid in Washington; but, notwithstanding this fact, the court in the *Weatherall Case* sets out with especial approval the generality employed in *Re McLaughlin*, and says that its logic has been applied in later cases to uphold the marriage relation where the parties have lived together as husband and wife and held themselves out to the public as sustaining that relation; and then holds that in such cases, the law will, in favor of morality and decency, presume a legal marriage,—concluding that while “language may be found in some of the earlier cases which tends to support the judgment, the uniform and unbroken current of opinion in this court, as we read the cases, has been that, while a common-law marriage is invalid in this state, evidence of cohabitation and reputation is admissible for the purpose of raising the legal presumption of a prior ceremonial marriage.” It would seem after this that the Washington court could not escape holding that cohabitation and reputation after the removal of the impediment would constitute good evidence of marriage, even though such a conclusion might entail further explanations with regard to how *Re McLaughlin* is to be read.

In *Beverlin v. Beverlin*, 29 W. Va. 732, 3 S. E. 36, the court held that where both parties knew at the time of their marriage that the woman had a husband living, their continued cohabitation after the removal of the impediment, without reliable evidence of a change in their relation, did not raise the presumption of marriage, although the real ground of the decision was that the common law had been abrogated by statute in West Virginia. Having determined that the common law no longer prevailed, and having alluded to the fact that there was no ceremony after the removal of the impediment, the court said: “There is no pretense that the pretended marriage sought to be established in this case was solemnized in any respect according to the requirements of the statute. I am therefore of opinion that the plaintiff and defendant in this case never were legally married, and that the plaintiff is not entitled to the relief prayed for in her bill” for divorce and alimony. Without reference to the foregoing (*Beverlin*) case, or to the fact that the L.R.A.1915E.

common law had been abrogated in West Virginia, and by the mere statement of its conclusion unaccompanied by any discussion, the West Virginia court in *Suter v. Suter*, 68 W. Va. 690, 70 S. E. 705, Ann. Cas. 1912B, 405, involving the legitimacy of a child and his right to inherit, held that evidence of circumstances, reputation, conduct of the parties, and cohabitation apparently matrimonial, sufficiently proved a marriage between the parents and raised the presumption that the marriage was legally performed.

Although in Tennessee, earlier decisions had held that the common law had been abrogated by statute, as shown in the note to *Re Love*, post, 109, the supreme court in a bigamy case held that where colored persons lived together and morally assented to marriage during slavery, their continued cohabitation after emancipation constituted a ratification of the marriage and rendered it valid, and that the passage of the Tennessee statute of 1866, providing that all free persons of color who had lived together as husband and wife in a state of slavery were declared to be man and wife, was unnecessary to render them such. *McReynolds v. State*, 5 Coldw. 18; *Andrews v. Page*, 3 Heisk. 653. See also the Kentucky cases, supra, footnote 35.

³⁵ In *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677, in which, although the relations of the parties were illicit in the beginning, they entered into a contract in England and cohabited there under circumstances which, together with the contract, would have rendered them husband and wife except for the English statute making common-law marriages void, the court held that their continued cohabitation in France, to which they removed for a time, accompanied by cohabitation and acts consistent with the marital relation, raised a presumption of consent in France, whose law was presumed to be like that of New York.

And it was held by the United States Supreme Court that persons whose alleged marriage in Virginia might have been invalid for want of a license had they remained there, and might also, for want of a religious ceremony, have been invalid in Maryland, where they afterwards resided, would be deemed married in New Jersey, when, as husband and wife, they took up their permanent residence there, and lived together in that relation continuously in good faith and openly up to the time of the man's death, being regarded by themselves and in the community as husband and wife, since their conduct toward each other in the eye of the public while in New

riage. Such an impediment is scarcely more formidable than that of infancy,³⁹ which must be seasonably asserted after majority to be effective. The ban on slave marriages furnishes a similar illustration of impediments prohibited in fact, but not inherently immoral. Indeed, a marriage between

slaves was termed "a moral marriage,"⁴⁰ though invalid in law. After the impediment of slavery was removed, the courts gave effect to subsequent cohabitation when of a marital character,⁴¹ co-operating with legislatures and constitutional conventions in according the marital status to negroes.

Jersey, taken in connection with their previous association, was equivalent in law to declarations by both that they did, and during their joint lives were to, occupy the relation of husband and wife, which was as effective to establish the status of marriage in New Jersey as if it had been in words of the present tense after they became domiciled in that state. *Travers v. Reinhardt*, 205 U. S. 423, 51 L. ed. 865, 27 Sup. Ct. Rep. 563.

But read *PEOPLE v. SHAW* in this connection.

³⁹ As to validity of marriage of persons of nonage, see the note to *Hunt v. Hunt*, 22 L.R.A. (N.S.) 1202.

⁴⁰ For a discussion of this designation, reference may be had to the following South Carolina cases among others: *Davenport v. Caldwell*, 10 S. C. 317, and *Watson v. Ellerbe*, 77 S. C. 232, 57 S. E. 855.

⁴¹ Where the impediment was that of slavery, it was held that the continuance of the parties openly to cohabit as husband and wife after their emancipation established the marital status between them. *Renfrow v. Renfrow*, 60 Kan. 277, 72 Am. St. Rep. 350, 56 Pac. 534. Note also that it is shown in connection with this case, cited later in the note to *Re Love*, post, 109, that a statute requiring freed persons to go before an officer and be married, and providing a penalty for their failure to do so, did not militate against the effect of their continued cohabitation.

Cohabitation for thirty-one years after their emancipation, and until the woman's death, between parties to a slave marriage, constituted them husband and wife independently of any statute or constitutional provision on the subject. *Coleman v. Vollmer*, — Tex. Civ. App. —, 31 S. W. 413.

And it was held in *Cumby v. Henderson*, 6 Tex. Civ. App. 519, 25 S. W. 673, that continued cohabitation after their emancipation, on the part of negroes who during their slavery cohabited under a mutual agreement to live together as husband and wife, "rendered their marriage complete;" and that no legislation was necessary to enable them thus to complete it. The court further held that this avenue of completing the marriage was not inferentially excluded to them merely because a constitutional provision validating slave marriages, enacted after the parties separated, did not apply to their case, inasmuch as it was confined to cases in which the parties either lived together until the death of one of them, or in which the parties were living together at the time of the adoption of the Constitution.

It was held in Missouri that a slave L.R.A.1915E.

marriage, though void, was not immoral nor a violation of any legal duty, and that where a slave married a free woman of color and was subsequently freed by his master, their continued cohabitation as man and wife rendered them such; and that their relations were not affected by the fact that he had previously married a slave, since such marriage was not valid, and since his taking up with the other woman, and his continued cohabitation after obtaining his civil rights, constituted a disaffirmance of the first marriage. *Johnson v. Johnson*, 45 Mo. 595 (stating that while the common law had been abrogated by statute in Missouri, the statute did not apply to the case in question, as both the marriage and the cohabitation occurred before it was passed).

Cohabitation between a man and his slave for some thirty-three years, eighteen of which followed the slave's emancipation, accompanied by the raising and education of children, would not, where the parties are not shown to have regarded themselves as husband and wife, and the repute in the community negatives marriage, and the parties having separated at the end of the eighteen years, the man married another woman and lived with her until his death,—be sufficient to establish a common-law marriage, even if mixed marriages were not forbidden by statute, so as to entitle a child of such alleged marriage to claim a share in his father's estate as against the woman whom he subsequently married. *Keen v. Keen*, 184 Mo. 358, 83 S. W. 526, appeal dismissed in 201 U. S. 319, 50 L. ed. 772, 26 Sup. Ct. Rep. 494, upon the ground that what constitutes a common-law marriage is a local question.

Attention is also directed to *Dickerson v. Brown*, 49 Miss. 357, holding that where, following cohabitation between a white man and a black woman while mixed marriages were forbidden by statute, a constitutional provision was adopted which required that all persons who had not been married, but were then living together as husband and wife, should be regarded for all purposes in law as married, and their children as legitimate,—continued cohabitation with knowledge of the constitutional provision, and mutual assent to the relation thereby created, rendered the parties husband and wife and entitled the children to claim the father's estate. While the court strongly intimates that continued cohabitation after the removal of the impediment would have raised the inference of a common-law marriage even in the absence of a provision expressly declaring previous cohabitation marital, it does not decide the question.

who had lived together with a desire for matrimony while legal marriage was denied them.

An invalid divorce is favorable to the presumption where both parties act in the belief that the same is valid. In such a

It was also held that the dispensation of the Constitution must be accepted and acted upon, and that where the relations of the parties were manifestly improper in the beginning, and continued such without any change, or any manifestation of a desire to avail themselves of the privilege created by the Constitution, the parties could not be deemed to be man and wife. *Rundle v. Pegram*, 49 Miss. 751 (suit brought by widow for year's support). Continuing the subject further, the court in *Floyd v. Calvert*, 53 Miss. 37, involving an alleged marriage between white persons, said that more evidence of a change of condition and the acceptance of the constitutional provision was required on the part of persons who had lived in adultery without any impediment to their lawful marriage, than between persons the impediment to whose marriage was removed by the Constitution. The court said: "If for instance, at the date of the adoption of that instrument, two persons were living together in confessed adultery, between whom there existed some lawful impediment to marriage which was swept away by the Constitution, then, perhaps, a subsequent continued cohabitation after its adoption might of itself be a strong circumstance to show an acceptance of its provisions, and a desire to assume towards each other a new and lawful relationship. But where such condition of concubinage existed between persons as to whom there was no lawful obstruction to matrimony, and who must therefore be considered as having voluntarily elected the unlawful connection, it is difficult to see how a claim of subsequent marriage can be made out under the section in question, by any proof short of that which would establish it in the absence of the provision."

It was held in *State v. Whaley*, 10 S. C. 500, that where two persons who had been ceremonially married while slaves continued to cohabit after emancipation, and were cohabiting at the time of the passage of the South Carolina statute of 1865, they were husband and wife by virtue of § 2 of that statute, providing that those who then lived as such were declared to be husband and wife. And it was further held in *James v. Mickey*, 26 S. C. 270, 2 S. E. 130, that the act of 1865 validated marriages between slaves, whether ceremonial or informal. Attention is also directed to *Ex parte Romans*, 78 S. C. 210, 58 S. E. 614, holding that the South Carolina statute of 1865, providing that persons of color desirous thereafter to become husband and wife should have the contract of marriage duly solemnized, did not render ineffectual a ceremony of marriage performed by a person not authorized by the act to perform it, L.R.A.1915E.

case the good faith is obvious, and the impediment usually technical rather than moral; and an inference of consent after the impediment does in fact cease to exist is drawn from evidence of mere continued cohabitation,⁴² except where the inference is

in view of the fact that the ceremony was followed by public cohabitation, and in view of a further provision of the statute that cohabitation with reputation or recognition of the parties should be evidence of marriage in cases criminal and civil.

And it is held in Virginia that positive proof of an express agreement to occupy the relation of husband and wife is not necessary to render applicable a statute providing that, where colored persons, before the passage of the act, had undertaken and agreed to occupy the relation of husband and wife and were cohabiting as such at the time of the passage of the act, they should be deemed husband and wife; and that circumstances tending to show an implied understanding on the part of the parties that they were husband and wife were almost as good evidence, and that evidence of cohabitation and reputation was competent for that purpose. *Francis v. Francis*, 31 Gratt. 283. See also the Tennessee cases of *McReynolds v. State*, 5 Coldw. 18, and *Andrews v. Page*, 3 Heisk. 653, supra.

⁴² Where, a marriage having been solemnized between a man and a woman who had obtained a decree of divorce, both of whom acted in the bona fide belief that the divorce was valid, and without knowledge that the decree was not entered of record, and the parties thereafter lived together continuously as husband and wife, their relation was not meretricious, but was matrimonial, and as soon as the impediment against the marriage was removed by the entry of a divorce of record, their relation is deemed to have become matrimonial in fact, as it had been in the honest belief and intent of the parties before that time. *Land v. Land*, 206 Ill. 288, 99 Am. St. Rep. 171, 68 N. E. 1109 (right of husband to take under wife's will), distinguishing *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737, supra, upon the ground of the difference in the original attitude of the parties to the respective actions.

Following *Re McLaughlin*, 4 Wash. 570, 16 L.R.A. 699, 30 Pac. 651, supra, the court in *Re Smith*, 4 Wash. 702, 17 L.R.A. 573, 30 Pac. 1059, held that where a marriage was invalid because entered into within the time allowed for appeal for divorce by one of the parties, under a statute declaring that neither of the parties should remarry until its expiration, cohabitation between parties to the second marriage, which continued until the death of one of them, had no effect to constitute them husband and wife. But it will be noticed above that *Re McLaughlin* has been practically overruled, and probably *Re Smith* falls with it.

required to be one of a marriage in fact.⁴³ In some jurisdictions effect is given continued cohabitation by statute.⁴⁴ Of course, the mere fact that the invalid divorce was granted is of no especial significance. To be of assistance it must be accompanied by innocence of the invalidity. If the parties

act with knowledge that the divorce is void, they start with the handicap which attaches to a relation illicit in its inception, and which must be overcome⁴⁵ before they can be pronounced husband and wife.

L. A. W.

⁴³ Upon the authority of the Williams and Spencer Cases above, the Wisconsin court later laid down the general principle that mere continued cohabitation after the expiration of the time specified, by persons who contracted marriage in contravention of a statute forbidding marriage within a specified time after divorce, did not establish a valid common-law marriage. *Lanham v. Lanham*, 136 Wis. 360, 17 L.R.A. (N.S.) 804, 128 Am. St. Rep. 1085, 117 N. W. 787 (action for widow's allowance). In reaching its conclusion the court said that where cohabitation is illegal in its inception, the relation between the parties will not be transformed into marriage by evidence of continued cohabitation, or by any evidence which falls short of establishing either directly or circumstantially the fact of an actual contract of marriage after the bar has been removed; and that at most the evidence showed only that the parties continued to live together after the expiration of the statutory period after divorce in the manner of husband and wife, and talked about a remarriage, which never took place on account of the husband's death.

And in *Severa v. Beranak*, 138 Wis. 144, 119 N. W. 814, the court contents itself with merely citing *Lanham v. Lanham*, as concluding a woman from asserting a claim as beneficiary in a policy of insurance on the life of her alleged husband, deceased, where she married him within the statutory period after his divorce from a former wife, and although she married him in entire good faith that the divorce removed any impediment to his marriage, and cohabited with him until his death. Any situation which makes a court feel it necessary to reach such a conclusion in such circumstances is to say the least unfortunate. Of all the impediments to marriage, statutory or otherwise, the least obnoxious would seem to be the period of restraint which the legislature has imposed subsequently to the granting of a divorce. While there are points in favor of holding that mere evidence of cohabitation without more, following the removal of the impediment of a former marriage, is insufficient to raise an inference of new consent, there seems little justification for extending its application after the former marriage had to all practical purposes been dissolved. The object of such statute is to prevent divorcees from remarrying, to place obstacles in the way of marrying correspondent or person, a desire for marriage with whom was the reason for seeking the divorce, and not to create concubines and bastards when a woman

marries a divorcee in good faith believing that he is at liberty to contract.

⁴⁴ Where a marriage takes place within the prohibited time after divorce, and, a proper ceremony having taken place, the parties cohabit in pursuance of the same after the expiration of the prohibition, the marriage must be deemed valid after that time under a statute providing that marriage between persons either of whom has a living spouse is void, but that if the parties live and cohabit together after the death or divorce of the former spouse, such marriage shall be valid. *Lee v. Lee*, 150 Iowa, 611, 130 N. W. 128.

The Massachusetts statute expressly provides that if a person during the lifetime of a husband or wife enters into a subsequent ceremonial marriage contract, and the parties thereto live together thereafter as husband and wife, and such subsequent marriage contract was entered into by one of the parties in good faith, either without knowledge of such former marriage or in the belief that the former husband or wife was dead or divorced, they shall, after the impediment to their marriage has been removed by death or divorce of the other party, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and after the removal of such impediment, and the issue of such subsequent marriage shall be considered legitimate. Under this statute it was held that, whether the removal of the impediment was known or unknown, the marriage ceremony became operative upon the removal, if the parties continued to live together in good faith on the part of one of them, and that fraudulent representations by one party as to the existence of the impediment were not grounds for having the second marriage declared null. *Turner v. Turner*, 189 Mass. 373, 109 Am. St. Rep. 643, 75 N. E. 612. But it was held that this statute did not apply to persons who were living in another state at the time the impediment was removed, and came to Massachusetts and there cohabited as man and wife at a subsequent time. *Com. v. Stevens*, 196 Mass. 280, 124 Am. St. Rep. 555, 82 N. E. 33.

⁴⁵ Where parties went through a marriage ceremony with knowledge that the man's divorce from his former wife was void, it was intimated that they would not be regarded as man and wife from evidence merely of continued cohabitation following the death of the first wife. *Miller v. Krelle*, 122 Ill. App. 380, distinguishing *Robinson v. Ruprecht*, 191 Ill. 424, 61 N. E. 631, *supra*.

OKLAHOMA SUPREME COURT.
(Division No. 2.)

RE ESTATE OF ALBERT W. LOVE, Deceased.

EMMA LOVE, Admr., etc., of Albert W. Love, Deceased, Plff. in Err.,
v.
W. S. LOVE.

(42 Okla. 478, 142 Pac. 305.)

Marriage — common law.

1. A common-law marriage exists where competent parties agree to be and become immediately man and wife, and pursuant thereto enter into and maintain thereafter the marriage relation.

Same — necessity of clergyman.

2. Marriage, in the legal sense, is a civil contract, and it is not indispensable that a clergyman should be present to authorize and confirm the contract in order to give validity to the marriage.

Same — statutory regulations — effect.

3. Statutes regulating marriage are usually directory merely, and, when such statutes do not expressly prohibit or forbid other forms of marriages, a common-law marriage, consummated in accordance with the rules of the common law, is valid.

Same — requirement of license and witnesses.

4. The general rule is that statutes which direct that a license must be issued and procured, that only certain persons shall perform the ceremony, that a certain number of witnesses shall be present, and that a certificate of the marriage shall be signed, returned, and recorded, and that persons violating the conditions shall be guilty of a criminal offense, are directory merely, being addressed to persons in authority to secure publicity and a record of marriage, and will in no wise affect the validity of the marriage contract unless they contain an express provision to that effect.

Same — common law — validity.

5. A common-law marriage is valid in this state.

(July 14, 1914.)

ERROR to the District Court for Blaine County to review a judgment reversing a judgment of the County Court granting letters of administration to the alleged widow of Albert W. Love, deceased. Reversed.

The facts are stated in the Commissioner's opinion.

Mr. J. P. Wishard, for plaintiff in error:

A legal, binding, and valid marriage ex-

Headnotes by BREWER, C.

Note. — See note, post, 118.
L.R.A.1915E.

isted by and between Emma Love and A. W. Love, and as his lawful surviving wife she was entitled under our law to the letters of administration.

Reaves v. Reaves, 15 Okla. 240, 2 L.R.A. (N.S.) 353, 82 Pac. 490; Hunt v. Hunt, 28 Okla. 490, 22 L.R.A. (N.S.) 1202, 100 Pac. 541; Klipfel v. Klipfel, 41 Colo. 40, 124 Am. St. Rep. 96, 92 Pac. 26; Warren v. Canard, 30 Okla. 514, 120 Pac. 599.

The mutual agreement to be husband and wife, *in presenti*, by a man and woman capable of assuming that relation, especially if followed by matrimonial cohabitation, constitutes a common-law marriage, without any necessity for a solemnization or formal ceremony of any kind.

Blanchard v. Lambert, 43 Iowa, 228, 22 Am. Rep. 245; Smith v. Fuller, — Iowa, —, 108 N. W. 765; Laurence v. Laurence, 164 Ill. 367, 45 N. E. 1071; McKenna v. McKenna, 73 Ill. App. 64; Hutchinson v. Hutchinson, 96 Ill. App. 52, 196 Ill. 432, 63 N. E. 1023; Porter v. United States, 7 Ind. Terr. 616, 104 S. W. 855; State v. Walker, 36 Kan. 297, 59 Am. Rep. 556, 13 Pac. 279; Matney v. Linn, 56 Kan. 613, 54 Pac. 668; Williams v. Kilburn, 88 Mich. 279, 50 N. W. 293; State v. Worthingham, 23 Minn. 528; Dickerson v. Brown, 49 Miss. 357; Floyd v. Calvert, 53 Miss. 37; Dyer v. Brannock, 66 Mo. 391, 27 Am. Rep. 359; Voorhees v. Voorhees, 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172; Carmichael v. State, 12 Ohio St. 553; Ingersoll v. McWillie, 9 Tex. Civ. App. 543, 30 S. W. 56; Newbury v. Brunswick, 2 Vt. 151, 19 Am. Dec. 703; Mathewson v. Phoenix Iron Foundry, 20 Fed. 281; United States v. Route, 33 Fed. 246; Holabird v. Atlantic Mut. L. Ins. Co. 2 Dill. 166, note, Fed. Cas. No. 6,587.

A presumption of marriage arises from cohabitation as husband and wife and reputation of marriage in the community.

Bynon v. State, 117 Ala. 80, 67 Am. St. Rep. 163, 23 So. 640; Moore v. Heineke, 119 Ala. 627, 24 So. 374; Tartt v. Negus, 127 Ala. 301, 28 So. 713; Klipfel v. Klipfel, 41 Colo. 40, 124 Am. St. Rep. 96, 92 Pac. 26; State v. Wilson, 5 Penn. (Del.) 77, 62 Atl. 227; Myatt v. Myatt, 44 Ill. 473; Nossaman v. Nossaman, 4 Ind. 648; Smith v. Fuller, — Iowa, —, 108 N. W. 765; Bartee v. Edmunds, 29 Ky. L. Rep. 872, 96 S. W. 535; Holmes v. Holmes, 6 La. 463, 26 Am. Dec. 482; Jones v. Jones, 45 Md. 144; Newburyport v. Boothbay, 9 Mass. 414; Sorensen v. Sorensen, 68 Neb. 483, 94 N. W. 540, 96 N. W. 837, 100 N. W. 930, 103 N. W. 455; Cramsey v. Sterling, 111 App. Div. 568, 97 N. Y. Supp. 1082; Thompson v. Nims, 83 Wis. 261, 17 L.R.A. 847, 53 N. W. 502.

Cases recognizing the validity of common-law marriages are cited in the opinion.

Messrs. Seymour Foose, Robert A. Lowry, and R. O. Brown, for defendant in error:

A common-law marriage is invalid in this state.

Beverlin v. Beverlin, 29 W. Va. 732, 2 S. E. 36; Holmes v. Holmes, 1 Abb. (U. S.), 525, 1 Sawy. 99, Fed. Cas. No. 6,638; Grishman v. State, 2 Yerg. 589; Smith v. North Memphis Sav. Bank, 115 Tenn. 12, 89 S. W. 392; Offield v. Davis, 100 Va. 250, 40 S. E. 910; Morrill v. Palmer, 68 Vt. 1, 33 L.R.A. 411, 33 Atl. 829; Com. v. Munson, 127 Mass. 459, 34 Am. Rep. 411; Norcross v. Norcross, 155 Mass. 425, 29 N. E. 506; Furth v. Furth, 97 Ark. 272, 133 S. W. 1037, Ann. Cas. 1912D, 595; Denison v. Denison, 35 Md. 361; State v. Wilson, 121 N. C. 657, 28 S. E. 416; Norman v. Norman, 121 Cal. 620, 42 L.R.A. 343, 66 Am. St. Rep. 74, 54 Pac. 143; Johnson v. Raphael, 117 La. 967, 42 So. 479; Nelson v. Carlson, 48 Wash. 651, 94 Pac. 477; Lanham v. Lanham, 136 Wis. 360, 17 L.R.A. (N.S.) 804, 128 Am. St. Rep. 1085, 117 N. W. 787; Re Smith, 4 Wash. 702, 17 L.R.A. 573, 30 Pac. 1059; Re McLaughlin, 4 Wash. 570, 16 L.R.A. 699, 30 Pac. 651.

Brewer, C., filed the following opinion: The record in this case presents a single question: Is a common-law marriage valid in this state?

Emma Love was granted letters of administration upon the estate of Albert W. Love, as his widow surviving him. W. S. Love, father of the deceased, filed a petition asking that the letters of administration issued to Emma Love be vacated, and that he be appointed as administrator of his son's estate. Upon a hearing in the county court, it was found that Emma Love was the common-law wife of the deceased; that the relation had been entered into by the parties in such a way as to constitute a valid marriage at the common law; and the court held, as a matter of law, that such a marriage was valid in this state. On appeal to the district court, the same findings of fact were made, but the court held that, under the present state of statutory law of this state, a common-law marriage is invalid; and that therefore Emma Love was not entitled to letters of administration on the estate of the deceased.

The territorial supreme court in *Reaves v. Reaves*, 15 Okla. 240, 2 L.R.A. (N.S.) 353, 82 Pac. 490, sustained a common-law marriage under the law of the territory as it then existed, saying in the syllabus: L.R.A. 1915E.

"Marriage, in the legal sense, is a civil contract, and it is not indispensable that a clergyman should be present to authorize and confirm the contract in order to give validity to the marriage. . . . Statutes regulating marriage are usually directory merely, and, when such statutes do not expressly prohibit or forbid other forms of marriages, a common-law marriage, consummated in accordance with the rules of the common law, is valid."

But, at the time of this decision, the law of Nebraska, which had been put temporarily in force by the organic act, relating to the question of marriage, was in force, and that decision followed and relied upon the construction of the statute law declared by the Nebraska supreme court; but, the court, in that opinion took occasion to make an extensive study of the question, saying in the opinion: "As before stated in this opinion, the general rule is that statutes which direct that a license must be issued and procured, that only certain persons shall perform the ceremony, that a certain number of witnesses shall be present, and that a certificate of the marriage shall be signed, returned, and recorded, and that persons violating the conditions shall be guilty of a criminal offense, are, directory merely, being addressed to persons in authority to secure publicity and a record of marriages, and will in no wise affect the validity of the marriage contract unless they contain an express provision to that effect. They simply provide the evidence of the marriage."

But the statute of Oklahoma in force at the time of the marriage involved here differs from that of Nebraska, with which the *Reaves* Case was concerned, and therefore it becomes necessary to again examine the question.

This difference in the statutory law led this court, in the case of *Clark v. Barney*, 24 Okla. 455, 103 Pac. 598, to propound in the syllabus the question: "Quere, Is a marriage under the common law, without a celebration or solemnization in manner provided by our statute, permissible under the laws as now in force in this jurisdiction?" And this question has not heretofore been squarely answered in this court.

Snyder's Comp. Laws 1909, § 4222 (Rev. Laws 1910, § 3886), follows: "No person shall enter into or contract the marriage relation, nor shall any person perform or solemnize the ceremony of any marriage, in this state without a license being first issued by the judge or clerk of the county court of some county in this state, authorizing the marriage between the persons named in such license."

Section 4219, Comp. Laws 1909 (Rev.

Laws 1910, § 3883), defines marriage as: "A personal relation arising out of a civil contract to which the consent of parties legally competent of contracting, and entering into it is necessary; and the marriage relation shall only be entered into, maintained, or abrogated as provided by law."

Other sections provide what the license shall contain, who may solemnize the rite, the execution and recording of the certificate, etc.; and § 4231 Comp. Laws 1909 (Rev. Laws 1910, § 3695) makes it a felony for a white person to marry a person of African descent. There is no penalty, however, prescribed for entering into the marriage relation, upon the parties themselves, except in the case named. There are penalties, however, prescribed against persons solemnizing the rite in certain cases, and also against the officers acting contrary to the provisions of the act.

The provisions of the statutory law prevailing in this state at this time, while differing in phraseology and substance from those in force in Nebraska when the Reaves Case was decided, are not materially different in effect upon the question involved here. The Nebraska statute (chapter 52, Neb. Comp. Laws 1889) defines marriage as a civil contract, depending upon the consent of competent parties, and provides that "previous to the solemnization of any marriage in this state, a license for that purpose must be obtained from the probate judge in the county wherein the marriage is to take place."

It also, like our own, prescribes the form and contents of the license for a ceremonial marriage, and that it be solemnized by certain persons or officers only; and § 9 of said chapter specifically provides that, while no particular form of ceremony shall be required, yet "that the parties shall solemnly declare, in the presence of the magistrate or minister, and the attending witnesses, that they take each other as husband and wife; and in any case there shall be at least two witnesses besides the minister or magistrate, present at the ceremony."

Other provisions provide for the issuance and recording of the certificate and for various penalties against officers failing to observe the statutory requirements. So we repeat that, so far as the statutes relating to the precise question involved here are concerned, all of the reasoning and the authorities quoted and relied upon in Reaves v. Reaves, *supra*, when studied closely, seem to be applicable at the present time; but it may be said that, to give our statutes a reasonable construction, they prohibit persons from entering into the marriage relation except in the manner pointed out, L.R.A.1915E.

and in a sense they do; but it is significant that they nowhere declare that marriages entered into otherwise than the statutory way are void; and this court in Hunt v. Hunt, 23 Okla. at page 495, 22 L.R.A. (N.S.) 1202, 190 Pac. 543, while discussing this question, said: "The rule to be gathered from all of the foregoing cases of this character is that, notwithstanding the statute may penalize those who solemnize or those who enter into marriage contrary to statutory authority, the marriage itself is not void, unless the statute itself so makes it, and hence in the case at bar, although the marriage was expressly forbidden and prohibited, it was voidable, and not void. While marriage is a personal relation arising out of a civil contract, it differs to such an extent from all other contracts in its consequences to the parties and to the public that the rule that prohibited and penalized contracts are void does not apply thereto."

And it may be said that it seems to be the policy of the law almost everywhere to apply far more liberal rules in aid of its validity than are applied to the ordinary contracts of everyday life; and this court emphasizes this idea in the language of Ames, C., in the case of Coachman v. Sims, 36 Okla. 536, 129 Pac. 845, wherein he says: "Marriage should not be destroyed on presumption. The law is apt to preserve the sanctity of the marriage relation, the legitimacy of children, and stability of descent and distribution, and therefore presumes innocence and virtue in the absence of proof."

And the rule applied in testing whether or not a marriage is void or merely voidable is well stated in Fearnow v. Jones, 34 Okla. 699, L.R.A., —, 126 Pac. 1017, thus: "A marriage may be considered voidable when it is possible, under any circumstances, for the plaintiffs to contract the marriage, or subsequently to ratify it, while it should be considered void if it is impossible for them under the law to contract it, and if it is impossible for them subsequently by any conduct to ratify it, and if the statute expressly declares that it is void."

Again it may be noted that common-law marriages were held valid in the Indian Territory, now a part of our state, where at least half of our people live, where the laws of Arkansas regulating the marriage relation were in force. Davis v. Pryor, 50 C. C. A. 579, 112 Fed. 274 (Ind. Terr.); Porter v. United States, 7 Ind. Terr. 616, 104 S. W. 855. And yet, when we come to examine the Arkansas law (chapter 103, Mansfield's Dig. Laws of Ark. 1884), we find the statutes requiring ceremonial marriage

under license as strong and exact, and perhaps in some points more specific, than are our present statutes; and we feel that it may be said with confidence that it is held, by the great weight of authority, that in common-law states a marriage contract entered into in conformity to the common-law requirements is valid, notwithstanding the statutes in force provide for a ceremonial marriage under license, and in a certain way, and by certain ministers or officers only. And that such marriages will only be held void where statutes of the state in terms declare them so. We think this is made to appear in the authorities collected in *Reaves v. Reaves*, 15 Okla. 240, 82 Pac. 490, and the note to that case, where it is reported also, in 2 L.R.A. (N.S.) 353, but we will reproduce here the views of the Supreme Court of the United States as expressed in *Meister v. Moore*, 96 U. S. 76, 24 L. ed. 826, as follows: "That such a contract constitutes a marriage at common law there can be no doubt, in view of the adjudication made in this country from its earliest settlement to the present day. Marriage is everywhere regarded as a civil contract. Statutes in many of the states, it is true, regulate the mode of entering into the contract, but they do not confer the right. Hence they are not within the principle that, where a statute creates a right and provides a remedy for its enforcement, the remedy is exclusive. No doubt a statute may take away a common-law right; but there is always a presumption that the legislature has no such intention unless it be plainly expressed. A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license or publication of banns, or be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common-law right to form the marriage relation by words of present assent. And such, we think, has been the rule generally adopted in construing statutes regulating marriage. Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law, to be good notwithstanding the statutes, unless they contain express words of nullity."

The following list of cases indicates some of the states wherein common-law marriages are sustained, and, so far as we have examined, all of these states have statutes regulating how the marriage contract may

be entered into: *Tartt v. Negus*, 127 Ala. 301, 28 So. 718; *Darling v. Dent*, 82 Ark. 76, 100 S. W. 747; *Klipfel v. Klipfel*, 41 Colo. 40, 124 Am. St. Rep. 98, 92 Pac. 26; *Askew v. Dupree*, 30 Ga. 174; *Drawdy v. Hesters*, 130 Ga. 161, 15 L.R.A. (N.S.) 193, 60 S. E. 451; *Hiler v. People*, 156 Ill. 511, 47 Am. St. Rep. 221, 41 N. E. 181; *Franklin v. Lee*, 30 Ind. App. 31, 62 N. E. 78; *Davis v. Pryor*, 3 Ind. Terr. 396, 58 S. W. 660; *Porter v. United States*, 7 Ind. Terr. 616, 104 S. W. 855; *Smith v. Fuller*, — Iowa, —, 108 N. W. 765; *People v. Mendenhall*, 119 Mich. 404, 75 Am. St. Rep. 408, 78 N. W. 325, 11 Am. Crim. Rep. 163; *Supreme Tent, K. M. v. McAllister*, 132 Mich. 69, 102 Am. St. Rep. 382, 92 N. W. 770; *Hulett v. Carey*, 66 Mian. 327, 34 L.R.A. 384, 61 Am. St. Rep. 419, 69 N. W. 31; *Hargroves v. Thompson*, 81 Miss. 211; *Floyd v. Calvert*, 58 Miss. 37; *Re Imboden*, 128 Mo. App. 555, 107 S. W. 400; *Eaton v. Eaton*, 66 Neb. 676, 60 L.R.A. 605, 92 N. W. 995, 1 Ann. Cas. 199; *State v. Zichfeld*, 23 Nev. 804, 34 L.R.A. 784, 62 Am. St. Rep. 800, 46 Pac. 802; *Londonberry v. Chester*, 2 N. H. 268, 9 Am. Dec. 61; *Voorhees v. Voorhees*, 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172; *Clark v. Clark*, 52 N. J. Eq. 650, 30 Atl. 81; *Mullaney v. Mullaney*, 65 N. J. Eq. 384, 54 Atl. 1086; *Atlantic City R. Co. v. Goodin*, 62 N. J. L. 394, 45 L.R.A. 671, 72 Am. St. Rep. 652, 42 Atl. 383; *Tummalty v. Tummalty*, 3 Bradf. 369; *Hicks v. Cochran*, 4 Edw. Ch. 107; *Geiger v. Ryan*, 123 App. Div. 722, 108 N. Y. Supp. 13; *Re Wells*, 123 App. Div. 79, 108 N. Y. Supp. 164; *Carmichael v. State*, 12 Ohio St. 553; *Reaves v. Reaves*, 15 Okla. 240, 2 L.R.A. (N.S.) 353, 82 Pac. 490; *McCauland's Estate*, 213 Pa. 189, 110 Am. St. Rep. 540, 62 Atl. 780; *Ex parte Romans*, 79 S. C. 210, 58 S. E. 614; *Jackson v. Banister*, 47 Tex. Civ. App. 317, 105 S. W. 66; *Burks v. State*, 50 Tex. Crim. Rep. 47, 94 S. W. 1040; *Riddle v. Riddle*, 26 Utah, 268, 72 Pac. 1081; *Hilton v. Roylance*, 25 Utah, 129, 58 L.R.A. 723, 95 Am. St. Rep. 821, 69 Pac. 660; *Travers v. Reinhardt*, 25 App. D. C. 567.

In the instant case, both the county and district courts found that the facts were sufficient to establish a common-law marriage. The deceased took this woman in the presence of witnesses to be his wife, moved her to another town, where they lived together as man and wife, and were known as such, until the man came to his death. At the trial of this suit a little daughter, the result of this union, sat innocently by, unconscious that her very name and future status were being determined there. We infer from the record that the property

involved is insignificant, and was probably little in mind, while this woman fought for the relation of wife and for a name for her little girl. She is entitled to both. We do not propose to sit here, considering the most sacred relation of life, and construe away the status of this woman, who appears to have acted in good faith; neither will we turn the innocent result of this common-law union out into the world a nameless thing. She was begotten by a

man who had voluntarily assumed the relation of husband, and she shall have the right to be called his child and bear his name.

The cause should be reversed and remanded for proceedings in harmony with this opinion.

Per Curiam:

Adopted in whole.

Note. — Effect of marriage statutes to abrogate the common law.

The custom of centuries which has sanctioned the creation of the marriage relation by informal consent,¹ expressly exchanged or circumstantially manifested, has been supplemented by various statutory provisions. Courts and legislatures have deprecated the fact that marriage, which is the foundation of society, should be governed by rules more lax than those relating to other and less important institutions of society. England rejected the doctrine of informal marriages after it was for years supposed to be a part of the English common law. This was done in 1844 in the case of *Reg. v. Millis*,² holding that, although a mutual present contract of marriage was indissoluble between the parties, and entitled either, by application to the spiritual court, to compel the other to yield to a solemnization, it did not of itself constitute marriage. This decision was entirely independent of the Act of 26 Geo. II. chap. 33, expressly invalidating unsolemnized marriages.

In this country, where the statute just referred to never applied,³ the common law has quite generally been held to sanction informal marriages. But it was recognized that the rules of the common law were too lax to make marriage the secure and stable institution it should be. It appears also to have been realized that the custom of centuries was firmly a part of the common mind, and that suddenly to abolish this custom, so far as its sanction in law was concerned, would work greater mischief than

did the rule itself. While the worst that the rule itself could do would be now and then to accord the marriage relation to persons who had wantonly abandoned themselves to illicit relations, a sudden abrogation would result in frequently creating bastards, paramours, and concubines, notwithstanding there may have been the purest motives and the utmost good faith.

So, while statutes in many of the states regulate the mode of entering into the contract, and while a statute may abrogate the common law of marriage, there is always a presumption that the legislature had no such intention, unless it is plainly expressed. A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring that all marriages be entered into in the presence of a magistrate or clergyman, or that they be preceded by a license or publication of banns, or be attested by witnesses. Whatever directions the statute may give respecting the formation or solemnization of marriage, courts have usually held that a marriage good at common law is good notwithstanding the statutes, unless they contain express words of nullity. Of statutes making no such express declaration it is said that their object is not to declare what shall be requisite to the validity of a marriage, but to provide a legitimate mode of solemnizing it; and that they speak of the celebration of its rite rather than of its validity, addressing themselves principally to the functionaries they authorize to perform the ceremony.⁴ The legislatures must have been conscious of the common law, and it is therefore argued that if they had desired to invalidate marriages in pursuance of it, they would have so declared in unmis-

¹ The various phases of marriage by informal consent are treated in the notes to *Grigsby v. Reib*, ante, 8; *Becker v. Becker*, ante, 56; and *People v. Shaw*, ante, 87.

² This case is discussed at length in subdivision II. a of the note to *Grigsby v. Reib*, ante, 9.

³ The act of 26 Geo. II. chap. 33, declaring void all marriages which did not observe all the formalities thereby specified, did not apply to the American colonies. *Cheney v. Arnold*, 16 N. Y. 345, 60 Am. Dec. 609.
L.R.A.1915E.

⁴ *Meister v. Moore*, 96 U. S. 76, 24 L. ed. 826, adopting the construction of the Michigan statute expressed in *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164, which declared the same to be directory merely.

The main purpose of the provision of the Nebraska statute that marriage is considered a civil contract to which the consent

takable terms.⁵ It was said in an early Kentucky case: "The legislature . . . has done nothing more than substitute a statutory mode of solemnizing the rites of matrimony, instead of the common law mode of doing it *in facie ecclesie*; and it was necessary to do this, because there was in this country no church established by law, and consequently none that had the authority to solemnize the rites of matrimony."⁶

of the parties capable of contracting, is essential, is declared to be that of negating the idea that marriage is an ecclesiastical sacrament, or that in the eye of the law it is controlled by the mandates or dogmas, or subject to the observance of the rituals or regulations of any particular churches or sects. *University of Michigan v. McGuckin*, 64 Neb. 304, 89 N. W. 778.

It has been said in this connection that in making provision for license, solemnization by certain persons, and registration in the public records of marriages, the legislature must be presumed, and especially so where it has declared that marriage is a civil contract to which the consent of the parties, capable in law of contracting, is essential, to have known that marriages by contract are valid at common law, and that they have been entered into from time immemorial; and that if the legislature intended to prohibit such marriages and render them void, and thus entail upon the parties, conscious of no wrongdoing, and their children, such evil consequences as must result from the invalidity of their marriage, it would have expressed such intent in terms that would have required no construction, and would have been ample notice to all. *State v. Zichfeld*, 23 Nev. 304, 34 L.R.A. 784, 62 Am. St. Rep. 800, 46 Pac. 802.

For, even supposing that the common law of England was as declared in *Reg. v. Mills*, still, as that case declared a contract *per verba de presenti* indissoluble between the parties themselves, and such that it entitled either, by application to the spiritual court, to compel the other to solemnize an actual marriage,—it should not be supposed that legislatures, in prescribing the forms of marriage, would, in view of the cessation of ecclesiastical power over civil rights, have failed to provide some remedy, or to make some provision, with reference to contracts so binding as to be indissoluble as between the parties. *Carmichael v. State*, 12 Ohio St. 553. The court said that in enacting a statute containing no express words of nullity, either the legislature must have proceeded on the idea of the inapplicability of any such rule of law as is laid down in *Reg. v. Mills*, in this country, where ecclesiastical authority binds only those who voluntarily submit, or, as is more probable, the legislature had in mind that the rule of the common law was that shown by the certainly prevalent opinion in England before the decision in *Reg. v. Mills*. L.R.A.1916E.

Conformably to the above principles, it is declared in the great majority of jurisdictions⁷ that statutes prescribing the forms and ceremonies to be observed in marrying do not abrogate the common law, and that therefore they do not invalidate marriages contracted without compliance with the statutory requirements, unless the statutes contain express words of nullity.⁸ And the courts consistently adhere to this

⁶ *Dumarey v. Fishly*, 3 A. K. Marsh. 368. A subsequent Kentucky statute, however, invalidated common-law marriages by express words.

⁷ Where the statute does not prohibit or declare void a marriage not solemnized in accordance with its provisions, a marriage according to the common law will be valid without observing the statutory regulations. *Port v. Port*, 70 Ill. 484; *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Elzas v. Elzas*, 171 Ill. 632, 49 N. E. 717; *Reifschneider v. Reifschneider*, 241 Ill. 92, 89 N. E. 255; *Wilson v. Cook*, 266 Ill. 460, 43 L.R.A. (N.S.) 365, 109 N. E. 222; *Sabalot v. Populus*, 31 La. Ann. 854; *Hargroves v. Thompson*, 31 Miss. 211; *Dickerson v. Brown*, 49 Miss. 357; *Dyer v. Brannock*, 66 Mo. 301, 27 Am. Rep. 359; *State v. Bittick*, 103 Mo. 183, 11 L.R.A. 587, 23 Am. St. Rep. 869, 15 S. W. 325; *Ashford v. Metropolitan L. Ins. Co.* 80 Mo. App. 638; *State v. Zichfeld*, 23 Nev. 304, 34 L.R.A. 784, 62 Am. St. Rep. 800, 46 Pac. 802; *Haggin v. Haggin*, 35 Nev. 375, 58 N. W. 209; *Coad v. Coad*, 87 Neb. 290, 127 N. W. 455; *Pearson v. Howey*, 11 N. J. L. 12; *Carmichael v. State*, 12 Ohio St. 553; *Reaves v. Reaves*, 15 Okla. 240, 2 L.R.A. (N.S.) 353, 82 Pac. 490; *Coleman v. Vollmer*, — Tex. Civ. App. —, 31 S. W. 413.

⁸ By "express words of nullity" is meant such as requires no construction. Some instances thereof are below referred to by way of illustration.

The common law was abrogated in Kentucky by a statute providing that all marriages should be void when not solemnized or contracted in the presence of an authorized person or society. *Estlin v. Rogers*, 1 Bush, 62; *Stewart v. Munchandler*, 2 Bush, 278.

The provision of the California Code that marriage could be constituted by consent followed by solemnization, "or by a mutual assumption of marital rights, duties, or obligations," was amended in 1895 by removing the quoted phrase, so that thereafter the act read: "Consent alone will not constitute marriage; it must be followed by solemnization authorized by this Code." Under such a provision, of course, no marriage was valid unless solemnized by a person authorized by the statute. *Norman v. Thomson*, 121 Cal. 620, 42 L.R.A. 343, 66 Am. St. Rep. 74, 54 Pac. 143.

Common-law marriages were for a time abolished in New York by chap. 889 of

formula by upholding marriages under the principles of the common law, where the statutes makes provision in the ordinary

form, for license, authority of celebrant, manner of solemnization, certificate, registration, and the like.* A statute is con-

the Laws of 1901, effective January 1st, 1902. *Re Garner*, 59 Misc. 116, 112 N. Y. Supp. 212.

The words of nullity were contained in § 19 of chap. 339 of the Laws of 1901, providing that no marriage contracted otherwise than as provided by the statute should be valid for any purpose whatever, provided that no such marriage should be deemed invalid for want of authority of the celebrant if consummated with the full belief on the part of either of the contracting parties that they were lawfully joined in marriage, or on account of any mistake in the date or place of marriage, or in the residence of either of the contracting parties. *Re Hinman*, 147 App. Div. 542, 131 N. Y. Supp. 861. This case was affirmed in 206 N. Y. 663, 99 N. E. 1408, as shown in the succeeding paragraph.

However, chapter 742 of the Laws of 1907, effective January 1, 1908, repealed the section containing the words of nullity, and this has been held to reinstate the common law of New York. *Re Smith*, 74 Misc. 11, 133 N. Y. Supp. 730. To the same effect is a suggestion by the appellate division in *Re Hinman*, supra, which refers to other changes in the statute as further evidencing the intention of the legislature to remove the ban on common-law marriages. In affirming this case (see the preceding paragraph) the court of appeals expressly refused to consider the effect of the act of 1907 to validate common-law marriages.

Perhaps it should be noted that *Petit v. Petit*, 45 Misc. 155, 91 N. Y. Supp. 979, which is cited in the note in 3 L.R.A. (N.S.) 244, was reversed in 105 App. Div. 312, 93 N. Y. Supp. 1001, upon the ground, among others, that the New York statute of 1901 operated to prevent the parties from marrying by mere consent.

It was held that, although the colonial statute of Rhode Island, of 1647, prescribing certain formalities for marriage, expressly provided that the same should not be valid without such formalities, abrogated to that extent the rule of the common law,—the repeal of that statute and the enactment of other marriage statutes which prescribe the formalities of marriage, but do not expressly declare marriages void for noncompliance therewith, had the effect of reviving the common law, and that the same was in force in Rhode Island. *Mathewson v. Phoenix Iron Foundry*, 20 Fed. 281.

In *Northfield v. Plymouth*, 20 Vt. 682, and *Morrill v. Palmer*, 68 Vt. 1, 33 L.R.A. 411, 33 Atl. 828, holding that the common law does not prevail in Vermont, the court said that to hold otherwise would be to repeal the Vermont statute on the question, although the language of the act is not shown.

Of course, an alleged common-law mar-

riage between a white man and a colored woman cannot be upheld where, from the beginning of their relations, mixed marriages have been declared by statute to be illegal and void. *Keen v. Keen*, 184 Mo. 358, 83 S. W. 526, appeal dismissed in 201 U. S. 319, 50 L. ed. 772, 28 Sup. Ct. Rep. 494, upon the ground that what facts constitute a common-law marriage is a local question, which will not sustain an appeal to the United States Supreme Court. *Baggs v. State*, 55 Ala. 108 (there were intimations to the same effect in *State v. Murphy*, 6 Ala. 765, 41 Am. Dec. 79, and *Farley v. Farley*, 24 Ala. 501, 33 Am. St. Rep. 141, 10 So. 646); *Taylor v. Taylor*, 10 Colo. App. 303, 50 Pac. 1049; *Daniel v. Sams*, 17 Fla. 487; *Caras v. Hendrix*, 62 Fla. 446, 57 So. 345; *Warren v. Warren*, 66 Fla. 138, 63 So. 726; *United States v. Lee Sa Kee*, 3 Haw. Dist. Ct. 265; *Hebblethwaite v. Hepworth*, 98 Ill. 126; *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Bowman v. Bowman*, 24 Ill. App. 165; *Dumaresny v. Fishly*, 3 A. K. Marsh. 368 (construing Indiana statute); *Porter v. United States*, 7 Ind. Terr. 618, 104 S. W. 855; *State v. Worthingham*, 23 Minn. 528; *Rundle v. Pegram*, 49 Miss. 751; *Bissell v. Bissell*, 55 Barb. 325, 7 Abh. Pr. N. S. 16; *Williams v. Williams*, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98; *Becker v. Becker*, ante, 56.

It was declared in Louisiana in 1834 that the Louisiana statutes relating to forms and ceremonies were merely directory to those persons authorized to celebrate marriages, and were intended to guard against hasty and inconsiderate unions in defiance of parental authority (*Holmes v. Holmes*, 6 La. 463, 26 Am. Dec. 482), and that the law does not declare null marriages in which the laws relating to forms and ceremonies have not been observed (*Hube's Succession*, 20 La. Ann. 97). And while the opinion in *Johnson v. Raphael*, 117 La. 967, 42 So. 470, states that the Civil Code does not recognize marriages by private agreement, or as resulting from cohabitation as man and wife, it is to be noted that that statement is made following the paragraph relating to article 182 of the Civil Code of 1825, permitting slaves to marry with the consent of their master, and the comment thereon that it contemplated some kind of a public celebration of the contract of marriage; and while one of the syllabi by the court states that marriages by private agreement, express or implied, have never been recognized by the laws of Louisiana, which on the contrary have always required that a contract of marriage shall be celebrated by a priest, minister, or by some duly authorized public officer in the presence of three witnesses, it is to be noted that the only thing said in the opinion on the question is that under the Civil Codes of 1825 and

1870 marriage was a solemn contract which must be celebrated by a priest, minister, or magistrate in the presence of three witnesses. Furthermore, if the meaning intended was as broad as the words are capable of carrying, it is considerably discounted by the fact that the questions thus stated were not before the court, and by the further fact that previous cases have expressly declared that a marriage is not rendered void by the Louisiana statute even though it was contracted without the statutory formalities.

The Civil Code of 1900 provides in § 86 that the law regards marriage in no other view than as a civil contract, and in § 88 that only such marriages are recognized by law as are "contracted and solemnized" according to the rules which it prescribes. While the latter may possibly be regarded as rendering the statute mandatory, the point is not at all certain. At any rate the remark of the court is not entitled to great weight, for its inadvertence is clearly indicated by the error in stating that the Civil Code of 1825 required celebration by a clergyman or magistrate in the presence of three witnesses, without reference to the fact that the contrary conclusion was reached in *Holmes v. Holmes*, and *Habee's Succession*, supra.

Although the Nebraska statute does not abrogate common-law marriages, it seems to be regarded as requiring a higher degree of proof than was necessary to establish a common-law marriage before the intervention of the legislature,—for it is said that there was a time, perhaps, when the doctrine of a liberal construction of the testimony and the slight proof of a common-law marriage subserved a useful purpose, but that that time is now passed, especially since the legislature has undertaken to provide for the formal solemnization of the marriage rites and to have the fact of marriage preserved in records provided for that purpose. "This ancient doctrine," said the court, "is alien to the ideas and customs of our people. It tends to weaken the public estimate of the sanctity of the marriage relation. It puts in doubt the certainty of the rights of inheritance. It opens the door to false pretenses of marriage and the imposition upon estates of supposititious heirs. It places honest, God-ordained matrimony and mere meretricious cohabitation too nearly on a level with each other. In view of these consequences, that are apparent to all, it seems to us that grave considerations of public policy require us to closely scrutinize the testimony offered and the proof adduced in support of every common-law marriage alleged to have been consummated in this state." *Sorensen v. Sorensen*, 68 Neb. 500, 100 N. W. 930. However, it is to be observed that a marriage in fact by express consent was the bone of contention in the case, and it appeared that the consent, if voiced at all, was *per verba de futuro*, and not followed by cohabitation as man and wife.

The Nebraska statute which was in force L.R.A.1915E.

in the territory of Oklahoma in 1890 and before did not invalidate common-law marriages. *Reaves v. Reaves*, 15 Okla. 240, 2 L.R.A.(N.S.) 353, 82 Pac. 490.

And it was held that a provision of the Pennsylvania act of 1729 providing that all marriages should be solemnized by taking each for husband and wife before twelve sufficient witnesses was directory merely. *Rodebaugh v. Sanks*, 2 Watts, 9.

Reviewing the Tennessee cases, the Missouri court held that the Tennessee statute was merely directory, and that therefore a ceremonial marriage without the statutory license, followed by cohabitation, was a good common-law marriage in Tennessee. *Snuffer v. Karr*, 197 Mo. 182, 94 S. W. 983, 7 Ann. Cas. 780.

In Texas the act of the Congress of the Republic in 1840, expressly adopted "the common law of England." This was construed by the Texas supreme court to mean not the common law stripped of the doctrine of consensual marriages, as it stood in England at the time, but the common law as adopted and applied in the states of this country. *Grigsby v. Reib*, ante, 8. Earlier Texas appellate courts failed to apply the doctrine that statutes containing no words of nullity do not render common-law marriages invalid. *Dumas v. State*, 14 Tex. App. 464, 46 Am. Rep. 241; *Western U. Teleg. Co. v. Procter*, 6 Tex. Civ. App. 300, 25 S. W. 811. The first case reached such a result without discussion, while the second based its conclusion upon the argument that, in adopting the common law, the Congress of the Republic of Texas in 1840 adopted it only in so far as it was not inconsistent with other acts; and that the acts of 1836, 1837, and 1841, validating bond marriages, in the nature of things, recognized their invalidity (as to these acts see subdivision II. b, 2, (d), of the note to *Grigsby v. Reib*, ante, 20). After remarking that by the acts of the Congress of the Republic, of 1836, 1837, and 1841, earlier bond marriages were expressly validated, thereby implying that none others were excepted from the general rule, the court in the latter case said: "This legislation from the beginning—for now more than a half century—has received, by common consent and universal custom in conforming thereto, a practical construction which would seem to exclude as inapplicable and inconsistent an unwritten law founded upon the immemorial custom and usage of the ancient Britons. It never was the intention, we think, to adopt this usage in the Republic or state of Texas, and it should be now rejected as an unwarranted innovation."

However, *Dumas v. State*, supra, was expressly disapproved in *Cumby v. Henderson*, 6 Tex. Civ. App. 519, 25 S. W. 673, involving legitimacy and right to inherit, the court declaring that Mexico was largely peopled by immigrants coming from common-law states, and that they resorted to bond marriages upon the erroneous theory that they were valid, as they would have

strued as directory wherever possible,¹⁰ and such a construction is not precluded by the fact that the statute imposes a penalty

for its violation.¹¹ The same principles appear to govern the analogous question as to the effect of the absence of a license

been at common law, but that, inasmuch as the Spanish law prevailed, the marriages were not valid, and the acts validating them did not, as contended in *Dumas v. State*, proceed upon the assumption that such marriages were invalid at common law, but were enacted for the reason that they were invalid under the Spanish law; and that therefore, when the legislature of the state of Texas subsequently enacted statutes prescribing the formalities of marriage, the common law was not abrogated, for the reason that the statutes contained no express words of nullity, and for the further reason that the statutes enacted were substantially like those which prevailed in most states; and that, inasmuch as in such states the statutes were construed as not abrogating the common law, the Texas legislature must be deemed to have taken them with that construction.

A later case restated the doctrine that the Texas statutes are merely directory, noncompliance with them not invalidating the marriage, the court saying that marriage is a thing of common right, it is the policy of the state to encourage it, and it has sometimes been said that any other construction of the statute would compel holding illegitimate the offspring of many parents conscious of no violation of the law. *Ingersoll v. McWillie*, 9 Tex. Civ. App. 543, 30 S. W. 58, disapproving *Western U. Teleg. Co. v. Proctor and Dumas v. State*, supra. It was held in other cases that marriage without a license was valid notwithstanding the statute. *Chapman v. Chapman*, 11 Tex. Civ. App. 392, 32 S. W. 564, subsequent appeal in 16 Tex. Civ. App. 382, 41 S. W. 533 (right as between wife and woman whom the man subsequently married to administer on his estate). And there is an assumption to the same effect in *Galveston, H. & S. A. R. Co. v. Cody*, 20 Tex. Civ. App. 520, 50 S. W. 135, holding that the omission of the license does not prevent the parties from becoming husband and wife, inasmuch as the marriage relation was constituted by virtue of the common law.

The Missouri statute providing that persons of color who had, before emancipation, cohabited as husband and wife, should appear before the proper officer whose duty it was to join them in marriage, and to keep a record of the same, and that free persons of color living or cohabiting together as husband and wife without being married, as thereby required, should with certain exceptions be subject to certain penalties,—was held not to affect the validity of their consensual marriage, which was inferable from their continuance to cohabit as man and wife after emancipation. *Renfrow v. Renfrow*, 60 Kan. 277, 72 Am. St. Rep. 350, 56 Pac. 534.

¹⁰ *State v. Walker*, 36 Kan. 297, 59 Am. Rep. 556, 13 Pac. 279.
L.R.A.1915E.

¹¹ Notwithstanding statutes directing a license to issue, and inflicting a penalty on any clergyman or magistrate who shall solemnize a marriage in which all the formalities have not been observed, still, in the absence of any positive enactment that marriages not celebrated in the prescribed form shall be void, a marriage deliberately and intentionally entered into by the parties, who are able to contract according to the rules of the common law, is a valid marriage without conforming to the statute. *Askew v. Dupree*, 30 Ga. 173 (celebrant without authority because expelled from church).

The Ohio "act regulating marriages," prescribing certain formalities, and imposing certain penalties on authorized persons for solemnizing marriages without observation of the statutory requirements, and upon unauthorized persons for solemnizing marriages at all, is held in no way to abridge the right of persons to enter into the marriage state by the exchange of mutual consent without observance of the statutory form. *Carmichael v. State*, 12 Ohio St. 553.

Statutes which direct that a license must be issued and secured, that only certain persons shall perform the ceremony, that a certain number of witnesses shall be present, and that a certificate of the marriage shall be signed, returned, and recorded, and that persons violating the conditions shall be guilty of a criminal offense, are deemed to be directory merely, and in no way to affect the validity of a marriage according to the common law, unless such statute contains express words of nullity. RE LOVE.

The Pennsylvania act of 1885 requiring marriage licenses, and making it an offense to celebrate marriages without a license, was held in *Ollschlager v. Widmer*, 55 Or. 145, 105 Pac. 717, on the authority of Pennsylvania decisions, not to invalidate a marriage before a justice of the peace without a license.

Rhode Island statute of 1857 authorizing certain ministers and judicial officers to join persons in marriage, prohibiting them from doing so unless the parties should sign and deliver a certificate setting forth their names, age, color, occupation, etc., imposing a penalty upon the minister for marrying persons without first receiving the certificate, requiring the solemnization to be in the presence of two witnesses, excepting Quakers, Friends, and Jews, and requiring the parties to deliver to the town clerk the certificate mentioned,—was held to be directory merely, and not to render invalid a contract of marriage *per verba de presenti*, which was valid by the rules of the common law. *Mathewson v. Phoenix Iron Foundry*, 20 Fed. 281.

The validity of marriages according to the rules of common law is not affected by

upon a duly solemnized marriage.¹² Out of an abundance of caution legislatures have in some instances expressly provided that noncompliance with the statutory requirements should not be fatal.¹³

But, as suggested above, there are a few jurisdictions in which a contrary conclusion has been reached by various routes. Mary-

the Alabama statute forbidding the marriage of certain persons, authorizing solemnization by certain ministers and judicial officers, authorizing the pastor of any religious society to solemnize marriage according to the rules of such society, authorizing members of societies professing peculiar customs and beliefs to celebrate their marriage in accordance with such custom, and forbidding marriages except upon license to be issued as directed, where it does not declare void marriages which fail to observe the rules thus laid down, but inflicts penalties for their violation upon the officer who is to issue the license, or upon the person who celebrates the marriage. *Campbell v. Gullatt*, 43 Ala. 57.

Although persons, including both the parties and the celebrant, who may violate the forms required by the statute in solemnizing marriages, may be liable to penalties prescribed for noncompliance, yet marriages contracted without conformity to such regulations are very generally held to be valid if made between parties capable by common law of contracting them, unless the statutes positively declare that marriages not conducted in conformity with their provisions shall be void. *Hargroves v. Thompson*, 31 Miss. 211.

See also *infra*, *State v. Walker*, 36 Kan. 297, 59 Am. Rep. 566, 13 Pac. 279, and other Kansas cases cited in the same connection.

¹² This question is the subject of a note to *Landry v. Bellanger*, 15 L.R.A.(N.S.) 463, supplementing in part the note to *Reaves v. Reaves*, 2 L.R.A.(N.S.) 353.

¹³ Noncompliance with the statute does not invalidate a marriage valid by the common law, where the statute defines marriage as a personal relation arising out of a civil contract, and provides that consent alone will not constitute marriage, but that it must be followed by a solemnization or by a mutual assumption of marital rights, duties, and obligations, especially where the statute further provides that marriage must be solemnized, authenticated, and recorded as provided, but that noncompliance with its provisions does not invalidate any lawful marriage. *Huff v. Huff*, 20 Idaho, 450, 118 Pac. 1080.

The Indiana statute expressly provides that no marriage shall be void or voidable for want of license or other formality required by law, if either of the parties there-to believe it to be a legal marriage at the time. *Reifschneider v. Reifschneider*, 241 Ill. 92, 89 N. E. 255.

And the Iowa statute expressly provided that marriages solemnized with the consent

land, although observing that the statute contained no express words of nullity, and that a question could be made as to its construction, placed its decision practically on grounds of general policy.¹⁴ Massachusetts and North Carolina were influenced by certain colonial statutes.¹⁵ Others ascribe a nullifying effect to the statutes, either

of the parties in any other manner than that prescribed by statute should be valid. *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245.

¹⁴ Discussing the Maryland act of 1777, expressly requiring the rites of marriage to be celebrated except in the case of members of the society of Quakers, and providing that no person should marry without a license or until after the publication of banns, and prescribing a penalty upon parties going out of the state to be married contrary to the provisions of the act,—the court in *Denison v. Denison*, 35 Md. 361, stated that, although the act contained no express prohibition or declaration of absolute nullity of marriages contracted by mutual consent, it was plainly to be perceived that such marriages, if allowed, would contravene the spirit and policy of the act as evidenced by implications from its provisions, especially that provision prescribing a penalty for going out of the state to be married contrary to the provisions of the act, which plainly indicated the legislative intention to forbid all marriages otherwise than prescribed by the act. The court also said that the practice and custom of the people of the state had been so universally in conformity with what would appear to have been the policy and requirement of the law that such custom had acquired the force and sanction of the law, even though a question could be made as to the technical construction of the act itself.

¹⁵ An early Massachusetts case held that under the provincial statute of 4 William and Mary, chap. 10, and as amended by 7 William III. chap. 6, forbidding other than named functionaries to solemnize marriage, a valid marriage could not be constituted *per verba de presenti*, and that mutual words of marriage between a man and woman recited before a justice of the peace, who was authorized to solemnize marriages, but who did not consent, and indeed refused, to solemnize the marriage, was invalid, upon the ground that the statute operated to prevent persons from solemnizing their own marriages. *Milford v. Worcester*, 7 Mass. 48, in which it was therefore held that the woman and her issue did not obtain a derivative pauper settlement from her husband. The court took the view that when our ancestors left England there could be no valid marriage unless celebrated before a clergyman in orders, and that, smarting under the arbitrary censures of ecclesiastical courts, they enacted the ordinance of 1646, by which no person but a magistrate was authorized to celebrate marriages, and all persons were forbidden

er by main strength,¹⁶ or by the expedient of spelling an implication that common-law marriages are invalid, for a provision

to join themselves in marriage except before some magistrate, and a magistrate was not authorized to permit parties to contract marriage in his presence unless the intention of marriage had been previously published. It was then shown that the marriage in question must be governed by the provincial statute above referred to, under which every justice of the peace and every settled minister in any town were authorized to solemnize marriages between competent parties or with the consent of parents of infants upon the production of a certificate of the publication of intention; and to this were added by the statute of 7 William III. chap. 6, negative words to the effect that no person other than a justice of the peace within the county, or an ordained minister in the town in which he was settled, should join any persons in marriage, nor without a certificate of publication. The conclusion of the court was that where a statute thus enacts that no person but a justice or a minister should solemnize a marriage, and then only in certain cases, the parties were themselves prohibited from solemnizing their own marriages by any form of engagement or in the presence of any witnesses whatever, and that therefore they could not, as the parties in the case attempted, constitute a marriage by repeating the customary mutual contract of marriage before a justice who refused to solemnize the marriage and to assent to the same. The court said that if this was not the result of the statute, all the precautions of the legislature were fruitless, and that it was vain for the law to require a previous publication of the banns or the consent of the parents or guardians of young minors, or prohibit a justice or minister from solemnizing the marriage without these prerequisites. The doctrine of this case was reasserted in *Com. v. Munson*, 127 Mass. 459, 34 Am. Rep. 411.

For a case in which the colonial statutes were given no effect, see *supra*, *Mathewson v. Phoenix Iron Foundry*, 20 Fed. 281.

In *State v. Samuel*, 19 N. C. (2 Dev. & B. L.) 177, the court says that the colonial statutes of 1715, 1741, and 1778 required, as an essential requisite of a legal marriage, that it should either be celebrated by some person in a sacred office, or be entered into before someone in a public station and judicial trust, and that the usage ever since had been in accordance with this. The court added that this was especially true in view of the fact that the courts of this country had no jurisdiction which corresponded with that of the ecclesiastical courts to compel the solemnization of a marriage *à facie ecclesiæ*. Although the court was careful to point out that the question was not directly involved, and should not therefore be finally passed upon, the case was cited in *State v. Wilson*, 121 N. C. 657, 28 S. E. 416, to the point that L.R.A.1916E.

that certain abortive ceremonial marriages shall not be void under specified conditions,—¹⁷ under the principle of *expressio*

there was no such thing in North Carolina as marriage by mere consent, and that a marriage could not be upheld by the rules of the common law where the celebrant was without authority. This is consistent with *Cooke v. Cooke*, 61 N. C. (Phil. L.) 583, holding that marriages not celebrated according to the statutory formalities were void (want of power of justice of the peace).

But the North Carolina court held that, although no license was obtained and the celebrant was subject to the statutory penalty, the marriage was good to every intent and purpose. *State v. Robbins*, 28 N. C. (6 Fed. L.) 23, 44 Am. Dec. 64; *State v. Parker*, 106 N. C. 711, 11 S. E. 517, both cases involving first marriages of defendant accused of bigamy. And it appeared to regard the common law as in force in *Jones v. Reddick*, 79 N. C. 200, where it held that marriage could be proved under the rules of the common law by evidence of cohabitation, reputation, etc. Other cases held marriages provable in that manner, without discussing the question.

¹⁶ The Arkansas statute defining marriage as a civil contract, designating the persons who may solemnize marriages, providing how a minister or priest is authorized to do so, prescribing how the ceremony is to be performed, providing that religious societies which reject formal marriages may marry its members according to its forms, customs, or rites, requiring the certificate of marriage to be recorded, was held to state the formalities without which no marriage could be valid, especially in view of the fact, the court said, that before the common law was adopted as a part of the system of the jurisprudence of Arkansas, marriage was regarded as more than a contract, and that such a contract could not be entered into without being solemnized by some person authorized by statute to do so. *Furth v. Furth*, 97 Ark. 272, 133 S. W. 1037, Ann. Cas. 1912D, 595. The ground of the court's position on this point was that before the enactment of a statute in 1816, while Arkansas was a part of the Missouri territory, adopting the common law of England and the acts of the British Parliament up to the fourth year of James the First as a part of its system and laws, statutes were enacted (1806) validating all marriages theretofore solemnized in the territory by certain persons, and providing that thereafter it should be lawful for certain ministers and magistrates to perform the marriage ceremony, the same to be certified and recorded.

That the common law was abrogated by statute in Tennessee was the conclusion in *Bashaw v. State*, 1 Yerg. 177, decided in 1829, involving a prosecution for bigamy, and holding that an intent on the part of the legislatures to abrogate the common law was indicated both in statutes of North

Carolina before the severance of Tennessee, as well as statutes of the latter enacted after its severance. But it is to be observed that the only express negative in such statute which the court referred to is the provision that all marriages solemnized without license should be void. Although the marriage attacked in the case was solemnized without a license, and thus came expressly within the limited clause of nullity, and rendered it unnecessary to hold void attempted marriages not solemnized, the court nevertheless expressly declared that the statute entirely superseded the common law. That this was the true doctrine was taken for granted in *Grisham v. State*, 2 Yerg. 589, in which a common-law marriage was interposed as a defense to a prosecution based upon the theory that the parties were living together in fornication. But this was seriously doubted in *Johnson v. Johnson*, 1 Coldw. 626, involving an action between the parties with respect to property, and was strongly disapproved in *Andrews v. Page*, 3 Heisk. 653, involving the right of the alleged wife and children in the man's estate. But the *Bashaw* and *Grisham* Cases were held to be conclusive on the point in *Smith v. North Memphis Sav. Bank*, 115 Tenn. 12, 89 S. W. 392, pointing out that the provisions of the statute construed in those cases had been re-enacted by the Code, and applying the rule of construction that where a statute has received a judicial interpretation, and is afterwards re-enacted, the judicial construction which has been theretofore placed upon it forms a part of the enactment, and that therefore it was to be taken as settled that the statute abrogated the common law in Tennessee. The court added, however, that if the *Bashaw* Case had not been decided and the questions were one of first impression, it should hold, as it was held in that case, that the common law had been abrogated by statute; and the court also expressly nullified the doubt that was cast upon that decision by the remarks in *Johnson v. Johnson* and *Andrews v. Page*.

17 The Virginia court looked askance at the proposition that a statute containing no express words of nullity does not abrogate the common law, and held that the common law was abrogated in Virginia where a statute the title of which read, "Marriage without License Prohibited; When Not Void for Want of Authority in Person Solemnizing It," provided that every marriage should be under license and solemnized in the manner therein provided; but that no marriage solemnized by any person professing to be authorized to solemnize the same should be deemed or adjudged to be void, nor should the validity thereof be in any way affected, on account of any want of authority in such person, if the marriage was in all respects lawful, and was consummated with a full belief on the part of the person so married, or either of them, that they had been lawfully joined together. The L.R.A. 1915E.

court said that the clear implication of this statute was that marriages which did not comply with it were void, there being two principal reasons assigned for this position. The first was that, inasmuch as the introductory words, "Every marriage in this state shall be under a license, and solemnized in the manner herein provided," had been substituted for the language of earlier acts which provided "that no minister shall celebrate," this change clearly indicated a legislative intent to recognize no marriage which did not comply. The second reason was that, having expressly required every marriage to be under license, the legislature, by excepting from the category of invalid marriages those performed by a celebrant without authority, where the parties believed that they were lawfully married, by inference, required all other marriages not within the statute to be held void. While this reasoning has points in its favor, the fact remains that it is contrary to the great weight of authority, as indeed the court itself recognizes. *Offield v. Davis*, 100 Va. 250, 40 S. E. 910.

The court in the *Offield* Case relied upon *Beverlin v. Beverlin*, 29 W. Va. 732, 3 S. E. 38, involving a like statute and reaching a like conclusion, though upon the sole ground that the implication in the provision that certain marriages should not be deemed or judged void for certain defects was equivalent to an express declaration that marriages contrary to the commands of the statutes, not saved by the exceptions, should be void. In reaching its conclusion the court said that the provision that every marriage should be under a license and solemnized in the manner therein provided should, standing alone, be interpreted merely as directory.

The theory that an implication of the invalidity of common-law marriages arises from a provision that certain attempted ceremonial marriages shall not be invalid because of certain defects was also given great weight, and it seems accounts for the decision in *Re McLaughlin*, 4 Wash. 570, 16 L.R.A. 699, 30 Pac. 651, holding that a common-law marriage is not valid under a statute requiring a license for a marriage, providing that certain persons shall be authorized to perform the ceremony, and expressly providing further that a marriage shall not be void because solemnized by a person not legally authorized to perform it, if the parties to the marriage, or either of them, believe that they are lawfully married; and also holding that marriages solemnized before or in any religious organization or congregation according to the ritual or form commonly practised therein shall be valid. So far as appears the Washington statute did not have the added feature in favor of the decision of the court upon which the stress was laid in the Virginia case, namely the requirement "that every marriage" shall be by license and solemnization.

unius est exclusio alterius. A few others attach particular importance to such a title as "Marriage without License Prohibited,"¹⁸ or such words in the body of the act as "before any persons shall be joined in marriage, they shall procure a license directed to" the celebrant, etc.,¹⁹ or "the marriage relation shall be entered into . . . only as provided by law."²⁰ But these cases are combated by others holding that a provision of the latter kind does not affect common-law marriages,²¹ in compliance with the principle above stated that a statute will not be construed to abolish common-law marriages unless there are express words of nullity,—a principle which has become firmly established in the great majority of jurisdictions.

L. A. W.

¹⁸ *Offield v. Davis*, supra.

¹⁹ The marriage relation cannot be created in Oregon unless the contract is entered into before a person authorized to solemnize marriages, and in the presence of two witnesses, in view of the provision of the Oregon statute that before any persons can be joined in marriage, they shall procure a license directed to any person authorized to solemnize marriage, and that in the solemnization of marriage no particular form is required, except that the parties thereto shall assent or declare in the presence of the minister, priest, or judicial officer solemnizing the same, and in the presence of at least two attending witnesses, that they take each other to be husband and wife. *Holmes v. Holmes*, 1 Abb. (U. S.) 525, 1 Sawy. 99, Fed. Cas. No. 6,638.

²⁰ The common law was held to have been abrogated in North Dakota by chap. 91 of the Law of 1890, by virtue of the following quoted language in the 1st section, which provides that marriage is a personal relation arising out of a civil contract to which the consent of the parties thereto is essential: "But the marriage relation shall be entered into, maintained, annulled, or dissolved only as provided by law." *Schumacher v. Great Northern R. Co.* 23 N. D. 231, 138 N. W. 85.

²¹ It is to be noted that in *RE LOVE* the Oklahoma statute is held not to abrogate the common law, although, after defining marriage as a personal relation arising out of a civil contract to which the consent of parties legally competent to contract is necessary, it provides that the marriage relation shall only be entered into, maintained, or abrogated as provided by law, and also that no person shall enter into or contract the marriage relation, nor shall any person perform or solemnize the ceremony of any marriage, without a license first being issued, the court applying the rule that inasmuch as the statute did not contain express words of nullity, it did not affect the common law.

Under a statute providing that the marriage relation shall be entered into, main-

tained, or abrogated only as provided by law, and that any persons living together as man and wife without being married shall be deemed guilty of a misdemeanor, persons living together under a contract of marriage without observing the statutory requirements are punishable, even though the marriage may be in accordance with the rules of the common law, and its validity as such be not affected by the statute. *State v. Walker*, 36 Kan. 297, 59 Am. Rep. 566, 13 Pac. 279.

From the fact that this case was cited in *Matney v. Linn*, 59 Kan. 613, 54 Pac. 688, to the point that mutual present assent followed by cohabitation constitutes marriage in Kansas, the court seems to take the intimation in the *Walker* Case as settling the law that the Kansas statute does not affect the marriage at common law.

Likewise cited in *Shorten v. Judd*, 60 Kan. 73, 85 Pac. 286, stating summarily that there is nothing in the statute prohibiting a marriage at common law.

A marriage good at common law is good notwithstanding the neglect of statutory forms relating to the subject, unless the statute itself contains express words of nullity. *Renfrow v. Renfrow*, 60 Kan. 277, 72 Am. St. Rep. 350, 56 Pac. 534, quoting with approval from *State v. Walker* language stating that "punishment may be inflicted upon those who enter the marriage relation in disregard of the prescribed statutory requirement, without rendering the marriage itself void."

LOUISIANA SUPREME COURT.

IVIE WATSON

v.

FRANK M. LAWRENCE, Admr., etc., of
John Lawrence, Deceased.

MRS. ATHELIA A. W. SERBIAN et al.,
Interveners, Plffs. in Certiorari.

(134 La. 194, 63 So. 873.)

Evidence — marriage — parol.

A marriage, like any other civil contract, may be proved by parol, and it is not necessary to produce the marriage certificate, or explain its absence, for the existence of the marriage may be proved by eyewitnesses to the performance of the marriage, or by the testimony of one of the contractants.

(December 15, 1913.)

Headnote by BREAUX, Ch. J.

Note. — Proof of ceremonial marriage by testimony of eyewitnesses, celebrant, or parties.

It is said by Prof. Wigmore in § 1336 of his great work on evidence, that, in spite of long tradition to the contrary, the effort is frequently made to declare the celebrant's

APPPLICATION for certiorari on writ of review to the Court of Appeal for the Second Circuit to review a judgment affirming a judgment of the District Court for the Parish of Caddo rejecting interveners' demand in a suit to obtain possession of certain mortgage notes. Reversed.

The facts are stated in the opinion.

Messrs. Barnett & Keeney for plaintiffs in certiorari.

Mr. Joseph H. Levy, for defendant in certiorari:

Marriage, like other contracts, may be proved by any species of evidence not prohibited by law, which does not presuppose a higher species of evidence within the power of the party.

register or certificate of the performance of a marriage ceremony to be preferred testimony to that of other eyewitnesses of the ceremony; but that it has long been settled that no such preference exists. This is entirely consistent with the position of the courts that the fact that statutes specify the recording of marriages does not prevent an inference, even of a ceremonial marriage, from habit and repute. As to this see part V. of the note to Grigsby v. Reib, ante, 33; part IV. of the note to Becker v. Becker, ante, 72, and the note to People v. Shaw, ante, 87.

Likewise, in the case of eyewitness evidence, it is held that the record evidence is not the best evidence. In this connection it is sometimes pointed out that the record must be supplemented with testimony to identify the parties. Some cases go so far as to hold that the eyewitness evidence is superior to that of the record.

Thus, in *Cameron v. State*, 14 Ala. 546, 48 Am. Dec. 111, the court remarked *obiter* that marriage may be proved in all cases by persons who were present at the ceremony, and alluded to the view that this species of evidence is considered better proof of the marriage than the record itself.

And in *Chew v. State*, 23 Tex. App. 230, 5 S. W. 373, holding that a license and certificate of a marriage between third persons were not, though required by statute to be recorded, admissible in evidence in a trial for theft, to rebut an alibi of the defendant by showing that he had declared that at the time of the wedding he was at a certain point, which was in fact near the scene of the theft, — the court said that the best evidence that the marriage took place on a certain day would be the testimony of persons who witnessed the ceremony.

Certainly sworn testimony of an eyewitness should be regarded as superior to a record kept under a statute which does not specify the form or contents of the certificate, or how or when or by whom it shall be sent to the register, and does not require it to be substantiated by the oath of any person. This position was taken in an early Virginia case, endorsing the general principle. L.R.A. 1915E.

Albion v. Yazoo & M. Valley R. Co., 107 La. 133, 31 So. 875.

A registered act of marriage would be conclusive evidence of the fact of marriage, and if such an act were extant upon the public records, the failure to produce evidence which would be so conclusive, especially where the court gave the interveners six weeks to obtain such act of marriage, carries with it the presumption that the said act of marriage does not exist.

Hube's Succession, 20 La. Ann. 97.

Breaux, Ch. J., delivered the opinion of the court:

This suit involves the possession of notes, aggregating, exclusive of interest, exactly \$2,000. Interveners' demand was rejected

principle that the testimony of a witness who was present at the ceremony is better evidence than the record. *Warner v. Com.* 2 Va. Cas. 95, involving the alleged first marriage of a defendant in a prosecution for bigamy. The court held that this principle was especially applicable to the testimony of a witness of the defendant's first marriage in Pennsylvania, under an act then in force in that state which provided that marriage might be solemnized by taking each other for husband and wife before twelve witnesses, and that the certificate of their marriage under the hands of the parties and witnesses, at least twelve, one of them a justice of the peace, should be brought to the register of the county where they are married and registered in his office. The reason why a record under such an act is not regarded as evidence is shown by the following language of the court: "What is this certificate, and how and when is it to be made and sent to the register to be registered? Is there any time in which it is to be made out and sent to the register? No. Is it made the duty of any particular person to take it to him? No. Are the witnesses, or any one of them, required to go to the register's office, and make oath there, or anywhere else, to its verity? No. What then is it? A mere certificate under the hands of the witnesses present, unsupported by the oath of any person, to be sent to the register's office by anyone who may chance to be going there, to be by him recorded as a kind of memorial of the transaction and the witnesses present at it. And is this to be put in competition with the oath of a witness who was present, who saw the parties married, and heard the marriage contract, given in open court, in the presence of all parties concerned? Surely it is not."

Most of the cases confine their utterances to what is necessary, and hold merely that the record is not the best evidence.

Thus, it is held that a statute providing that a copy of the record of any marriage shall be received in all courts and places as evidence of the fact of marriage does not have the effect of making such record

in the district court. In the court of appeal the court decided that there should have been a nonsuit on the intervention. The ground of the court of appeal for the conclusion was that the certificate of marriage was the best evidence of the marriage, and, until it was produced, or its absence explained, the evidence of eyewitnesses to the ceremony, and all other evidence, was secondary, and not the best, evidence.

The interveners alleged that they are the heirs of the late John Lawrence, and entitled to the property of his succession. That among its effects are the notes representing the amount before stated.

Plaintiff answered the intervention, and denied that interveners are the heirs of John Lawrence; that their mother and

father, were never married, and it follows that interveners are not his legitimate heirs.

Our learned brothers of the court of appeal inform us in their decision that John Lawrence died in Shreveport in the summer of 1911. Frank Lawrence, son of John Lawrence, was appointed administrator of his succession. There was a suit filed in the district court in which the interveners' demand to be placed in possession of the notes in question was rejected. The vital question here is whether there was a legal marriage of the mother of interveners to John Lawrence.

The onus of proof of the alleged marriage was with the interveners. Evidence in support of the alleged marriage, said the court,

the best evidence, so as to render inadmissible testimony of eyewitnesses without showing that the copy of the record is not available. *State v. Marvin*, 35 N. H. 22.

And it was said in *Massucco v. Tomassi*, 80 Vt. 188, 67 Atl. 551, that the fact that some sort of a writing commemorating the marriage is necessary does not exclude testimony of eyewitnesses as to the marriage, and that, indeed, the testimony of such witnesses is regarded as better evidence than the record, inasmuch as the record is frequently required to be supplemented by evidence of identity.

And it is stated *arguendo* in *Dumas v. State*, 14 Tex. App. 464, 46 Am. Rep. 241, that the record required by statute is not the only means of establishing marriage, and that the same may be proved by testimony of eyewitnesses who were present when the rites were solemnized.

A marriage may be proven not only by the marriage certificate or a certified copy of the record, but also by the person who performed the ceremony, by a person who witnessed the ceremony, by cohabitation and other circumstances, and by admissions, and where evidence of this kind is present, it is not prejudicial error to admit the marriage certificate without identifying the parties. *State v. Thompson*, 31 Utah, 228, 87 Pac. 709 (marriage of defendant in prosecution for adultery).

The effectiveness of testimony of persons present, to prove the marriage, is apparently assumed in cases dealing with the question whether cohabitation, repute, and confession are sufficient, or whether there must be a production of the record or the testimony of a witness who was present at the ceremony. For instance, see *Ford v. Ford*, 4 Ala. 142; *Martin v. Martin*, 22 Ala. 86; *Langtry v. State*, 30 Ala. 536.

Marriage may be proved by any person who knows the fact. *Sellers v. Page*, 127 Ga. 633, 56 S. E. 1011 (headnote).

Certainly, the testimony of an eyewitness is admissible to identify the parties named in the record. *People v. Stokes*, 71 Cal. 263, 12 Pac. 71, 8 Am. Crim. Rep. 14. To L.R.A.1915E.

the same effect was *Birt v. Barlow*, 1 Dougl. K. B. 171.

It is shown in subdivision V. g. of the note to *Grigsby v. Reib*, ante, 51, that such proceedings as bigamy and crim. con. are excepted from the rule permitting marriage to be proved by evidence of habit and repute. But no such exception is made in the case of eyewitness evidence. It appears to be the rule that such evidence is proper in any proceeding.

Crim. con. is no exception to it. *Arthur v. Broadnax*, 3 Ala. 557, 37 Am. Dec. 707 (*obiter*); *Nixon v. Brown*, 4 Blackf. 157.

Bigamy is not an exception. *Arthur v. Broadnax*, supra (*obiter*); *Brewer v. State*, 59 Ala. 101; *Murphy v. State*, 50 Ga. 150; *Dale v. State*, 88 Ga. 552, 15 S. E. 287; *State v. Williams*, 20 Iowa, 98; *People v. Perriman*, 72 Mich. 184, 40 N. W. 425; *State v. Johnson*, 12 Minn. 476, Gil. 378, 93 Am. Dec. 241 (*obiter*); *State v. Kean*, 10 N. H. 347, 34 Am. Dec. 162; *Warner v. Com.* 2 Va. Cas. 95. And it was said in *Bird v. Com.* 21 Gratt. 890, involving the first marriage of one accused of bigamy, that, although the testimony of a witness present at the marriage (in this case a Catholic priest who celebrated it), may not be as conclusive or satisfactory as a confession thereof by parties to it, there is no valid reason for rejecting it as incompetent, and no technical rule forbidding its reception, and that when a witness testifies that a marriage in a foreign state was solemnized in a manner usual and customary in such state, by a person duly authorized to celebrate the rites of marriage, and that the parties afterward lived together as man and wife, this is as satisfactory evidence of a valid marriage as could be expected or desired, and in such case it is not necessary to prove the laws of such state, or to offer further evidence of a compliance with their provisions.

Adultery is not an exception. *Com. v. Norcross*, 9 Mass. 492; *Lord v. State*, 17 Neb. 526, 23 N. W. 507, 6 Am. Crim. Rep. 17; *State v. Winkley*, 14 N. H. 480; *State v. Eggleston*, 45 Or. 346, 77 Pac. 738; *State v. Rood*, 12 Vt. 396; *State v. Nelson*, 39

consists of the deposition of several witnesses, including the mother of the interveners, Mrs. Julian Lawrence, taken in Illinois, who testified that she had in her possession a marriage certificate, "which she attached to her answer."

Document typewritten in the German language, on half sheet of ordinary white paper, not properly authenticated, and not for that reason admissible. Unauthenticated unofficial copy purporting to be an entry of church or governmental record of a marriage of one whose impossible name was John Katsherenski and Julian Laurenry, at Forclam, on the 8th of November, 1850, obtained, said Mrs. Julian Laurenry, several months previously from the records in Germany, and that her husband "quit

claiming the long name" and adopted hers, which he spelt Lawrence, instead of her maiden name, Laurenry.

Interveners in the district court offered the deposition of this witness and the asserted certificate. Objected to by plaintiff because certificate was not authenticated, and objection to the testimony urged because it was an attempt to prove marriage by parol; that there was a certificate of marriage which could be obtained. The objection, the court held, should have been sustained in the district court. It was not sustained in that court.

Our learned brothers expressed the opinion that marriage can be proven by parol, subject, however, to the fundamental rule that the best evidence should, none the less,

Wash. 221, 81 Pac. 721; *Mills v. United States*, 1 Pinney (Wis.) 73.

And such evidence is admitted and given effect in a prosecution for lascivious intercourse (*Com. v. Littlejohn*, 15 Mass. 163); or on a trial for perjury in swearing to a marriage in the prosecution of another for adultery (*United States v. DeAmador*, 6 N. M. 173, 27 Pac. 488); and in prosecutions for rape (*Boling v. State*, 91 Neb. 599, 136 N. W. 1078, *obiter*).

It is also given effect in an action for seduction of the wife (*Kilburn v. Mullen*, 22 Iowa, 498), and other civil actions, such as those of crim. con. (see above); inheritance (*Watson v. Lawrence*; *Patterson v. Gaines*, 6 How. 550, 12 L. ed. 553; *Baughman v. Baughman*, 29 Kan. 283); dower (*Gilman v. Sheets*, 78 Iowa, 499, 43 N. W. 299; *Smith v. Fuller*, 138 Iowa, 91, 16 L.R.A.(N.S.) 98, 115 N. W. 912); death of the plaintiff's alleged husband (*Williams v. Walton & W. Co.* 9 Houst. [Del.] 322, 32 Atl. 726, 13 Am. Neg. Cas. 787; *Southern R. Co. v. Brown*, 126 Ga. 1, 54 S. E. 911; *Soyer v. Great Falls Water Co.* 15 Mont. 1, 37 Pac. 838; *McQuade v. Hatch*, 65 Vt. 482, 27 Atl. 136, involving an action under the civil damage act; *Koloff v. Chicago, M. & St. P. R. Co.* 71 Wash. 543, 129 Pac. 398).

The above remarks relate to the competency or qualitative value of such evidence. When its competency is admitted, there still remains the question as to its quantitative value. Following are instances in which the evidence was considered from this point of view.

For the purpose of establishing the marriage of a deceased person with the plaintiff in an action for negligently causing his death, testimony of his brother is competent, which tends to show that he was present at the wedding in a foreign country ten years before, that the ceremony was performed by a priest in accordance with the custom of that country, and that the parties lived together until the deceased came to this country, and that three children were born to them. *Koloff v. Chicago, M. & St. P. R. Co.* 71 Wash. 543, 129 Pac. 398. L.R.A.1915E.

The testimony of a witness who was present at the marriage, and who testified that it was solemnized at a certain place by a settled minister of that place, and that the clergyman also officiated at the witness's marriage and at other marriages at which he was present, is sufficient to establish the first marriage of a defendant in a prosecution for bigamy, a copy of the record of the marriage not being indispensable. *State v. Kean*, 10 N. H. 347, 34 Am. Dec. 162.

So, in the case of the testimony of a single witness who testified that she was present at a marriage solemnized by her brother-in-law, a clergyman; that the name of one of the contracting parties was the same as that of one of the parties to the marriage in dispute; that the ceremony was performed on a date which was shown by other evidence to be the date of the disputed marriage; that no marriage certificate was given by reason of the fact that the minister was without proper blanks at the time, and that he died from an illness of which he was shown by other evidence to be suffering at the time of the marriage; and that a day or two after the marriage, application was made for a certificate, but the clergyman was at the time too ill to furnish one,—it was held proper to charge the jury that while the testimony of this single witness did not establish the fact of marriage, it was in the nature of direct evidence that tended to prove a ceremonial marriage. *Perrine v. Kohr*, 20 Pa. Super. Ct. 36, affirmed on another point in 205 Pa. 602, 55 Atl. 790.

But testimony of a witness that he was present at a ceremony before a justice of the peace at a certain time and place cannot prevail even where the legitimacy of issue is involved, where it appears that at the time and place mentioned there was no justice of the peace of the name testified to, and the conduct, declarations of the parties, and the understandings of relatives and acquaintances, were entirely inconsistent with anything but the relation of concubinage. *Barnum v. Barnum*, 42 Md. 251.

In *Bashaw v. State*, 1 Yerg. 177, holding that the common law was abrogated by

be produced by the one who has the onus of proof. Evidently, said the court, there was recorded evidence of the marriage, and parol evidence, therefore, was not admissible. Our brothers state, in substance, in their opinion, with manifest close attention to the subject in *Mercier v. Harnan*, 39 La. Ann. 94, 1 So. 410, where the title to realty was at issue, secondary evidence should not have been admitted. With this view, we agree.

But the difficulty in its application is that it is not directly in point. The same is true of *Etie v. Sparks*, 4 La. 465; *Marks v. Winter*, 19 La. Ann. 445; *Pendery v. New Orleans Crescent Mut. Ins. Co.* 21 La. Ann. 410; *Isabella v. Pecot*, 2 La. Ann. 391; *Albinest v. Yazoo & M. Valley R. Co.*

107 La. 133, 31 So. 675; *Hube's Succession*, 20 La. Ann. 97, and *Hennen's Digest*, pp. 497, et seq.

In the first decision cited above, attempt was made to prove a written agreement which was within the power of parties to produce.

In the other cases cited, beginning with *Isabella v. Pecot*, there was beyond all question better evidence in existence, and it was properly decided that the best evidence must be produced.

True, in *Albinest v. Yazoo & M. Valley R. Co.* 107 La. 133, 31 So. 675, this court said that marriage, like other contracts, may be proved by any species of evidence not prohibited by law, which does not pre-

statute in Tennessee, the court, in explaining its holding that when a marriage is sought to be established it must be a marriage valid under the statute, said that it was not intended to convey the idea that the bystander should prove that he saw the marriage license in the actual possession of the justice of the peace, or that he read it, having indorsed thereon the time of said marriage, and that the license and certificate were genuine and authentic papers; but that he must give such testimony respecting these particulars, together with the performance of the ceremony, as would enable the jury to be satisfied that the marriage ceremony was actually performed under the authority of a regular and genuine license, by a person duly authorized to solemnize it (first marriage in prosecution for bigamy).

But the *Bashaw Case* was distinguished in *Crane v. State*, 94 Tenn. 86, 28 S. W. 317, also involving a prosecution for bigamy, and holding that the regularity of the ceremonial marriage need not be shown by the eyewitness testifying thereto, the court saying: "As applied to that [*Bashaw*] Case, where all the facts connected with the marriage were brought out in the proof, and a sharp contest and controversy was made, both on the facts and law, as to whether that marriage was valid or not, or whether the prerequisites to a valid marriage were complied with, the holding was correct. But in this case no contest is made; no objection was made so far as the record shows, on account of the failure to produce the license or to prove that the party officiating was not regularly authorized to perform the ceremony. No evidence to impeach the apparent regularity of the proceeding is given, and no explanation is offered whatever." The court held that the first marriage must be deemed established, where the regularity of the proceeding is apparently not questioned and there is no countervailing proof, there being only the testimony as to the ceremony, the subsequent cohabitation, which, together with the ceremony, amounts to acknowledgment, and subsequent confessions and statements.

L.R.A.1915E.

The celebrant's testimony is properly received under the same considerations which govern as to eyewitness testimony generally. Like the latter, it is accepted in actions of crim. con. (*Stark v. Johnson*, 43 Colo. 243, 16 L.R.A.(N.S.) 674, 127 Am. St. Rep. 114, 95 Pac. 930, 15 Ann. Cas. 868); and in prosecutions for bigamy (*State v. Goodrich*, 14 W. Va. 834); and adultery (*Hawaii v. Kuhia*, 10 Haw. 440; *People v. Imes*, 110 Mich. 250, 68 N. W. 157).

The testimony of the parties themselves is received in the same manner, as is shown by the following cases:

Testimony of one of the parties that they married on a certain date before a certain clergyman, and that a regular ceremony was performed, and evidence that the parties thereafter lived together as husband and wife, and were known as such, are sufficient to establish marriage, where it is provided by statute that a marriage solemnized before a clergyman shall in no way be affected on account of want of jurisdiction or of authority, provided it be consummated with the full belief on the part of the persons married, or either of them, that they have been lawfully joined in marriage. *Woldson v. Larson*, 90 C. C. A. 422, 164 Fed. 548.

The general rule that marriage may be established by testimony of one of the parties, naming the time, place, and celebrant, and that record evidence is not necessary, was applied without discussion in *Mathews v. Silvester*, 14 S. D. 505, 85 N. W. 998, although the case involved an action of crim. con., and the testimony was given by the plaintiff therein.

In *People v. Goodrode*, 132 Mich. 542, 94 N. W. 14, involving a prosecution for bigamy, the testimony of the accused and his first wife was held sufficient to establish the marriage, but no objections to the admissibility of the testimony of the wife seem to have been interposed.

And on a prosecution for adultery with a party to the marriage, the testimony of either the husband or wife as to the fact of marriage, together with proof of continued cohabitation as husband and wife, raises the

suppose "a higher species of evidence within the power of the party."

According to the decisions heretofore cited, parol evidence of persons present, or within whose knowledge beyond question there was a marriage, is considered as direct or primary evidence. The full text of the opinion does not convey the meaning that proof of marriage is to be considered in the same light as evidence relating to proof of the title to realty and testimony relating to written agreements. The fact of marriage may be established by oral testimony of persons who were present at the ceremony. 8 Enc. Ev. p. 465.

According to Wigmore on Evidence (§ 1336): "That the register or certificate of marriage is not preferred to testimony of other eyewitnesses has long been settled." This commentator is generally considered as the exponent of the best thought and most authentic views of the different courts of the country.

Similar view is expressed by Wharton in his work on Criminal Evidence, 10th ed. § 170, p. 403. Said this commentator: "A ceremonial marriage may be shown by

eyewitnesses," being in direct connection with the object to be proved, is primary or direct evidence. Of course, the evidence upon the subject must be consistent and cogent.

Marriage may be proved by a marriage certificate or by a person who performed the ceremony, and it may be proved by the testimony (if admissible) of one of the parties to the marriage. It is not always necessary that the record of marriage be produced; it may be proven by oral testimony. *Boling v. State*, 91 Neb. 599, 136 N. W. 1078.

There is no reason why the oath of the person who officiated as minister should be deemed inferior evidence to his written statement or that of another. *Com. v. Dill*, 156 Mass. 226, 30 N. E. 1016.

In any civil action in which the mere question of descent of property is involved, the fact of a marriage may, in the absence of a statute positively requiring other evidence, be proven by the testimony of persons who were present and witnessed the ceremony.

Said the court in *Baughman v. Baugh-*

presumption of marriage, and record proof is not necessary to establish the marriage where the presumption is not rebutted. *State v. Wilson*, 22 Iowa, 364.

On the trial of a man for adultery, testimony of the woman that she was previously married to another man by a certain person, it not appearing that such person was a functionary authorized to solemnize a marriage, or that the marriage was consummated with a full belief on the part of either of the persons that they were lawfully married,—was held insufficient evidence of a marriage to support the indictment. *State v. Bowe*, 61 Me. 171.

In *State v. Winkley*, 14 N. H. 480, involving a prosecution against a man for adultery, the court, in holding that the husband of the woman was competent to testify to their marriage, declared that proof of the identity of the party was necessary, even if the copy of the record was produced.

In a prosecution for lewd and lascivious cohabitation with a third person, the defendant's husband may testify to his marriage with her. *Com. v. Dill*, 156 Mass. 226, 30 N. E. 1016. And the court said: "It is true that the record by statute is presumptive evidence of the marriage, . . . but the record of a marriage is not like the record of a divorce, or other judgment or decree. It is a mere memorandum or declaration of the fact which effected the result, not itself the fact, nor that which has been constituted the only evidence of the fact. . . . There is no reason why the oath of the person who did the act should be deemed inferior evidence to a written statement by him or another."

In a prosecution for wife beating, testimony of the prosecutrix that the parties

were married in a certain year and at a certain place is admissible to prove the marriage, although she could not give the exact date, claimed never to have received a certificate, and did not know the name of the minister who performed the ceremony. *State v. Adams*, 2 Boyce (Del.) 588, 83 Atl. 936.

Marriage may be established in an action for dower, by testimony of one of the parties. *Smith v. Fuller*, 138 Iowa, 91, 16 L.R.A. (N.S.) 98, 115 N. W. 912.

Ceremonial marriage may be proved by the testimony of one of the parties, notwithstanding a record thereof is required by statute. *Rhode Island Hospital Trust Co. v. Thorndike*, 24 R. I. 105, 52 Atl. 873, following *Albertson v. Smyth*, 3 N. J. L. 473, involving legitimacy and inheritance, and involving an action for necessities furnished the alleged wife.

Testimony of the wife that the parties were married is sufficient to establish the marriage in the absence of countervailing evidence, and without the production of the certificate of marriage, in an action by the wife for causing the death of the husband. *White v. Maxcy*, 64 Mo. 552.

In an action by a woman, under the civil damage act, for injury caused by the sale of liquor to her husband, she may testify as to the fact of marriage, and record proof of the marriage is not necessary. *Lowry v. Coster*, 91 Ill. 182.

The testimony of the wife is not incompetent to establish the marriage upon the theory that since marriage is a matter of record, the record is the best evidence. *Leighton v. Sheldon*, 18 Minn. 243, Gil. 214 (joint action by husband and wife in trover). L. A. W.

man, 29 Kan. 283, consideration of these views has brought us to the conclusion that we cannot agree in this instance with our learned brothers.

For reasons stated, it is ordered, adjudged, and decreed that the judgment of the District Court is annulled, avoided, and reversed as between plaintiff on the one hand and the interveners, and as between interveners and the defendant. It is further ordered, adjudged, and decreed, that the judgment of the Court of Appeals is avoided, annulled, and reversed as between the interveners on the one hand and the plaintiff and intervener on the other, and the defendant and intervener on the other. The case is remanded to the District Court, to be further proceeded with in accordance with the views before expressed.

Petition for rehearing denied January 5, 1914.

ILLINOIS SUPREME COURT.

JOHN W. HUTTON

v.

STATES ACCIDENT INSURANCE COMPANY, Appt.

(267 Ill. 287, 108 N. E. 296.)

Insurance — accident — injury due to assault.

A policy insuring against injury by accidental means does not cover the breaking

Note. — Accident insurance: when death or injury may be deemed to have been caused by accidental means, though the voluntary act of the insured was the primary cause thereof.

The question here considered is covered in the note to Fidelity & C. Co. v. Carroll, 5 L.R.A.(N.S.) 657, to which the present note is supplementary.

It will be observed that these notes are confined to the question whether the death or injury may be deemed to be due to "accidental means," and do not purport to cover the question whether the death or injury may be regarded as an accident.

As to construction and effect of provision in accident policy exempting insurer or limiting its liability in case of an injury intentionally inflicted by another, see note to Ryan v. Continental Casualty Co. 48 L.R.A.(N.S.) 524, and later case, Continental Casualty Co. v. Cunningham, L.R.A. 1915A, 538.

Other questions related to that under annotation may be found by consulting the Index to L.R.A. Notes, under the title "Insurance," §§ 165, 166.

In harmony with the decision in HUTTON L.R.A.1915E.

of a leg in an effort by one assaulted by insured to defend himself, although insured intended to make the initial assault so effective as to prevent resistance.

(Farmer, J., dissents.)

(February 17, 1915.)

APPEAL by defendant from a judgment of the Appellate Court, Fourth District, affirming a judgment of the Circuit Court for Jasper County in plaintiff's favor in an action brought to recover the amount alleged to be due on an accident insurance policy. Reversed.

The facts are stated in the opinion.

Mr. McKenzie Okeland, with Messrs. Nathan & Kasserman, for appellant:

Where a policy insures against the result of an injury effected exclusively by accidental means, there can be no recovery where such injury is occasioned by the voluntary act of the insured, although the result of such act may be totally unexpected, fortuitous, and undesigned.

Southard v. Railway Pass. Assur. Co. 34 Conn. 574, Fed. Cas. No. 13,182; McCarthy v. Travelers' Ins. Co. 8 Biss. 362, Fed. Cas. No. 8,682; Westmoreland v. Preferred Acci. Ins. Co. 75 Fed. 244; Travelers' Ins. Co. v. Selden, 24 C. C. A. 92, 42 U. S. App. 253, 78 Fed. 285; Shanberg v. Fidelity & C. Co. 19 L.R.A.(N.S.) 1206, 85 C. C. A. 843, 158 Fed. 1; Hastings v. Travelers' Ins. Co. 190 Fed. 258; Cobb v. Preferred Mut. Acci. Asso. 96 Ga. 818, 22 S. E. 976; Schmid v.

v. STATES ACCI. INS. Co. on the theory that the insured did exactly what he intended to do, and that, so far as the means were concerned, nothing unforeseen or unexpected occurred, the injury was held in the following cases not to have resulted from accidental means:

—where insured aimed a cocked rifle at, and accosted, one whom he knew to be armed, and was immediately shot by such person; Prudential Casualty Co. v. Curry, 10 Ala. App. 642, 65 So. 852;

—where the insured ruptured an artery while reaching to close the shutters of a window, there being no evidence that he slipped or did anything other than what he intended, Feder v. Iowa State Traveling Men's Asso. 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252;

—where death occurred from meningitis resulting from a violent snuffing of a nasal douche, which caused infection to pass into the middle ear, and thence through the mastoid process into the brain, the snuffing having been no harder than was intended, Smith v. Travelers' Ins. Co. 219 Mass. 147, L.R.A.1915B, 872, 106 N. E. 607;

—where the insured took hold of an automobile tire with both hands in an effort to remove the tire, and it came off with such

Indiana Travelers' Acci. Asso. 42 Ind. App. 483, 85 N. E. 1032; Carnes v. Iowa State Traveling Men's Asso. 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683; Feder v. Iowa State Traveling Men's Asso. 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252; Smouse v. Iowa State

Traveling Men's Asso. 118 Iowa, 436, 92 N. W. 53; Lehman v. Minneapolis & St. L. R. Co. 153 Iowa, 118, 133 N. W. 327; Lehman v. Great Western Acci. Asso. 155 Iowa, 737, 42 L.R.A. (N.S.) 562, 133 N. W. 752; Pervanagher v. Union Casualty & S. Co. 85 Miss. 31, 37 So. 461; Appel v. Aetna L.

suddenness as to cause him to stagger back several steps with the tire in his hand and he immediately turned pale and died shortly afterward from a blood clot which resulted, Lickleider v. Iowa State Traveling Men's Asso. — Iowa, —, 151 N. W. 479;

—where appendicitis resulted from the irregular working of the muscles of the side because of their strain in bowling, Lehman v. Great Western Acci. Asso. 155 Iowa, 737, 42 L.R.A. (N.S.) 562, 133 N. W. 752;

—where death occurred from appendicitis which resulted from a bicycle ride, during which the insured sustained no fall or shock, and did nothing which he did not intend to do, Appel v. Aetna L. Ins. Co. 86 App. Div. 83, 83 N. Y. Supp. 238, affirmed in 180 N. Y. 514, 72 N. E. 1139;

—where the insured, a man fifty-four years old, after raising and lowering himself by the use of his hands and arms on the arm of a chair, gasped and in a few minutes died from heart disease caused by his exertions, Hastings v. Travelers' Ins. Co. 190 Fed. 258;

—where it appeared that the insured, a farmer, while performing an operation on an animal, ran up a small hillside to a fire, where he heated an iron, and ran back again, without stumbling or falling, and almost immediately suffered a stroke of apoplexy as a result of his diseased condition, Travelers' Ins. Co. v. Selden, 24 C. C. A. 92, 42 U. S. App. 253, 78 Fed. 285;

—where it appeared that after a tedious journey to a place where the altitude was greater than that to which he was accustomed, the insured left the station, carrying heavy luggage, and ascended a flight of one hundred steps leading to a hotel, and immediately after entering the hotel died from paralysis of the heart, due to the rarefied atmosphere and his exertions, Schmid v. Indiana Travelers' Acci. Asso. 42 Ind. App. 483, 85 N. E. 1032;

—where a rupture of the heart, which was in a state of fatty degeneration, resulted from assisting in carrying a heavy door, or from filling the lungs with air by drawing a long breath after putting the door down, Shanberg v. Fidelity & C. Co. 19 L.R.A. (N.S.) 1206, 85 C. C. A. 343, 158 Fed. 1;

—where a carpenter suffering from hardening of the blood vessels sustained a rupture of one of them by lifting timbers while working on a house, Niskern v. United Brotherhood C. J. 93 App. Div. 364, 87 N. Y. Supp. 640;

—where the insured's heart was in a weakened condition, and death resulted from an injury to his heart, brought about by an attempt to eject a drunken man by L.R.A.1915E.

pushing or pulling the man, who offered only a passive resistance, Scarr v. General Acci. Assur. Corp. [1905] 1 K. B. 387, 2 B. R. C. 358, 74 L. J. K. B. N. S. 287, 92 L. T. N. S. 128, 21 Times L. R. 173, 1 Ann. Cas. 787.

The rule applied in the preceding cases was recognized in Preferred Acci. Ins. Co. v. Patterson, 130 C. C. A. 175, 213 Fed. 595, where it was held that if an insured, while cranking an automobile, slipped and fell and sustained an injury as a direct result thereof, the injury would be accidental, the court saying: "We agree that, when a man is injured while doing merely what he intends to do, he is not injured by an accident, unless the course of his action has been interrupted or deflected by some unforeseen and unintended happening. To illustrate from the facts before us: Since the deceased was attempting to start the engine of his car by turning the crank, whatever injury he might sustain from the ordinary strain of that operation would properly be regarded as a result of what he intended to do, and therefore would not be accounted accidental. But we can hardly suppose that he intended to slip and fall in the course of the operation, and therefore if he did slip and fall and sustained injury as the direct result thereof, the happening would be unforeseen and unintended, and the injury would be accidental."

In Erb v. Commercial Mut. Acci. Co. 232 Pa. 215, 81 Atl. 207, the insured's death was held to have resulted from accidental means where it appeared that he pointed a pistol at his sister-in-law to force her to leave his house, and that in a struggle which occurred each attempted to get possession of the pistol to prevent the other from using it, and that after she got the pistol, he advanced toward her to gain possession of it, and not to continue the assault, and that when the shot which killed him was fired, he had retreated from the place where the struggle occurred.

In Smouse v. Iowa State Traveling Men's Asso. 118 Iowa, 436, 92 N. W. 53, the court refrained from determining the correctness of an instruction that if a rupture from which an insured died was the result of voluntary movements or exertions on his part, the result could not be regarded as accidental, but held this to be the law of the case for the jury, and that a verdict against the insurer did not conform to such instruction where there was nothing to sustain a finding that the acts or exertions of the insured in trying to disentangle himself from his nightshirt, which resulted in a rupture and death, were of an involuntary character.

J. T. W.

Ins. Co. 86 App. Div. 83, 83 N. Y. Supp. 238; Niskern v. United Brotherhood C. J. 93 App. Div. 364, 87 N. Y. Supp. 640; Clidero v. Scottish Acci. Ins. Co. Eng. 29 Scot. L. R. 303; Scarr v. General Acci. Assur. Corp. [1905] 1 K. B. 387, 2 B. R. C. 358, 74 L. J. K. B. N. S. 287, 92 L. T. N. S. 128, 21 Times L. R. 173, 1 Ann. Cas. 787.

Where the insured brings about an assault upon himself by his own wrongful act, or where he voluntarily incurs obvious hazard of this character, or places himself in a position that may reasonably be expected to bring about an assault upon him, an injury so received is not effected by accidental means.

Taliaferro v. Travelers' Protective Asso. 25 C. C. A. 494, 49 U. S. App. 275, 80 Fed. 368; Robinson v. United States Mut. Acci. Asso. 68 Fed. 825; Supreme Council O. C. F. v. Garrigus, 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818; Phoenix Acci. & Sick Ben. Asso. v. Stiver, 42 Ind. App. 636, 84 N. E. 772; Travelers' Ins. Co. v. Wyness, 107 Ga. 584, 34 S. E. 113; Hutchcraft v. Travelers' Ins. Co. 87 Ky. 300, 12 Am. St. Rep. 484, 8 S. W. 570; Campbell v. Fidelity & C. Co. 109 Ky. 661, 60 S. W. 492; Furbush v. Maryland Casualty Co. 131 Mich. 234, 100 Am. St. Rep. 605, 91 N. W. 135; Phelan v. Travelers' Ins. Co. 38 Mo. App. 640; Guldenkirch v. United States Mut. Acci. Asso. 25 N. Y. S. R. 945, 5 N. Y. Supp. 428; Erb v. Commercial Mut. Acci. Co. 232 Pa. 215, 81 Atl. 207.

The burden is upon plaintiff to show that the injury was effected by accidental means. Moore v. Illinois Commercial Men's Asso. 166 Ill. App. 38; Wilkinson v. Aetna L. Ins. Co. 240 Ill. 205, 25 L.R.A. (N.S.) 1256, 130 Am. St. Rep. 269, 88 N. E. 550; Fidelity & C. Co. v. Weise, 182 Ill. 496, 55 N. E. 540.

Mr. William B. Wright, for appellee:

The term "accident" or "accidental" should be given its ordinary and usual significance, as being an event that takes place without one's foresight and expectation.

Supreme Council, O. C. F. v. Garrigus, 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818; Barry v. United States Mut. Acci. Asso. 23 Fed. 712, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; Joyee, Ins. § 2863, last par. and note 24; Fidelity & C. Co. v. Johnson, 30 L.R.A. 206, note; Lovelace v. Travelers' Protective Asso. 126 Mo. 106, 30 L.R.A. 209, 47 Am. St. Rep. 638, 28 S. W. 877; Fidelity & C. Co. v. Carroll, 5 L.R.A. (N.S.) 657, note.

The voluntary act of insured does not bar recovery.

Lovelace v. Travelers' Protective Asso. 126 Mo. 106, 30 L.R.A. 209, 47 Am. St. Rep. L.R.A.1915E.

638, 28 S. W. 877; Fidelity & C. Co. v. Carroll, 5 L.R.A. (N.S.) 657, note.

Whether a given injury is the result of accidental means or not is a question of fact for the jury.

Moore v. Illinois Commercial Men's Asso. 166 Ill. App. 38; Fidelity & C. Co. v. Weise, 182 Ill. 496, 55 N. E. 540; Wilkinson v. Aetna L. Ins. Co. 240 Ill. 205, 25 L.R.A. (N.S.) 1256, 130 Am. St. Rep. 269, 88 N. E. 550; Atlanta Acci. Asso. v. Alexander, 104 Ga. 709, 42 L.R.A. 188, 30 S. E. 939, 4 Am. Neg. Rep. 616.

Cooke, J., delivered the opinion of the court:

The appellee, John W. Hutton, obtained a judgment in the circuit court of Jasper county against the appellant, the States Accident Insurance Company, for \$500, which was affirmed by the appellate court for the fourth district. 186 Ill. App. 499. A certificate of importance having been granted, this appeal has been perfected from the judgment of the appellate court.

The suit was brought upon a policy of accident insurance issued by appellant, which insured the appellee against "injuries effected exclusively by external, violent, and accidental means." The record discloses that at the close of appellee's case, and again at the close of all the evidence, a peremptory instruction was offered to find the issues for the appellant, which was refused in each instance. In the appellate court this action of the court was assigned for error, and the errors there assigned have been reassigned here. While in the argument of appellant this action of the court is not specifically referred to, the effect of the argument made is that there was no evidence tending to support appellee's claim or to disclose a cause of action, and this is the only question of law presented upon this appeal. Counsel for appellee in his brief states: "If this case has any standing in the supreme court, it is upon the theory that there is no evidence in the record on behalf of plaintiff which, standing alone and undisputed, would support the verdict of the jury; in other words, if it is rightly here, it is because the court refused, at the close of plaintiff's evidence and at the close of all the evidence, to instruct the jury to find the issues for the defendant."

And his argument, in effect, is directed to upholding the action of the court in refusing the peremptory instructions. We shall therefore consider the case as though this action of the court was specifically mentioned by appellant as the ground relied upon for reversal.

There was practically no conflict in the

testimony of the various witnesses as to the facts. According to the testimony of appellee, in which the facts are presented in as favorable light as by any other witness, there had been some little difficulty between him and one John Huddleston prior to November 9, 1911. On that evening he and Huddleston had a conversation in the city of Newton in reference to their difficulty, after which appellee went to his office. Having finished his work there, he went to a restaurant in that city to get his supper. As he entered the restaurant from the west, he saw Huddleston sitting on a stool on the south side of the room, at a lunch counter. Without saying a word to Huddleston, appellee walked up behind him and struck him a blow with his fist on the side of the face or head, intending, as he states, to hit him so hard that "he wouldn't get up and begin it all over." The blow did not have the desired effect. Huddleston immediately arose from his seat, whereupon the appellee struck at him again. Huddleston then pushed or knocked appellee down, breaking his leg. It is uncertain from the testimony of appellee whether his leg was broken in the fall, or whether it was twisted and broken before he fell; but in any event it was broken, according to the undisputed testimony, while he was engaged in the fight with Huddleston.

Appellant contends that, where an accident policy insures against an injury effected exclusively by accidental means, there can be no recovery where such injury is the result of the voluntary act of the insured, although such result may be entirely unexpected and undesigned, and insists that the evidence does not even tend to prove that the injury was caused by accidental means, inasmuch as appellee had voluntarily engaged in a fight, of which the injury received was but the natural and probable consequence. The contention of appellee is based upon the proposition that his act in assaulting Huddleston was attended with an unexpected and unusual result,—that is, the breaking of his leg,—and one which could not have been reasonably anticipated and which he did not intend to produce. We are of the opinion that the position of appellee is not tenable. Where one voluntarily and deliberately engages in a fight or brawl, and places another in a position where he, too, must fight to defend himself, it is a natural result, and one known to all sensible men as likely to follow, that one or both of the combatants will receive more or less serious injury. As to whether the assailant or the one assailed would be the more likely to be injured would depend upon the comparative strength and

skill of the antagonists, as well as upon the fortunes of the combat.

It is shown in this case that both appellee and Huddleston were large, powerful men, possessed of more than average physical strength. While appellee testifies that it was his intention to render Huddleston incapable of defending himself by a single blow, he was bound to take notice of the fact that he might not be able to accomplish that design, and that if he then persisted in the attack the chances were largely in favor of Huddleston exercising the right to defend himself by all necessary means. Appellee persisted in the assault upon Huddleston, after having failed to accomplish his purpose in striking the first blow, and continued the same up until the instant that his leg was broken. In the meantime Huddleston was defending himself solely by the use of his arms and fists. Appellee was a practising physician and surgeon, thirty-five years of age at the time of the assault, and a man of intelligence and experience. He was bound to know that one of the natural and probable consequences of voluntarily engaging in an assault under such circumstances was that he might be injured, although he could not, of course, foresee the exact form of the injury he might receive, or, indeed, be able to know certainly that he would be injured at all. Such being true, and the assault committed upon Huddleston being the deliberate and voluntary act of appellee, the injury which he received as a result cannot be said to have been caused by accidental means.

An effect which is the natural and probable consequence of an act or course of action cannot be said to be produced by accidental means. 1 Cyc. 248. In *Fidelity & C. Co. v. Stacey*, 5 L.R.A.(N.S.) 657, 74 C. C. A. 409, 143 Fed. 271, 6 Ann. Cas. 995, suit was brought upon a policy which insured against disability or death resulting, directly and independently of all other causes, from bodily injuries sustained through external, violent, and accidental means. In that case the insured committed an assault upon one Porter, striking him in the face with his fist. As a result of the blow there was an abrasion of the skin on the hand of the insured, which afterwards became infected and resulted in his death. It was there held that an injury received in this way was not by accidental means within the meaning of the policy.

In *Taliaferro v. Travelers' Protective Asso.* 25 C. C. A. 494; 49 U. S. App. 275, 80 Fed. 368, it was held that the death of the insured was not accidental where it appeared that, in an altercation with another he was the first to draw his pistol,

and, after stating that he "must have revenge," and warning the other "to put himself in shape," struck him in the face with his pistol, whereupon the other drew his own pistol and shot the insured, causing his death. In passing upon the question the court there said that "the deceased voluntarily engaged in an encounter with deadly weapons, the result of which was not an unlikely result, but was such as any reasonable person might have foreseen;" and that if a man should do an act from which it was possible death might not result, but of which death would be the naturally expected result, such death could not be said to be accidental.

In *Lovlace v. Travelers' Protective Asso.* 126 Mo. 104, 30 L.R.A. 209, 47 Am. St. Rep. 638, 28 S. W. 877, Lovlace, the insured, attempted to eject a man who was drunken and boisterous from the office of a hotel. In doing this he used no other means than his hands, and while making the attempt the other drew a pistol and shot him, causing his death. The court there held that the death of Lovlace was an accident, and not a risk voluntarily assumed, inasmuch as he had made the attempt to eject the other by force from the office of the hotel without knowing that the other person was armed. In this case a different question would be presented if Huddleston had resisted the attack on appellee by the use of a deadly weapon; but instead of that it is conclusively shown that the assault was met in kind, and that he used no more than the necessary means which would have been employed by any reasonable man in his defense.

In *Prudential Casualty Co. v. Curry*, 10 Ala. App. 642, 65 So. 852, it was held that where the insured in an accident policy, while armed with a gun, brought on a difficulty with a third person, also armed with a gun, with knowledge of that fact, and the third person shot the insured in self-defense, his death was not occasioned by accidental means, for an accident may be said to be an unforeseen or unexpected event, of which the insured's own misconduct is not the natural and proximate cause, and hence a result ordinarily and naturally flowing from the conduct of the insured cannot be said to be accidental, even when he may not have foreseen the consequence; and the happening of an event, to be termed an accident, must not only be unforeseen, but without the design and aid of the insured.

The above cases, while not involving the identical facts here presented, lay down the principle which must govern. Applying the rules there announced, we must hold that the evidence on behalf of appellee does L.R.A.1915E.

not tend to show that the injury sustained by appellee was caused by accidental means, but does not show it was the natural and probable result of his voluntary act in making the assault upon Huddleston.

The court erred in refusing to give the peremptory instructions. For this error, the judgments of the Appellate and Circuit Courts are reversed, and the cause remanded to the Circuit Court.

Farmer, J., dissents.

Petition for rehearing denied April 7, 1915.

KANSAS SUPREME COURT.

ETTA CONRAD

v.

MAGGIE L. ROBERTS, App't.

(95 Kan. 180, 147 Pac. 795.)

Evidence — slander — reputation of plaintiff.

1. In an action for slander, plaintiff was permitted, over defendant's objections, to offer evidence in chief of her reputation and character. Held, that the evidence was not admissible in chief, but since it only tended to prove a fact which the law will presume, its admission was not material error.

Pleading — general denial — truth of slander.

2. In such an action, where the plaintiff, for the purpose of showing malice, proves the utterance of words not alleged in the petition, the defendant may then prove the truth of these matters under a general denial, or may offer evidence showing conduct of the plaintiff which would excuse or justify the language.

Same — justification.

3. Where the defense consists of a general denial and a plea that the matter was privileged, the defendant may, notwithstanding neither justification nor mitigating circumstances has been pleaded, prove the truth, or may prove conduct of the plaintiff justifying the utterance of the words.

Headnotes by *PORTER, J.*

Note. — Libel and slander: privilege as affected by extent of publication.

The earlier decisions on this question are considered in the note to *Coleman v. MacLennan*, 20 L.R.A. (N.S.) 361, to which the present note is merely supplementary.

The privileged character of a libelous instrument may be lost where the extent of the publication is excessive. Privilege does not extend to false publications made to persons who have no interest in the subject-matter. *Flynn v. Boglarsky*, 164 Mich. 513, 32 L.R.A. (N.S.) 740, 129 N. W. 674.

Witness — husband and wife — bystander — privilege.

4. Where the presence of bystanders at a conversation between husband and wife is a mere casual incident, not in any sense sought for by the defendant, the latter will not be deprived of the privilege.

Trial — instruction — privilege of witness.

5. In an action for slander, the defendant pleaded a qualified privilege that the words were spoken in a conversation with her husband at a time when she understood her husband was liable to be arrested for his conduct with the plaintiff and another woman where he lived, and that it would result in disgrace being brought upon their family, and that she desired to warn him in the protection of his own interest, as well as that of the family. Held, that an in-

struction charging that if a third person overheard what was said, the matter was not privileged unless such person was a mere eavesdropper, was error.

(April 10, 1915.)

APPEAL by defendant from a judgment of the District Court for Ford County in plaintiff's favor, and from an order denying a motion for new trial, in an action brought to recover damages for an alleged slander. Reversed.

The facts are stated in the opinion.

Messrs. Leonard S. Ferry, Thomas F. Doran, and John S. Dean, for appellant: Evidence tending to establish the good character of the plaintiff was inadmissible.

Davis v. Hearst, 160 Cal. 143, 116 Pac.

And the court cannot take from the jury the consideration of the excessive character of the publication, or malice in the circulation about the community, and publication in the public press, of a petition designed for presentation to a police magistrate, containing charges of misconduct of a libelous character against the occupants of a dwelling, and asking that they be required to remove therefrom. Ibid.

The publication in the city newspapers, before its delivery to the addressee personally, of an alleged libelous letter addressed to the mayor of the city, concerning the removal of an official over whom he has that power, takes away and destroys the privilege in the writer to send such communication to the mayor solely for the purpose of presenting facts to him that he might determine whether such official should be continued in office or removed therefrom. Bingham v. Gayno, 203 N. Y. 27, 96 N. E. 84, affirming 141 App. Div. 301, 126 N. Y. Supp. 353, which in turn reversed 68 Misc. 565, 125 N. Y. Supp. 216.

In Lathrop v. Sundberg, 55 Wash. 144, 25 L.R.A.(N.S.) 381, 104 Pac. 176, holding that the publication, in a newspaper, of a petition of tenants in a building to their landlord, not to rent offices to an osteopath, who is classed in the petition with fakers and charlatans, is not privileged, the court said: "The claim that the publication is privileged is equally without foundation. It is thought to be privileged because it was a communication concerning a matter in which the communicants had an interest, and was made to another having a corresponding interest. But if the facts justified this contention, we think that the allegations of the complaint show such an abuse of the privilege as to justify a recovery if proven. The publication was not confined to the parties in interest. It was given to the newspapers and published to the world at large. The interests of the respondents did not require publication in this manner, and to so publish it was an abuse of the privilege."

A libel concerning a local agent of a foreign insurance company, who is alleged L.R.A.1915E.

to have criticized a local insurance company, published to all the agents of the latter company by its superintendent of agents, without reference to whether or not they knew of such criticisms, and without reference to whether or not such criticism had been made in their communities, was held in Hines v. Shumaker, 97 Miss. 669, 52 So. 705, to exceed the privilege of the occasion, and warrant a recovery.

But the privilege, in the county of an article published in a newspaper concerning candidates for office in the county, is not affected by the fact that the paper has some circulation outside the county. Arnold v. Ingram, 151 Wis. 438, 138 N. W. 111, Ann. Cas. 1914C, 976.

In Kruse v. Rabe, 80 N. J. L. 378, 33 L.R.A.(N.S.) 469, 79 Atl. 316, Ann. Cas. 1912A, 477, it is held that while advice by an attorney to a client as to the business integrity of a third person with whom such client has been dealing is privileged, yet when such advice is given in a public or semi-public place, in a loud voice, and is addressed not to the client, but to the third person, is slanderous, and without need of either publicity or loud utterance, express malice is a question for the jury. The court said: "In Fahr v. Hayes [former note] the plaintiff was asking for credit, and gave Hayes as a reference; this, in the opinion of the supreme court, justifying a confrontation of plaintiff by defendant for the purpose of convincing the prospective creditor of the danger of trusting the plaintiff. In the case at bar the plaintiff did not refer Mrs. Vette to Rabe, and had no part in her consulting him. It is true that she was entitled to consult him, and he was entitled to advise her with entire freedom, so long as he did so honestly. But it cannot be said that a lawyer may shout to his client, in a public place, advice that a party with whom the client has been dealing has taken advantage of him, and claim immunity under the plea of privilege. The rule is thus stated in Odgers on Libel & Slander, at page 245: 'If the words be spoken in the presence of strangers wholly uninterested in the matter, the communica-

548; *Morgan v. Barnhill*, 55 C. C. A. 1, 118 Fed. 24; *Shipman v. Burrows*, 1 Hall, 442; *Chubb v. Gsell*, 34 Pa. 114; *Blakeslee v. Hughes*, 50 Ohio St. 490, 34 N. E. 793; *Hitchcock v. Moore*, 70 Mich. 112, 14 Am. St. Rep. 474, 37 N. W. 914; *Miles v. Vanhorn*, 17 Ind. 245, 79 Am. Dec. 477; *Hall v. Elgin Dairy Co.* 15 Wash. 542, 46 Pac. 1049; *Kennedy v. Holladay*, 25 Mo. App. 503; *Cooper v. Phipps*, 24 Or. 357, 22 L.R.A. 836, 33 Pac. 985; *Mayo v. Sample*, 18 Iowa, 306; *Houghtaling v. Kilderhouse*, 1 N. Y. 530; *Wright v. Schroeder*, 2 Curt. C. C. 548, Fed. Cas. No. 18,091; *Odgers, Libel & Slander*, p. 366; *Folkard, Slander & Libel*, p. 260; *Johnson v. Featherstone*, 141 Ky. 793, 133 S. W. 753; *Haag v. Cooley*, 33 Kan. 388, 6 Pac. 585.

tion loses all privilege. The defendant in these cases must be careful that his words reach only those who are concerned to hear them. Words of admonition or confidential advice should be given privately, not shouted across the street, or written on post cards, or published in the newspapers. [Citing cases.] It is true that the accidental presence of some third person will not alone take the case out of the privilege, if it was unavoidable, or happened in the usual course of business affairs. But if the defendant purposely contrives that a stranger should be present, and who, in natural course of things, would not be present, all privilege is lost. [Cases.] And whenever a defendant deliberately adopts a method of communication which gives unnecessary publicity to statements defamatory of plaintiff, the jury will be apt to suspect malice. It is this last particular in which the case at bar is distinguishable from *Fahr v. Hayes*. The publicity of the words in that case was fairly attributable to the plaintiff's own act, and was considered by the court to be justified in consequence, and that malice was not inferable therefrom. In the case at bar, as already noted, the defendant, if plaintiff's evidence is believed, took occasion to impugn his business integrity by addressing him, and not defendant's client, in a semi-public place, in a loud voice, and without any invitation on his part. We think this brings the case within the last clause of the text just quoted, and that the question of express malice should have been left to the jury."

While privilege of a communication is lost if the extent of the publication be excessive, it is not defeated by the mere fact that the statement is made in the presence of others than the parties immediately interested. *Phillips v. Bradshaw*, 167 Ala. 199, 52 So. 662. This is in accord with the holding in *CONRAD v. ROBERTS*.

In *Laughlin v. Schnitzer*, — Tex. Civ. App. —, 106 S. W. 908, it was held that defendant's reason for canceling a lease of his house to defendant, given in response to her question and in the presence of one whom

Evidence of Mrs. Weingarth was admissible under a plea of the general issue, in mitigation of damages.

Scott v. McKinnish, 15 Ala. 662; *Williams v. Miner*, 18 Conn. 464; *Jones v. Townsend*, 21 Fla. 431, 58 Am. Dec. 676; *Wagner v. Holbrunner*, 7 Gill, 296; *Kennedy v. Dear*, 6 Port. (Ala.) 90; *Osterheld v. Star Co.* 146 App. Div. 388, 131 N. Y. Supp. 247; *Vorhees v. Toney*, 32 Okla. 122, 122 Pac. 552; *Wood v. Custer*, 86 Kan. 391, 38 L.R.A. (N.S.) 1176, 121 Pac. 355.

The relation of husband and wife is such as not only to render all communications between the two absolutely privileged, but such as to impose upon each the imperative duty to communicate to the other any knowledge, information, or belief which the

she had accompany her when defendant sent for her, was conditionally privileged, and not actionable unless malicious.

A physician who, in good faith, but acting under mistaken diagnosis, informs an unmarried woman who has come to him to consult him professionally, that she is pregnant, in the presence of friends who have accompanied her to the office, is not liable for slander, since the communication is privileged. *Brice v. Curtiss*, 38 App. D. C. 304, 38 L.R.A. (N.S.) 69, Ann. Cas. 1913C, 1070. The court said: "In the instant case the statements of the defendant were made in the natural course of his business, and in response to the express and implied request of the plaintiff that she be informed as to the nature of her ailment. The sister, the only third party present, was there by the procurement of the plaintiff, and the defendant was in no way responsible for her presence. She accompanied the plaintiff upon each of the two occasions, and, by request of the plaintiff, was present when the defendant made the examination. The defendant therefore had a right to assume that he could speak freely and frankly. Certain it is that unless he took advantage of the occasion for the purpose of vilifying the plaintiff, and of making statements so far beyond the demands of the occasion as to indicate malice or lack of good faith, the presence of this witness, in the circumstances disclosed, in no way affects the situation."

A report by one employed to ascertain the character of another as an insurance risk, and his fitness for the position of agent, which states that he had lost a position through carelessness, had paid too much attention to women and drank some, if made in good faith, and if seen only by those having an interest in the matter and confidential stenographers, is privileged, even when sent by the company requesting it, to the examiners and agents who had recommended the risk and employment, to check the correctness of their recommendation. *Bohlinger v. Germania L. Ins. Co.* 100 Ark. 477, 36 L.R.A. (N.S.) 449, 140 S. W. 257, Ann. Cas. 1913C, 613.

one may consider to be of importance to the other.

Gildner v. Busse, 3 Ont. L. Rep. 581; 18 Am. & Eng. Enc. Law, 1047; *Broughton v. McGrew*, 5 L.R.A. 406, 39 Fed. 676; *Brow v. Hathaway*, 13 Allen, 239; *Hatch v. Lane*, 105 Mass. 395; *Fahr v. Hayes*, 50 N. J. L. 275, 13 Atl. 261.

Messrs. L. A. Madison and Carl Van Riper for appellee:

Evidence tending to establish the good character of the plaintiff was admissible. 25 Cyc. 507; *Adams v. Lawson*, 17 Gratt. 250, 94 Am. Dec. 445; *Shroyer v. Miller*, 3 W. Va. 158; *Sample v. Wynn*, 44 N. C. (Busbee, L.) 319; *Bennett v. Hyde*, 6 Conn. 24; *Williams v. Haig*, 3 Rich. L. 362, 45 Am. Dec. 774; *Williams v. Greenwade*, 3 Dana, 432; *Stafford v. Morning Journal Asso.* 142 N. Y. 598, 37 N. E. 625; *Broughton v. McGrew*, 5 L.R.A. 406, 39 Fed. 672; *Stark v. Publishers George Knapp & Co.* 160 Mo. 529, 61 S. W. 669.

There was no question of privilege involved.

But in *Fields v. Bynum*, 156 N. C. 413, 72 S. E. 449, holding defendant liable for the use of slanderous words in the presence of third persons, the court said: "Where the expressions employed are allowable in all respects, the manner in which they are made public may take them out of the privilege. In the case of spoken words the defendant must be careful in whose presence he speaks. While the accidental presence of a third person will not always take the case out of the privilege, it is otherwise if the defendant purposely selects an occasion where a number of persons are present. *Odgers, Libel & Slander*, 199. It is generally held that answers to questions put by the plaintiff himself will in general be privileged, though made in the presence of third persons. *Palmer v. Hummerston*, 1 Cab. & El. 36; *Billings v. Fairbanks*, 139 Mass. 66, 29 N. E. 544. But even in reply to plaintiff's questions the defendant is not protected by privilege if he repeats in presence of third persons, charges of a slanderous character which he has previously made. *Griffiths v. Lewis*, 7 Q. B. 61, 14 L. J. Q. B. N. S. 197, 9 Jur. 370; *Sanborn v. Fickett*, 91 Me. 364, 40 Atl. 66; 18 Am. & Eng. Enc. Law, 1032. Assuming the communication to have been made in manner and form as testified by the plaintiff, it is manifestly not privileged. And we think, taking the defendant's version of the occurrence, it was not a privileged occasion. The response was not elicited in reply to questions asked by plaintiff; nor is the inference justified that the defendant sought the plaintiff for the sole purpose of ascertaining the origin of the fire. Defendant put no questions to the plaintiff and asked for no information. According to defendant's own testimony, he did not ask plaintiff if he burned the mill, but at once

Holyoke v. Holyoke, 110 Me. 469, 87 Atl. 40; *Wigmore, Ev.* 2336, 2341.

Testimony tending to show the condition of the mind of the person making slanderous remarks is admissible upon the question of malice.

25 Cyc. 495.

Mr. Charles A. Baker also for appellee.

Porter, J. delivered the opinion of the court:

The plaintiff sued to recover damages for an alleged slander. The petition contained five counts. The cause was submitted to the jury upon the third and fourth counts only, and upon both of these there was a verdict for the plaintiff. A motion for a new trial was overruled, and judgment rendered, from which defendant appeals.

The third count alleged, in substance, that defendant, in a conversation in the hearing of George McKinney, maliciously charged the plaintiff with being a whore. To this cause of action the defendant answered by a general denial. The fourth

charged plaintiff with attempting to sell timber which he had already sold plaintiff, and then substantially charged him with burning the mill. 'I believe you burned the mill, and your neighbors believe it.' 'You known you burned the mill,' etc. These are words of accusation, and not those which should be used in an inquiry intended only to elicit the truth. The defendant did not see the plaintiff in privacy and demand to know what plaintiff had to say concerning the burning of the mill, but made the accusation openly in the presence of three persons. 'Confidential communications,' says Mr. Newell, 'must not be shouted across the street for all passers-by to hear.' 'He should choose a time when no one else is by except those to whom it is his duty to make the statement.' *Slander*, p. 477. From all the evidence it cannot be inferred that the communication was fairly and impartially made on an proper occasion, in a proper manner, and without other defamatory matter. These are essentials to a privileged communication, especially where the matter communicated charges, as in this case, a felony. *Ibid.* The cases strongly relied upon by the learned counsel for the defendant are *Adcock v. Marsh*, 30 N. C. (8 Ired. L.) 360, and *Brow v. Hathaway*, 13 Allen, 239. In the former the communication was in private and was in the strictest sense privileged, made, as held by this court, in the performance of a high moral duty. In the latter the communication was made in the house of the plaintiff, and in reply to inquiries put by plaintiff in presence of a police officer who accompanied the defendant for the purpose of searching the house for stolen goods. The supreme court of Massachusetts held that the circumstances surrounding it made the communication privileged." W. W. A.

count alleged, in substance, that defendant, in a certain conversation in the presence and hearing of plaintiff's sister Velma Warder, and C. M. Roberts, falsely and maliciously charged the plaintiff with running a whorehouse. To this cause of action the defendant filed a general denial and a special defense that the matter was privileged; that C. M. Roberts is the husband of the defendant; that she called at a house owned by her husband, which she understood at the time was occupied by him and the plaintiff; that she found her husband in his bedroom and with him the plaintiff's sister Velma Warder; that she informed her husband that she desired to speak to him, and called him to the outside door of the house, leaving, as she understood, said Velma Warder in the bedroom; that she then told her husband that "if he did not look out he would be arrested;" that her husband said, "Do you mean to call these women whores?" that she said, "I never use that language," and that her husband then said to her, "Do you mean to say that this is a disorderly house?" and that she said, "It looks like it."

It appears that some time before this conversation the defendant and her husband had separated and were living apart; he owned several houses, and occupied one a few doors from the house where defendant lived. Mr. Conrad and Mrs. Conrad, the plaintiff, and her sister Velma Warder, lived in the house with him.

The first error complained of is that the court permitted the plaintiff to prove her good reputation and character. One ground of the objection is that the evidence was not confined to the reputation of the plaintiff at the time the alleged slanderous statements were made. The witnesses testified to her reputation in the town of Fowler, where she lived for a year or more prior to removing to Dodge City. She had moved from Fowler to Dodge City in November, 1911, and the petition charges slanderous statements made by defendant on January 25, 1912, and on May 30, 1912. So far as the time is concerned, we think it cannot be said that it was too remote. The principal ground urged in support of the objection to the testimony is that it is never competent for the plaintiff to offer evidence in chief of reputation and character in an action for slander. A number of cases in support of this doctrine are cited in the brief. While the evidence should not have been admitted in chief, on the ground that the law presumes, until the contrary is shown, that plaintiff has a good reputation, still the admission of testimony to prove a fact which the law will presume cannot be regarded as material error. *Stafford v. L.R.A.1915E.*

Morning Journal Assn. 142 N. Y. 598, 37 N. E. 625. Aside from any authorities upon the subject this court would not reverse a judgment for such an error.

The ground of the next complaint is that the court excluded certain testimony offered by defendant, and the question is whether, in an action for slander, where neither justification nor mitigating circumstances has been pleaded, evidence is admissible, under a general denial, which tends to establish the truth of the slanderous words. Mrs. Weingarth was one of the defendant's witnesses whose testimony was excluded and afterwards produced on motion for a new trial. We think her testimony was admissible for the following reasons: Over the defendant's objections the court permitted the plaintiff to offer proof under the first cause of action, which charged the utterance of certain words in the presence of Maggie McKinney. Afterwards the court concluded that the first count stated no cause of action, and withdrew all evidence under it, but, over the defendant's objections, instructed that the jury might consider the evidence under this count so far as it tended to show malice on the part of defendant. Now there is a rule, supported by well-considered cases, and, we think, resting upon sound reasoning, that where the plaintiff, for the purpose of showing malice, proves the utterance of words not "laid" in the petition, defendant may then prove the truth of these matters under a general denial. It would seem to be only fair that if the evidence introduced under the cause of action afterwards withdrawn from the consideration of the jury was proper to be considered for the purpose of showing malice, then the defendant should have been permitted to introduce the evidence showing conduct of the plaintiff which would excuse or justify the language. The rule should and does work both ways, and if the plaintiff is permitted to prove express malice, the defendant may offer evidence to disprove it. In *Reiley v. Timme*, 53 Wis. 63, 10 N. W. 5, plaintiff, over defendant's objections, was allowed to prove that at about the time the words were spoken the defendant caused him to be arrested for the alleged theft referred to in the slander. The court refused to permit the defendant to explain the circumstances under which he caused plaintiff's arrest. The judgment was reversed. In the opinion it was said: "If evidence of such fact could be properly admitted on the part of the plaintiff without pleading it, to raise the presumption of malice in the defendant, then there would seem to be no good reason why the defendant, without pleading the same, should not have been allowed to

disprove or explain the circumstances under which the arrest occurred, to rebut such presumption. . . . It would be a harsh rule, indeed, to allow one party to give evidence of a collateral fact, not pleaded by either, and then hold the other party concluded by the proof made by his adversary." pp. 64, 65.

In *Tatlow v. Jaquett*, 1 Harr. (Del.) 333, 26 Am. Dec. 399, it was ruled that other slanders not pleaded, but given in evidence to show malice, may be justified without pleading as to them. "Where plaintiff has put in evidence a fact, not pleaded by him, tending to show express malice, defendant may, without a special plea, rebut by showing evidence explanatory of the fact." 25 Cyc. 480. *Henry v. Norwood*, 4 Watts, 347; *Burke v. Miller*, 6 Blackf. 155.

Under the first count, which did not in fact state a cause of action, the plaintiff offered evidence, which remained in the record, over defendant's objections, for the sole purpose of proving express malice. Plaintiff's situation was the same as if she had not pleaded the facts, and had introduced the evidence without any pleading with reference thereto. In *Newell on Slander & Libel*, 3d ed. § 954, commenting upon what may be proved under a general denial, the author says that while "the truth cannot be shown in mitigation of damages, yet any facts or circumstances which will rebut or repel the presumption of malice are properly admissible under this plea."

The evidence of the witness Mrs. Wein-garth should have been admitted so far as it tended to disprove malice, since the cause of action under which the plaintiff's evidence was admitted was in effect stricken from the petition.

Other testimony offered by the defendant was excluded on the ground that it tended to prove the truth of the statements without any plea of justification. We think this evidence was admissible. The defense pleaded to one of the causes of action was that the matter was privileged, and it is a rule that where the matter is privileged, the defendant may, under the general denial, prove the truth or conduct of the plaintiff justifying the utterance of the words. *Bradley v. Heath*, 12 Pick. 163, 22 Am. Dec. 418. In the latter case Chief Justice Shaw used this language: "Where words imputing misconduct to another are spoken by one having a duty to perform, and the words are spoken in good faith, and in the belief that it comes within the discharge of

that duty, or where they are spoken in good faith, to those who have an interest in the communication and a right to know and act upon the facts stated, no presumption of malice arises from the speaking of the words, and therefore no action can be maintained in such cases without proof of express malice. If the occasion is used merely as a means of enabling the party uttering the slander to indulge his malice, and not in good faith to perform a duty or make a communication useful and beneficial to others, the occasion will furnish no excuse. *Bromage v. Prosser*, 4 Barn. & C. 247, 6 Dowl. & R. 296, 1 Car. & P. 475, 3 L. J. K. B. N. S. 203, 28 Revised Rep. 241; *Starkie, Slander*, 200. . . . Such being the occasion of speaking the words, as it appeared on the proof of the plaintiff's case, any evidence which tended to prove that the defendant was acting in good faith, in the discharge of his duty, was competent to repel the charge of express malice, or colorable pretense." pp. 164, 165.

To the same effect see *Lawson v. Hicks*, 38 Ala. 279, 81 Am. Dec. 49, note, 56; *Holt v. Parsons*, 23 Tex. 9, 76 Am. Dec. 49; *Edwards v. Chandler*, 14 Mich. 471, 90 Am. Dec. 249. The reason of the rule is stated to be that, in order for the plaintiff to recover where the communication is privileged, he must affirmatively prove express malice, and for the defendant to prove the truth of the statement is merely to prove a denial of something which the plaintiff was bound to prove. See also *Remington v. Congdon*, 2 Pick. 310, 13 Am. Dec. 431; *Cranfill v. Hayden*, 22 Tex. Civ. App. 656, 55 S. W. 805; 25 Cyc. 481.

The defendant asked the following instruction: "You are instructed that conversations between husband and wife are privileged; hence the repetition or use of words spoken of or concerning another in a conversation between husband and wife, in conversation intended to be private between the two, would not furnish any foundation for an action for slander; and the fact that some third person, not supposed by the parties to be present or to hear the conversation, happened to be near enough to hear would not constitute the publication of the same."

The court refused this instruction, and gave in its stead the following: "Private communications between husband and wife concerning a third person do not amount to a publishing of slander; but, if such communications are so made that others may and do overhear the same, it is such pub-

lishing. If, however, a husband and wife attempt to hold a private conversation, and do so under circumstances and in tones that would naturally not be overheard by others, the language they used could not be deemed to be published, although some other person, by purposely eavesdropping, did in fact overhear what was said."

"Defendant further denies that she said anything to or in the hearing of Miss Warder. If any language used by defendant was only heard by her husband, there was no publishing of slanderous words, and plaintiff could recover nothing under such claim. If defendant did in fact use the language charged in the fourth count, but only to her husband, and after making reasonable effort to make such conversation a private one between themselves alone, and the witness, Miss Warder, only overheard the same by eavesdropping without the knowledge of defendant, in such event there would be no publishing of such language that would warrant an action against her thereon for damages."

In our opinion the instruction given does not correctly state the law. Conversations between husband and wife are privileged, and unless the jury believed that the statement in this instance, though made in the presence of the husband, was intended to be heard by others, it was privileged. It was something more than a privilege. It was the duty of the wife to communicate to the husband any knowledge, belief, or information which she might consider it proper for the husband to know, or which might influence his conduct affecting the marriage relation. The defendant testified that she understood her husband was liable to be arrested for his conduct with the women at the house where he lived, and that it would result in disgrace being brought upon their family, and that she desired to warn him in the protection of his own interest as well as that of the family. Now, whether this was true or not, she was entitled to have the cause submitted to the jury upon that theory. If they believed her testimony, she had established a defense as to the fourth cause of action.

"The defendant is entitled to judgment if the jury find that he reasonably acted under an honest sense of duty, desiring to serve the person most concerned, and not from any self-seeking motive." *Odgers, Libel & Slander*, 1st ed. p. 214.

"Communications made between relatives for the protection of or in furtherance of L.R.A.1915E.

their common interests are conditionally privileged." 25 Cyc. 397.

In *Odgers on Libel and Slander*, 5th ed 159, it is said that communications between husband and wife are held sacred. "They are clearly privileged. In cases apart from the married women's property acts, there is in law no publication where the words merely pass between husband and wife." Where the words are absolutely privileged, malice is immaterial; where the privilege is a qualified one, express malice must be shown. 25 Cyc. 411.

In substance, the court charged that if a third person overheard what was said, the matter was not privileged unless such person was a mere eavesdropper. On the contrary, it was privileged though a third person, without being an eavesdropper, heard it, provided it was made in good faith. "Where the presence of bystanders is a mere casual incident, not in any sense sought for by the defendant, he will not be deprived of his privilege." 18 Am. & Eng. Enc. Law, 2d ed. 1047, and cases cited in note 3.

The record contains the opinion of the trial court denying a motion for a new trial, and it appears that the court concluded there was no error in the instructions respecting privilege, for the reason that, in the opinion of the court, the relation of husband and wife no longer existed in fact, since they had separated and were living apart at the time, and because the evidence disclosed an entire lack of affection or regard for each other by the husband and wife, and that therefore the matter could not be regarded as privileged in any sense. In this view we think the trial court was wrong. Notwithstanding the defendant and her husband had separated and had divided their property, no court could say that they might not, at some future time, resume their marriage relations, and forget and forgive their past differences. It is the policy of the law to encourage this, rather than to discourage it. The evidence is that the defendant and her husband have several adult children who are married. The fact that they have separated and no longer manifest affection or regard for each other would not destroy the marriage relation. They are still husband and wife, and when they communicate with each other the law protects statements made in good faith by one to the other, and regards the communication as privileged.

The judgment will be reversed, and the cause remanded for another trial.

KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, Appt.,

v.

RUSSELLVILLE HOME TELEPHONE
COMPANY.

(163 Ky. 415, 173 S. W. 1105.)

Highway — vacation — removal of poles.

Abutting property owners* cannot compel the removal without compensation from a vacated street, of telephone poles which were placed in the street under municipal authority by one not made a party to the vacation proceedings.

(March 9, 1915.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Logan County in defendant's favor, in an action brought to compel defendant to remove its poles and wires from a vacant street. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. B. D. Warfield, C. H. Moorman, with Mr. Wilber F. Browder, for appellant:

It is the duty of persons or corporations who have placed structures in or upon a public street or highway, with or without the sanction of the municipality, to remove them, on demand of the abutting landowners, and at the expense of such persons or corporations who placed the structures thereon, so soon as the street itself shall have been abandoned as a public highway, and the title to the center of the street has thereby reverted to the abutting landowners.

Alexander v. deKermel, 81 Ky. 345; West Covington v. Freking, 8 Bush, 121; Angell, Highways, 301; Hawesville v. Hawes, 6 Bush, 232, 7 Mor. Min. Rep. 193; Covington v. McNickle, 18 B. Mon. 262; Kennedy v. Covington, 8 Dana, 55; Kelly v. Donahoe, 2 Met. (Ky.) 482; Powell v. Dayton, S. & G. R. Co. 16 Or. 38, 8 Am. St. Rep. 251, 16 Pac. 863; Schneider v. Jacob, 86 Ky. 101, 5 S. W. 350; Moore v. Parker, 34 N. C. (12 Ired. L.) 129; Den ex dem. Flynn v. Williams, 23 N. C. (1 Ired. L.) 513; Nicholson v. Hemsley, 3 Harr. & McH. 409; 1 Bouvier, 391; 2 Bl. Com. 169; 1 Washb. Real Prop. 63; Louisville Property Co. v. Com. 146 Ky. 827, 38 L.R.A.(N.S.) 830, 143 S. W. 412; 1 Elliott, Railroads, §§ 403, 405, 938; Cumberland Teleph. & Teleg. Co.

Note. — A careful search has disclosed no other cases involving the effect of the vacation of a street upon the rights and duties of the owner of a franchise therein. L.R.A.1915E.

v. Avritt, 120 Ky. 34, 85 S. W. 204, 8 Ann. Cas. 955.

Mr. S. R. Crewdson for appellee.

Clay, C., filed the following opinion:

The question presented on this appeal is whether or not the owners of property abutting on a public street, that has been vacated in the manner provided by law, may compel a telephone company, not a party to the proceedings, which, with the consent of the city, and pursuant to a valid franchise, had, prior to the vacation, constructed its poles and wires on the street, to remove them without compensation. The question arises in the following way: In the year 1906 the Russellville Home Telephone Company purchased from the city of Russellville a valid twenty-year franchise to construct and operate a telephone system over the entire city, and to build for that purpose telephone lines attached to poles located along the edges of the streets of the city. Pursuant to the franchise, and with the consent of the city, the telephone company erected eight or nine poles on the north side of Center street, and strung wires thereon. After this had been done, the Louisville & Nashville Railroad Company determined to build a new passenger station to be located at the junction of the Memphis line division, and the Owensboro and Nashville division, and about half a mile west of the old passenger station, which formerly stood at the foot of Main street. To do this, it became necessary to inclose that part of Center street extending from a point 4 feet east of the Owensboro & Nashville Railroad right of way to a point on the western boundary of the city, 50 or 60 feet from the Memphis line division, and to open and construct and turn over for public use a new section of Center street at a point 200 or 300 yards south of the old street. Thereupon the city council, pursuant to § 3562, Kentucky Statutes, passed an ordinance closing that part of Center street above referred to, and opening up the new section of that street. Upon the adoption of the ordinance, an action was filed in the Logan circuit court by the city attorney against all of the abutting landowners on that part of Center street ordered to be closed by the ordinance, and a judgment of vacation regularly entered. At the time the vacation suit was instituted, the land abutting on the north side of Center street, and between the termini of the closed section, belonging to the railroad, while the land abutting on the south side belonged to David W. Caldwell and J. W. McLaughlin and the railroad. Some time after the vacation proceedings, Caldwell and McLaughlin conveyed their title to the railroad company. During the year

1912, the railroad requested the telephone company to remove its poles and wires from its property. The telephone company refused to do so unless the railroad company would pay the cost of removal, amounting to \$594.89. The railroad company refused to pay this or any other sum, and brought this action to require the telephone company to remove the poles and wires. The trial court refused the relief asked, and the railroad company appeals.

The facts are admitted, and the question presented is one of law. Briefly presented, the argument for the railroad is as follows: The city had but an easement in the land covered by the street. When it ceased to be used for street purposes, the title thereto vested in the owners of the abutting property on each side of the street. The telephone company constructed its poles and wires on the street subject to the unquestionable right of the city to discontinue the use of the street whenever, in its discretion, it became necessary or desirable to do so. The city, having only an easement in the land, could confer on the telephone company no rights after that easement was abandoned. When, therefore, the street was abandoned, the telephone company's contract rights ceased. The title to the street having reverted to the railroad, the poles and wires are now on its private property, and it may require the telephone company to remove them. It is unnecessary for us to determine what the rights of the city would have been had it seen fit, under its police power, to enact an ordinance requiring the telephone company to remove its poles and wires, or to make the telephone company a party to the vacation proceedings. That question is not here, because no such action was taken. Not being a party to the vacation proceedings, the telephone company's rights were in no wise concluded by the judgment closing the street. It is admitted that the telephone company had a valid franchise, authorizing it to occupy the streets of the city, and that the poles and wires were placed on Center street with the consent of the city. At that time the street was subject to the city's regulation and control, and the city had full power to contract with the telephone company. Even if the franchise was granted subject to the right of the city to vacate the street in question, the telephone company's rights could not be taken away by a proceeding to which it was not a party. Certainly the city, without the enactment of an ordinance pursuant to its police power, or without making the telephone company a party to the vacation proceedings, could not voluntarily authorize and suffer vacation proceedings to be had, and thus impair the telephone company's L.R.A.1915E.

contract rights, without a hearing of any kind. As a city had the right to grant the franchise for a period of twenty years, and to authorize the telephone company to place its poles and wires on the street in question, and as the city never took, even if it could take, any valid action requiring the telephone company to remove its poles and wires from the street in question, we conclude that the railroad company, upon the abandonment of the street, took the property subject to the burden which had been lawfully placed thereon by the city. To permit the railroad, under these circumstances, to compel the telephone company, without compensation, to remove its poles and wires, would impair the obligation of a valid contract. It follows that the relief asked by the railroad company was properly denied.

Judgment affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

BOARD OF EDUCATION OF THE DISTRICT OF NORTHFORK

v.

C. S. ANGEL et al., Plffs. in Err.

(— W. Va. —, 84 S. E. 747.)

Bills and notes — mailing notice of protest — effect.

1. If notice of protest of a negotiable note be regularly mailed as prescribed by § 8, chap. 99, W. Va. Code 1906, it is immaterial that such notice may not have been in fact received by the indorser thereon. He is nevertheless legally bound by such notice.

Contract — for indemnity — loss by criminal act — validity.

2. Notwithstanding the pendency of criminal proceedings against the wrongdoer, one whose money or property has been embezzled or fraudulently obtained may contract with such wrongdoer for repayment of the money or satisfaction for the loss sustained, and take security therefor, without invalidating the contract, unless there be included therein, as a part of the consideration therefor, some promise or agreement, express or implied, that such prosecution shall be suppressed, stifled, or stayed.

Headnotes by MILLER, J.

Note. — Validity and enforceability of contract to compensate the owner of property stolen or embezzled, in absence of duress or agreement, express or implied, to stifle prosecution.

As to civil action against thief to recover stolen property of its value, see note to *Downs v. Baltimore*, 41 L.R.A.(N.S.) 255.

As to when the statute of limitations

Same — compounding felony.

3. Such contract, however, if made, in whole or in part, upon consideration of such unlawful promise or agreement, is void as against public policy, and will not be enforced by the courts.

Evidence — sufficiency.

4. In this case the verdict of the jury against the defendants on the plea of such an illegal contract was sustained by the proof, and there was no error in the judgment below denying them a new trial.

(March 2, 1915.)

ERROR to the Circuit Court for McDowell County to review a judgment in plaintiff's favor in an action brought to

commence to run against action to recover stolen property, see note to *Lightfoot v. Davis*, 29 L.R.A. (N.S.) 120.

As to the effect of agreement to stifle prosecution upon contract to pay existing indebtedness, or the value of property or money feloniously obtained, see note to *Bankhead v. Shed*, 16 L.R.A. (N.S.) 979.

And as to contract procured by threat to prosecute a relative, see notes to *City Nat. Bank v. Kusworm*, 26 L.R.A. 48; *Williamson-Halsell Frazier Co. v. Ackerman*, 20 L.R.A. (N.S.) 484; *Ball v. Ball*, 37 L.R.A. (N.S.) 539, and *Embrey v. Adams*, L.R.A. 1915D, 1118.

Stated in another way, the question under annotation in the present note is whether an agreement, voluntarily entered into without duress or any agreement, express or implied, to stifle prosecution, to repay to the owner money stolen or embezzled, is founded upon a sufficient consideration to be enforceable, and whether the enforcement of such a promise is contrary to public policy. The question what amounts to duress or an agreement to stifle a prosecution is, of course, not within the scope of this note.

While the rule is that agreements which have for their purpose the compounding of a crime for the stifling of a criminal prosecution are against public policy and will not be enforced, the authorities are unanimous in holding that such rule does not prevent the compromise or settlement of a claim for civil liability growing out of a criminal act, where there is no express or implied agreement to suppress the prosecution, and the case is free from duress.

The question as to the necessity of instituting criminal proceedings against the wrongdoer before instituting a civil suit to enforce the contract to compensate the owner for the loss of his property was raised in but two of the cases in the present note, and in each case it was pointed out that the rule requiring criminal proceedings before resorting to the civil remedy did not obtain in those jurisdictions.

Thus, in *Thorn v. Pinkham*, 84 Me. 101, 30 Am. St. Rep. 335, 24 Atl. 718, the court points out that money stolen may be

recover the amount alleged to be due on a certain promissory note. Affirmed.

The facts are stated in the opinion.

Messrs. Anderson, Strother, Hughes, & Curd, and Stokes & Sale, for plaintiffs in error:

If the note sued upon was given and indorsed by the defendants to stop an intended prosecution for felony of plaintiff's secretary, the said note and the consideration therefor are illegal, and the note cannot be enforced against either the maker or the indorsers.

Norton, Bills & Notes, pp. 268, 273, 274; 4 Am. & Eng. Enc. Law, 191; Henderson v. Palmer, 71 Ill. 579, 22 Am. Rep. 119; Friend v. Miller, 52 Kan. 139, 39 Am. St. Rep. 340, 34 Pac. 397.

recovered in assumpsit, citing *Howe v. Clancy*, 53 Me. 130 (where it is shown that the rule that the civil action is suspended until after the termination of a criminal prosecution has been abolished by statute in that jurisdiction); and it is said: "A *fortiori* is money embezzled a good consideration for a promise to refund it."

And in holding it lawful for the injured person to obtain restitution from an employee who had embezzled his funds, the court in *Herbst v. Mauss*, 7 Ohio Dec. Reprint, 701, points out that in cases of embezzlement, where a definite pecuniary injury is done, the law gives a civil remedy, and that the old English rule requiring previous criminal prosecution never obtained in that jurisdiction. As to the necessity of instituting a criminal prosecution before resorting to the civil remedy against a thief to recover stolen property or its value, see note in 41 L.R.A. (N.S.) 256.

In *Powell v. Flanary*, 109 Ky. 342, 59 S. W. 5, the court said: "While it is a well-recognized rule of law that a person 'cannot make a trade of a felony,' or convert a crime into a source of profit or benefit to himself, yet this rule of law does not prevent a person whose property has been stolen or misappropriated from seeking to recover the same by compromises or otherwise, if nothing is done to suppress the criminal prosecution to which the wrongdoer has laid himself liable. A mere intimation, or even a threat to prosecute, would not in all cases avoid a contract made by the defaulter for the purpose of making reparation to the person injured by his misdoing, if there is no agreement not to prosecute."

In *Johnston v. Allen*, 22 Fla. 224, 1 Am. St. Rep. 180, the court quotes with approval the rule as stated in 2 Chitty on Contracts, 991: "In all cases of offenses which involve damages to an injured party, for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage any way he may think fit; but that an agreement for suppressing evidence, or for stifling or compounding a criminal prosecution for a fel-

The protest must be annexed to the bill, or contain a copy thereof, be under the hand and seal of the notary making it, and must specify the time and place of presentment; the fact that presentment was made, and the manner thereof; the cause or reason for protesting the bill; and the demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

Peabody Ins. Co. v. Wilson, 29 W. Va. 546, 2 S. E. 888; Miller v. Clendenin, 42 W. Va. 416, 26 S. E. 512; Shields v. Farmers' Bank, 5 W. Va. 254.

Messrs. F. C. Cook and Harold A. Ritz, for defendant in error:

The indebtedness of Roberts to plaintiff on account of his embezzlements or pecula-

tions was a sufficient and good consideration for the giving of this note, and for the procuring of the security for its payment by having defendants indorse it.

Johnston v. Allen, 22 Fla. 224, 1 Am. St. Rep. 180; Portner v. Kirschner, 169 Pa. 472, 47 Am. St. Rep. 925, 32 Atl. 442; Page, Contr. § 418; Tecumseh Nat. Bank v. Chamberlain Bkg. House, 63 Neb. 163, 57 L.R.A. 811, 88 N. W. 186; Fosdick v. Van Arsdale, 74 Mich. 302, 41 N. W. 931; 9 Cyc. 506.

Even if this note was given to pay for Roberts's embezzlements, and to suppress a criminal prosecution against him as well, still it is valid and binding.

Bibb v. Hitchcock, 49 Ala. 468, 20 Am. Rep. 288; 6 Am. & Eng. Enc. Law, 460;

ony, is void;" and it was held that the mere fact that the embezzler was under arrest for the embezzlement would not vitiate or taint any agreement he made with the injured persons for the payment of the amount for which he was indebted to them.

In Bremer County v. Barrick, 18 Iowa, 390, the court said, in passing upon the enforceability of a note given in settlement of the indebtedness to the public school funds of one who was a defaulter: "We find nothing in the statute, nor are we aware of any principle, which prohibits the county authorities from saving and securing to this fund, in the best manner possible, any defalcation on the part of those intrusted with its disbursements."

In Johnston Harvester Co. v. McLean, 57 Wis. 258, 46 Am. Rep. 39, 15 N. W. 177, the court said: "We know of no law which prevents a party whose funds have been embezzled by his agent, from demanding and receiving from such agent payment of the funds so embezzled, or from taking security for the payment of such money."

And in Miller v. Minor Lumber Co. 98 Mich. 163, 39 Am. St. Rep. 524, 57 N. W. 101, it is held that an employer has a right to receive money from an employee, or from his wife, or any other person, by his procurement, in payment of money embezzled by the employee, so long as he does not promise, either expressly or by implication, not to prosecute the employee for the crime.

In an action upon a bond given to secure the payment of the indebtedness of a defaulting treasurer of a labor union, it was said (Portner v. Kirschner, 169 Pa. 472, 47 Am. St. Rep. 925, 32 Atl. 442) that an embezzler is under a moral and legal obligation to repay the person whose money he has wrongfully appropriated to his own use; that the debt is a good and valid consideration for security given to the injured person; that the law provides the injured party with civil remedies for the recovery of his money, and it is therefore not against public policy for an embezzler to give security for its return.

In Bishop v. Howe, 117 N. Y. Supp. 996, L.R.A.1915E.

it is held that the duty of one to make restitution of money misappropriated by him is an abundant and valid consideration for the transfer of real and personal property by him, or by his wife at his suggestion,—especially where the money misappropriated had been the means by which the property had been acquired. The court said that the grantee in such case probably could have successfully maintained an action to reach and impress with a trust in his favor the property in question; that the restitution of moneys misappropriated is not to be discouraged when made in recognition of the just claim which the injured person has upon the property and upon all the financial resources of the thief; that no principle of public policy is thereby violated; that the presence of the fear of legal consequences of embezzlement, and the hope that those consequences may be averted in case restitution is made, do not make restitution odious in the eyes of the law when no undue advantage is taken, and where the parties act deliberately and by the advice of their own counsel and after time for reflection is given, and where there is no agreement or intimation that immunity from criminal prosecution will be extended if restitution is made; and that a settlement of civil rights thus accomplished should not be set aside.

In Tecumseh Nat. Bank v. Chamberlain Bkg. House, 63 Neb. 168, 57 L.R.A. 811, 88 N. W. 186, it is held that the contract of a defaulting bank officer to furnish collateral security for his indorsement upon paper previously sold to the bank by him, so as to replenish the assets of the bank and enable it to resume business, is not illegal, and after such securities have been furnished, the bank has resumed business, the person furnishing such securities at the request of such defaulting officer, with knowledge of the use to be made thereof by him, cannot be heard to say that there was no consideration for furnishing the same.

In Groves v. Harris, 18 D. L. R. 475, 29 West. L. Rep. 331, 7 W. W. R. 68, an action against the indorser of a promissory note given in settlement of money misappropriated, it was held that so long as there was

Bankhead v. Shed, 80 S. C. 253, 16 L.R.A. (N.S.) 971, 61 S. E. 425, 15 Ann. Cas. 308; Loud v. Hamilton, — Tenn. —, 45 L.R.A. 400, 51 S. W. 140.

Notice of protest having been mailed to defendants, it was immaterial whether or not they received it.

Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. 888.

Miller, J., delivered the opinion of the court:

Defendants Angel, Toney, Kaufman, and Strudwick seek reversal of a judgment against them on a note dated October 30, 1903, made by one Roberts, payable sixty days after date, to one E. T. Sprinkle, sheriff of McDowell county, for \$921.05,

negotiable and payable at the McDowell County Bank, Welch, West Virginia, and indorsed by them and also by their codefendants, Tipton, Roberts, Ballard, and Botsford.

Besides the general issue and the plea of the statute of limitations of ten years, plaintiffs in error interposed as defenses, by special plea number 2, "that if they signed the note sued upon as indorsers thereon, the said note was given and their indorsements obtained for an illegal consideration, to wit, to suppress a criminal prosecution for a felony, begun and put on foot against the maker of said note, F. G. Roberts, and this they are ready to verify;" and by special plea number 3, "that they" were merely indorsers upon the note sued upon,

no agreement not to prosecute, money misappropriated by an employee is a debt for which the employer lawfully may take security.

In Lomax v. Colorado Nat. Bank, 46 Colo. 229, 104 Pac. 85, the court points out that a promise to compound any criminal offense is itself a crime, and affords no valid consideration for a contract, but that the statute while so providing says: "But no person shall be debarred from taking his goods or property from the thief or felon, or receiving compensation for the private injury occasioned by the commission of any such criminal offense;" and it was accordingly held, in an action for the cancellation of a certificate of shares of stock given as security for a note to cover the amount embezzled by the maker's brother from a bank, that if the note was given by the maker and received by the bank as compensation for the bank's private injury, in discharge of the brother's civil liability, it was enforceable and the pledge of securities given therefor was valid.

And following the Lomax Case, as authority, it was held in Godding v. Hall, 56 Colo. 579, 140 Pac. 165, that a transfer of property by the wife would not be set aside where the sole consideration therefor was the amount her husband, as president of a bank, had misappropriated; it being clear, the court said, that there was no agreement to refrain from prosecution or of freedom from punishment, nor was there any duress, though there may have been the natural anxiety to relieve her husband from impending punishment and the consequent disgrace to both.

In Allen v. Dunham, 92 Tenn. 257, 21 S. W. 898, it is said that the statute permits the settlement of an embezzlement charge, and that it would constitute a sufficient consideration for a contract.

Following Allen v. Dunham, supra, it was held in Loud v. Hamilton, — Tenn. —, 45 L.R.A. 400, 51 S. W. 140, that an obligation given for the settlement of a claim of embezzlement by an agent of a private person, although the purpose of the transaction was to prevent a prosecution of the L.R.A.1915E.

embezzler, was not void on the grounds of public policy.

The Pennsylvania statute authorizes the magistrate or the court to which the proceedings have been returned, to permit the settlement of misdemeanors causing injury or damage to any person, for which there is also a remedy by action, where he acknowledges satisfaction. Under this statute it has been held that the obtaining of money by false pretenses is an offense for which there would also be a remedy by action, and that a note given in settlement thereof is founded upon a valid consideration. Geier v. Shade, 109 Pa. 180; Rothermal v. Hughes, 134 Pa. 510, 19 Atl. 677; Steinbaker v. Wilson, Campb. (Pa.) 76.

Likewise the offense of fraud in misappropriating money as a broker is an offense for which there is a remedy by action for the amount appropriated, and a bond given for that amount is valid. Williams v. Dreshler, 14 W. N. C. 211.

But the settlement must be made, in compliance with the statute, after arrest and with the consent of the court. Salfield v. Manrow, 13 Pa. Co. Ct. 497.

It was accordingly held in the above case that a bond and mortgage given by the father of the embezzler to the injured person was void for want of consideration, where there was no legal settlement of the criminal charges, and no release of the right of action for damages against the embezzler. Ibid.

In Ford v. Cratty, 52 Ill. 313, it was held that where the statute permits one to recover his property from a thief, or receive compensation for the private injury received, a promissory note, with surety, for the maker's defalcation, is valid, although given after the exhibition to him of a warrant for his arrest and demand that he settle or secure the claim, or the prosecution will be pushed to a conclusion.

In the following cases it is expressly held that an obligation given to make restitution for property stolen or embezzled or in settlement of damage caused by the commission of a criminal offense is based upon a sufficient and valid consideration:

and that said note was not presented for payment according to the time thereof, and protested for nonpayment, thereby relieving and releasing these defendants from liability thereon as indorsers, and this they are ready to verify."

On the trial the plea of the statute of limitations was not sustained by the proof, and no point of error on said plea is made or relied on here.

On the plea of want of notice of protest and consequent release as indorsers on the note, we think, as the court below evidently concluded, that this defense also failed for want of proof. The evidence was that the note and certificate of protest had been lost, and evidence was admitted showing conclusively its contents, and that the

note was duly presented for payment, payment refused, and protest and notice thereof mailed to each of said indorsers at their regular postoffice addresses. The only evidence to the contrary was the personal recollection of two or three of these defendants, after nine years, that they had never received such notices. But there is no evidence that any of them ever denied liability on the note on that account until suit brought, and, moreover, some of them, at least, negotiated for payment of the note after its maturity, and one of them seems to have paid over to another his part or portion of the debt, that the whole might be settled and paid. The note having been so regularly protested and notices mailed to the indorsers, it is wholly immaterial

—Morgan v. Knox, 15 La. Ann. 176, holding that a note given by the master in settlement for loss caused by his slave in setting fire to the property of the payee, was enforceable where it was not a condition of the settlement that the slave should not be criminally prosecuted for arson, it appearing that the master was liable for the damage caused by his slave unless he preferred to surrender the slave;

—Miller v. Minor Lumber Co. 98 Mich. 163, 39 Am. St. Rep. 524, 57 N. W. 101, holding valid a deed executed by a wife in settlement of money embezzled by her husband;

—Johnston Harvester Co. v. McLean, 57 Wis. 258, 46 Am. Rep. 39, 15 N. W. 177, holding that a note given by an agent in settlement of funds embezzled by him was valid and enforceable, where the evidence was insufficient to establish an agreement not to prosecute the agent for embezzlement;

—Lauderdale County v. Alford, 65 Miss. 63, 7 Am. St. Rep. 637, 3 So. 246, holding that a note given to secure the repayment of public funds that had been misappropriated by the maker was based upon a legal and sufficient consideration;

—Beath v. Chapoton, 115 Mich. 506, 69 Am. St. Rep. 589, 73 N. W. 806, holding that a promissory note given to restore funds misappropriated by an employee, though for an amount greater than that actually due the employer, is valid for the amount the jury may find to have been embezzled;

—Thorn v. Pinkham, 84 Me. 101, 30 Am. St. Rep. 335, 24 Atl. 718, holding that a note given to refund money embezzled by the maker is supported by a sufficient consideration;

—Powell v. Flanary, 109 Ky. 342, 59 S. W. 5, holding that a promissory note given by an agent for the purpose of making restitution of money misappropriated cannot be avoided in the absence of an agreement that he should not be prosecuted for the crime;

—Provident Sav. Life Assur. Soc. v. Edmonds, 95 Tenn. 53, 31 S. W. 168, upholding a note given in settlement of a L.R.A.1915E.

deficit of an agent and for the purpose of securing to him further employment by his principal, where there was no agreement not to prosecute him criminally;

—Herbst v. Mauss, 7 Ohio Dec. Reprint, 701, holding that a mortgage on the wife's property to secure repayment of money embezzled by the husband is valid in the absence of a showing of an express agreement not to prosecute for the crime of embezzlement, the court saying: "It certainly is not an agreement to stifle criminal proceedings, for one party to make restitution, actuated partly or entirely by the hope that the other party will refrain from prosecuting, nor for the other to accept restitution, intending upon receiving it not to prosecute;"

—Armstrong v. Southern Exp. Co. 4 Baxt. 376, holding that a note given by an agent in settlement of money believed to have been embezzled by him could not be avoided by the surety, where there was no agreement that the agent would not be prosecuted. The court said that the employer had the right to receive this indemnity, and that it was binding on the maker and his surety, notwithstanding they expected that it would prevent a criminal prosecution, and that it did in fact result in the release of the agent from arrest.

And in the following cases such contracts have been enforced, it being assumed that the consideration therefor was sufficient and valid:

—Catlin v. Henton, 9 Wis. 476, holding a note and mortgage given in settlement of funds embezzled by a clerk valid and enforceable, where the evidence was insufficient to establish the defense that they were given to suppress a criminal prosecution;

—Brittin v. Chegary, 20 N. J. L. 625, holding that the substitution of a good bill of exchange for a forged bill is not unlawful, if unaccompanied by any stipulation to suppress evidence or to stifle a criminal prosecution, and will not invalidate the subsequent security;

—Manning v. Columbian Lodge, No. 117, I. O. O. F. 57 N. J. Eq. 338, 38 Atl. 444, affirmed without opinion in 57 N. J. Eq.

whether the indorsers received their notices or not. Section 8, chapter, 99, serial § 3446, Code 1906; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888. Defendants' instruction number 4, propounding a contrary proposition, was therefore rightfully rejected.

The real and only question of merit presented by plea, and by an instruction given by the court in lieu of instruction number 1, requested by plaintiff, and defendants' instructions numbered 2 and 3, rejected, is whether, as alleged in the plea, and as assumed by defendants' two instructions rejected, said note and the indorsements thereon were given or procured in consideration of the suppression of a criminal prosecution for a felony, begun and put on foot against said Roberts, as alleged in said plea, or to stop such intended prosecution, as assumed in said instructions.

The evidence is that the note was made by Roberts, who had been secretary of said board of education, to cover the amount of certain orders drawn by him on said sheriff, as treasurer *ex officio* of the school funds of said district, and on which he had forged the name of the president, and had thereby fraudulently procured and embezzled money and funds belonging to said school district, and that at the time he executed said note with the indorsers he had been arrested and was then in the custody of a constable on a warrant sworn out by the prosecuting attorney, and who also represented the said board of education in the taking of said note.

It is well-settled law that, though criminal proceedings have been begun and be pending against the wrongdoer for the crime, one whose money or property has been embezzled or fraudulently procured may contract with such wrongdoer for repayment or satisfaction of the loss, and

take security therefor, without invalidating such contract, unless there be included therein and as part consideration therefor some promise or agreement, express or implied, that such prosecution shall be suppressed, stifled, or stayed. 9 Cyc. 506, and notes, citing cases; *Johnson v. Allen*, 22 Fla. 224, 1 Am. St. Rep. 180; *Portner v. Kirchner*, 169 Pa. 472, 47 Am. St. Rep. 925, 32 Atl. 442; 1 Page, Contr. § 418; *Tecumseh Nat. Bank v. Chamberlain Bkg. House*, 63 Neb. 163, 57 L.R.A. 811, 88 N. W. 186; *Fosdick v. Van Arsdale*, 74 Mich. 302, 41 N. W. 931.

On the other hand, it is equally well settled that if such an unlawful promise or agreement constitutes any part of the consideration for the promise or agreement of the wrongdoer or his sureties, the contract is wholly void and will not be enforced by the courts. All such contracts are deemed contrary to good morals and public policy, and as to which the courts will turn a deaf ear when their enforcement is sought therein. And this rule of law as between the parties thereto is applicable to the making and enforcement of negotiable instruments. 1 Dan. Neg. Inst. 6th ed. § 196a and notes; 3 R. C. L. p. 957; *Norton, Bills & Notes*, 268, 277, 278; *Henderson v. Palmer*, 71 Ill. 579, 22 Am. Rep. 119; *Friend v. Miller*, 52 Kan. 139, 39 Am. St. Rep. 340, 34 Pac. 397; 1 Chitty, Com. Law, 4, 4 Am. & Eng. Enc. Law, 191.

The evidence is clear and convincing that as between Roberts, the offender and maker of the note, and the board of education, and the sheriff, the nominal payee in the note, not a word of communication was had. No promise or agreement, written or verbal, was made between them, directly at least, in regard to the pending prosecution, or what was to become of it, on execution and indorsement of the note. The

342, 45 Atl. 1092, holding a bond and mortgage enforceable where the defense of illegal consideration, to the effect that they were given to secure the payment of funds embezzled by a third person and upon agreement that he would not be prosecuted for embezzlement, was not established because of failure to aver and prove that a crime had in fact been committed;

—*Hudson v. Brown*, 11 Rich. L. 643, holding that a bill given in settlement for money stolen from the payee by the maker's slave could not be avoided where the agreement not to prosecute the slave formed no part of the consideration for the bill;

—*Ward v. Allen*, 2 Met. 53, 35 Am. Dec. 387, holding an accepted draft for the amount of money obtained by forgery enforceable, in the absence of an agreement not to prosecute for the crime, notwithstanding it was subsequently agreed that the forgery should be concealed, as such L.R.A.1915E.

agreement formed no part of the consideration for the draft;

—*School Dist. v. Alderson*, 6 Dak. 145, 41 N. W. 466, holding that a note given by a retiring treasurer of a school district in settlement of a deficit in his accounts could not be avoided where the evidence failed to show that the note was given in consideration of an agreement by his successor, with whom the settlement was made, that he should not be criminally prosecuted for embezzlement, and also failed to show any authorization or ratification on the part of the school district which would bind it, if such agreement were found to have been made.

In *Connery v. Macfarlane*, 97 Pa. 361, it was held that a note given by a father for part of the money stolen by his son was without consideration, where the evidence failed to show a settlement or release of the payee's claim against the son. A. L. R.

prosecuting attorney in charge of the prosecution, and representing the board of education, admits a conversation with the members of the board, who were together conferring on the subject on the day the note was executed and indorsed, in which they indicated to him that so far as they were concerned, if Roberts would secure them by a note with good security, they would not insist on his being prosecuted. This conference and communication, however, was wholly private, and between the board and prosecutor, and was not communicated in any way, so far as the record shows, to maker or indorsers of the note, and the prosecuting attorney swears positively that he at no time made any promises to Roberts or his indorsers that Roberts would not be prosecuted. He said on cross-examination that his recollection was that Roberts wanted to pay the board the money he admitted he had taken, and wanted these defendants as his friends to indorse the note as an accommodation to him, and he was satisfied that no promise not to prosecute Roberts was made to maker or indorsers, or either of them, as part consideration for the execution of the note by them. Plaintiffs in error, Angel, Toney, and Kaufman, the only defendants who gave testimony on the trial, do not swear that any promises not to prosecute Roberts were made to them; and all they did say on the subject was that they indorsed the note to keep Roberts out of jail. Neither of them swore that the prosecuting attorney, or the board of education, or the sheriff, who was not present, made any promise not to prosecute Roberts. It is conceded, however, that immediately after the note was made and indorsed Roberts was released from custody, and, contrary to his representations that he proposed to go to work and pay the note to the relief and discharge of his sureties, he left the state the same night by a freight train, and never returned. This fact is referred to by plaintiff's counsel as corroborative of the fact that no promise not to prosecute him was made as part consideration for the note. Certainly there is no evidence of an express promise. That is expressly and positively denied. True, such a promise and agreement may be inferred from the facts relating to the transaction; but such inference is one of fact for the jury, and not of law for the court, and as their verdict was for plaintiff, we must assume that they decided the issue in favor of plaintiff and the validity of the note.

We have examined the instructions relied on by defendants and rejected by the court. We think the court's instruction given covered the whole case presented by L.R.A.1915E.

pleadings and proofs, and that there was no reversible error in rejecting defendants' instructions.

Nor do we find any error based on the theory that plaintiff had no right of action on the note. The note was admittedly made to cover money fraudulently drawn out of the treasury of the board of education, and while credit might possibly have been denied the sheriff on settlement, evidently such was not the fact, for the board of education counselled with the prosecuting attorney, and consented to the taking of the note, dealt with it as their own, and brought suit upon it. The sheriff took no part in the transaction except to receive the note as treasurer. The point is overruled.

We are of opinion to affirm the judgment.

WEST VIRGINIA SUPREME COURT OF APPEALS.

MORRIS TURK

v.

NORFOLK & WESTERN RAILWAY COMPANY, Plff. in Err.

(— W. Va. —, 84 S. E. 569.)

Pleading — complaint against carrier — inconsistent causes.

1. A declaration against a railway company for alleged injuries sustained by a passenger by being ejected from one of its cars is not bad on demurrer because it alleges that the acts of defendant's servants complained of were done negligently, wilfully, maliciously, and so forth, supposed inconsistent causes of action, such defects therein, if any, being cured by § 29, chapter 125, serial § 4783, Code 1913.

Carrier — wreck — passenger remaining in car — rights.

2. Where one is received as a passenger, and while on the way to his destination the journey is interrupted by a wreck on the track, and after waiting some hours for the obstruction to be removed without success, the train is run back to the initial station where he was received as a passenger, at a late hour of the night, and the night is dark and cold, the passenger a stranger, the station a small one in a remote place in

Headnotes by MILLER, J.

Note. — Duty to passenger where journey is interrupted by wreck or other cause.

This note does not go into the question of the liability in the first instance for the cause of the interruption of a passenger's journey, but is concerned only with the subsequent duty of the carrier to facilitate the passenger's journey, and to protect him

the mountains, and on inquiry of the conductor the passenger is told that he knows of no place where he can secure shelter and lodging, and that he might remain on the car until the journey would be resumed in the morning, and the conductor provides him a place to rest on the seats of the car, the relation of passenger and carrier is not then severed, but continues, entitling the passenger to reasonable protection at the hands of the railway company, and from any and all unlawful assaults or imprisonment at the hands of its employees.

Damages — Injury to passenger.

3. The verdict of the jury for \$500 compensatory damages and \$1,000 punitive damages, under the facts and circumstances of this case, is not excessive, and under the evidence was justified by the following instruction given, which we think properly

propounded the law of this case: "The court further instructs the jury that if they shall find the defendant guilty, they are, in estimating the plaintiff's damages, at liberty to consider the bodily and mental pain and anguish resulting from the defendant's acts as proved, and the humiliation put upon the plaintiff; and if they shall further believe from the evidence that the conduct and acts of the defendant's servant toward the plaintiff were wanton, wilful, and in utter disregard of his rights, then the jury are told that they are not bound to adhere, in computing it, to the money loss or damage, but may give such damages as will be exemplary in keeping others from so doing, and the defendant from repeating like conduct."

(February 16, 1915.)

from injury while the progress of his journey is interrupted.

The few cases which have considered the question whether the relation of carrier and passenger continues during the interruption of a passenger's journey by wreck, washout, or analogous causes, sustain the decision in *TURK v. NORFOLK & W. R. Co.*, that such relation continues so as to make the carrier liable for a neglect of duty to protect the passenger from injury.

Thus, if because of a washout, the train is unable to proceed further, and passengers are required to transfer to another train beyond the washout, they are entitled, while making the change, to all the rights of passengers upon a moving train, including that of protection from wilful assault by the carrier's employee. *Dwinnelle v. New York C. & H. R. Co.* 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319.

And where the progress of a car was interrupted by the unsafe condition of a trestle due to a washout, and the passengers, in reliance upon the conductor's assurance that no car would cross the trestle that night, and so it would be safe for them to walk over it and continue their journey, proceeded to cross the same, and when partially over were met by a car coming in the opposite direction and one of them was run into and injured, it was held in *Bugge v. Seattle Electric Co.* 54 Wash. 483, 103 Pac. 824, that, the journey of such injured passenger not having been completed, the relation of carrier and passenger still existed, and so the carrier owed a duty to exercise the same degree of care to passengers while being transferred over the bridge from one car to another as to passengers while actually on board the car. The court said: "We think both reason and authority generally hold that she was a passenger. Her destination was Ballard. The car was supposed to run through to her destination. She was not informed otherwise. The company undertook to carry her to that place, and was, of course, bound to do so. It gave her the option of going on by walking across the trestle or of going around another way. She remained a passenger under L.R.A.1915E.

either option. If she assumed the risk of apparent dangers in walking the trestle, the company was in reason bound to exercise such care as not to run her down by a car about which she did not know and which she could not avoid. She did not assume such danger. . . . Whether the break was caused by the railroad company or by some other agency could make no difference. Nor does it change the rule that no written transfer was issued. If it was understood that the destination of the passenger was reached when she alighted from the car at the point of the break, of course the relation of passenger ended at that point. But there seems to be no dispute that the company undertook to carry the respondent to Ballard and that Ballard was the destination of the respondent, and not the place where she alighted to make the transfer. She was given the choice of two ways, but the relationship of carrier and passenger continued either way to the destination."

And so also in *Killmeyer v. Wheeling Traction Co.* 72 W. Va. 148, 48 L.R.A.(N.S.) 683, 77 S. E. 908, it was held that where, because of a freshet, passengers were directed to alight from a car and proceed on foot to another car of the same company beyond the freshet, the relation of carrier and passenger was not suspended while the change was being made, and passengers were entitled to the protection that the highest degree of care on the part of the carrier could afford under the circumstances, and so the carrier, having negligently directed a passenger without light or guide into a place the dangers of which were unknown to him, and not obviously apparent to reasonable men under similar conditions, was liable for an injury sustained by reason of a fall from a high wall.

And again, where, because of repairs to its track, an electric railroad company transfers its passengers from one car to another, the relation of carrier and passenger continues to exist while such transfer is being made, and the carrier owes a duty to exercise reasonable care to provide a safe passageway, and so will be liable for injuries sustained by a passenger as a re-

ERROR to the Circuit Court for McDowell County to review a judgment in plaintiff's favor in an action brought to recover damages for injuries sustained by him while a passenger on defendant's railway by alleged unlawful assault by its servants, and for his unlawful arrest and removal by them from the cars. Affirmed.

The facts are stated in the opinion.

Messrs. Theodore W. Reath and Stokes & Sale, for plaintiff in error:

The declaration was demurrable in disclosing the case of a trespasser on the cars, who enhanced the damage by resisting ejection, and in charging inconsistent causes of action for negligent and wilful injury.

Loy v. Northern P. R. Co. 68 Wash. 33, 122 Pac. 372; Rideout v. Winnebago Trac-

tion Co. 123 Wis. 297, 69 L.R.A. 601, 101 N. W. 672, 17 Am. Neg. Rep. 400; Cleveland, C. C. & St. L. R. Co. v. Miller, 149 Ind. 490, 49 N. E. 445.

Plaintiff was not a passenger at the time of the occurrences in suit; and his instructions based on the carrier's duty to a passenger were error.

Raines v. Chesapeake & O. R. Co. 68 W. Va. 694, 33 L.R.A. (N.S.) 583, 70 S. E. 711, 3 N. C. C. A. 121; Kidwell v. Chesapeake & O. R. Co. 71 W. Va. 664, 43 L.R.A. (N.S.) 999, 77 S. E. 285; Layne v. Chesapeake & O. R. Co. 68 W. Va. 213, 31 L.R.A. (N.S.) 414, 69 S. E. 700; Schley v. Susquehanna & N. Y. R. Co. 227 Pa. 494, 136 Am. St. Rep. 906, 76 Atl. 207, 19 Ann. Cas. 1019.

As there was no evidence of assault or

sult of a breach of this duty. Colorado Springs & C. C. D. R. Co. v. Petit, 37 Colo. 326, 86 Pac. 121, 20 Am. Neg. Rep. 496.

Also the relation of carrier and passenger exists between a railroad company and a passenger on a train which is temporarily stopped by a burning tank of oil on the track, during which time the passengers on the train are taken to a place a safe distance from the tank while waiting for a train to receive them on the other side of the obstruction; but the railway company is bound to exercise only ordinary care in the circumstances, and a passenger who, from motives of curiosity, leaves such place and goes within 85 feet of the burning oil, and remains there for several minutes, is guilty of contributory negligence precluding recovery from injuries caused by the explosion of the tank. Conroy v. Chicago, St. P. M. & O. R. Co. 96 Wis. 243, 38 L.R.A. 419, 70 N. W. 486, 2 Am. Neg. Rep. 98.

Duty as to performance of contract of transportation.

If, from accident or misfortune or other cause, and without the passenger's fault, his transit be interrupted, and it be more than an ordinary delay, then he may resume his journey afterward upon a different train and without repayment of fare. Wilsey v. Louisville & N. R. Co. 83 Ky. 511.

In this case the passenger's journey was interrupted about nighttime by a wreck on the company's line. Upon being told that the train could not proceed for several hours, and possibly not until morning, he informed the conductor that he was sick and asked for a stop-over ticket so that he might go to a hotel for the night, but he was told that this could not be done, and also that the check given him when his ticket was taken up would not be good on another train. He went to a hotel for the night and in the morning resumed his journey on another train, and when the conductor asked for his fare he presented his ticket check, which was refused and conductor's fare demanded, and on refusal to pay more than ticket fare he was ejected from L.R.A.1915E.

the train. The court in the course of its opinion, after referring to the general rules governing the duties of passengers and carrier, said: "But upon the other hand the company owes duties to the passenger. By the contract it undertakes to make the transit covered by the ticket within a reasonable time; and it is only when it is doing so in a reasonable manner that the passenger has no right to leave the train and take passage upon another under the original contract. To hold that he cannot under any circumstances whatever make a re-election of trains would give to the carrier an unfair advantage in the performance of the contract, and would be an unjust discrimination against the public. Reason dictates that for good cause a passenger may leave a train and have his baggage delivered and embark upon another. The peculiar circumstances of this case say so. Here is a sick passenger upon a train which about dark is stopped upon the road by a wreck ahead of it, and upon its own road. It matters not whether the wreck resulted from the company's neglect or not. It exists and impedes the further passage of the train, and prevents the company from complying with the contract as it has undertaken to do within a reasonable time and in a reasonable manner. The passenger is informed by the train officials that the delay will last several hours; perhaps all night; that they cannot tell when it will go on, and they fix no time when he must be present and ready to proceed. Is he in such a case required to remain upon the train all night or for an unknown time? We think not. Suppose the particular train upon which he has embarked was by some accident disabled from proceeding at all; would he not be entitled to take a later one and proceed to his destination without the payment of additional fare? The delay in question could not be considered an ordinary one, and that hence the passenger must submit to it. The appellee was not bound to wait all night in the train, or from 7 o'clock in the evening until 4 o'clock the next morning, for the train to proceed. The company itself having first failed in the performance of

wanton and wilful injury by the railway company's employees, plaintiff's instruction upon exemplary or punitive damages was error.

Norfolk & W. R. Co. v. Neely, 91 Va. 539, 22 S. E. 367.

Messrs. Cook, Litz, & Harman and George W. Howard for defendant in error.

Miller, J., delivered the opinion of the court:

Action by plaintiff for injuries sustained while a passenger on defendant's railway, in consequence of an alleged unlawful assault upon him by defendant's servants, and his unlawful arrest and removal by them from the railway cars, and imprisonment in a certain lockup or prison.

On the trial the jury returned a verdict for plaintiff for \$500 compensatory damages, and \$1,000 punitive damages, and the aggregate verdict of \$1,500 and on which the court pronounced the judgment complained of on this writ of error.

The first point of error is that the declaration is bad on demurrer. The specifications of error are, first, that it discloses plaintiff a trespasser on the train; second, that the acts complained of are alleged to have been done "wrongfully, negligently, unlawfully, injuriously, wilfully, maliciously,

and violently," inconsistent causes of action, and which may have resulted in an inconsistent verdict.

We deny the proposition involved in the first specification, upon the ground, as we shall hold on the merits, that plaintiff was at the time of his alleged injuries a passenger, and entitled to all the protection of a passenger, imposed on defendant by law. On this proposition *Loy v. Northern P. R. Co.* 68 Wash. 33, 122 Pac. 372, is cited and relied on. That was the case of a passenger who purchased a ticket over the wrong railroad, and boarded the train on which he intended to take passage, and was ejected by the conductor because he refused to pay, or produce a ticket entitling him to passage. Such is not the case here presented.

On the second specification, defendant's counsel rely on *Rideout v. Winnebago Traction Co.* 123 Wis. 297, 69 L.R.A. 601, 101 N. W. 672, 17 Am. Neg. Rep. 400, and *Cleveland C. & St. L. R. Co. v. Miller*, 149 Ind. 490, 49 N. E. 445. We do not think these cases support their proposition to the extent at least of rendering the declaration bad on demurrer. Apropos to this question the Wisconsin court says: "The theory of appellant's counsel seems to have been then, and to be still, that the charges of inadvert-

the contract within a reasonable time, reason, a fair interpretation of the contract, as well as public policy, require a different rule in such cases from the general one."

Whether a conductor failed in his duty of enabling a passenger to continue her journey was held in *Alabama & V. R. Co. v. Purnell*, 69 Miss. 652, 13 So. 472, to be a question for the jury where the facts were that, a wreck on the line having necessitated the transfer of passengers from one train to another, plaintiff was notified twice by the conductor to alight and go to the starting point of such train and await its arrival, but she elected to remain on her train until it arrived, and while her train had backed up to allow an engine to pass the second train arrived and, being late, left immediately and before she could reach it, although the conductor knew that he was leaving her behind.

Where a train was stopped by the washing away of a bridge, with no prospects of its continuing on its journey until the following morning, it is a question for the jury whether the railroad company, as carrier of passengers, owed a duty to back the train to the last station or to a farmhouse where the passengers could have been cared for, instead of, as was done in this case, requiring the passengers to alight and walk to a farmhouse 2 miles distant, the way being muddy and dangerous and the night dark, cold, and rainy. *Houston, E. & W. T. R. Co. v. Rogers*, 16 Tex. Civ. App. 19, 40 S. W. 201.

L.R.A.1915E.

Where a train was delayed by a severe snowstorm and a passenger complains of the dark, cold, and uncomfortable condition of the car in which he was compelled to spend the night, and the failure of the railroad company to mitigate such condition, and there was conflict of evidence on that issue, he is entitled to have the issue submitted to the jury. *Cormack v. New York, N. H. & H. R. Co.* 196 N. Y. 442, 24 L.R.A. (N.S.) 1209, 90 N. E. 6, 17 Ann. Cas. 949.

In *Mathieson v. Caledonia R. Co.* 5 F. 511, Ct. Sess. cited in *Mews Supp. Carriers*, col. 2179, it was held that no relevant case was stated where, in an action for personal injuries to a passenger due to exposure, it was alleged that the train was snowed up for over an hour, during which time plaintiff was left unattended, other passengers being transferred to a special train which carried them on, of which arrangement plaintiff was not notified.

Duty to furnish means of transportation.

Where the officers of a carrier knew that excursionists had been detained by a severe storm, it was their duty to have sufficient equipment on hand to take them home when they arrive, and if, with indifference to the excursionists' rights, the train which was to carry them home went away with empty cars, and insufficient equipment was left to transport them on later trains, the carrier is liable for punitive damages. *Woodward*

ent conduct and of wilfulness neutralized each other, rendering the complaint insufficient to state any cause of action. We think otherwise. In a case of this kind, while it is true a charge of gross negligence will not warrant a recovery on the ground of ordinary negligence, even though accompanied by an allegation that plaintiff was in exercise of ordinary care at the time of the occurrence complained of, it does not necessarily follow that a charge including both elements of wrongful conduct is meaningless. If very strict technical rules of pleading were applied it might be otherwise. Under the proper rule every reasonable intentment is to be considered in favor of the pleading, and every thing essential to the cause of action sought to be stated, reasonably inferable from the language used, is to be deemed as effectually pleaded as if expressly alleged." Citing a statute and cases.

Or as sometimes stated in other cases, says this court: "If the essential facts can be gathered from the pleading or may reasonably be inferred from the allegations, it is good though such allegations be in form uncertain and incomplete."

The Indiana case decides, among other things pertinent here, that "an action for a wilful injury is not supported by a find-

ing that the jury was the result of gross negligence."

But why need we dwell on this subject? Our statute, § 29, chapter 125, serial § 4783, Code 1913, cures any supposed defects in this declaration. See that section and the decisions cited under notes 12 and 13 to that section, and especially *Union Stopper Co. v. Wood*, 66 W. Va. 461, 66 S. E. 702. The demurrer was properly overruled.

The propositions covered by defendant's second and sixth assignments of error, namely, that the court should have stricken out plaintiff's evidence and directed a verdict, as proposed by defendant's several motions and instructions, rejected, all depend upon the leading and controlling question, namely, Was Turk, the plaintiff, a passenger, as he alleges, or as defendant contends a mere licensee or trespasser, at the time of the injuries complained of?

We must therefore devote ourselves to this question, Was Turk a passenger? The controlling facts are few, and not materially controverted: On April 24, 1912, at Berwind, McDowell county, West Virginia, Turk purchased from defendant a ticket from Berwind, by way of Iaeger, to Welch, a total distance of about 55 miles. To Iaeger was about 28 miles. At Iaeger it was necessary to change cars for Welch.

v. Southern R. Co. — S. C. —, L.R.A.1915C, 477, 83 S. E. 591.

A taxicab company which contracts to carry a person from one place to another and return in an automobile is bound to furnish another automobile where the first one breaks down, and the contract can be fulfilled only by the sending of another one. *Taxicab Co. v. Grant*, 3 Ala. App. 393, 57 So. 141.

And it is no waiver of the performance of its duties, so as to preclude recovery of damages, that the hirer of the automobile abandons the broken-down auto and walks back, where he waits a reasonable time for an auto to be sent. *Ibid*.

But a railroad company, in selling a ticket to a certain place, to reach which it is necessary to make a change at a junction point, contracts only to use due diligence to make the connection, and so where, by reason of freshets, the train is delayed in reaching the junction point until after the connecting train is gone, there is no obligation to send the passenger through on a special train, instead of requiring him to await the next regular train. *Fitzgerald v. Midland R. Co.* 34 L. T. N. S. 771.

And in *Woodgate v. Great Western R. Co.* 51 L. T. N. S. 826, 33 Week. Rep. 428, 49 J. P. 196, where a passenger missed connection with a regular train because the train was delayed in reaching the junction point by reason of heavy traffic and the foggy condition of the weather, it was contended that the company should have sent him L.R.A.1915E.

on in a special train instead of requiring him to wait for the next regular train; but it was held that as his ticket had printed thereon, "Issued subject to the conditions stated on the company's time bill," the condition that the company would not be accountable for injury which might arise from delays unless in consequence of the wilful misconduct of the company's servant was incorporated in the passenger's ticket, and so, as there was no evidence of wilful misconduct, there was no liability for such refusal.

And while not within the scope of the note, *Turner v. Great Northern R. Co.* 15 Wash. 213, 55 Am. St. Rep. 883, 46 Pac. 243, may perhaps be in point, as it was held that where a railroad company, because of a break in its line, is unable to carry a passenger to his destination, and he is forced to seek transportation over another railroad company's line, the first railroad company is justly liable for the expense incurred.

And the same is also true of *Leclair v. Tacoma R. & Power Co.* 62 Wash. 157, 113 Pac. 268, where it was held that the fact that thirty or forty passengers refused to pay further fare, disputing the right of the company to exact the same, did not justify the company's refusing to take the car further and carry to her destination a passenger who had paid her fare.

Generally, as to performance of contract of transportation, see Index to L.R.A. Notes, Carriers, §§ 36-48.

J. H. B.

The train for which Turk purchased his ticket and on which he took passage, and on which it is conceded he became a passenger, was due to leave and did leave Berwind about 4:30 o'clock P. M. When the train had proceeded about ten miles beyond Berwind a wreck was encountered. After waiting there several hours for the wreck to be cleared the train was run back about 2 miles to English, a station intermediate between the wreck and Berwind, and there an effort was made by the conductor to learn whether a train would be sent from Iaeger to which the passengers might be transferred and carried on to Iaeger, and learning that such a train would not be provided, the conductor announced to the passengers that his train would be run back to Berwind, and wait there till morning. And the evidence of plaintiff and others is that the conductor also announced to him and other passengers, on arrival at Berwind that night about 9 o'clock, that any passengers desiring to do so might remain on the cars until they should proceed to Iaeger the next morning. The conductor admits that he told the passengers that so far as he was concerned they might do so. Plaintiff and two or three other passengers, having no other place to go, and the night being dark and cold, and not being able to learn on inquiry of the conductor that there was any place at or in the vicinity of Berwind, a little country station, where they could secure shelter or lodging, remained on the train, and plaintiff swears the conductor turned the car seats for him so that he might lie down, as he did, and being tired, soon fell asleep. Along about 10 or 11 o'clock plaintiff was rudely awakened by one Meade, a car cleaner employed by defendant, and was by him told to get out of the car. Plaintiff explained to Meade that he was a stranger, with no place to go, and that he was there by the conductor's permission to remain over night, until the train should proceed on its journey in the morning. A colloquy ensued between plaintiff and Meade, in which, according to plaintiff, Meade used rough and profane language in ordering him off the car, plaintiff protesting all the while that he had no place to go and had been given permission by the conductor to stay there till morning. After this colloquy Meade left the car, but returned a few minutes later with another employee, Kennedy, the hostler, who took hold of plaintiff in a rough way, and in very profane and abusive language ordered plaintiff out of the car, plaintiff all the while protesting his right to remain in the car by authority of the conductor, until morning, and that he had no place to go for shelter or sleep. After these imbroglis Meade and Kennedy left the car. While they were gone I.L.R.A.1915E.

plaintiff says he went out to view the situation and to determine whether it was better to go than remain, and finding the train on a side track, and the night very dark and cold, and being afraid of his life, and not knowing where to go, he went back into the car and laid down again. Shortly afterwards Meade and Kennedy returned bringing with them a big fellow by the name of Sparks, a deputy sheriff, who caught hold of plaintiff roughly, cursed him, knocked him down, and together with Meade and Kennedy, led him out of the car and took him bleeding and wounded by the blows to a dirty filthy lockup in that locality, infested with body lice, and thrust him in and locked him up with another passenger, where he remained bleeding, and cold and chilled. the entire night, and till released in the morning and told he had time to catch the train to Iaeger; that no charges were ever afterwards made or prosecuted against him as a cause for his arrest and imprisonment. And when plaintiff inquired of Sparks, on releasing him, whether he was not going to give him a trial, he said no, that he "puts in a man whenever he wants to, and lets him out whenever he wants to."

This evidence of plaintiff is not materially controverted by these trainmen or Sparks, the deputy sheriff, except the trainmen deny that they assisted in arresting plaintiff and in taking him to the lockup, and they say plaintiff used profane language toward them and Sparks. That plaintiff was subjected to very unusual and rough treatment, and even gross and wanton abuse by these men, cannot be doubted.

Do these facts make plaintiff a passenger at the time he was so ejected from the train and thrown into prison? The law of carriers is that where one presents himself for passage, buys a ticket, and is received as such, either at the station a reasonable time before the time for departure, or on board the cars provided, he is a passenger, and continues to be such until the contract of carriage has been fully performed by the carrier, and during that time is entitled to all the protection which the law imposes upon carriers. *Layne v. Chesapeake & O. R. Co.* 66 W. Va. 607, 67 S. E. 1103; *Kidwell v. Chesapeake & O. R. Co.* 71 W. Va. 664, 43 L.R.A.(N.S.) 999, 77 S. E. 285; *Killmyer v. Wheeling Traction Co.* 72 W. Va. 148, 48 L.R.A.(N.S.) 683, 77 S. E. 908; *Illinois C. R. Co. v. O'Keefe*, 61 Am. St. Rep. 68, and valuable note pp. 75, et seq. (168 Ill. 115, 39 L.R.A. 148, 48 N. E. 294, 4 Am. Neg. Rep. 48).

That plaintiff had become a passenger and had paid his fare on the car from which he was so ejected is conceded. And that defendant company had not performed its

contract, for which plaintiff had paid the consideration demanded, and who still held a ticket canceled to Iaeger, is also a conceded fact. But it is claimed that on returning to Berwind, and notwithstanding the circumstances and conditions existing there, and the temporary suspension of the journey to Iaeger that night, the train was thereby annulled until morning, and that the relationship of carrier and passenger was thereby also suspended, and this notwithstanding the permission of the conductor that plaintiff might remain in the car until morning; that plaintiff was thereafter no longer entitled to protection as a passenger, but, if at all, only as a trespasser or licensee, until the journey to Iaeger was resumed in the morning.

It is well settled law that the temporary suspension of a contract of carriage, until arrangements can be made by the carrier to overcome difficulties due to washouts or other obstructions on the track, does not sever the relationship of carrier and passenger already begun. And that during such time the passenger is entitled to all the rights pertaining to a passenger on a train moving towards the point of destination, and stipulated in the contract. 4 R. C. L. § 496; *Dwinelle v. New York C. & H. R. R. Co.* 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319; *Killmyer v. Wheeling Traction Co.* 72 W. Va. 148, 48 L.R.A. (N.S.) 683, 77 S. E. 908. And these cases hold that under such circumstances the obligation still rests on the carrier to protect its passengers against any injury from the negligence or wilful misconduct of its servants, and of the fellow passengers and strangers, so far as practicable, and to provide them with the usual accommodations and any information and facilities necessary for the full performance of the contract on the part of the carrier.

It is not pretended in this case that the relationship of carrier and passenger, as between plaintiff and defendant, ceased until the train was run back to Berwind, and there was reasonable time given to alight. The proposition is that, regardless of the circumstances of the night and conditions existing at Berwind, defendant had the right to suspend this relationship, eject the passengers, and leave them to shift for themselves, without shelter and protection, and thereby relieve itself of all duties and liabilities of carrier to passenger. We do not think this can be the law in this case. What defendant's rights might be under other and different circumstances, we are not called upon to say, but as applied to the facts in this case the law ought to be, and we think L.R.A.1915E.

is, otherwise. When one goes to a railroad station at a proper time and with intention in good faith to become a passenger, he ordinarily occupies the status of a passenger, even though he has not purchased a ticket. *Illinois C. R. Co. v. O'Keefe*, supra, note in 61 Am. St. Rep. 76, and cases cited. And high authority is found for the proposition that a person waiting at a station for passage on a train soon to depart, who is invited by the ticket agent to sit in an empty car standing on a side track, while the station room is being cleaned, is entitled to the same protection from the company while in the car as while waiting in the regular waiting room. *Shannon v. Boston & A. R. Co.* 78 Me. 52, 2 Atl. 678, 3 Am. Neg. Cas. 585; 4 R. C. L. § 491, p. 1035. Upon reason and the general principles of these authorities applied to the facts in this case, we think plaintiff continued in the status of passenger at the time he was ejected from the car and maltreated and imprisoned by defendant's servants and Sparks.

Having reached this conclusion the question remains, Is defendant liable in damages for the injuries inflicted on plaintiff by its servants and Sparks? While the relationship of passenger and carrier continues, the carrier is held to a very high degree of care in protecting its passengers not only from the wrongs and injuries of its servants, but of strangers also. *Gillingham v. Ohio River R. Co.* 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243; 6 Cyc. 598; 2 *Hutchinson, Carr.* 3d. § 980; *Brunswick & W. R. Co. v. Ponder*, 117 Ga. 63, 60 L.R.A. 713, 97 Am. St. Rep. 152, 43 S. E. 430, 13 Am. Neg. Rep. 254, the *West Virginia* cases above cited; *Dwinelle v. New York C. & H. R. R. Co.* supra. In the latter case it was held that "a sleeping car porter who makes an assault on a passenger while the latter is seeking of him information necessary to enable the passenger to pursue his journey in another train which the carrier had provided for his transportation may be regarded as in the service of the company, and the passenger may therefore recover from it compensation for injuries suffered from such assault."

We think it makes no difference whether the trainmen or Sparks assaulted and arrested and imprisoned plaintiff. Sparks was there at the instance and solicitation of defendant's servants, and they must be regarded as having procured Sparks to commit the assault on plaintiff, and imprison him. All were fully advised by plaintiff of his relationship to defendant company, and of the permission given him by the conductor to

remain in the car; and they had no lawful excuse for the assault and brutality towards plaintiff. With this knowledge, and though in the discharge of their duties as car cleaner and hostler, they had no right to disregard plaintiff's rights and call to their assistance a public officer, to commit wrongs and injuries on plaintiff. According to plaintiff's evidence Sparks assaulted and maltreated him before plaintiff had uttered a word. And there is no foundation for the contention that plaintiff invited the injuries or was responsible for his arrest by this officer. Our cases of *Raines v. Chesapeake & O. R. Co.* 68 W. Va. 694, 33 L.R.A. (N.S.) 583, 70 S. E. 711, 3 N. C. C. A. 121, and *Layne v. Chesapeake & O. R. Co.* 66 W. Va. 607, 67 S. E. 1103, and subsequent cases cited, we think, fully sustain this proposition.

The only other point of error which we will note is that the verdict of the jury awarding compensatory and punitive damages is excessive, and that plaintiff's instruction number 3, given, and on which the verdict was evidently predicated, is erroneous. That instruction is as follows: "The court further instructs the jury that if they shall find the defendant guilty, they are, in estimating the plaintiff's damages, at liberty to consider the bodily and mental pain and anguish resulting from the defendant's acts as proved, and the humiliation put upon the plaintiff; and if they shall further believe from the evidence that the conduct and acts of the defendant's servant toward the plaintiff were wanton, wilful, and in utter disregard of his rights, then the jury are told that they are not bound to adhere, in computing it, to the money loss or damage, but may give such damages as will be exemplary in keeping others from so doing, and the defendant from repeating like conduct."

We think the instruction properly states the law of this case, and is not opposed to *Claiborne v. Chesapeake & O. R. Co.* 46 W. Va. 363, 33 S. E. 262, as interpreted by our subsequent decisions. If plaintiff's treatment was as his evidence tends to show, and the jury had the right to believe, and evidently did believe him, he was grossly maltreated and abused. We cannot say the damages awarded were excessive, nor do we think the punitive damages, under the facts and circumstances of this case, are disproportionate to the compensatory damages awarded.

In view of the conclusion reached, we find no error in the giving or refusing of the other instructions, and are therefore of opinion to affirm the judgment.
L.R.A.1915E.

OREGON SUPREME COURT.
(Department No. 1.)

MAY E. A. HARTMAN et al., Respts.,
v.

NATIONAL COUNCIL OF THE KNIGHTS
AND LADIES OF SECURITY, Appt.

(— Or. —, 147 Pac. 931.)

Benefit association — officers as agents of member.

1. A contract by a member of a mutual benefit society, formed by his assent to its by-laws, that the local lodge to which he is attached and its officers shall be his agents in collecting and transmitting assessments and reinstating suspended members, and that the national council shall not be bound by any irregularity on the part of such lodge or officers, is valid and binding.

Same — payment of arrears — warranty of health.

2. A member of a mutual benefit association cannot effect his reinstatement by paying dues when he is ill, although the local lodge makes no objection, where the rules of the order allow reinstatement only if the applicant is in good health, and make the payment of arrears a warranty of good health.

(April 20, 1915.)

A PPEAL by defendant from a judgment of the Circuit Court for Multnomah County in plaintiffs' favor in an action brought to recover the amount alleged to be due on a life insurance policy. Reversed.

Note. — Waiver by officer of subordinate lodge of forfeiture for nonpayment of assessments.

This note is supplementary to the notes to *Royal Highlanders v. Scovill*, 4 L.R.A. (N.S.) 421, and *Bixler v. Modern Woodmen*, 38 L.R.A. (N.S.) 571.

In general.

As stated in the note in 38 L.R.A. (N.S.) 571, there is a conflict as to whether local lodges and their officers may by acts or omissions work a waiver sufficient to preclude the society from relying upon a forfeiture for nonpayment of assessments. The want of authority of these subordinate lodges and their officers to effect such waivers has been vigorously asserted by the superior organizations.

It has been held that a benefit society is estopped to deny a recovery to an injured member according to the terms of his certificate, where after suspension he applied for reinstatement, and was informed by the local lodge that he had been reinstated, and thereafter regularly paid his dues, although the supreme body had refused to grant the reinstatement, and placed the dues to the general credit of the local lodge, it being held that the local lodge acted as the

Statement by Burnett, J.:

This is an action by the plaintiffs, who were children and beneficiaries of Johanna H. Hartman, to recover upon a certificate of membership issued by the defendant corporation insuring her life for their benefit in the sum of \$1,000. They allege full performance by the assured of all things required of her by the contract, demand of the amount after the death of their mother, and the defendant's refusal to pay. The certificate is made part of the complaint, and its execution and delivery are admitted. The answer interposes two defenses. The first is in substance that the action was not brought within one year after the rejection of the claim, such shortening of the statute of limitations being one of the terms

of the agreement. The second is to the effect that the insured failed to pay her dues to the defendant, whereby she was automatically suspended, during which suspension she became sick of typhoid fever, complicated with uremia, of which she subsequently died; that by the laws of the defendant, made part of the contract by the parties, her sickness made her ineligible for reinstatement; that although during her illness, her arrearages were paid to the defendant, yet it was without the knowledge of the latter that she was sick, and, on discovery of the same for the first time after her death, the money so paid was tendered to the plaintiffs, and by them refused. After many denials for want of information and belief, the reply in substance alleges

agent of the society granting the insurance. *Richardson v. Brotherhood of Locomotive Firemen & Enginemen*, 70 Wash. 76, 41 L.R.A.(N.S.) 320, 126 Pac. 82.

And in *Blais v. United Brotherhood, C. & J.* 169 Ill. App. 596, it was held that there was a waiver of a forfeiture or suspension by reason of a failure to pay dues promptly as provided in the by-laws, where the local union recognized a delinquent as a member, and paid him weekly benefits, which were payable only to members in good standing, for several weeks prior to his death, and never reported him not in good standing, although there was some evidence that he was in arrears for three months.

And where a member of a benefit society sent a check for an assessment, which was not received, and, upon being notified that he was suspended subsequently, while in good health, gave the chief officer of the local society a duplicate check, and was assured that that made him all right, and afterwards also paid another regular assessment, which was retained by the society, it was held that if any suspension had occurred it had been waived. *Coile v. Order of United Commercial Travelers*, 161 N. C. 104, 76 S. E. 622.

But a forfeiture because of a failure to pay assessments cannot be avoided by showing an agreement by the clerk of a local camp to pay the assessments of the member, or to notify him in case he should decide not to do so, there being no knowledge of such agreement by the insurer, and the clerk having no authority to bind it by such an agreement. *Sovereign Camp W. W. v. Wagner*, — Tex. Civ. App. —, 164 S. W. 1082.

And in *Knode v. Modern Woodmen*, 171 Mo. App. 377, 157 S. W. 818, it was held that in the absence of a custom or knowledge and acquiescence by the general governing body, there was no waiver of a suspension and forfeiture on the ground of a failure to pay an assessment when due, because the clerk of the local lodge stated that the lodge would pay the member's dues while he was sick, and repeated the assurance that the dues were being kept up, where the laws of the order did not require or

authorize subordinate lodges or their officers to make such payments or agreements.

And where the supreme lodge, on the occasions on which it had notice of defaults by a member in the payment of his dues, suspended him, the fact that on other occasions his dues were paid by the local lodge out of funds kept for paying dues of unfortunate members, by an officer of the lodge, will not sustain a waiver of provisions of the certificate as to assessments and forfeitures. *Supreme Lodge K. L. D. v. Anderson*, 146 Ky. 481, 142 S. W. 1069.

Necessity for compliance with by-laws.

Supplementing note in 38 L.R.A.(N.S.) 571.

In *Day v. Supreme Forest W. C.* 174 Mo. App. 260, 156 S. W. 721, it was held that a member of a benefit association was conclusively presumed to know the provisions of the laws of the order, and that under such laws the secretary of the local lodge had no power, after a suspension had resulted from the nonpayment of assessments, to accept the payment of assessments otherwise than in accordance with the rules and regulations governing reinstatements, and that no waiver resulted from such acts of the secretary, where the supreme council had no knowledge thereof.

And in *Woodmen of World v. Jackson*, 80 Ark. 419, 97 S. W. 673, it was held that no waiver of a forfeiture for nonpayment of assessments resulted from a mere acceptance by the local clerk of overdue assessments without requiring the appearance of the insured, or the presentation of a written application for reinstatement, as required by the by-laws.

And in *Busta v. Court of Honor*, 172 Ill. App. 71, the act of the recorder of a local lodge in sending notices to the insured of the amount of assessments for the current month and for the preceding month was held not sufficient, standing alone, to constitute a waiver of a forfeiture, which the laws of the order provided should take place *ipso facto* upon a failure to pay assessments by

a waiver by the defendant of the condition of the policy mentioned, basing it upon certain alleged conversations which one of the plaintiffs had with the financier of the local council. The result of a jury trial was a verdict for the plaintiffs, and from the ensuing judgment the defendant appeals.

Messrs. Christopherson & Matthews, for appellant:

The laws of a fraternal benefit society providing that officers and members of the local lodge or council are agents of the members of the local lodge or council, and not of the national council, for the purpose of the collection and transmission of all assessments to the national order, are bind-

ing upon the members, and render an attempted waiver illegal.

ing upon the members, and render an attempted waiver illegal.

Lathrop v. Modern Woodmen, 56 Or. 440, 106 Pac. 328, 109 Pac. 81; National Council, J. U. A. M. v. Thompson, 153 Ky. 636, 45 L.R.A. (N.S.) 1148, 156 S. W. 135; Voelkel v. Supreme Tent, K. M. 116 Wia. 202, 92 N. W. 1104.

At the time Johanna H. Hartman's dues were paid on the 12th day of July, 1912, she was ill in the hospital and under the doctor's care, and under the rules and laws of the order she was a suspended member.

Whigham v. Independent Foresters, 51 Or. 489, 94 Pac. 968; Burke v. Grand Lodge, A. O. U. W. 136 Mo. App. 450, 118 S. W. 493; Kirk v. Sovereign Camp, W. W. 169 Mo. App. 449, 155 S. W. 39; Graves v.

a certain day, but which allowed reinstatement upon payment of dues.

In Keys v. National Council, K. & L. S. 174 Mo. App. 671, 161 S. W. 345, evidence that the local financier accepted delinquent dues more than sixty days after suspension without requiring a certificate of good health, as required by the law of the society, and that he marked the person reinstated, was held, with other evidence, sufficient to take the question of the waiver of the provisions as to reinstatement to the jury.

In Klauss v. National Council K. L. S. 170 Ill. App. 196, where the local council at the insured's request loaned or appropriated the money necessary to put him in good standing, and the insured was formally declared reinstated at a meeting of the local society, it was held that there was a waiver of the forfeiture, notwithstanding that the provisions of the by-laws as to reinstatements were not followed, since the local lodge was the agent of the supreme council, and had power to waive the requirements of the contract.

And in Shultze v. Modern Woodmen, 67 Wash. 65, 120 Pac. 531, notwithstanding provisions of the by-laws that no local camp or its officers should have the power to waive any by-law, and declaring the clerk of a local camp to be the agent of the camp, and not of the society, and of a provision that a member suspended for failure to pay dues might be reinstated by the payment of all arrearages within a specified time if he was in good health, it was held that a foreign corporation was liable on a certificate where the clerk of the local camp, through whom the company acted in the state, collected and retained assessments after the suspension of a member who was in default, with knowledge that the person was not in good health, it being held that the question of agency was to be determined from the facts and circumstances of the case, and not merely from the terms of the contract.

Custom as affecting waiver.

Supplementing note in 38 L.R.A. (N.S.) 573.

The conflict alluded to in the earlier note, L.R.A. 1915E.

as to whether or not a custom of a subordinate lodge or its officers, of receiving arrearages, whereby a member is led to believe that a compliance with the laws of the organization as to prompt payment will not be required, constitutes a waiver of forfeiture, also appears among the later cases.

The earlier Illinois decisions holding that a waiver may take place by reason of such custom have been followed in the later cases.

Thus it has been held that a local branch of a society is the agent of the supreme council, and that where a uniform custom exists by which the members of the local lodge are permitted to pay assessments due in one month at the first meeting in the following month, this amounts to a waiver of a provision of the contract declaring a member to be suspended from all rights of the association if his assessment is not paid on or before the last day of the month. O'Malley v. Supreme Council, C. M. B. A. 165 Ill. App. 186.

And to the same effect is Walker v. American Order, F. 162 Ill. App. 30.

And in another case, although a by-law declared a suspension for nonpayment of an assessment during the calendar month, where it was the custom of the local recorder to remit from the 5th to the 10th of the month, and to accept assessments for the preceding month up to the time of remitting, and not to report for suspension any person so remitting, no forfeiture was held to result where a payment was made on the 4th of the following month to the recorder, who knew that the insured's health was impaired, notwithstanding a provision that no officer of any local camp was authorized to waive any provisions of the contract, and that the recorder of the local camp should be considered the agent of the insured, and that a reinstatement was only provided for within a specified time if the member's health was not impaired. Dromgold v. Royal Neighbors, 261 Ill. 60, 103 N. E. 584.

And in Jakes v. North American Union, 186 Ill. App. 1, although the by-laws provided that the local lodge or its officers should not extend the time for payment of

Modern Woodmen, 85 Minn. 396, 89 N. W. 6; Modern Woodmen v. Tevis, 54 C. C. A. 293, 117 Fed. 369; Loeffler v. Modern Woodmen, 100 Wis. 79, 75 N. W. 1012; Scheeler v. Casualty Co. 137 N. Y. Supp. 811; Kayser v. United Electric Protection Co. 133 N. Y. Supp. 356; Quinlin v. Providence Washington Ins. Co. 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31; Northam v. Dutchess County Mut. Ins. Co. 166 N. Y. 319, 82 Am. St. Rep. 655, 59 N. E. 912; Shartle v. Modern Brotherhood, 139 Mo. App. 433, 122 S. E. 1139; National Council J. U. A. M. v. Thompson, 153 Ky. 636, 45 L.R.A. (N.S.) 1148, 156 S. W. 135.

At the time of the death of Johanna H. Hartman, she was a suspended member under the constitution and laws of the order,

assessments, or waive any conditions, and also provided for a forfeiture if assessments were not paid on the 1st of each month, and gave a right to reinstatement in a specified time if a delinquent was in good health, the right to suspend a member for delinquencies was held to be waived where for nine years he had been allowed by the local lodge, which permitted monthly, to pay his dues quarterly, instead of monthly, and it appeared that assessments which were claimed to work a forfeiture would have been received at the end of the quarter if the persons who undertook to pay them had not disclosed that he was sick.

And in *Edmiston v. Homesteaders*, 93 Kan. 485, 144 Pac. 826, although the by-laws provided that no officer was authorized to waive any provisions of the laws of the society, and such laws provided for a suspension in case of a failure to pay assessments by the last day of the month, the insurer was held estopped to claim that a member was suspended because of a failure to pay an assessment for a month before the 5th of the following month, where for a long time payments had been received by the officer of the local council as late as the 7th of the following month, and, although a suspension of the local council was provided for in case of its failure to remit dues before the 5th of the month following collection, it had been customary for the supreme secretary to receive remittances from the lodge in question later than such date without objection.

And in several recent Minnesota cases there has been held to be a waiver of forfeitures and provisions relating thereto, by reason of a custom of local officers or societies failing to require a strict compliance with the laws of the order.

Thus it has been held that if a benefit society, by a course of conduct in accepting the payment of dues and assessments after the time required by its by-laws, creates a belief on the part of a member that strict compliance with the contract as to the time of payment will not be exacted, and a member in consequence thereof fails to pay on the day appointed, the society will be held L.R.A.1915E.

for the reason that she was delinquent in the payment of her dues and assessments.

Montour v. Grand Lodge, 38 Or. 55, 62 Pac. 524; *Harvey v. Grand Lodge*, A. O. U. W. 50 Mo. App. 474; *Lyon v. Supreme Assembly*, R. S. G. F. 153 Mass. 83, 26 N. E. 236; *Brotherhood's Case*, 31 Beav. 365; *Burbank v. Boston Police Relief Asso.* 144 Mass. 437, 11 N. E. 601; *Baxter v. Chelsea Mut. F. Ins. Co.* 1 Allen, 294, 79 Am. Dec. 730; *McCoy v. Roman Catholic Mut. Ins. Co.* 152 Mass. 272, 25 N. E. 289; *Hale v. Mechanics' Mut. F. Ins. Co.* 6 Gray, 169, 66 Am. Dec. 410; *Brewer v. Chelsea Mut. F. Ins. Co.* 14 Gray, 203.

The retaining of the dues paid by Johanna H. Hartman or her beneficiaries, by the council, did not have the effect of reinstat-

to have waived the requirement, and will be estopped from setting up the condition as a cause of forfeiture. *Dougherty v. Supreme Court I. O. O. F.* 125 Minn. 142, 145 N. W. 813.

And it was held that where, by the laws of a benefit society, a subordinate body is the sole agency by which the society transacts the business for which it was organized, if the conduct of the subordinate lodge is such as to operate as a waiver of timely payment, such waiver is binding on the superior body, even though it has had no knowledge of the course of conduct of the subordinate body on which the waiver is based. *Ibid.*

And in *Sauerwein v. Grand Lodge O. S. H.* 121 Minn. 229, 141 N. W. 174, it was held that where a subordinate lodge was intrusted with the collection of dues and assessments, as well as visiting the penalty for failure to pay the same, it had the power to bind the supreme lodge by a waiver effected through a custom of carrying members in arrears and remitting their dues to the supreme lodge.

And where there was evidence that the subordinate lodge carried a person as a member in good standing although he was repeatedly in arrears with his dues for months, and that after delinquencies were reported at its meeting it paid his dues and those of many other members to the supreme council, in violation of rules of the order, it was held that the case was properly submitted to the jury on the question whether the subordinate lodge had waived strict compliance with the provision for a forfeiture in case of a failure to pay dues at a given time. *Ibid.*

In *Walker v. United Order*, G. S. 212 Mass. 289, 98 N. E. 1039, Ann. Cas. 1913D, 345, it was held that where there is nothing in the by-laws or certificate, or in the nature of the society, or in the office which the collector holds, to prevent his paying assessments for an insured, and it is customary for the collector to make such payments, a payment so made in good faith during the period of grace allowed for reinstatement operates to reinstate a delinquent member,

ing her, or entitling her or her beneficiaries to any rights under her certificate.

Whigham v. Independent Foresters, 44 Or. 557, 75 Pac. 1067.

Messrs. Hansen & McGinnis and John Ditchburn for respondents.

Burnett, J., delivered the opinion of the court:

The contention here is waged around the representations imputed to the financier of the local council, and the motion for a directed verdict at the close of all the testimony. Many other errors were assigned, but all depend upon the rulings of the court upon these two questions.

The evidence shows that the defendant is a mutual fraternal organization, with ritual, secret work, and social features, combined with the element of insurance of its members. It consists of a national body, the defendant, of district conventions, and of local organizations. The local concerns elect their own officers by vote of their members. They also elect representatives to district conventions, and these in turn elect delegates to the national council, which enacts the laws governing the institution and its membership. Certain conditions of the certificate upon which the action is founded are here set forth:

"3. This certificate is issued in consideration of the warranties and agreements made

by the person named in this certificate in said member's application to become a member of this order and in said member's medical examination, and also in consideration of the payments made when initiated as a member, and said member's agreement to pay all assessments and dues to become due during the time said member shall remain a member of this order. . . ."

"6. This certificate and contract is and shall be subject to forfeiture for any of the causes of forfeiture which are now prescribed in the laws of the order, or for any other cause or causes of forfeiture which may be hereafter prescribed by this order by the amendment of said laws."

The laws of the order, pleaded and read in evidence, and against which there is no contradictory evidence, contained these provisions:

"Suspensions.

"Sec. 112. Members Suspended by Their Own Act.—The financier of each subordinate council shall keep a book wherein all regular and special assessments and dues received from each member holding a valid certificate shall be credited. Such entries shall be made showing the date when actually received by the financier. All assessments for every month shall become due and payable on the first day of the month. The certificate of each member who has not

there being no requirement for reinstatement in addition to the payment for delinquencies.

But in *Griffith v. Supreme Council*, R. A. 182 Mo. App. 644, 166 S. W. 324, where the by-laws provided that the officers of local councils should be the agents of the member, and that neither the local councils nor their officers should waive performance or compliance with any law of the supreme council, and that such waiver should be inoperative to bind or create any liability on the part of the supreme council, it was held that the local council of its officers could not, by a custom of paying the dues of delinquent members, waive provisions of the order relative to suspensions for nonpayment of dues. The company was held estopped, however, in this case, because of the knowledge of the custom by one of the officers of the supreme council.

And where by the provisions of the order the local camp had no authority to release members from the payment of their dues, and suspension of such camp and its members was provided for in case of a failure of its officer to remit to the sovereign camp, although a custom prevailed by which a local camp paid one assessment for sick and indigent members, it was held that the failure of the camp to comply with that custom and make such payment for a member would not relieve him from suspension according to the laws of the society because of nonpayment, since the agreement for such pay-
L.R.A.1915E.

ment was a private matter between the member and the local camp and did not release him from the conditions governing a forfeiture. *Bennett v. Sovereign Camp*, W. W. — Tex. Civ. App. —, 168 S. W. 1023.

In *Odd Fellows' Ben. Asso. v. Smith*, 101 Miss. 332, 58 So. 100, where there was no evidence that the general officers of a benefit association had notice of the custom of the secretary of a local lodge, who was authorized to collect assessments, not to insist on a compliance with the provisions relative to the time of payment, or of the acceptance by him of payments after the prescribed time, the society was held not estopped to set up a noncompliance with its laws providing for payment of dues by a given date. The court said: "There seems to be some conflict in the decisions of the various courts which have had this matter under consideration; but a correct conclusion is easily reached, if we bear in mind certain elementary rules governing the relation of principal and agent. These are: First, that the acts of an agent in excess of his real or apparent authority are not binding upon his principal; second, that limitations upon the authority of an agent, known to persons dealing with him, are binding upon such persons, and they can acquire no rights against the principal by dealing with the agent contrary thereto; and, third, in determining whether the limitations placed by the principal on his agent's authority have

paid such assessment or assessments and dues on or before the last day of the month shall, by the fact of such nonpayment, stand suspended without notice, and no act on the part of the council or any officer thereof, or of the national council, shall be required as essential to such suspension, and all rights under said certificate shall be forfeited. No right under such certificate shall be restored until it has been duly reinstated by the member complying with the laws of the order, with reference to reinstatement. . . .

"Reinstatements.

"Sec. 113. How Reinstated.—Each member who has been suspended for nonpayment of dues or nonpayment of an assessment or assessments shall only be reinstated in accordance with the constitution and laws of the order.

"Sec. 114. How a Member may be Reinstated within Sixty Days.—Any beneficiary member suspended by reason of nonpayment of an assessment or assessments, or dues, may within sixty days from the date of such suspension be reinstated upon the following conditions and none other, viz: If not engaged in any of the prohibited occupations mentioned in § 107 of these laws, he may be reinstated by payment, within sixty days from date of suspension, of all arrearages of every kind, including assessments

and dues, for which he would have been liable had he remained in good standing: Provided, however, that he be in good health at the time of making payment to the financier with a view of reinstatement. The payment of any such assessments and dues for reinstatement shall be a warranty by such member that he is in good health at the time of such payment. Provided, further, that the receipt and retention of such assessment and dues, in case the suspended member is not in good health, or is engaged in a prohibited occupation, shall not have the effect of reinstating said member or of entitling him or his beneficiaries to any rights under his benefit certificate. . . ."

"Sec. 117. Suspended or Expelled Member Forfeits All Rights.—Any member suspended or expelled from the order for any cause whatever forfeits all claims to the beneficiary fund, reserve fund, general fund and all other funds of the order during said suspension or expulsion. . . ."

"Sec. 120. National Council Not Bound by an Illegal Receipt.—The national council shall not be bound by the acceptance of arrears of assessments and dues from suspended members who are not entitled to reinstatement in accordance with the laws of the order. The receiving of such arrears and receipting therefor by an officer of a subordinate council, the national secretary, or by any other person, or the pay-

been waived by reason of a custom of the agent to act in violation thereof, one of the essential facts to be determined is whether or not such custom on the part of the agent was known to and acquiesced in by the principal. The secretary of appellant's local lodge was its agent for the purpose of collecting the monthly assessments; his authority so to do being derived from, and limited by, appellant's constitution and by-laws, with notice of which assured was charged, for the reason that they constituted a part of his contract. Any act of this local agent, therefore, in excess of the limitations upon his authority contained in the constitution and by-laws, is not binding upon appellant, unless it can be held to have waived such limitations by reason of the custom of its agent to act in violation thereof. There is no evidence whatever tending to show that any general officer of appellant had any sort of notice of this custom on the part of its agent, and, consequently, such a custom cannot be held to have been acquiesced in by appellant."

And in *Order of United Commercial Travelers v. Young*, 128 C. C. A. 648, 212 Fed. 132, where the laws of the order provided that the members should be considered in good standing so long as they paid assessments and dues as they became due, and that any member who failed to pay the same when and as they became due should forfeit his good standing in the order, it was L.R.A.1915E.

held, in an action to recover on the certificate, which was defended on the ground of a failure to pay dues and assessments when due, that evidence of the custom and practice of the secretary and treasurer of the local council in permitting the deceased to pay his dues after the date on which they became payable, and that the secretary had before advanced money to pay the deceased's dues, was inadmissible, since the secretary had no authority to waive the laws of the order, and there being no evidence that the order had ever authorized or ratified such practice.

Payment after death as affecting waiver.

Supplementing note in 38 L.R.A.(N.S.) 576.

In *Bennett v. Sovereign Camp, W. W.* — Tex. Civ. App. —, 168 S. W. 1023, it was held that a receipt of delinquent dues by the clerk of a local camp after the death of a member, which were applied by the clerk to reimburse himself for assessments advanced for the member, had no retroactive effect, and did not avoid a forfeiture, where the laws of the order provided for a suspension on default in the payment of assessments, and that local officers had no authority to waive conditions of the contract.

J. T. W.

ment by or on behalf of any suspended member, of arrears of assessments and dues with a view to reinstatement except as provided for in the laws of the order, shall not be binding on the national council. The failure of any financier to report to the national council as suspended any suspended member of his council shall not operate in any case as a waiver of the forfeiture occurring on account of the suspension. The retention by the financier, or by the order, of assessments and dues paid by members or for them with a view to reinstatement other than as provided in the laws of the order, either before or after death, shall not constitute a waiver of any provisions of these laws until a demand has been duly made for their return by such member, or his beneficiary, or legal representative.

"Sec. 120 (a) National Council Not Bound by Knowledge of or Notice of Officers or Members of Local Councils.—No officer of this society nor any local council officer, or member thereof, is authorized or permitted to waive any provisions of the by-laws of this society, which relate to the contract between the member and the society whether the same be now in force or hereafter enacted. Neither shall any knowledge or information obtained by or notice to any subordinate council or officer or member thereof, or by or to any other person, be held or construed to be the knowledge or notice to the national council or the officers thereof, until after said information or notice be given in writing to the national secretary of the order."

It appears without dispute that the decedent did not pay her assessments for the months of May and June, 1912, during those months, and that they were not paid for her until July 12th of that year, at which last date she had been sick and in the hospital for several days, afflicted as before stated. The payments were made by her daughter, one of the plaintiffs, who testifies that she told the local financier that her mother, the insured, was sick, and that he, having the knowledge thus imparted, accepted the arrearages which she paid. There is no testimony whatever tending to show that information of the sickness of the insured was in any way communicated to the principal officers of the defendant. She never recovered from her illness, but died at the hospital August 2, 1912. Proofs of her death were forwarded to the defendant at Topeka, Kansas, and seasonably thereafter its executive committee, in whom the laws of the order vested the authority during the recess of the grand council to approve or reject such claims, addressed to the plaintiffs this letter, under date of October 11, 1912:

L.R.A.1915E.

"The claim made on account of the death of your mother was considered by our executive committee at its session yesterday and unanimously rejected. The proof shows that your mother did not pay May or June, 1912, assessments and dues within the month, but that on July 12th there was paid for her the three months, May, June, and July, at which time she was ill with typhoid fever and uremia, and under our law could not reinstate, and the payment to the financier, she not being in good health, did not reinstate her. This information did not come to our attention until the proof was in. Under the circumstances, she was not a member of the society at the time of her death, and therefore there was no liability on account of the certificate. The assessments paid since she was not entitled to reinstate will be handed you by our deputy, Brother W. E. Cummings, who is acting in this matter at our instance and request."

Signed by the National Secretary.

The evidence also shows that the amount mentioned was tendered to each of the plaintiffs, and was by both of them refused, prior to the commencement of the action. Another section of the laws of the order reads thus:

"Sec. 169. Council is Member's Agent.—A subordinate council and its officers are the agents of its members in making application for membership, admission of members, the reinstatement of members, the collection and transmission of all assessments to the national council, the serving of all notices upon its members whether such notices are required by the laws of the order, or whether they have been adopted by custom of the subordinate council or its officers. The national council shall not be liable for any negligence in any of these matters, nor be bound by any irregularity, neglect, or illegal action by a subordinate council or by any of its officers."

The facts indicated by the excerpts from the testimony here given are undisputed. The question is: What is the legal conclusion to be drawn from those uncontroverted facts? Some courts have gone so far as to say that, notwithstanding the laws of the order and the stipulations of the parties to be bound by them, yet the local officers are the agents of the chief organization of the order, and not of the members or the local council. Such is the rule laid down in such cases as *Dromgold v. Royal Neighbors*, 261 Ill. 60, 103 N. E. 584, and *Dougherty v. Supreme Court*, I. O. O. F. 125 Minn. 142, 145 N. W. 813, and other precedents which might be noticed. The great weight of authority, however, is to the effect that it is competent for parties to enter into a contract such as is here set out and embodied in the certificate and laws

of the order. There is nothing contrary to public policy or in violation of any public law in making such a stipulation. There is good reason for making the officer of the local council the agent of the member, for that official is elected by the vote of the members, and, being so chosen, it is competent for the parties to stipulate against a possible favoritism to be shown by the officer to the person who elects him, as against the general membership of the order.

It is also sound policy to hold a member to strict compliance with the laws of the order respecting the payment of dues, and the regulation requiring the applicant for reinstatement to be at the time in good health. The insurance in these fraternal institutions is temporary in its character, and its stability depends upon exact observance of the rules for payment. The contract is not purely between the individual member and the corporate organization. It is in spirit and in truth a covenant, not only with the central body, but with every other individual participating in the benefits afforded by the project, for the concern is mutual, and the co-operation of every member is essential to its success as an insurance society. The assured cannot take chances and make default during good health, and afterwards, when death threatens, come forward with the arrears and claim the insurance. None the less, under such circumstances, can the beneficiary at the eleventh hour take up a project which the assured has abandoned and expect to profit thereby. The situation is analogous to the one condemned by Mr. Justice Eakin in *Matthews v. Travelers' Ins. Co.* — Or. —, 144 Pac. 85, where the plaintiff, holding an accident insurance policy, allowed the same to lapse, and, after having lost an eye, sent his overdue premium to the company without informing it of his misfortune. A recovery on the policy was denied. In *Lathrop v. Modern Woodmen*, 56 Or. 440, 106 Pac. 328, 109 Pac. 81, it was held by this court that the "by-laws of a beneficial association, expressly providing that no local camp or any officer thereof shall waive any provisions of such by-laws, are binding, and render an attempted waiver illegal;" and "where the by-laws of a beneficial association provided that the certificate should not be effective until delivered to the applicant while in good health, and his adoption into the order, and his payment of dues and assessments, the failure of an applicant to pay, while in good health and before the accident, the dues and assessments, defeated a recovery on the certificate, and a payment after the accident to the local clerk was not binding on the association, in the absence of a showing

that it had knowledge thereof and acquiesced therein."

It may be noted that at a subsequent trial of this case a recovery was had, which was sustained in the opinion of Mr. Justice McBride, reported in 63 Or. 193, 126 Pac. 1002, but upon the fact, developed in the second trial, that the member had never been in default, and the doctrine that, the right to the policy having been established, placing it in the hands of anyone for delivery, the actual passing from hand to hand only remaining to be accomplished, was tantamount to delivery as against the defendant. The principles announced in the first opinion were not disturbed by the later decision.

Again, in *Squires v. Modern Brotherhood*, 68 Or. 336, 135 Pac. 774, the court, speaking by Mr. Justice Ramsey, said: "But if the defendant did not know or have notice that the defendant's health was not good when said reinstatements occurred, and reinstated her with the understanding that her health was good, such reinstatements were invalid, and not binding on the defendant, if her health was in fact not good at the time of such reinstatements."

It is elementary that, if one dealing with an agent has knowledge of limitations on his authority, the representations or acts of the latter contrary to his instructions will not be binding upon the principal, unless, with knowledge of all the facts, the principal either waves the disobedience of the agent or adopts his acts. In the exhaustive opinion of Mr. Justice Shiras of the United States Supreme Court in *Northwestern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, the subject of agency for an insurance company was carefully considered. The claim there was that the condition against other insurance had been violated by the insured. It was shown that knowledge of the outstanding insurance was brought home to the agent of the company; but it was part of the policy in question that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of the policy may be the subject of agreement indorsed herein or added thereto, and as to such provisions or conditions no officer, agent, or representative shall have power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The opinion goes on to state that "the plaintiff's case stands solely on the propo-

sition that because it is alleged, and the jury have found, that the agent had notice or knowledge of the existence of insurance existing in another company at the time the policy in suit was executed and accepted, and received the premium called for in the contract, thereby the insurance company is estopped from availing itself of the protection of the conditions contained in the policy. In other words, the contention is that an agent, with no authority to dispense with or alter the conditions of the policy, could confer such power upon himself by disregarding the limitations expressed in the contract; those limitations being, according to all the authorities, presumably known to the insured. It was not shown that the company, when it received the premium, knew of the outstanding insurance, nor that, when made aware of such insurance, is elected to ratify the act of its agent in accepting the premium. . . . So that there is not the slightest ground for claiming that the insurance company, with knowledge of the facts, either accepted or retained the premium. The plaintiff's case, at its best, is based on the alleged fact that the agent had been informed, at the time he delivered the policy and received the premium, that there was other insurance. The only way to avoid the defense, and escape from the operation of the condition, is to hold that it is not competent for fire insurance companies to protect themselves by conditions of the kind contained in this policy. So to hold would, as we have seen, entirely subvert well-settled principles declared in the leading English and American cases, and particularly in those of this court."

It was lawfully competent for the defendant to forbid the local officer to waive the conditions mentioned, for § 20 of the act of the legislative assembly of date February 23, 1911 (Laws 1911, p. 363), "for the regulation and control of fraternal benefit societies," reads thus: "Waiver of the Provisions of the Laws.—The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members, shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society, and each and every member thereof, and on all beneficiaries of members."

In this case there is no evidence, as stated, to show that the local officer who accepted the arrearages, or anyone, ever communicated to the principal officers of the defendant anything concerning the sickness of the assured. On the contrary, the only evidence on that subject is to the effect that the first knowledge they had of it was de-

rived from the proofs of death, based upon which they immediately rejected the claim and offered to repay the arrearages which had been advanced. Moreover, controlled as she was by the terms of her certificate and the laws of the order, which are made a part thereof, and to which she was subject, having had her part in the enactment of the same through her representatives, the assured was bound to take notice of the limitations upon the authority of the local officer, although for some purposes he might be held to be the agent of the defendant. The beneficiaries can take nothing by reason of the agent's violation of his instructions. The following precedents are illustrative of the conclusion here set down: *Woodmen of World v. Jackson*, 80 Ark. 419, 97 S. W. 673; *Supreme Commandery, U. O. G. C. v. Bernard*, 26 App. D. C. 169, 6 Ann. Cas. 694; *Sheridan v. Modern Woodmen*, 44 Wash. 230, 7 L.R.A.(N.S.) 973, 120 Am. St. Rep. 987, 87 Pac. 127; *Hay v. People's Mut. Benev. Asso.* 143 N. C. 256, 55 S. E. 623; *Gifford v. Workmen's Ben. Asso.* 105 Me. 17, 72 Atl. 680, 17 Ann. Cas. 1173; *Shawalter v. Modern Woodmen*, 156 Mich. 390, 120 N. W. 994; *Grand Lodge, A. O. U. W. v. Taylor*, 44 Colo. 373, 99 Pac. 570; *Bixler v. Modern Woodmen*, 112 Va. 678, 38 L.R.A.(N.S.) 571, 72 S. E. 704; *Royal Highlanders v. Scovill*, 66 Neb. 213, 4 L.R.A.(N.S.) 421, 92 N. W. 206; *Modern Woodmen v. Tevis*, 54 C. C. A. 293, 117 Fed. 369; *Clair v. Supreme Council, R. A.* 172 Mo. App. 709, 155 S. W. 892; *Jones v. Modern Brotherhood*, 153 Wis. 223, 140 N. W. 1059; *Knode v. Modern Woodmen*, 171 Mo. App. 377, 157 S. W. 818; *United Commercial Travelers v. Young*, 128 C. C. A. 648, 212 Fed. 132.

The only conclusion to be drawn from the uncontradicted testimony was that, at the time the arrearages were paid, the assured was not eligible for reinstatement; that the payments made for her amounted under the laws of the order to a warranty that she was then in good health; that, although the local official may have known that this was not true, yet there is nothing to show that the controlling officers of the defendant knew anything about the state of her health; and that promptly upon the same being brought to their attention they repudiated her claim, as of right they could, and offered to return to her beneficiaries the amount paid for her. The deduction which the law makes in such a case is favorable to the defendant, and a verdict should have been directed accordingly.

It is not necessary to consider the other defense, depending upon the agreed limitation of the time within which an action should be instituted.

The judgment of the Circuit Court is reversed, and the cause remanded, with directions to enter judgment for the defendant.

Moore, Ch. J., and McBride and Benson, JJ., concur.

Petition for rehearing denied.

ARKANSAS SUPREME COURT.

JOE MARSHAK, Appt.,

GUSTIE MARSHAK.

(— Ark. —, 170 S. W. 567.)

Husband and wife — antenuptial agreement as to residence — effect.

1. An antenuptial agreement by a woman

Note. — Relations between one spouse and relatives of other as affecting question of desertion or cruelty.

Supplementing the notes to Brewer v. Brewer, 13 L.R.A. (N.S.) 222, and Hall v. Hall, 34 L.R.A. (N.S.) 758.

The few cases decided since the preparation of the earlier note bear out the statement therein made, that each case depends upon its own facts, and that about the only current running through them is the principle that, while the power of determining where the marital domicile shall be located, or who shall be the inmates thereof, rests primarily in the husband in correlation to his duty to make provision for the wife, this right must be reasonably exercised, and he can neither arbitrarily compel the wife to live with, or in close proximity to, his relatives, nor can he without reason forbid social intercourse between the wife and her relatives, or exclude them from his home.

Cruelty cannot be imputed to the husband, nor was the wife warranted in deserting him, because her control of the household was intruded upon by his daughters by a former marriage and his spinster sister, who lived with him, where the wife was not without fault in the matter and the husband did not encourage the interference or treat her with anything resembling cruelty. Dummer v. Dummer, — N. J. —, 41 Atl. 149. The case appeared to be merely one of an inharmonious household, the female members of which, because of infirmities of temper, took exceptions to acts of each other which ordinarily would be regarded as unobjectionable.

But a wife does not abandon her husband in the sense that entitles him to a divorce from bed and board, by refusing to live with him in a room in a boarding house conducted by his mother, who is hostile to her. Geisinger v. Connors, 130 La. 922, 58 So. 815.

L.R.A.1915E.

to live after marriage in the home of the parents of her intended husband is terminated by the marriage.

Divorce — desertion — leaving home of husband's parents.

2. A wife who leaves the home of her husband's parents, to which he has taken her to live, because she cannot live happily there, is not, where there is no necessity for her living in that place because of the needs of either the parents or the husband, guilty of desertion which will entitle the husband to a divorce.

(November 2, 1914.)

A PPEAL by plaintiff from a decree of the Chancery Court for Yell County in defendant's favor in an action for a divorce. Affirmed.

Statement by Hart, J.:

On the 25th day of May, 1912, Joe Mar-

In Field v. Field, 79 Misc. 557, 139 N. Y. Supp. 673, in which the husband brought his mother into the home, and she interfered with the wife's control and management of the home, and made things unpleasant by her interference, it was held that the wife was justified in leaving the husband, and that he was not entitled to a separation upon the ground of abandonment. The court brought it out that the husband did not have sufficient income to maintain two homes, and that the mother did not have means or ability to support herself, and that "under these conditions he is justified in providing a place for her in his home, provided she recognizes that place and keeps it. Thus, she can have no say whatever regarding the management and control of the home; this belongs to the wife, and if the husband's mother makes discord where there should be harmony, interferes with the wife's control and management, even at the request of her son, or by her own improper conduct and thoughtless language makes the home unpleasant and distressing to the defendant, then the wife would be justified in leaving her husband and requiring support from him elsewhere."

In Buckner v. Buckner, 118 Md. 101, 84 Atl. 156, Ann. Cas. 1914B, 628, it appeared to be assumed that a wife might be justified in deserting her husband where he required her to live with his daughters by a former marriage, if their discourtesy and antagonism were such as to render her life miserable; but it held that the evidence did not show that the acts of discourtesy were sufficiently serious to entitle her to demand a separation of the father from his daughters as a condition of the resumption of the marital relation, where she entered into the marriage with knowledge that the husband would not give up his daughters, as she proposed, and with appreciation of their sensitiveness to her presence in the household in the place of their deceased mother.

In Giese v. Giese, 107 Ill. App. 659, the

shak instituted an action of divorce against Gustie Marshak on the ground of desertion. The facts, as shown by the record, are substantially as follows: Joe Marshak is thirty years of age and is the son of a farmer residing near the town of Dardanelle, in Yell county. On the 6th day of February, 1910, he married Gustie Lucas, the daughter of a neighboring farmer. She is twenty-four years of age. After their marriage they went to live with the father and mother of the plaintiff, each of whom are about seventy years of age. In July after the marriage the defendant left the plaintiff and stayed away from home three days. He went to her father's house, where she was, and she returned home with him. They continued to live with his parents until the first part of May, 1911, when she again returned to her father's home, and has not lived with the plaintiff since.

During the pendency of the action and on the 31st day of March, 1913, the plaintiff wrote to his wife that his father and mother had agreed to move from their place and go to live with another son who resided in the neighborhood, if she would return and live with him. In his letter he asked her to let him know whether she would return or not. She answered the letter and stated that she had hesitated because she feared his letter was not in good faith, and wrote him that his parents must move out, and that she must be placed in charge of the home as its exclusive mistress, free from the domination of any one except himself, and that if, after

further reflection, she could convince herself of his sincerity in the matter, she would return to him. The plaintiff did not reply to this letter, and says that he did not do so because she had left him and he thought she should return without any further action on his part.

The defendant testified that during the time she lived with her husband at the home of his parents the latter constantly abused her and mistreated her; that they called her vile names, which she mentions in her deposition, and that they were at all times ill-tempered and disagreeable towards her; that she told her husband that she had overheard his mother saying hard things about her, and that she could not live with her; that she told him that their remarks and abuse of her and bearing and temper towards her made it impossible for her to live in their house, and asked him to provide her a home at another place; and that her husband did not accede to her request, and did not in any way try to prevent his parents from mistreating her. She further stated that after she left him, and before this suit was instituted, she told him if he would provide a home for her she would go and live with him, but that she could not attempt to live with his father and mother any more because of their mistreatment of her. She stated that more than once before the bringing of this suit she had told him that if he would provide a home for her, she would be glad to go and live with him, and that he had replied

prevailing opinion; in holding the wife unjustified in deserting the husband, and therefore not entitled to separate maintenance, stated the facts to be that, against her wishes and request, the husband suffered the mother of his first wife to control the household, that the day after she (the wife) left he wrote asking her to return, and that she replied that she would not live with him and his mother-in-law, but would live with him and his daughter as soon as he obtained a home, and in the meantime they might live in her house, matters standing thus until the bill was filed. In the dissenting opinion, however, upholding the desertion, the judge recited these additional facts: "This woman [the mother-in-law] handled all the household funds and would let the wife do nothing. She even went to the store and purchased clothing which she thought was suitable for the wife; and when offended by something the wife did or said, for the last three weeks the wife remained she did not speak to appellant." The dissenting opinion also criticized the trial court for not permitting the wife to show that when she returned to the house in answer to the husband's letter, the mother-in-law took the wife's clothes and threw them in front of her and told her to L.R.A.1915E.

get out. Such a case as this unfortunately lends color to the criticism that courts are now and then moved to decide cases on general principles, and then sort out the particular facts which warrant the desired conclusion.

The rule which relieves the husband from living with the parents of the wife where unpleasantness and hostility exist is somewhat modified where the wife is sickly and unable to do the work necessary to maintain a home, and the husband is financially unable to supplement her efforts in this respect. This is illustrated by cases like *Copping v. Termini*, 135 La. 224, L.R.A. 1915A, 222, 65 So. 132. The report of this case in L.R.A.1915A, 222, is accompanied by a note dealing with the question whether the inability of the husband to support the wife is an excuse for her refusal to live with him.

As to desertion by forcing spouse to leave marital home, see the note to *Hudson v. Hudson*, 29 L.R.A.(N.S.) 614.

As to whether an effort by one spouse to induce the other to return home is a condition of desertion by the latter, see the note to *Hill v. Hill*, 29 L.R.A.(N.S.) 1118.

L. A. W.

that he could not make a living; and that since the bringing of this suit she had, at different times, offered to live with him if he would provide a home for her separate and apart from that of his parents. She stated in her deposition that she had been at all times ready and willing, and was then willing, to live with him if he would provide a home for her, and that she could not live with his father and mother. She is corroborated in all her statements by her father, except that he stated that he did not know whether or not the parents of the plaintiff abused her, or used the words towards her which she attributed to them.

The parents of the plaintiff testified that they had never applied any vile epithets to the defendant, and that they had not mistreated or abused her while she lived with them. They said she would go visiting three or four times every week, and that she would mistreat her husband. The mother of the plaintiff denied that she had quarreled with the defendant while she lived at their house, but stated that she had told the defendant that she did not think it right for her to be gone from home so much. She further stated that the defendant told her that she would not live with her husband any more. The plaintiff corroborated his mother and father in their statements, and said that they never mistreated her while she lived with them.

The record shows that the father and mother of the plaintiff were well-to-do people, and had two other married sons living in the same neighborhood, to whom they had deeded a part of their property. They had never given the plaintiff any of their property, but it appears it was their intention to live with him and leave him their home place when they died. The record shows that they were in good financial circumstances, and were physically and mentally capable of taking care of themselves. They were in no sense dependent upon their children for support or for care and attention. The plaintiff was an able-bodied, hardworking young man and had no bad habits.

The evidence on the part of the plaintiff tends to show that the defendant, after she left her husband, was seen several times in the company of some neighbor girls who did not bear a good reputation, but there is nothing whatever in the record from which it might be inferred that the defendant herself was not of good character. Other facts will be stated or referred to in the opinion.
L.R.A.1915E.

The chancellor found that the plaintiff was not entitled to a divorce, and dismissed his complaint for want of equity. The plaintiff has appealed.

Mr. Joe Marshak in *propria persona*.

Messrs. Bullock & Davis, for appellee:

In selecting the matrimonial domicile the husband cannot arbitrarily require his wife to live where her health or comfort will be jeopardized, or even where she seriously believes such results will follow; nor can he require her to live with his relatives.

9 Am. & Eng. Enc. Law, 2d ed. 802, note 7; Powell v. Powell, 29 Vt. 148; Hadenbergh v. Hadenbergh, 14 Cal. 654; Boyce v. Boyce, 23 N. J. Eq. 337; Hall v. Hall, 69 W. Va. 175, 34 L.R.A.(N.S.) 759, 71 S. E. 103; Mossa v. Mossa, 123 App. Div. 400, 107 N. Y. Supp. 1044; Gleason v. Gleason, 4 Wis. 64; Bishop v. Bishop, 30 Pa. 412.

Plaintiff's refusal to take defendant back under any circumstances brings the case within the rule that she is absent with his consent, and this may be implied from words or acts.

Reed v. Reed, 62 Ark. 611, 37 S. W. 230; Cox v. Cox, 35 Mich. 461; Beller v. Beller, 50 Mich. 49, 14 N. W. 696; Thompson v. Thompson, 1 Swabey & T. 231; Rose v. Rose, 50 Mich. 92, 14 N. W. 711; 1 Nelson, Divorce, § 67; 1 Bishop, Marr. Div. & Sep. §§ 1671-1690.

Hart, J., delivered the opinion of the court:

The sole ground upon which the plaintiff relied to obtain a divorce was desertion. The second subdivision of § 2672 of Kirby's Digest provides that the courts shall have power to dissolve a marriage contract where either party wilfully deserts and absents himself or herself from the other for a space of one year without reasonable cause. The record shows that the defendant has been absent from the home of the plaintiff for more than one year before the institution of this action. It is the contention of the plaintiff that the husband, because he is legally responsible for the support of his family, has an absolute right to choose and establish the domicile; it is also the contention of the plaintiff that the preponderance of the evidence shows that the parents of the plaintiff did not abuse and mistreat the defendant, and that her refusal to live with the plaintiff at the home of his parents was without reasonable cause, and amounted to desertion within the meaning of the statute. On the other hand, it is contended by counsel for the defendant, as held by

the supreme court of Nebraska in the case of *Brewer v. Brewer*, 79 Neb. 726, 13 L.R.A. (N.S.) 222, 113 N. W. 161, that every wife is entitled to a home corresponding with the circumstances and condition of her husband, over which she shall be permitted to preside as mistress, and that she is not guilty of desertion within the meaning of the statute where she refuses to live in the home of her husband's parents, which is under their domination and control. To the same effect see *Powell v. Powell*, 29 Yt. 148, Hall v. Hall, 69 W. Va. 175, 34 L.R.A. (N.S.) 758, 71 S. E. 103.

We have reached the conclusion that the chancellor did not err in refusing to grant a divorce to the plaintiff, but in doing so we do not deem it necessary to adopt in its entirety the contention of either party to this suit. It is apparent from the record that, while the parties to this suit may not have lived in perfect harmony, the principal subject of difference between them at any time was as to living with the mother and father of the plaintiff.

The plaintiff testified that before the marriage the wife agreed to live with him at the home of his parents. This was an antenuptial contract, and has no binding force. It was terminated by and merged into their marriage contract, which bound them to live together as husband and wife.

The principal question for us to determine is whether or not the wife wilfully remained away from the home of her spouse for a year without reasonable cause. We do not deem it necessary to determine whether or not under any circumstances the husband could establish his domicile at the home of his parents and compel his wife to live there, or be guilty of desertion within the meaning of the statute. It is true the parents of the plaintiff testified that they did not abuse or mistreat the defendant while she lived with them. In this respect they are corroborated by the plaintiff, but we do not deem that to be decisive of the rights of the parties in this case. The undisputed facts show that the parents had ample means of their own to support them, that they were not feeble in body or weak in mind, and that they did not need the services of their son to wait upon them. Besides, the record shows that they had two other sons, married and residing in the neighborhood, to whom they had deeded a part of their property, and with whom they were on affectionate terms.

If it be conceded that the parents of the plaintiff did not call the defendant vile names or abuse and mistreat her to the extent that she claims they did, still it is L.R.A.1915E.

apparent from the record that the defendant could not get along with the plaintiff's parents, and that their relations were unfriendly and unpleasant. The plaintiff's mother says that she did not quarrel with the defendant, but admits that she did tell her that she was away from home too much. The defendant testified that after she left the plaintiff, and before this suit was instituted, she told him she could not get along with his parents and live happily in their home, and that she was perfectly willing to live with him at any other home he might provide. We do not think the defendant left her husband because she did not desire to live with him, but on the contrary she left him because she was not able to live happily in the home of his parents. There was no necessity for her to live there. The plaintiff was a strong, able-bodied young man and was able to provide her a home at another place. Under the circumstances we think a just and affectionate husband should have listened to the pleadings of his wife, and should not have arbitrarily confronted her with a decision of either living unhappily with him at his parents' home, or living separate and apart from him at another place.

We do not regard the letters of the parties to each other, written after the institution of the suit, as of any importance in the case. It seems that those letters were written by each one simply for the purpose of obtaining an advantage over the other in the trial of the case. If the parties were sincere in the statements they made in their letters, there seems to be no reasonable cause why they should not again live together. They are both young, and of good moral character. It is true the evidence shows that the defendant was seen in the company of some neighbor girls who bore a bad reputation, but there is nothing whatever in the record from which it might be inferred that the defendant herself has been guilty of any improper conduct. Marriage was instituted for the good of society, and the marital relation is the foundation of all forms of government. For that reason the state has an interest in every divorce suit, and the marital relation, once established, continues until the marriage contract is dissolved upon some ground prescribed by the statute. The law presumes that when parties enter into the bonds of matrimony they do so with a full realization of the frailties of human nature, and with full recognition of their duty of mutual forbearance of the faults of each other.

The decree will be affirmed.

CALIFORNIA SUPREME COURT.

(In Banc.)

CITY OF HANFORD, Resp't.,

HANFORD GAS & POWER COMPANY,
Appt.

(— Cal. —, 147 Pac. 969.)

Gas — extending franchise — exaction of share of profits.

A city may, in granting to a corporation having power to occupy its streets with mains to supply its inhabitants with gas for lighting purposes, a franchise to supply gas for heat and power, exact a percentage of the gross annual receipts of the corporation, because of the additional authority granted, although the service is to be rendered by the use of the mains already in the streets.

(March 31, 1915.)

A PPEAL by defendant from a judgment of the Superior Court for Kings County overruling a demurrer to the complaint in an action to recover a percentage of the gross annual receipts of the defendant corporation from the operation of its franchise. Affirmed.

The facts are stated in the opinion.

Mr. John G. Covert for appellant.

Mr. F. E. Kilpatrick for respondent.

Henshaw, J., delivered the opinion of the court:

The city of Hanford, a city of the sixth class, sued defendant, the Hanford Gas & Power Company, to recover judgment for a specific sum, with interest, this sum being 2 per cent of the gross annual receipts of

the defendant earned by operating its plant in the city of Hanford, under the provisions of ordinance No. 115 of that city. Defendant demurred to the complaint. The demurrer was overruled. Defendant declining to answer, judgment was given against it, and it appeals. It appears that the defendant, a public service corporation, was and had been for many years occupying the streets of the city of Hanford with mains and laterals for the supplying of gas to the inhabitants of the city. It was exercising this franchise under the constitutional grant and permission of § 19, art. 11, of the Constitution as it read prior to the amendment of October 10, 1911. The legislature in 1901 enumerated certain franchises which a municipality might dispose of by sale, and provided for the manner of disposition. Stat. 1901, p. 265. Amongst these franchises was the franchise "to lay gas pipes for the purpose of carrying gas for heat and power." In 1902 an application was filed with the board of trustees of the city of Hanford for a franchise for the privilege of using the public streets and thoroughfares of the city for the purposes of laying pipes and conduits therein to supply the city and its inhabitants with gas "for heat, light, and power." Pursuing the course prescribed by the act of 1901, above cited, the city of Hanford advertised for bids, and sold this franchise to the applicant Young, who, in turn, conveyed and assigned all his franchise rights to defendant corporation. The act of 1901 required that the successful bidder and his assigns must, during the life of the franchise, pay to the municipality 2 per cent of the gross annual receipts arising from the use and

Note. — Right to exact additional compensation when extending street franchise to cover additional purposes.

This note is limited to the question before the court in HANFORD v. HANFORD GAS & POWER Co., and does not include cases where the new grant contemplates an extension of tracks, mains, or other means of using the franchise upon the same or other streets.

The grant under which defendant in HANFORD v. HANFORD GAS & POWER Co. furnished gas to the municipality before acquiring the special franchise reads as follows: "In any city where there are no public works owned and controlled by the municipality for supplying same with water or artificial light, any individual or any company duly incorporated for such purpose under and by authority of the laws of this state shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, L.R.A.1915E.

have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof." Cal. Const. 1879, art. XI, § 19, as amended in 1884.

The particular question raised in HANFORD v. HANFORD GAS & POWER Co., it will be seen, arose out of the construction of the clause of the California Constitution, as quoted, supra. Judge Dillon says that this is probably the widest and most sweeping grant of franchises that has been made by any of the states. 3 Dill. Mun. Corp. § 1304. The statement appears to be absolutely correct in the sense in which Judge Dillon was discussing it, i. e., a direct grant by the people without any legislation necessary by state or city. But it will be seen at once that in one respect the grant is not

operation or possession of the franchise. Such provision was contained in the grant to Young. It is this 2 per cent which defendant has refused to pay, and for which judgment was sought and obtained. Upon appeal appellant places reliance upon such cases as *Re Johnston*, 137 Cal. 115, 69 Pac. 973; *Denninger v. Recorder's Ct.* 145 Cal. 629, 79 Pac. 360; *People ex rel. Los Angeles v. Los Angeles Independent Gas Co.* 150 Cal. 557, 89 Pac. 108; and *St. Helena v. Ewer*, — Cal. App. —, 146 Pac. 191. To sum up its argument under these cases, appellant declares that, by virtue of the constitutional grant in § 19, art. 11, it had the free right to use the streets for gas mains and laterals without being subject to any charge for such use by the municipality. This may at once be conceded to be true. It argues that, while the Constitution limits the right of public service corporations to the use of the streets for the purpose of supplying "gaslight or other illuminating light," the fact that by the same mains and laterals the gas so carried and purveyed may be used for heat or power imposes no additional burden upon the municipality or its streets, and does not therefore become the legitimate subject-matter of a new franchise, with onerous payments and exactions thereunder; that therefore it acquired nothing by virtue of the franchise which it secured for the furnishing of gas for heat and power, and, as it acquired nothing, can be made to pay nothing for

nothing. The cases upon which appellant relies, however, are not decisions in accordance with its contention, which contention was in no one of them involved. *Re Johnston*, 137 Cal. 115, 69 Pac. 973, merely decided that certain onerous provisions of an ordinance of the city of Pasadena unconstitutional hampered the right of public service corporations to lay their pipes for illuminating gas or water in the streets of that city, and, so far as the matter before us is concerned, it decided nothing more. To the suggestion on the part of the city of Pasadena that it was the purpose of the corporation to supply gas for other than illuminating purposes, this court answered that, even if the suggestion were founded upon fact, it did not deprive the corporation of the right conferred upon it by the Constitution (to lay pipes for the furnishing of gas for light), "or authorize the municipality to prevent it from enjoying that right." In *Denninger v. Recorder's Ct.* 145 Cal. 638, 79 Pac. 364, an ordinance regulating and fixing gas rates was under consideration. The petitioner was convicted of having collected a rate in excess of the municipal rate. The conviction was upheld. In the course of the discussion this court said: "Section 19 of article 11 does not directly confer upon any individual or company the right to lay pipes and conduits in the streets of a city in order to supply gas for cooking and heating purposes, but only so far as may be necessary for supplying

nearly as wide or sweeping as is the ordinary grant. Most grants include the right to furnish a specified commodity, such as gas or electricity, but the grant under this clause does not specify the commodity at all, but merely gives the right to furnish "gaslight or other illuminating light." The peculiarity in the wording of the clause probably accounts for the fact that no cases can be found that are directly in point as to facts. Reasoning from well established general principles, however, there is no escape from the conclusion reached in *HANFORD v. HANFORD GAS & POWER CO.* "Grants of franchises, being against common right, are strictly construed in favor of the grantor, and against the grantee, so that nothing passes by implication, where the meaning is doubtful or where the implication is not necessary" (10 Cyc. 1088). Under this rule, courts have gone to the extent of holding that an exclusive franchise to furnish "gas," granted before the discovery of natural gas, includes only manufactured gas. *Circleville Light & P. Co. v. Buckeye Gas Co.* 69 Ohio St. 259, 69 N. E. 436; *Warren Gaslight Co. v. Pennsylvania Gas Co.* 161 Pa. 510, 29 Atl. 101; *Cumberland Gaslight Co. v. West Virginia & M. Gas Co.* 110 C. C. A. 383, 188 Fed. 585. There may be other cases on the same point. Applying this principle would, as a matter of course, exclude from a grant of the right to furnish "gaslight or other illuminating light," the right to furnish gas, electricity, or any other commodity for any other purpose than that of light. The clause was intended to enable the city to have light no matter what the commodity producing it might be. It would also seem very difficult to argue that because no extra burden would be placed upon the streets, the grant of a right to furnish light includes the right to furnish heat, etc., no particular commodity being mentioned in the grant.

It was also held in *HANFORD v. HANFORD GAS & POWER CO.*, that the municipality was not deprived of the right to collect the compensation for the extra franchise according to the terms thereof, because of the fact that no extra burden was or would be placed upon the streets in order to enable the grantee to fulfil his part of the agreement. This holding would seem to be a logical deduction from the holding that the privileges granted by the second franchise were not included in the first grant, and were of value to the grantee, taken into consideration with the fact that the compensation was provided for in the terms of the second grant which had been acquired by the defendant.

J. W. M.

the city and its inhabitants with gaslight. The same gas, however, which furnishes light, also serves for cooking and heating, and the pipes and connections necessary for the one purpose make the gas available for the other purposes without subjecting the streets to any additional burden."

In *People ex rel. Los Angeles v. Los Angeles Independent Gas Co.* 150 Cal. 557, 89 Pac. 108, the state, by quo warranto, sought to forfeit the unquestioned constitutional franchise of the defendant gas company to use the streets for the supplying of gas for illuminating purposes, because the company was also, through the same mains, laterals, and connections, supplying the same gas for purposes of heat, power, and cooking. It is to be borne in mind that the effort was not to prevent the defendant company from using a franchise which it did not possess, namely, the franchise to supply the gas for purposes other than illumination, but it was to forfeit its franchise for the supplying of gas for illumination, because it was permitting the gas to be used for other purposes. The trial court refused to forfeit the franchise, and this court affirmed the judgment. In so doing it nowhere declared that a gas company, purveying gas under the Constitution for illuminating purposes, had under that constitutional franchise the right to supply it for other purposes. It held merely that it would not forfeit the franchise because it was so doing. It is not even intimated as to what the decision of this court would have been had the action been addressed to an effort to restrain the defendant corporation from exercising a franchise not given to it by the Constitution, namely, the franchise of supplying gas for heat, power, and cooking. It is said in this case, but only *arguendo*, that "the burden [upon the street] is in no way increased by the fact that the use of the gas carried through the pipe is not confined to illumination."

In *St. Helena v. Ewer*, — Cal. App. —, 146 Pac. 191, the court of appeal had under review an ordinance of the town of St. Helena granting a franchise for supplying the town and its inhabitants with water. The defendant acquired this franchise under a bid agreeing to pay $7\frac{1}{2}$ per cent of the gross annual receipts from the sale of water under the franchise. This franchise was one granted under the franchise act of 1897 (Stat. 1897, p. 135), held to be unconstitutional in *Pereria v. Wallace*, 129 Cal. 397, 62 Pac. 61, as an attempt to impose illegal conditions upon the franchises freely granted by the Constitution under § 19, art. 11.

Manifestly, no one of these cases is in point upon the question here under consideration.

The franchise granted by the city of Hanford did not attempt to touch upon, nor deal with, defendant's rights to supply gas for illuminating purposes. Unquestionably, while the same gas may be used through the same mains and laterals, the use of gas for heat and power is a distinct and different use from its use for illumination, and it is only the right to the latter use which is protected and, so to speak, given free under the Constitution. To say, as our decisions have said, that the franchise to supply illuminating gas, will not be forfeited because the purveyor permits its gas to be used for purposes not covered by the franchise, is very different from saying that with the franchise to furnish gas for lighting purposes goes the franchise right to furnish it for the other purposes. The latter this court has never said, and from nothing that it has said can any such inference be derived. If the use is different, the right to the use is different. Conceivably a corporation might be formed for the purpose of supplying a gas unfit for illumination, but eminently well suited for purposes of heat and power. Could such a company without a franchise occupy the streets for this purpose under the constitutional grant of a right to occupy the streets for the supplying of illuminating gas? If it could not, then *per contra* a company supplying illuminating gas has acquired no right to supply a gas for the other separate enumerated uses. The vital question then is: Did the defendant, in accepting this franchise from the city of Hanford, acquire anything of value? If it did, then, no element of fraud entering into the case, it is bound by its contract. We think clearly that it did. Up to the time that it acquired the right to supply gas for purposes of heat and power, it had the franchise right to supply gas solely for purposes of illumination, with the added guaranty under the decisions of this court that its franchise to supply illuminating gas would not be forfeited merely because it permitted its gas to be used for these other purposes. It was not told that it had the right, and it did not have the legal right, to permit its gas so to be used. If effort had been directed to that end, this use could undoubtedly have been restrained. The city of Hanford admittedly, under its charter (Mun. Corp. Act [Stat. 1883, p. 270], § 862, subdiv. 13), had the power to grant the franchise for the use of its streets for the purveying of gas for heat and power, if the constitutional grant before referred to did not stand in the way. Clearly, it did not stand in the way, and, moreover, the legislature itself had recognized that the different uses were subject to different fran-

chise rights, and had made provision for the award by municipalities of separate franchises permitting these new uses.

The judgment appealed from is therefore affirmed.

We concur: Angellotti, Ch. J.; Lorigan, J.; Melvin, J.; Shaw, J.; Sloss, J.

GEORGIA SUPREME COURT.

JOHN NICHOLSON et al., Plffs. in Err.,

P. D. DAFFIN et al., Park and Tree Commissioners.

(142 Ga. 729, 83 S. E. 658.)

Cemetery — rules — care of lots.

1. The grantee in a deed to a lot in a

Headnotes by EVANS, P. J.

Note. — Validity of regulations concerning care or improvement of cemetery lots.

Generally, as to regulations of burials and cemeteries, see the note to Laurel Hill Cemetery v. San Francisco, 27 L.R.A. (N.S.) 260.

Generally, as to the character of the estate or property of the owner in a burial lot, see note to Waldron's Petition, 67 L.R.A. 118.

Delegation of power by legislature.

A statute authorizing cemetery associations to enact by-laws providing for the care and management of all burial lots and the protection of all shrubs, trees, fences, and monuments thereon, and making it an offense for any person to violate any such by-law, authorizes a joint stock cemetery association to enact a by-law providing that no person shall plant, cut, or trim any herbage of any kind except by the consent and direction of the president or superintendent of such association; and in this respect neither the statute nor the by-law is invalid as depriving persons of the proper use and control of their own property. *State v. Scoville*, 78 Conn. 90, 61 Atl. 63. It was also contended in this case that only nonstock associations were authorized to enact a by-law under this statute, but the court held that neither the language of the statute referred to, nor of § 4452 of the General Statutes permitting the organization of cemetery associations in accordance with the provisions of § 3937, which provided for the formation of corporations without capital stock, required cemetery associations to be organized under § 3937 in order to become such within the meaning of the enabling act. The language of the sections of the General Statutes referred to was not disclosed.

In connection with the penal phase of the L.R.A.1915E.

public cemetery, for the purpose of sepulture, acquires only an easement in the soil for the purpose of the grant. A municipality acquiring the fee to the cemetery, subject to the easement of the lot owner, may make reasonable rules for the care and management of lots in the cemetery agreeably with the grant of the easement. A rule requiring the written authority of the commission charged by law with the superintendence of the cemetery, before any professional gardener or other person for hire can be employed to care for a lot, is unreasonably enforced by the arbitrary refusal to grant permission to a lot owner to employ a suitable person to care for the lot, because, in the opinion of the commission, they can furnish material and perform the work required cheaper than the service may be elsewhere obtained.

Injunction — propriety.

2. Injunction was the proper remedy in this case.

(November 14, 1914.)

statute in the foregoing case, note that a New York case holds that the legislature has no power to delegate to a cemetery association the right to impose penalties upon persons entering the cemetery and cutting grass and caring for lots under employment by lot owners, in violation of rules and regulations of the association. *Johnstown Cemetery Asso. v. Parker*, 28 Misc. 280, 59 N. Y. Supp. 821, affirmed in 45 App. Div. 55, 60 N. Y. Supp. 1015.

Exercise of power.

In discharging, in behalf and for the benefit of the public, the duty of providing, maintaining, and protecting a burial place, a cemetery association is not only authorized to provide suitable burial places and to regulate the use of the same so far as may be necessary for the protection of the public health, but also to keep and maintain that condition and appearance of the entire cemetery grounds, including burial lots, which are generally demanded by public sentiment and taste. *State v. Scoville*, supra.

Generally, one receiving a deed of a burial lot from the cemetery association does not take title to the soil itself, but is entitled merely to a limited use of the particular lots for purposes of interment, and is subject to the reasonable police regulations of the association having charge of the cemetery,—such as a rule that no person shall plant, cut, or trim any herbage of any kind without the consent or direction of the president or superintendent. And this is especially so where the holders of burial lots have acquired the same under deeds providing that the lots are granted both subject to the charter and to the by-laws, rules, and regulations made or to be made in conformity therewith; and that the grantees are entitled to the rights and privileges by said charter, by-laws, rules, and regulations

ERROR to the Superior Court for Chat-ham County to review a judgment in defendants' favor in an action brought to enjoin them from interfering with plaintiffs' employment of competent agents for the proper improvement of their cemetery lot and for doing work thereon. Reversed.

The facts are stated in the opinion.

Mr. David C. Barrow for plaintiffs in error.

Messrs. John Rourke, Jr., and D. S. Atkinson, for defendants in error:

Irrespective of the covenants with the Evergreen corporation, it being conceded that the city now owns the cemetery, and that the park and tree commission has "exclusive control" of it, the park and tree commission has the power to make all reasonable rules and regulations for the proper government and care of the cemetery.

Jacobus v. Congregation of Children of

secured; and that the deed "is given on condition that the grantee shall devote the premises to the specific purpose for which the cemetery was established, and to no other." *Ibid.*

A regulation providing that all lots and graves shall be cared for under the direction of the superintendent of the cemetery at moderate prices, and that no person shall be permitted to enter the cemetery at the instance of any lot owner for the purpose of cutting grass, planting flowers, or sodding and grading lots, is reasonable as a means of promoting uniformity of improvement and ornamentation. *Cedar Hill Cemetery Co. v. Lees*, 22 Pa. Super. Ct. 405. It was further held in this case that a gardener employed by lot owners, but bearing no contractual relations to the cemetery association, was not in a position to attack the regulation as being in restraint of trade and therefore against public policy.

Where the deed conveys merely an exclusive right of burial and the right to erect a monument or gravestone, the owner is not entitled to place a wreath covered by a glass shade and wire screen upon the grave against the objection of the cemetery authorities, especially where they would have no power expressly to grant such right,—so long as other lot owners are not permitted to place similar objects upon graves. *McGough v. Lancaster Burial Bd.* L. R. 21 Q. B. Div. 323, 57 L. J. Q. B. N. S. 568, 36 Week. Rep. 822, 52 J. P. 740.

In *Graves v. Bloomington*, 67 Ill. App. 493, involving a prosecution for assault and battery against the superintendent of a cemetery, for forcibly ejecting a person who came to care for graves under employment of the owners of lots, it was held that, although the association's charter conferred a private franchise, the same was impressed with a public character, and that the owners of lots were entitled to enter and improve and care for their lots, and could not

Israel, 107 Ga. 518, 73 Am. St. Rep. 141, 33 S. E. 853, 6 Am. Neg. Rep. 437; *Stewart v. Garrett*, 119 Ga. 386, 64 L.R.A. 90, 100 Am. St. Rep. 179, 46 S. E. 427; 6 Cyc. 717; 5 Am. & Eng. Enc. Law, 789; *Dwenger v. Geary*, 113 Ind. 116, 14 N. W. 903; *Kincaid's Appeal*, 66 Pa. 411, 5 Am. Rep. 381; *Went v. Methodist Protestant Church*, 80 Hun, 266, 30 N. Y. Supp. 157; *Hertle v. Riddell*, 127 Ky. 623, 15 L.R.A. (N.S.) 796, 128 Am. St. Rep. 364, 106 S. W. 282; *McGough v. Lancaster Burial Bd.* 57 L. J. Q. B. N. S. 568, L. R. 21 Q. B. Div. 323, 36 Week. Rep. 822, 52 J. P. 740; *Martin v. Wyatt*, 48 J. P. 215; *Close v. Glenwood Cemetery*, 107 U. S. 466, 477, 27 L. ed. 408, 412, 2 Sup. Ct. Rep. 267; *State v. Scoville*, 78 Conn. 90, 61 Atl. 63; *Cedar Hill Cemetery Co. v. Lees*, 22 Pa. Super. Ct. 405; *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 605, 44 S. E. 769.

be excluded so long as they created no disturbance and complied with the reasonable regulations of the association.

Where a deed gave the right to construct a private grave and the exclusive right of burial therein, to hold to the grantee in perpetuity for purpose of burial, and of erecting a monument or stone, with a proviso that if the monument or stone with the appurtenances should not be kept according to regulations, the grant should be void,—it was held that the grantee could not, by a regulation subsequently made, be deprived of the right which she had exercised in the meantime of planting and ornamenting the grave. *Ashby v. Harris*, 37 L. J. Mag. Cas. N. S. 164, L. R. 3 C. P. 523, 18 L. T. N. S. 719, 16 Week. Rep. 869.

A cemetery association whose act of incorporation provides that the lots shall be held as real estate cannot, by an order intended to give the association exclusive control of the care of all lots through its employees, prevent a lot owner from exercising through his own agent or servant the right to cultivate trees, shrubs, and plants, where he has enjoyed the same for some twenty years under express provision of the deed of his lot, which reserves only the right of entry for the purpose of removing anything placed on the lot by the grantee which may have become dangerous, inconvenient, offensive, or improper. *Silverwood v. Latrobe*, 68 Md. 620, 13 Atl. 161.

No duty to pay the cost of maintenance, in pursuance of a regulation that all lots shall be cared for by the sexton at stipulated prices, is imposed upon a lot owner by provisions in his deed that he shall have the use of the lot in fee simple for the purpose of sepulture only, subject to the rules and regulations governing the cemetery, and that the proprietor reserves the control of the lot in accordance with such rules and regulations. *Monett Lodge No. 106, I. O. O. F. v. Hartman*, 185 Mo. App.

Evans, P. J., delivered the opinion of the court:

The Evergreen Cemetery Company of Bonaventure, a corporation, sold and conveyed by deed under seal, unto John Nicholson, Jr., Matilda Nicholson, Robert B. S. Nicholson, and Mary Matilda Nicholson, their heirs and assigns forever, as a burial place for the dead, a certain lot in the cemetery—"upon condition, nevertheless, that the said John Nicholson, Jr., Matilda Nicholson, Robert B. S. Nicholson, and Mary Matilda Nicholson, their heirs and assigns, shall henceforth and at all times hereafter hold, use, and occupy the said portion of ground hereby granted solely as a place of interment for the dead, other than persons of color, and to and for no other use or purpose whatsoever; and shall also

hold, use, and occupy the same as a part and parcel of the grounds of the said Evergreen Cemetery, and subject to all the by-laws, rules, regulations, and ordinances which are or may be ordained and established by the Evergreen Cemetery Company of Bonaventure for the government of said cemetery, legally and by virtue of their charter of incorporation as it now exists, or as it may be hereafter amended."

Two of the grantees, Matilda Nicholson and Robert B. S. Nicholson, died since the making of the deed, and the other two grantees are their sole heirs at law. In July, 1907, the mayor and aldermen of the city of Savannah purchased the cemetery from the Evergreen Cemetery Company of Bonaventure. Upon the purchase of the cemetery by the city of Savannah the park

148, 170 S. W. 670. In reaching this conclusion the majority opinion states that whatever the moral duty may be, there is no legal duty upon the part of the lot owner to keep the resting place of his dead in an attractive condition, and that if any such duty is sought to be imposed upon him by regulation, it must be by specific words. It is said that there was no specific promise in the deed, and none could be spelled from the circumstance that for several years the owner paid the stipulated assessment, objecting only when the proprietor sought to raise the rate. In a minority opinion two judges take the contrary view.

A lot owner holding under a deed granting him the entire estate in the premises, subject to the rules and regulations annexed to the deed, and according him the right to cultivate trees, shrubs, and plants upon the premises, cannot be deprived of the privilege of exercising that right through his agent or employee by a regulation designed to place the care of lots within the exclusive control of the cemetery association, for revenue purposes among others, where the only power reserved by the grantor is the right to remove any offensive, improper, or injurious objects placed upon the premises, and to make such rules and regulations for the government of the grounds as the trustees may deem proper. *Johnstown Cemetery Asso. v. Parker*, 28 Misc. 280, 59 N. Y. Supp. 821. This case was affirmed in 45 App. Div. 55, 60 N. Y. Supp. 1015, on the point to which it is cited in a preceding paragraph.

An objection that, in enacting a by-law forbidding any person to plant, cut, or trim any herbage of any kind upon any burial lot or other portion of the cemetery, without the consent and direction of the president or superintendent, a cemetery association sought to arbitrarily control the cutting of grass, etc., for other reasons than to secure the proper care and management of the burial lots, cannot prevail where it appears, not that the president or superintendent had refused permission, but that such consent was not asked for, and it does not appear

either that the person accused of violating the by-law was a lot holder or that the herbage was out within the limits of any burial lot. *State v. Seoville*, 78 Conn. 90, 61 Atl. 63.

A cemetery company of a quasi public character, having power to take property for its use by eminent domain, must exercise its powers of regulation fairly and impartially, and cannot prevent the erection of a vault on a particular lot without the adoption of a general rule on the subject which will be applicable to all lots. *Rosehill Cemetery Co. v. Hopkinson*, 114 Ill. 209, 29 N. E. 685. In this case it was held that a particular lot owner could not be arbitrarily denied the right to construct a vault while others were permitted to do so, where he had filed plans and specifications as required by a rule of the company, the same not having been regarded as objectionable, and where his deed provided that he should have the right to erect any proper stone or monument or sepulchral structures, but that no vault should be built entirely or partially above the ground without permission of the company, and that no portion of vaults above ground should be of other material than cut stone, granite, or marble, without the consent of the company.

And no general discretion with respect to the cemetery and plan of improvement of the same rests in its board of trustees, by which it can prevent a lot owner from building a mausoleum on the side of a lot instead of in the center, where the lot owner holds a fee restricted as to alienation generally, and holds the same subject to the rules and regulations contained in the deed and to those which may be adopted in a lawful way, and where the board seeks to act in an individual case, and not by a general order covering all lots, especially where the plans for the proposed mausoleum have been approved by the board so far as design is concerned, and the owner has made the contract for its construction in reliance upon such approval. *Pitcairn v. Homewood Cemetery*, 229 Pa. 18, 77 Atl. 1105.

L. A. W.

and tree commissioners of the city took charge of it. Under the act of the general assembly establishing such commission they have exclusive control of the cemetery, and have adopted the following rule: "No professional gardener or other person for hire shall be permitted to take care of any private lot or do any work on said lot, without written authority from this commission; but nothing in this rule shall be construed as forbidding any lot owner or member of his or her family from doing work on said lot."

On April 3d, 1913, Mary Nicholson (who had intermarried with one Moore), with the approval of her brother John, the joint owner of the lot, purchased from a responsible and competent florist of Savannah a wagon load of fertilizer for the purpose of having the same placed and used upon the lot belonging to them, where the members of their family were buried. This load of fertilizer was sent by the florist to the cemetery, and was met at the gate by Mrs. Moore, who accompanied the wagon into the cemetery for the purpose of directing the driver to her lot. While she was proceeding with the load of fertilizer down the street of the cemetery towards her lot, the agent of the park and tree commissioners in charge of the cemetery required the driver to turn the horse and wagon about, and was proceeding to force the driver to take the wagon from the cemetery. Mrs. Moore protested to the agent, stating that she, as a lot owner in the cemetery, had purchased the fertilizer, and was taking it to her lot, and that it would be placed on the lot under her personal direction and supervision; and she demanded that the agent desist until she could communicate with the park and tree commission. She then telephoned the chairman of the commission, who replied that he would not permit the load of fertilizer to be carried to her lot, and that the rules of the park and tree commission did not permit the purchase of fertilizers by the owners of lots from anyone else than the park and tree commission. The chairman of the park and tree commission then ordered his agent to send the load of fertilizer from the cemetery, which was done. Thereupon Mrs. Moore, through her attorney, made a request to the park and tree commissioners of Savannah for permission to purchase material needed for use upon her lot, and for permission to employ a competent agent to place such material upon her lot and do the work desired by her upon the lot. The response to this request was conveyed in the form of a resolution of the commissioners, to wit: "Resolved, that Mr. D. C. Barrow, attorney for Mrs. Mary N. Moore, be informed that his letter has been

received and placed before the commission, and that we are compelled to refuse his client's request, and call attention to the rule adopted by the park and tree commission, copy of which is herewith furnished, and to say that we will not give written authority to your client to employ a professional gardener or other person for hire, as we are in position to furnish such material or to perform such work as she may require at a lesser figure than she could employ outside help."

Thereupon Mrs. Moore filed a petition setting forth the foregoing facts, and further alleging that when the lot was purchased from the Evergreen Cemetery Company of Bonaventure that corporation had no by-laws, rules, or regulations prohibiting lot owners from purchasing any material they considered necessary upon their lots for the cultivation of plants, flowers, and shrubs, or to employ a skilful and competent person to care for and work upon the lot, but, on the contrary, the cemetery company authorized and permitted lot owners to purchase materials from anyone they selected, and authorized and permitted them to employ any skilful and competent person to care for and work upon the lots. She alleged that she had contracted with a named florist, who was competent and skilful, to do certain work and beautify her lot, and had purchased from him fertilizers needed upon her lot in order to put and keep the same in proper condition, but that she was prohibited by the park and tree commission from having her contract executed; and she prayed that they may be enjoined from interfering with her employment of competent and skilful agents in the proper improvement of her lot, in placing fertilizer and material thereon, and doing work thereon. The petition was dismissed on demurrer, and the plaintiff excepted.

1. One who purchases a lot in a public cemetery for burial purposes, though the right of interment therein be exclusive, does not acquire any title to the soil, but only an easement or license for the use intended. *Stewart v. Garrett*, 119 Ga. 386, 64 L.R.A. 99, 100 Am. St. Rep. 179, 46 S. E. 427; *Jacobus v. Congregation of Children of Israel*, 107 Ga. 518, 73 Am. St. Rep. 141, 33 S. E. 853, 6 Am. Neg. Rep. 437. The rights of burial are so far public that the right of exclusive interment is subject to the reasonable police regulations of the association or corporation having charge of the cemetery. *Edwards v. Stonington Cemetery Asso.* 20 Conn. 466. Undoubtedly the municipality of the city of Savannah, acting through its park and tree commission, had the right to make reasonable rules and regulations respecting the care, management, and protec-

tion of the cemetery. When the plaintiff acquired ownership of her easement, there was no rule or regulation passed by the Evergreen Cemetery Company of Bonaventure, nor did it promulgate any such rule or by-law, forbidding lot owners to employ competent and skilful persons to assist them in the care of their lot. After the city of Savannah became the owner, the municipal authorities, in effect, held the fee in trust for the purposes for which the corporation from whom they purchased was organized. It would seem clear that the owner of a burial lot would have the right of personal superintendence, so long as that superintendence did not work to the injury of the cemetery or other lot owners. If the lot owner had the personal right to work upon her lot, as the rule of the park and tree commission concedes, we can see no reason why she would not have the right to have the work done by a competent and skilful person of her own choosing. The park and tree commission would have the right to pass any reasonable rule affecting the improvements in the lots; but it would seem to pass beyond the region of legitimate regulation to require of a lot owner that she buy her fertilizer from the park and tree commission, and that no work would be permitted by a gardener of her selection, however capable, and however proper the work may be done. *Ashby v. Harris*, L. R. 3 C. P. 523, 18 L. T. N. S. 719, 37 L. J. Mag. Cas. N. S. 164, 16 Week. Rep. 869; *Silverwood v. Latrobe*, 68 Md. 620, 13 Atl. 161. The rule of the park and tree commission, on its face, seems to be within the sphere of legitimate regulation. It does not forbid a lot owner from employing any competent person to care for the lot, but requires that the written consent of the commissioners be obtained. Under this rule the commissioners would have no right to arbitrarily withhold consent to the employment of a suitable person by a lot owner to care for her lot. Of course, they could impose reasonable regulations respecting the time of work, and such other requirements as would tend to the protection of the cemetery and other lot owners. In their resolution the commissioners arbitrarily refused to allow the plaintiff to employ any person for hire, irrespective of his competency to do the work and of the nature of the work to be done, and they undertook further to require that all material be furnished by them, as well as the necessary labor, and based their refusal on their ability to furnish cheaper service. We think the action of the board, as contained in their resolution, amounted to an arbitrary refusal to consent to the employment of any agent by the plaintiff to work upon her lot, or L.R.A.1915E.

to the use of any material not purchased from the park and tree commission. We therefore think that the commission acted arbitrarily in the matter.

2. The order of the judge dismissing the petition was as follows: "The remedy of the plaintiff, if any there be, is not by injunction; and the demurrer is therefore sustained and the petition dismissed."

We think the remedy by injunction was appropriate to the facts of the plaintiff's case. She was informed by the park and tree commission that they would not permit her to bring into the cemetery for use upon her lot any fertilizer, irrespective of its innocuous character. She was also informed that she could not employ a competent and skilful gardener to look after and care for her lot, but that she would have to accept service from the commission. The park and tree commission are in charge of the cemetery, and are in position to enforce their demand. It seems to us that the plaintiff has pursued the proper remedy to assert her rights pertaining to the ownership of her lot.

Judgment reversed.

All the Justices concur, except Fish, Ch. J., absent.

KENTUCKY COURT OF APPEALS.

BIGE JONES, Appt.,

v.

ROBERT VAN BEVER et al.

(164 Ky. 80, 174 S. W. 795.)

Sheriff — liability for act of deputy — arrest not in official capacity.

1. An arrest by a deputy sheriff under circumstances not authorized by statute, as where he has no warrant, or reason to believe that the person arrested has committed a felony, and no offense has been committed in his presence, is not in his official capacity, and therefore the sheriff is not liable for his act.

Pleading — conclusion of law.

2. An allegation in a petition to hold a sheriff liable for an arrest made by his deputy, that the act was done by the deputy in his official capacity, is a mere conclusion of law.

(Carroll and Hannah, JJ., dissent.)

(March 26, 1915.)

Note. — Liability of sheriff, marshal, or constable for his deputy's tort in making an arrest.

Supplementing the note to *Brown v. Walsh*, 12 L.R.A. (N.S.) 1019.

A PPEAL by plaintiff from a judgment of the Circuit Court for Bell County dismissing a petition filed to recover damages for alleged unlawful arrest of plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. Patterson & Ingram for appellant.

Mr. Charles I. Dawson for appellees.

Miller, Ch. J., delivered the opinion of the court:

This appeal is presented from a judgment sustaining demurrers to the two paragraphs of the petition, and dismissing it upon plaintiff's failure to amend. At the times mentioned in the petition, the appellee Robert Van Bever was sheriff of Bell county, and J. F. McCoy and A. V. Haynes were his regularly appointed deputies.

After reciting the qualification of Van Bever as sheriff, and the appointment and qualification of McCoy and Haynes as his deputies, the first paragraph of the petition reads as follows: "Plaintiff further states that said deputy sheriffs, in July or the 1st of August, 1913, in their official capacity, as aforesaid, and by virtue of their said office as deputy sheriff, at Arjay in Bell county, Kentucky, did unlawfully and without warrant or process from any court, and without reason to believe that plaintiff had committed a felony, and when he had committed no offense in their presence, arrest the plaintiff at said place in the presence of divers and sundry people, and then and there, by virtue of their said official capacity, did forcibly and unlawfully,

ly, and against the will and consent of the plaintiff, drag and force him to enter a train and go with them from said place to Pineville, Kentucky, and there, in the presence of divers and sundry people, they took him into the presence of Charles I. Dawson, county attorney, where, by advice of said county attorney, they released the said plaintiff, and by said acts the said plaintiff was greatly humiliated and caused to suffer great mental anguish and distress, all to his damage in the sum of \$1,000."

The second paragraph of the petition, as amended, is a substantial copy of the first paragraph above set out, except that it sets up and relies upon a second arrest made by McCoy and Haynes in August or September, 1913; and that, instead of being released, plaintiff was delivered to one Yeary for the purpose of being transported by Yeary into the state of Tennessee, against plaintiff's will and consent.

The trial judge sustained the demurrers and dismissed the petition, upon the theory that it showed that the deputy sheriffs were acting without any authority of law when they arrested the plaintiff; and that they were doing something not required of them in the performance of their duties as officers. Moreover, some stress is laid upon the fact that it is shown by the second paragraph of the petition that the plaintiff was not arrested for any violation of the laws of the state of Kentucky; but, if he was arrested for any offense, it was for an offense committed in the state of Tennessee.

The sole question, therefore, for decision in this case, is: Was the action of the deputy

As indicated by JONES v. VAN BEVER and the note above referred to, the officer's liability in the premises depends upon whether his deputy's act was within the scope of his authority, or was merely his individual act. There are few authorities in addition to those cited in the earlier note and those which are sufficiently set out in JONES v. VAN BEVER.

It was assumed without comment in King v. Gray, — Ala. —, 88 So. 643, that an arrest without a warrant by a deputy sheriff was an official act for which the sheriff was liable. And where the defendant had instructed his deputy to enforce a milk license ordinance by making arrests, and the latter had been making arrests for years with the defendant's knowledge, it was declared without discussion in Gambill v. Cargo, 151 Ala. 421, 48 So. 866, that in making an unlawful arrest without a warrant, where no violation of the ordinance had been committed in his presence, the deputy was acting within the scope of his authority so as to render the defendant liable for the unlawful arrest. And without showing the defect in the arrest, the court in Hereford v. Brentz, — Ala. —, 68 So. L.R.A.1915E.

350, was content to state the generality that a general deputy, like the sheriff, is a peace officer, and has the same authority to arrest, with or without warrant; and that if the deputy, while acting as such, commits a tort or trespass upon another, for which he would be liable, his chief is also liable in the same degree and to the same extent civilly as the deputy himself. It was also held that the sheriff might be liable in punitive damages, although the deputy's act was wrongful and malicious.

It was held in King v. Brown, 100 Tex. 109, 94 S. W. 328, that an official act for which a sheriff was responsible was committed by his deputy in wrongfully wounding a person while trying to arrest him in the erroneous belief that he was the one of a group of persons who had committed a breach of the peace in the view of the deputy.

Generally, as to the liability of an officer for making an arrest, see the notes to Leger v. Warren, 51 L.R.A. 193; Lawton v. Harkins, 42 L.R.A.(N.S.) 69; and Brown v. Hadwin, L.R.A.1915B, 505. See also in those notes, references to annotation on analogous topics.

L. A. W.

ty sheriffs, in arresting Jones at a time when he had committed no offense in the presence of the deputy sheriffs, and when they had no warrant for his arrest, and no reasonable ground to believe he had committed a felony, such an official act of the deputies as made their principal liable therefor in damages?

The official bond of the sheriff, given under § 4556 of the Kentucky Statutes, provides, among other things, that he "shall by himself and deputies, well and truly discharge all the duties of said office," while § 4558 of the Kentucky Statutes provides that the sheriff's official bond "may be put in suit, from time to time, at the cost of any person injured by the acts or omissions of the sheriff or any of his deputies." By § 4560 of the Kentucky Statutes it is further provided: "Every sheriff may, by and with the approval of the county court, appoint his own deputies, and may revoke the appointment at his pleasure. Before any deputy shall proceed to execute the duties of his office he shall take the oath required to be taken by the sheriff."

The gist of the ruling of the trial court was that the acts of the deputies, as set forth in the petition, were not official acts; that their principal, the sheriff, was not responsible for the acts of his deputies that were not done in their official capacity or by virtue of their said office; and that the acts complained of were not done in their official capacity, or under color of their offices, or by virtue thereof. And, although the petition is careful to say the arrests were made by Haynes and McCoy in their official capacities as deputy sheriffs, the trial court held, and we think properly, that the subsequent allegations as to the manner and occasion of the arrests effectually negated the former allegation by showing that the arrests were not made by the deputies in their official capacities or by virtue of their office. No judgment is asked against the sureties on the sheriff's bond.

The cases in which an officer may make an arrest are specified by § 36 of the Criminal Code of Practice, as follows: "A peace officer may make an arrest—1. In obedience to a warrant of arrest delivered to him. 2. Without a warrant, when a public offense is committed in his presence, or when he has reasonable grounds for believing that the person arrested has committed a felony." See also *Madden v. Meehan*, 151 Ky. 220, 151 S. W. 681.

If he makes an arrest in any other way, it is not authorized by law, and is consequently his individual, and not his official, act.

The allegation that the arrests were made by the deputies in their official capacities L.R.A.1915E.

is a mere legal conclusion or inference, and adds nothing to the petition. This question was passed upon by this court in *Com. ex rel. Richardson v. Cole*, 7 B. Mon. 250, 46 Am. Dec. 506, which was an action against a constable and his sureties to recover for alleged breaches of the official bond of the constable. In that case the court said: "The first breach is that the relator was compelled to pay to said Cole the sum of \$95, which Cole, by color of his office as aforesaid, wrongfully collected from the said Richardson and refused to account for," etc. There being no allegation of fact to aid the general phrases used in this statement, we are clearly of opinion that it is too vague and indefinite to answer the purpose of a declaration. It does not appear how the relator was compelled to pay, nor what was the particular act complained of, and the statement furnishes to the court no means of determining whether the collection was by color of office or not. Nor does it furnish to the defendants the requisite information of the charge or complaint relied on. It is a mere statement of legal conclusions or inferences, without the facts on which they are founded, and was properly adjudged insufficient."

The question again arose in *Hawkins v. Thomas*, 3 Ind. App. 399, 407, 29 N. E. 157, which was a suit against a United States marshal and the sureties upon his bond, for an alleged illegal arrest by a deputy marshal. In speaking of the question of pleading before us, the court said: "In the complaint in the case before us, the only allegation upon this subject is the general averment that the marshal and his alleged deputy were acting illegally, but under color of office. It does not appear that any writ or process of any kind had issued to either of them, or that any offense had been committed against the Federal laws, or that they ever claimed such to be the case. The averment that the officer was acting under color of authority is a mere conclusion, and is not sufficient to show that the injury resulted from an official act. It was so decided in *Com. ex rel. Richardson v. Cole*, supra, and in speaking of the legal effect of such general averment the court said: 'It is a mere statement of legal conclusions or inferences, without the facts on which they are founded, and was properly adjudged insufficient.' So, in our own state, the rules of pleading require that facts be particularly alleged which show that the injury complained of was the result of official misconduct. *State ex rel. Tyson v. Shackelford*, 15 Ind. 376; *Major v. State*, 8 Blackf. 71; *Jones v. State*, 5 Blackf. 492. Indeed, an examination of the many cases decided by our supreme court upon the question of of-

ficial responsibility shows the uniform practice to be to specifically plead facts imposing a duty upon the officer to act, as furnishing the only basis of the liability of the surety."

In *Eaton v. Kelly*, 72 N. C. 110, a sheriff represented that he had an execution authorizing him to sell certain real estate, and assumed to sell the same thereunder, in regular manner, at the courthouse door. An attendant at the sale, relying upon the sheriff's representation concerning his authority, bought the property and paid for it. In fact, the sheriff had no execution, and the sale was void, and the purchaser sued him upon his bond to recover the money paid by him; but the court held that the sheriff acted without authority of law in selling the property, and the wrong could not be redressed in an action upon his bond. The same principle was applied, under somewhat similar circumstances, in *Jewell v. Mills*, 3 Bush, 82.

In considering a case of this character, we should not overlook the fact that, while the deputy is personally liable for any misconduct of which he may be guilty, his principal, the sheriff, is only liable when the deputy acts officially, for and on behalf of his chief. This idea was well expressed by Chief Justice Marshall, speaking for the court in *Com. ex rel. Richardson v. Cole*, supra, as follows: "It is to be recollected that the question is not how far the constable may be individually responsible for his own acts, but how far his securities may be responsible for them. As by executing the official bond with him they have not only evinced their confidence in his capacity and other qualifications for the office, but have enabled him to assume the character and rights belonging to it, they may perhaps be justly held responsible for such acts within the general range of his powers as (though without legal authority in the particular instance) he does in the name and by color of the office, and of the rights incident to it; but for acts which in their nature are wholly beyond the office, or for acts which, though within the general powers of the office, are neither actually authorized in the particular case, nor pretended to be done in virtue of official authority, that is, for acts done as a private individual, they cannot be made responsible on the bond."

In the note in 21 L.R.A. 738, the general rule as to the liability of sureties for the act of an officer is stated as follows: "The cases generally support the rule that where an officer having no writ in his hands falsely asserts that he has, and commits a trespass under such assumed authority, or where he acts without any such assumption simply as an officer and commits a wrong-

ful act, the sureties on his official bond are not liable unless under a statute as that of Alabama."

The relation of a surety to and his liability for the acts of his principal are analogous to the relations of a sheriff to his deputy. It is elementary that no one except the trespasser is liable for the individual wrong of the trespasser; and the fact that he claims to be acting for another does not make that person responsible or liable in any way. The sheriff is liable for the act of his deputy only when the deputy commits a wrong while acting for his chief. So the question always is: Was the act of the deputy, which is complained of, done by him in his official capacity or by virtue of his office? The difficulty arises in determining when an act is done by virtue of one's office.

In the note found in 8 L.R.A. (N.S.) 1223, the editor says: "The distinction between acts done by virtue of office and acts done under color of office has been recognized in some of the cases. . . . Without regard to that distinction, however, the practical criterion of liability seems to be [under the authorities] whether the assault was committed in the course of an attempt to serve or execute the writ or process and as a means to that end."

In making an arrest the statute carefully specifies the cases in which it may be done, either with or without a warrant. It cannot be done otherwise. This certainty is the result of the long contest in England against arbitrary arrests.

There can be no doubt of a sheriff's liability for the act of his deputy where the deputy abuses his writ or process. This abuse of process is most generally found in cases where the deputy, armed with a writ, arrests the wrong man by mistake, or where he has an execution for the goods of one man, and by mistake seizes the goods of another, and the innumerable cases of that character.

The general rule is stated as follows in the note summarizing the result of the cases in 51 L.R.A. 225: "It may be said that an officer is not liable in trespass and false imprisonment for making an arrest under a warrant where it is valid on its face and the court has jurisdiction, or where the warrant is only irregular. He is not liable for making an arrest without a warrant where he has reasonable grounds to believe that a felony has been committed, or where a breach of the peace is committed 'on view,' or where he arrests on view for a breach of a city ordinance, and a statute authorizes such an arrest, or where he makes an arrest for other misdemeanors on view under statutory authority. He will not be liable for

the use of ordinary force to restrain the prisoner. But an officer will be liable where he makes an arrest under a warrant that is invalid or void, or where the court has no jurisdiction, or where he arrests for a felony without a warrant on suspicion, or where he makes an arrest without a warrant for a breach of the peace not committed in his presence, or where he arrests not 'on view' without warrant under a city ordinance. He will be liable where he arrests without warrant for a past misdemeanor, or where he makes an arrest outside of his local jurisdiction, or where he unreasonably detains and fails to take the prisoner before the proper court, or where he takes him before an improper court. He will be liable where he arrests the wrong party, or where he arrests the right party under a warrant in the wrong name. He cannot arrest for one offense and justify for another."

But in the cases of that class, where the officer was held liable for the act of his deputy, the deputy was acting under a writ or process of court, and the sheriff's liability came about from an abuse of that process. His action under a writ or process made his act an official act. This clear distinction runs through the rulings of the courts in all the well-considered cases, although in some of them the courts have not clearly expressed the reason for the ruling.

Confining ourselves to the cases presenting the question of the liability of the officer for the act of his deputy, we will briefly examine such cases as we have been able to find.

In *Shields v. Pflanz*, 101 Ky. 407, 41 S. W. 267, a sheriff was held liable in damages for the misconduct of his deputy for maliciously and unnecessarily putting handcuffs on a prisoner while conveying him, under a warrant, from one court to another. In that case the circuit court had sustained a demurrer to the petition; but, in reversing that judgment, this court said: "Taking the averments of the petition as amended as true, which must be done on demurrer, it appears that Donahue was deputy sheriff under appellee, and that by virtue of the writ, which he had authority to execute, he had arrested the appellant and for a time placed him in custody of the jailer and afterwards took him out for the purpose of taking him to Nelson county in obedience to the writ, and while appellant was in his custody the deputy sheriff perpetrated the wrong and injuries complained of. It is therefore clear that the acts complained of were inflicted by the deputy sheriff under color of his office, and while in the discharge of an official act."

In *Johnson v. Williams*, 111 Ky. 289, 54 L.R.A.1915E.

L.R.A. 220, 98 Am. St. Rep. 416, 63 S. W. 759, T. H. Johnson, the sheriff, was sued for the killing of Williams by Ernest Johnson and H. C. Judge, deputies under T. H. Johnson. Browder had murdered a man, and the deputies were sent to arrest him for the crime. Under a mistaken belief that Williams was Browder, for whose arrest they had a warrant, and that the killing of Williams was necessary to prevent his escape, the sheriff was held liable for the acts of his deputies. That this liability was rested upon the fact that the officers acted under a warrant which made their acts official acts is made plain by the following language of the court: "The law which gives an officer the right to kill an escaping felon certainly requires him to know that he is the felon, not an innocent party, whose life he is attempting to take. The question here is quite a different one from what we would have if the deputy sheriffs had shot at Browder while escaping, and killed Williams. In the latter case they would have been shooting at the right man, if the facts justified it, but here they shot at and killed an innocent man. While they did an unlawful act, still they were acting in their official capacity. They had the authority, as deputy sheriffs, to arrest Browder, but in the exercise of that authority they acted improperly, abusing the confidence which the law imposed in them."

Again in *Com. v. Hurt*, 23 Ky. L. Rep. 1171, 64 S. W. 911, it was held that a petition for damages against a sheriff and his sureties on his official bond, which alleged simply that, while a deputy sheriff held his office, he killed the deceased, and failed to allege that the deputy sheriff was acting by virtue of his office in the execution of the process, or doing an act in his official capacity at the time of the killing, was insufficient. In its opinion the court said: "It is not averred in the petition that the deputy was acting by virtue of his office in the execution of a process, or doing anything in his official capacity at the time of the killing, or that it was done in any attempt to discharge an official duty. A pleading should be construed strongly against the pleader. The averment of the petition is simply to the effect that, while he held the position of deputy sheriff, he killed the deceased. One holding the position of sheriff or deputy might kill a man and still not do it in the performance of an official act. The killing might have no connection whatever or relation to the discharge of his official duty."

In *Brown v. Weaver*, 76 Miss. 7, 42 L.R.A. 423, 71 Am. St. Rep. 512, 23 So. 388, it was held that an officer had no right to shoot one guilty of a misdemeanor

to prevent his escape, and that if he was unjustifiably shot by a deputy in attempting to prevent his escape after his arrest under a warrant, when he was merely running away, without committing any violence, he could maintain an action for damages against the sheriff.

Likewise, in *Thomas v. Kinkead*, 55 Ark. 502, 15 L.R.A. 558, 29 Am. St. Rep. 68, 18 S. W. 854, the action was against a constable to recover damages for the killing by the constable's deputy, of a person under arrest, to prevent his escape after arrest under a warrant charging a misdemeanor. It was held that the deputy's act was wrongful, and that the constable was liable for his deputy's wrongful act under the warrant.

In *Spencer v. Moore*, 19 N. C. (2 Dev. & B. L.) 264, a deputy sheriff arrested a defendant under a capias from an adjoining county; and, the prisoner having escaped and returned to the adjoining county, the deputy followed him and attempted to arrest him under the capias in the adjoining county. But, under the law of North Carolina, a defendant in a capias could not be arrested on the same writ after he was voluntarily suffered to escape, and the sheriff was consequently held responsible for the false imprisonment by his deputy in making the second arrest; it having been made under color of the deputy's office and the writ then in his hands.

Again, in *Smart v. Hutton*, 8 Ad. & El. 568, note, 2 Nev. & M. 426, it was held that a sheriff was liable for the misconduct of his deputy in arresting the plaintiff without any other authority than a writ of *f. fa.* commanding him to levy on plaintiff's goods.

Perhaps the leading and best considered opinion upon the subject is that of Judge Thayer, of the United States circuit court of appeals, in *Chandler v. Rutherford*, (1900) 43 C. C. A. 218, 101 Fed. 774. Rutherford was the United States marshal for the northern district of the Indian Territory, and McDonald was his deputy marshal. While hunting for a horse thief named Flave Carver, for the purpose of arresting him, and without a warrant, McDonald arrested Chandler, supposing him to be Carver. In making the arrest McDonald shot Chandler, who thereupon sued Rutherford, the marshal, for damages for the wrongful act of McDonald, his deputy. The statute in force in the Indian Territory, like the Kentucky statute, authorized a peace officer to make an arrest: "(1) In obedience to a warrant of arrest delivered to him; (2) without a warrant where a public offense is committed in his presence, or where he has reasonable

grounds for believing that the person arrested has committed a felony." After pointing out that the complaint or petition failed to show that an offense had been committed in the deputy marshal's presence when he attempted to arrest the plaintiff, or that prior to the arrest the deputy marshal had been informed that the plaintiff was Carver, the horse thief, the court said: "When an officer seeks to justify an arrest without a warrant under a statute like the one now under consideration, and the act for which the arrest was made was not committed in his presence, it is manifest that he must show that he acted on information such as would justify a reasonable man in believing that the particular person arrested was guilty of a felony. Where he has no such information, but nevertheless makes an arrest, he acts entirely outside of the line of his duty and authority, as much so, we think, as an officer who arrests without a warrant, where there is no law permitting an arrest without process. We are of opinion, therefore, that the facts stated in the complaint will not warrant a judgment against the marshal and his sureties in an action on the marshal's bond. The liability on the bond, by the terms whereof the sureties agreed that the marshal and his deputies should faithfully perform the duties of his office, is purely contractual. Such an obligation is materially different from an undertaking by the sureties to be responsible for any wrongful act of the marshal and his deputies which they may commit under the pretense that they are discharging an official duty. When the marshal's deputy undertook to arrest the plaintiff, he had no information, so far as the case discloses, which either required or authorized him, as an officer, to lay hands on the plaintiff, much less to make use of a deadly weapon for the purpose of arresting him. The deputy's act on the occasion in question was not only unauthorized, but it did not have the appearance of being done in obedience to the mandate of the law; in other words, he did not act *colore officii* in any such sense or under such circumstances as will render the sureties responsible."

The effect of the decision was that, if the marshal was not liable for the act of his deputy, the marshal's sureties could not be liable for the act of the deputy, and the demurrer was therefore sustained to the petition which sought to make the marshal and his sureties liable. Elsewhere in the opinion Judge Thayer said: "It is now well settled, although the proposition was at one time disputed, that the sureties on the official bond of a marshal, sheriff, constable, or other ministerial officer, may be held

liable when the officer having process in his hands commanding him to seize the property of one person in fact seizes the property of another. In such cases the trespass is not the act of a mere individual, but is perpetrated *colore officii*, and for that reason the act imposes a liability on the officer's sureties to the same extent as when, having a writ in his hands, he fails to execute it, or makes an excessive levy, or is guilty of some other wrongful or oppressive act in the execution of the process. *Lammon v. Feusier*, 111 U. S. 17, 21, 28 L. ed. 337, 338, 4 Sup. Ct. Rep. 286, and cases there cited; *People ex rel. Kellogg v. Schuyler*, 4 N. Y. 173; *Holliman v. Carroll*, 27 Tex. 23, 84 Am. Dec. 606; *Carmack v. Com.* 5 Binn. 184; *Forsythe v. Ellis*, 4 J. J. Marsh. 299, 80 Am. Dec. 218. But when an officer assumes to act under color of his office, having no writ or process whatsoever, or having process which on its face is utterly void, it seems to be the prevailing doctrine that whatever he may do under such circumstances imposes no liability on his sureties. To constitute color of office, such as will render an officer's sureties liable for his wrongful acts, something else must be shown besides the fact that in doing the act complained of the officer claimed to be acting in an official capacity. If he is armed with no writ, or if the writ under which he acts is utterly void, and if there is at the time no statute which authorizes the act to be done without process, then there is no such color of office as will enable him to impose a liability upon the sureties in his official bond."

It will thus be seen that the test as to whether the officer is acting by virtue of his office is whether he is either armed with a valid writ, or has authority to make the arrest without a writ, under a statute. If he is armed with no writ, or if the writ under which he acts is utterly void, and if there is, at the time, no statute which authorizes the act to be done without a writ, then the officer is not acting by virtue of his office.

In *Inman v. Sherrill* (1911) 29 Okla. 100, 116 Pac. 426, the action was against Sherrill, a constable, and the sureties upon his bond, for damages on account of an injury inflicted upon Inman by Sherrill. The evidence having failed to show that the constable was acting under legal process, or that there was cause for arrest without a warrant; but, showing that Sherrill's acts constituted merely a naked trespass, it was held no action would lie upon the bond, and the trial court sustained a demurrer to the evidence and dismissed the action. From that ruling the appeal was prosecuted. In affirming the ruling of the circuit court, the L.R.A.1915E.

supreme court of Oklahoma followed the opinion of that court in *Dysart v. Lurty*, 3 Okla. 601, 41 Pac. 724, which held that where an officer, while doing an act within the limits of his official authority, exercises such authority improperly, or exceeds his official powers, or abuses an official discretion vested in him, he becomes liable on his official bond to the person injured; but, where he acts without any process and without the authority of his office in doing such act, he is not to be considered an officer, but a personal trespasser. The court quoted with approval from the opinion of Judge Thayer in *Chandler v. Rutherford*, supra.

A case directly in point is *Jordan v. Neer* (1912) 34 Okla. 400, 125 Pac. 1117, where Pauline Neer, the widow of John Neer, deceased, sued to recover damages from Jordan, the sheriff, and Duke and Vann, his deputies, for the alleged wrongful killing of her husband by the deputies. The trial resulted in a verdict against all the defendants except one of the bondsmen, and the defendants appealed. Jordan, the sheriff, answered that he had nothing to do with the killing of Neer. Duke and Vann, the deputies, answered, admitted that they had participated in the shooting of Neer, but that they acted only in self-defense. In reversing the judgment, the court said: "The plaintiff seems to have been careful, both in the pleading and in the evidence, to show that, at the time of the difficulty in which Neer lost his life, both Neer and his companions were proceeding quietly along the highway in the peace of the state, and violating no law, and that the officers had no warrant for their arrest, and that they were not committing a misdemeanor in the presence of the officers which would justify or authorize an arrest. If this is true, the two deputies, in halting or accosting the young men, could not have been in the exercise of any authority conferred on them by law, or necessary or proper to be done under authority of their office. If plaintiff's evidence is true, the deputies Duke and Vann were naked trespassers. If the defendants' evidence is true, Duke and Vann, in a civil manner, asked the young men to 'stop' or 'hold on a minute,' and were answered by shots from the revolver of the young men, which they returned in their necessary self-defense. Under none of the proof were the bondsmen liable, because nothing done by the deputies was done by virtue of their office; and, not being so done, their act, if wrongful, was not within the obligation of the bond, under a number of decisions of this court, in which this rule is announced and adhered to under the doctrine of *stare decisis*."

And after quoting from *Iaman v. Sherrill*, supra, the opinion quoted, with approval, the language of Judge Thayer in *Chandler v. Rutherford* (1900) 43 C. C. A. 218, 101 Fed. 774. The sheriff had asked an instruction saying there could be no recovery against him for any shooting done by his deputies, unless the sheriff was present, aiding, abetting, or assisting his deputies when they did the shooting. In referring to this phase of the case, the court said: "The court should also have given, in effect, the instruction asked by the sheriff. As to him, there was a question for the jury. There was no proof of liability upon his part because of the official relation between him and the deputies; but there is some proof, however slight, that, if the deputies were in fact in the wrong and committing a trespass, tended to associate or connect the sheriff with the difficulty. In other words, if the shooting by the deputies was not justifiable under the circumstances, but was a trespass for which they are answerable in damages, and the sheriff was present, 'aiding, assisting, abetting, or encouraging' the commission of the wrongful act, then he would be liable as an individual participant therein. Upon a new trial, if the evidence should justify it, such instruction should be given."

It was held in *Holliman v. Carroll*, 27 Tex. 23, 84 Am. Dec. 606, that, while a sheriff is liable officially for seizing the property of one person on an execution against another, he is not so liable for seizing such property without any writ at all.

In *Maddox v. Hudgeons*, 31 Tex. Civ. App. 291, 72 S. W. 414, a deputy sheriff caused the arrest of Hudgeons on suspicion and without a warrant, and caused him to be put in jail. Later the deputy sheriff released Hudgeons, who sued the sheriff for damages for the false arrest by his deputy. In holding the sheriff was not liable for the acts of his deputy Isbell, the court said: "The acts of Isbell were without the knowledge or consent of his principal. He was not acting or purporting to act by virtue of any warrant, and not in the performance of any duty imposed by law. In other words, his conduct was not official. The case is not believed to be one of a mere abuse of an existing authority, as are the cases of *Huffman v. Koppelkom*, 8 Neb. 344, 1 N. W. 243, id. 12 Neb. 98, 10 N. W. 577; *Clark v. Winn*, 19 Tex. Civ. App. 223, 46 S. W. 915."

The principle is recognized in *State ex rel. Brennan v. Dierker*, 101 Mo. App. 642, 74 S. W. 153; *People use of Purdy v. Pacific Surety Co.* 50 Colo. 273, 109 Pac. 961, Ann. Cas. 1912C, 577; *McLendon v. State*, L.R.A.1915E.

92 Tenn. 520, 21 L.R.A. 738, 22 S. W. 200; *Gold v. Campbell* (1909) 54 Tex. Civ. App. 269, 117 S. W. 463; *King v. Brown*, 100 Tex. 109, 94 S. W. 328.

In *Brown v. Wallis*, 100 Tex. 546, 12 L.R.A.(N.S.) 1019, 101 S. W. 1070, Cozart, a deputy for Brown, the sheriff, shot Wallis while trying to arrest him without a warrant, and when Wallis had committed no misdemeanor in the presence of the deputy, and was not guilty of a felony. In denying the plaintiff a right to recover from the sheriff, the supreme court of Texas said: "The question to be determined, then, is: Did the evidence conduce or tend to prove that Cozart and Allen, whom appellant, the sheriff of Clay county, had appointed his deputies, were acting in an official capacity when they undertook to arrest and search appellee? That is, did it tend to prove that they had a warrant authorizing them to arrest him, or some other person, or that he or some other person had committed a felony, or an offense against the public peace in their presence? We answer that there is no evidence that Cozart and Allen had a warrant authorizing them to arrest any one, nor do the facts, as certified by the court, tend to prove that J. S. Wallis, or any other person, had committed a felony, or an offense against the public peace in the presence of Cozart and Allen, or either of them. This court will confine itself to the facts certified in the statement accompanying the question, and, looking to that statement, we find that the evidence does not prove at what point the firing of the pistol or pistols occurred. It does not appear that it was within the hearing or within sight of Cozart and Allen, or that they were able to discern the persons who did the firing, or the young men who were acting together. The evidence does not show that Cozart and Allen were acting in their official capacity at the time that they arrested Wallis and the other young men. They had no warrant, and there is no proof of any purpose on their part to enforce the law against offenders who had violated it within their view or presence."

Hawkins v. Thomas, 3 Ind. App. 399, 29 N. E. 157, heretofore quoted from, is also directly in point. As above stated, Thomas sued Hawkins, the United States marshal for the district of Indiana, and Isaacs, his deputy, for the act of Isaacs in arresting Thomas on election day in November, 1888. After stating the rule that a surety upon an official bond is only answerable for the acts of his principal while engaged in the performance of some duty imposed upon him by law, and citing authorities in support of the rule, the court said: "These cases are unquestionably in harmony with

a large majority of the decisions upon that subject, and in each of them the unauthorized act of the officer is characterized as *colore officii*. But the officer was acting under a valid writ, and by virtue of the mandate of the law, and the trespass consisted in an abuse of the power vested in him, and not in the performance of an act which the law did not enjoin upon him at all. It was an instance of exceeded, rather than usurped, power. Such acts are within the express line of the sureties undertaking,—that his principal shall faithfully discharge the duties of his office according to law. But where an officer, though he assumes to act as such, commits a wrong under circumstances where the law does not impose upon him any duty to act at all, the wrong is not a violation of any official duty, and consequently is not embraced within the sponsorship of the surety.

. . . Thus it is seen that official acts, as applied to the conduct of ministerial officers, are only such as are done in the execution of some legal process or of some positive command of the law. It follows as a logical sequence that, in an action upon an official bond, it is necessary to allege and prove the existence of conditions and circumstances requiring some official action on the part of the officer, and that the injury sought to be redressed was inflicted while the officer was so attempting to act, or on account of his failure to act at all."

Again, in *Lewark v. Carter*, 117 Ind. 206, 3 L.R.A. 440, 10 Am. St. Rep. 40, 20 N. E. 119, a sheriff was held not liable for representations made by his deputy in making a sale under an execution in his hands; he having no authority, by virtue of the execution, to make any representations whatever.

Our attention has been called to the case of *Hall v. Tierney*, 89 Minn. 407, 95 N. W. 219, as being in conflict with the uniform line of authorities above quoted. An examination of that case, however, will show that it was not a suit for the acts of the deputy, but was a suit against the sheriff and his bondsmen for an assault by the sheriff; and although the opinion contains some language that would apparently seem to hold that an action would lie upon the official bond for the misuse by the sheriff of his official position, although not acting under a writ, a more careful reading of the opinion shows that it was finally rested upon the fact that the sheriff had the right, under § 7120 of the Statutes of Minnesota (1894), to make the arrest without a warrant, and, "whether a sheriff arrests under a warrant or under the authority thus given by statute (that is, without a warrant), he acts in his official capacity. *Warner v. Grace*, 14 Minn. 487, Gill. 364." p. 411. *It L.R.A.1915E.*

will thus be seen that *Hall v. Tierney* is not, in principle, in conflict with the general rule above announced.

From this uniform line of authority we find the rule to be thoroughly established that, in order to render the sheriff liable for the act of his deputy, the act of the deputy must be done by virtue of his office as deputy; and, in order for the deputy's act to have that character, it must be done in an attempt to serve or execute a writ or process and as a means to that end, or in acting under a statute giving him the right to arrest without a warrant; otherwise he is acting as an individual. In other words, when a deputy sheriff, although he assumes to act as such, commits a wrong under circumstances where the law does not impose a duty on him to act at all, the wrong is not a violation of any official duty, and is not embraced within the sponsorship of his principal. In so ruling, the trial judge properly sustained the demurrer to the petition.

Judgment affirmed.

Carroll, J., dissenting:

The opinion holds that the sheriff is not liable for the act of his deputy, unless the act is committed by the deputy in an effort to execute a valid writ or process in his hands, or under authority of some statute. The application of this principle would in a similar way limit the liability of the sureties in the bond of an officer, such as a sheriff, policeman, constable, or town marshal. And so, for convenience and to avoid the necessity of repetition, I will treat the question as it affects the liability of the sureties in the bond of any of the officers mentioned.

The meaning and effect of the rule laid down in the opinion is that, although the officer may act and assume to act in his official capacity, and be exercising power that he might lawfully exercise if he had a valid writ or process, or was acting under the authority of a statute, the sureties in his bond will not be liable for his wrongful acts solely because they were not committed in the execution of a valid writ or under authority of a statute. To this proposition I do not agree, and, as it is a matter of very considerable importance, I will state the reasons for my dissent.

My contention is that the bond of any of these officers is liable for any wrongful or unlawful act committed by the officer while acting and assuming to act in his official capacity and within the scope of his official powers, although he may not have a valid process or the authority of a statute directing him to do the thing complained of. To make plain by illustration my position,

it is this: If the officer, in executing a valid writ or process, exceeds his authority or abuses his power, the bond is liable. If the officer has a valid writ to arrest A, but arrests B, the bond is liable. If, in attempting to execute a valid process against C, he assaults or beats or kills D, the bond is liable. If, under an execution or other process against E, he takes the property of F, the bond is liable. And so, if, without any process, or with a void one, and without statutory authority, the officer, while acting and assuming to act in his official capacity, arrests B, or assaults or beats or kills D, or takes the property of F, the bond is liable.

In using the words "in his official capacity," I mean when an officer, assuming to act as an officer, and not as an individual, undertakes as an officer, and not as an individual, to do something within the scope of his official powers. For example, if a town marshal should receive a telegram requesting him to arrest a certain described person on the charge of having committed a felony, and pursuant to this telegram, and without any other information or authority, the marshal, acting and assuming to act in his capacity as marshal, and armed with the authority that the office conferred, should arrest the person described in the telegram, and it developed that the person had not committed any offense whatever, the bond of the marshal should be liable to the party arrested in a suit for false arrest. Or if a policeman in a city, acting and assuming to act in his capacity as a policeman, should wrongfully and unlawfully arrest a person who had not committed any offense, and when he did not have any writ or process authorizing the arrest, the sureties in his bond should be liable.

I will presently undertake to show that this position is not only supported by the opinions of this court, but by the opinions of many other courts of last resort. But, before directly taking up the authorities, I wish to give expression to the opinion that the views of a majority of this court, speaking through the chief justice, on the liability of sureties, are entirely too narrow to afford the public the protection contemplated by the bond, conditioned, as most of them are, that the officer will faithfully perform his duties. I think the limitations on the liability of the bond, as set out in the opinion, virtually amount to a nullification of the statute requiring this class of officers to execute bond, for, if the bond is to be held liable only for the conduct of the officer when he acts under the authority of a warrant or a statute, there is really no liability whatever on the bond, unless the

officer should commit some unlawful act in excess of the authority conferred by the process in his hands or his authority under the statute. And so a person whose property had been wrongfully taken, or who had been wrongfully arrested, or wrongfully beaten by an officer acting and assuming to act in his official capacity and within the scope of his official powers, would have no recourse on the bond if the officer did not have the authority of a valid writ or a statute. I submit that the undertaking of the bond should not be restricted in this way. Its purpose is to afford protection against the abuse of official authority, however exercised; and, if the bond does not cover everything the officer does while acting or assuming to act in his official character and within the scope of his official powers, it affords protection for only a very limited number of wrongful acts that may be committed by an officer, when it should afford protection for all of his wrongful acts when acting and assuming to act in his official capacity.

I understand the general rule to be that the liability of sureties is confined to the terms of the undertaking; but when the undertaking of the bond is that the officer will faithfully perform his duties, or, in other words, will not commit in his official capacity any unlawful or wrongful act, I think this undertaking is, by its very terms, sufficiently broad to cover all acts committed by the officer while acting and assuming to act in his official capacity and within the scope of his official powers. The liability of the bond for the wrongful act of the officer should not depend upon the fact that the officer had a valid writ or the authority of a statute, but on the fact that it was committed while he was acting and assuming to act in his official capacity, and within the scope of his official powers. It should be construed to furnish indemnity for all wrongful or unlawful acts committed by the officer in the assumed performance of his official duties, as distinguished from his acts in his individual capacity, and this without regard to whether the acts complained of were committed by him under the authority of a writ or a statute. Many unlawful and wrongful acts are committed by officers in the honest belief that they have, in their official capacity, the lawful right to do the things complained of, and, generally speaking, the acts that give rise to suits like this are not prompted by malice or personal ill-will, but arise under a mistaken notion of official authority. But whether the officer does or does not mean to do any wrong, if, in fact, what he does is solely by virtue of his office, or in the

performance of the duties of his office, the bond should be liable.

The very purpose of the bond is to afford protection to persons who are mistreated by an officer while acting and assuming to act in his official capacity; and, when the bond is construed to embrace all such official acts, the sureties are not made liable for anything that was not in contemplation when they signed the bond, or anything that is not fairly embraced by the stipulations of the bond.

It is admitted in the opinion, and indeed by virtually all the authorities, that if an officer has a valid process against A, but wrongfully takes under it the property of B, the bond is liable; and so if the officer has a valid warrant for the arrest of A, but wrongfully arrests B, the bond is liable. *Lammon v. Feusier*, 111 U. S. 17, 28 L. ed. 337, 4 Sup. Ct. Rep. 286; *West v. Cabell*, 153 U. S. 78, 38 L. ed. 643, 14 Sup. Ct. Rep. 752; and cases cited in editorial note in 91 Am. St. Rep. 497. Now it seems to me that this admission demonstrates the weakness and fallacy of the limitation applied in the opinion to the liability of the bond, because, if the officer takes the property of B on a writ against A, or arrests B on a warrant against A, he is clearly a mere trespasser. He is not acting under a valid writ or any writ. His act is precisely the same as if he had no writ whatever, for the writ he has affords him no protection for the wrong committed against B. I am aware that a few of the courts that hold the bond liable when the officer takes the property of B or arrests B under a writ against A also hold that, if he should take the property of B or arrest B without having any writ, the bond would not be liable. But I must confess my inability to see how this distinction can be made. It seems to me clear that the liability of the bond, when the property of B is taken, or he is arrested under a writ against A, can be sustained only on the ground that the bond is liable for all the wrongful acts of the officer committed while he is acting and assuming to act in his official capacity, and this is all that I contend for.

Coming now to the authorities, I admit that there is conflict upon this subject, but I think the opinions of this court and many well-considered cases decided by other courts support the position I take.

In *Com. for Davy v. Stockton*, 5 T. B. Mon. 192, Davy brought a suit against Stockton, as sheriff, and the sureties in his bond, to recover damages for having illegally levied upon and sold his property to satisfy an execution against one Emerson. The lower court sustained a general demurrer filed by the sureties to the peti-

tion. In holding that the sureties were liable, the court said: "The condition of the bond is sufficiently comprehensive to embrace every official duty of the sheriff, and must be construed so as to authorize an action thereon against him and his sureties in every case where an action could be maintained against him in his official character."

To the same effect are *Forsythe v. Ellis*, 4 J. J. Marsh. 298, 20 Am. Dec. 218; *Hill v. Ragland*, 114 Ky. 209, 70 S. W. 634; *Lammon v. Feusier*, 111 U. S. 17, 28 L. ed. 337, 4 Sup. Ct. Rep. 286.

In *Com. ex rel. Richardson v. Cole*, 7 B. Mon. 250, 46 Am. Dec. 506, the suit was against Cole, as constable, and the sureties in his bond, to recover damages for the alleged unlawful acts of Cole in collecting money that he had no right to collect. The court held that the petition was fatally defective because wanting in several essential allegations, but in the course of the opinion, in speaking of the undertaking of the bond and what acts committed by the constable it covered, said: "Conceding, as we are disposed to do, that this clause of the condition should receive a most liberal construction, for the protection of the community against fraud, extortion, and every form of oppression incident to an abuse of the official character and powers of a constable, still there must be some reasonable limits to its operation. It cannot cover all acts which the individual may do while he holds the office of constable, nor even all acts which in their nature pertain to the office, and might under proper circumstances be rightfully done by a constable. The act must not only be of this nature, but it must at least be done by him as constable, under claim of a right to do the act by virtue of his office. . . . They may perhaps be justly held responsible for such acts within the general range of his powers as (though without legal authority in the particular instance) he does in the name and by the color of the office, and of the rights incident to it."

In *Johnson v. Williams*, 111 Ky. 289, 54 L.R.A. 220, 98 Am. St. Rep. 416, 63 S. W. 759, the action was against the sheriff and the sureties in his bond for the alleged negligent killing of Charles Williams by two of the sheriff's deputies. These deputies, while on the lookout for Dave Browder, who had committed the crime of murder, shot and killed Williams. In sustaining the judgment obtained by the administrator of Williams against the sheriff and his bond, the court said: "While they did an unlawful act, still they were acting in their official capacity. They had the authority as deputy sheriffs to arrest Brow-

der, but in the exercise of that authority they acted improperly, abusing the confidence which the law imposed in them. They were guilty of misconduct in office, for which their principal and his sureties are liable."

And quoting with approval Murfree on Sheriffs, the court said: "If the act from which the injury resulted was an official act, the authorities are clear that the sheriff is answerable. If it was not an official, but a personal, act, it is equally clear that he is not answerable. But an official act does not mean what a deputy might lawfully do in the execution of his office. If so, no action could ever lie against the sheriff for the misconduct of his deputy. It means, therefore, whatever is done under color or by virtue of his office.' To hold the deputy and his sureties liable to the sheriff on his bond, it is not necessary that the deputy should be acting under color of some writ; but, if he is acting under color of his office, and professing so to act, and inducing others interested to believe he is acting *colore officii*, he and his sureties will be bound by such acts. No other rule would be safe. Sureties are not needed on a sheriff's bond, if they are only to be held when he acts legally. They vouch for his acts, and bind themselves to make good any damage he may cause to anyone while acting under color of his office. And, if the sheriff and his sureties are bound for such acts of the deputy while acting under color of his office, then the deputy and his sureties are liable to the sheriff for his act."

In *Martin v. Smith*, 136 Ky. 804, 29 L.R.A.(N.S.) 463, 125 S. W. 249, the suit was against Burrell Smith, marshal of the town of Corbin, and the sureties on his bond, for the unlawful killing of Dempo Martin. The marshal was attempting to arrest one Charles Martin, and, while so attempting, unlawfully and wrongfully shot Dempo Martin, and the court held that the sureties in the bond were liable.

In *Growbarger v. United States Fidelity & G. Co.* 126 Ky. 118, 11 L.R.A.(N.S.) 758, 128 Am. St. Rep. 274, 102 S. W. 873, the suit was brought by the administrator of W. L. Growbarger against Stevens, marshal of the town of McHenry, and the sureties in his bond, to recover damages for the alleged wrongful killing of Growbarger. The sureties sought to escape liability upon the ground that the undertaking was limited to the official acts of the principal, and did not extend to an illegal act done under color of office. It appears from the opinion that Stevens was unnecessarily and maliciously killed by the mar-

shal while under arrest and in his custody, and the court held the sureties liable.

In *Com. v. Hurt*, 23 Ky. L. Rep. 1171, 64 S. W. 911, an action was instituted by the widow of Granville Lester against Hurt, sheriff of Adair county, and the sureties in his bond, for the alleged wrongful killing of her husband by J. Z. Williams, a deputy sheriff. The court, in holding that the petition did not state a cause of action, said: "It is not averred in the petition that the deputy was acting by virtue of his office in the execution of a process, or doing anything in his official capacity at the time of the killing, or that it was done in any attempt to discharge an official duty. A pleading should be construed strongly against the pleader. The averment of the petition is simply to the effect that, while he held the position of deputy sheriff, he killed the deceased. One holding the position of sheriff or deputy might kill a man and still not do it in the performance of an official act. The killing might have no connection whatever or relation to the discharge of his official duty."

In *Jewell v. Mills*, 3 Bush, 62, it appears from the opinion that Mills, a constable, who had a distress warrant in his hands against Pickering, went to the house of Jewell, who was not in any manner connected with the writ, and, after making a forcible entry, took the property of Jewell to satisfy the debt for which the warrant issued. The action was brought against the constable and the sureties in his bond to recover damages for the act of the constable in breaking open the house and cursing, abusing, and assaulting the family. On a trial there was a verdict of 1 cent for Jewell, and he appealed. One of the grounds urged for reversal was the refusal of the trial court to instruct the jury, in substance, that the constable and his sureties were responsible on the official bond for the tortious acts of the constable committed under color of his office, and the court said: "For nonfeasance and unintentional misfeasance in office the constable and his sureties would unquestionably be responsible to the party injured, because such would be an official wrong; but for acts of violence, such as are alleged in the petition against Mills, and which are, according to the allegations, personal wrongs, we apprehend the surety is not responsible."

It will thus be seen that the court separated the official from what it termed the personal acts of the constable, and held that his bond was liable for the former, but not the latter.

In *Shields v. Pfanz*, 101 Ky. 407, 41 S. W. 267, the suit was brought against the

sheriff, Pfanz, for the alleged wrongful act of his deputy, committed in the following manner: A warrant of arrest against Shields was placed in the hands of Pfanz, the sheriff. It was executed by a deputy, who, as alleged, wrongfully and maliciously abused and mistreated Shields while under arrest. A demurrer was sustained to the petition, and in reversing the case, this court said: "The contention of appellee is that, as the wrongs complained of were illegal and tortious, the sheriff is not liable. That he is only liable for nonfeasance and unintentional misfeasance. . . . Taking the averments of the petition, as amended, as true, which must be done on demurrer, it appears that Donahue was deputy sheriff under appellee, and that by virtue of the writ, which he had authority to execute, he had arrested the appellant and for a time placed him in custody of the jailer, and afterwards took him out for the purpose of taking him to Nelson county in obedience to the writ, and while appellant was in his custody the deputy sheriff perpetrated the wrong and injuries complained of. It is therefore clear that the acts complained of were inflicted by the deputy sheriff under color of his office, and while in the discharge of an official act."

It will be seen from these cases that this court has, in a long and uniform line of decisions, construed official bonds to cover all official acts of the officers, and has not in any case limited the liability of the bond to acts committed by the officer while acting directly under the authority of a valid writ or the direction of a statute.

The same rule of construction has been adopted by the courts of Massachusetts, Illinois, Minnesota, Wisconsin, Virginia, West Virginia, and North Dakota. Doubtless the courts of many other states have likewise adopted this rule, but I have not examined the cases.

In *Knowlton v. Bartlett*, 1 Pick. 271, the suit was against the sheriff to recover money wrongfully collected by and embezzled by his deputy. The defense of the sheriff was that he was not liable, as the deputy was not authorized to collect the money. In holding the sheriff liable, the court said: "If the act from which the injury resulted was an official act, the authorities are clear that the sheriff is answerable; if it was not an official, but a personal, act, it is equally clear that he is not answerable. But an official act does not mean what the deputy might lawfully do in the execution of his office; if so, no action would ever lie against the sheriff for the misconduct of his deputy. It means, therefore, whatever is done under color or by virtue of his office."

L.R.A.1915E.

In *Sangster v. Com.* 17 Gratt. 124, the court said: "The first question presented for our decision in this case is whether an action can be maintained against a sheriff and his sureties on his official bond, for a trespass committed by him in taking the goods of the relator, on an attachment issued against the property of another. We are of opinion that the action can be maintained. The condition of the bond is for the faithful discharge of the duties of the office of sheriff, according to law. A sheriff who takes the property of A under an attachment against the property of B thereby not only commits a trespass, but plainly violates the duty of his office and breaks the condition of his official bond. His duty is to levy the attachment, according to its mandate, on the property of B, instead of doing which he levies it on the property of A. He does this in his character of sheriff *colore officii*, and not as a naked trespasser without color of authority; and it is consistent alike with sound policy and legal principles that he and his sureties in his official bond should be liable to the party injured for all damages arising from the wrongful act."

In *Lucas v. Locke*, 11 W. Va. 81, the supreme court adopted the rule announced by the Massachusetts and Virginia courts.

In *Hall v. Tierney*, 89 Minn. 407, 95 N. W. 219, suit was brought against the sheriff and his sureties on his official bond to recover damages for bodily injuries alleged to have been received by Hall at the hands of the sheriff. The question was: Were the sureties in his bond liable? The cause of action arose in this way: The sheriff, without a writ or the authority of a statute, undertook to remove some property from the premises of Hall, and in so doing assaulted Hall, who was attempting to prevent the removal of his property, and afterwards arrested him. In holding the bond liable, the court said: "The defendant's official bond now under consideration was conditioned that he should well and faithfully in all things perform and execute the duties of sheriff according to law, and without fraud, deceit, or oppression. If he claimed and pretended to act as sheriff when visiting the plaintiff's premises, surely his conduct, while he was assuming to act officially, was both unfaithful and oppressive. The distinction between a case where the sheriff acts as an individual, and not by color or virtue of his office, and where he acts as such an officer, is obvious. In the present case the sheriff would have had the right, had he been armed with process of law, to take and remove these cattle. He went to plaintiff's premises for that purpose, demean-

ing himself as an officer in and about an act which he had a right to perform officially. He could have lawfully seized the cattle, but he was without authority so to do. He was an officer having the right, when armed with proper papers, to seize the cattle; and he professed to have authority, and took the property. He had no suitable or sufficient process, and his act cannot be distinguished from a taking under a void or insufficient writ."

Quoting with approval from *Murfree on Official Bonds*, § 211; the court said: "The object of an official bond is to obtain indemnity against the misuse of an official position for wrong purposes; and that which is done under color of office, and which would obtain no credit except for its appearing to be a regular official act, is within the protection of the bond, and must be made good by those who signed it."

In *Clancy v. Kenworthy*, 74 Iowa, 740, 7 Am. St. Rep. 508, 35 N. W. 427, the action was on the official bond of a constable. As stated in the opinion: "The petition and special verdicts show: (1) That the defendant J. C. Kenworthy arrested and imprisoned the plaintiff without a warrant, and filed an information against him for being found in a state of intoxication, and that the defendant Kenworthy did all that without probable cause, and without believing that the accused was guilty thereof; (2) that, in making said arrest, [he] . . . acted maliciously, and used excessive force; (3) that in imprisoning the defendant, and in instituting the criminal proceedings, and in making the arrest [he] . . . was . . . actuated . . . by some private and malicious purpose."

In holding the bond liable, the court said: "But it is insisted that, as the constable is shown to have had no lawful authority to arrest plaintiff, his act was therefore not done in the line of his duty. In truth, his act was in the line—direction—of official duty, but was illegal because it was in excess of his duty. In the discharge of official functions he violated his duty, and oppressed the plaintiff. This is all there is of it. If, in exercising the functions of his office, defendant is not liable for acts because they are illegal or forbidden by law, and for that reason are trespasses or wrongs, he cannot be held liable on the bond at all, for the reason that all violations of duty and acts of oppression result in trespasses or wrongs. For lawful acts in discharge of his duty he, of course, is not liable. It follows that, if defendant's position be sound, no action can be maintained upon the bond in any case."

In *Lowell v. Parker*, 10 Met. 309, 43 Am. L.R.A.1915E.

Dec. 436, the suit was on the bond of the constable. In holding the bond liable, the court said: "It is objected in the present case that the sureties are not liable, because the constable undertook to make an attachment on a writ in which the *ad damnum* exceeded \$70, and which therefore he had no authority to serve. But we think the objection cannot be sustained. He was an officer, had authority to attach goods on mesne process, on a suitable writ, professed to have such process, and thereupon took the plaintiff's goods, that is, the goods of Bean, for whose use and benefit this action is brought, and who therefore may be called the plaintiff. He therefore took the goods *color officii*; and, though he had no sufficient warrant for taking them, yet he is responsible to third persons, because such taking was a breach of his official duty."

In *Greenberg v. People*, 225 Ill. 174, 8 L.R.A.(N.S.) 1223, 116 Am. St. Rep. 127, 80 N. E. 100. In holding the sureties on a constable's bond liable for an assault by him upon the wife of the execution debtor when she attempted to view property which he had seized for the purpose of aiding her husband in making a schedule thereof, the court held the bond liable in a suit by the wife, pursuing the same line of reasoning followed in the cases cited.

In *Lee v. Charmley*, 20 N. D. 570, 33 L.R.A.(N.S.) 275, 129 N. W. 448, the suit was on the bond of a deputy sheriff who, falsely claiming to have a warrant for the arrest of a person not charged with any crime, arrested the person and took him into custody. In holding the sureties liable, the court said: "Charmley went to Brown's house, demeaning himself as an officer, claiming that he had authority for making an arrest, and made the arrest, and compelled Brown to accompany him in this official character. In such character he was authorized to make the arrest, if provided with a warrant, or without in case he had reasonable cause for believing that Brown had committed a felony. He pretended to have such authority, and intimidated, as we may presume, by such pretense, Brown, without resistance, submitted to arrest and to being held in custody. Charmley's official insignia was the means by which he was enabled to accomplish the wrongful act. It may safely be assumed that had he gone at such time and under such circumstances as a private citizen, he would have met with immediate resistance. He abused authority derived wholly from the fact that he held the office of deputy sheriff. An act so performed by a public officer seems to us clearly to have been done under color of office, within any accepted

definition of that term. Certainly his act was given a color as distinctive as though he had held a warrant directed against a person other than Brown, which state of fact, according to the holding of all later authority, constitutes color of office. Viewed from any standpoint, it was gross misbehavior in office, the wrongful character of which was greatly aggravated by reason of being done under pretense of official authority. . . . We think, therefore, that the allegations of the complaint set out a wrongful malfeasance of Charmley, committed under the guise of an official act unquestionably under color of office, and with characteristics which might almost warrant a holding that it was done by virtue of office. Certainly it is such an act as the sureties upon his official bond should reasonably be held to have had in contemplation as constituting a breach of its conditions, at the time they entered into their undertaking."

I could extend this opinion by citations of pertinent excerpts from other cases written by this court and the other mentioned courts, but the ones referred to are, I think, sufficient to show that the views I entertain are well supported by authority. That they are sound in principle I am quite sure.

Hannah, J., concurs in this dissent.

MARYLAND COURT OF APPEALS.

MARY E. SHAEFFER, Appt.,

v.

ESTATE OF MARGERY J. RICHARDSON,
Deceased.

(125 Md. 88, 93 Atl. 391.)

Evidence—second marriage—continuance of first.

A child of a man's first marriage must, to defeat the right of children of a second marriage duly solemnized and followed by cohabitation for many years, to share in his estate, prove that the first marriage had not been dissolved by death or divorce when the second was contracted.

(January 14, 1915.)

Note. — Presumptions flowing from marriage ceremony.

Supplementing the notes to Megginson v. Megginson, 14 L.R.A. 540; Smith v. Fuller, 16 L.R.A. (N.S.) 98; and Vreeland v. Vreeland, 34 L.R.A. (N.S.) 940.

It is to be observed that these notes are confined to presumptions arising from the marriage ceremony, as distinguished from the question of presumptions arising from cohabitation and reputation in the absence L.R.A.1915E.

A PPEAL by contestant from an order of the Orphans' Court of Baltimore City distributing one fourth of the estate of Margery J. Richardson, deceased, equally between the children of the first and of the second marriage of her brother. Affirmed.

The facts are stated in the opinion.

Messrs. Alfred J. O'Ferrall and James Morfit Mullen, for appellant:

There is no proof of the alleged divorce.

Wiseman v. Wiseman, 89 Ind. 479; Jones v. Jones, 48 Md. 391, 30 Am. Rep. 466; Le Brun v. Le Brun, 55 Md. 496; Bowman v. Little, 101 Md. 273, 61 Atl. 223, 657, 1084; Baltimore v. War, 77 Md. 593, 27 Atl. 85; Mundy v. Jacques, 116 Md. 11, 81 Atl. 289; Robinson v. Singerly Pulp & Paper Co. 110 Md. 382, 72 Atl. 828; Dorsey v. Dorsey, 3 Harr. & J. 410, 6 Am. Dec. 506; Lewis v. Kramer, 3 Md. 265; Richards's Appeal, 122 Pa. 547, 15 Atl. 903; Smith v. Wilson, 17 Md. 460, 79 Am. Dec. 665; Den ex dem. Weatherhead v. Baskerville, 11 How. 329, 360, 361, 13 L. ed. 717, 729, 730; 10 Enc. Ev. 845; 2 Enc. Ev. 310; Bray v. Aikin, 60 Tex. 688; Davidson v. Murphy, 13 Conn. 213; Martin v. Williams, 42 Miss. 210, 97 Am. Dec. 456; Penny v. Pindell, 7 Bush, 571; Young v. Mackall, 4 Md. 362; Braashears v. State, 58 Md. 563; Smith v. Easton, 54 Md. 138, 39 Am. Rep. 355; 17 Cyc. 536-538; National Bank v. Baltimore & O. R. Co. 99 Md. 661, 105 Am. St. Rep. 321, 59 Atl. 134; Wright v. Wright, 2 Md. 429, 56 Am. Dec. 723; Mandru v. Ashby, 108 Md. 693, 71 Atl. 312; de Riechstal v. Walton, 66 Md. 470, 8 Atl. 462; Com. v. Blood, 97 Mass. 538; 14 Cya. 821; 23 Cyc. 1521, note 12; 1 Greenl. Ev. 16th ed. § 540.

If there has ever been any divorce decree rendered by a California court, attempting to dissolve the bonds of matrimony theretofore existing between James W. McGuire and his first wife, it must have been entered in a proceeding by publication against the nonresident defendant. In this event the Maryland and Virginia courts can refuse to recognize the California decree as binding upon them.

Haddock v. Haddock, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 Ann.

of an express contract of marriage. The latter question is discussed in the notes to Grigaby v. Reib, ante, 8; Becker v. Becker, ante, 56; and People v. Shaw, ante, 87.

The later cases support the propositions laid down in the earlier note, that where the solemnization of a marriage is established, its validity is presumed until the contrary is made to appear (Llanos v. Nairn, 4 Porto Rico Fed. Rep. 75; Roxbury v. Bridgewater, 85 Conn. 198, 82 Atl. 193; Haddon v. Crawford, 49 Ind. App. 551, 97

Cas. 1; Bell v. Bell, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551; Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237; Harrison v. Harrison, 117 Md. 607, 84 Atl. 57; 14 Cyc. 584, note 80, 586, 817.

Messrs. Baldwin & Sappington, for appellees:

One who asserts the invalidity of a marriage because one of the parties thereto has been formerly married, and the spouse of the former marriage is still living, has upon him the burden of proving that the first marriage has not been dissolved by divorce or lawful separation.

Clarkson v. Washington, 38 Okla. 4, 131 Pac. 935; Coachman v. Sims, 36 Okla. 536, 129 Pac. 845; Scott v. Scott, 25 Ky. L. Rep. 1356, 77 S. W. 1122; Pittinger v. Pittinger, 28 Colo. 308, 89 Am. St. Rep. 193, 64 Pac. 195; Haile v. Hale, 40 Okla. 101, 135 Pac. 1143; note to Smith v. Fuller, 16 L.R.A. (N.S.) 98; Goset v. Goset, 112 Ark. 47, L.R.A.—, —, 164 S. W. 759; Re Eichler, 84 Misc. 667, 146 N. Y. Supp. 846; Re Grande, 80 Misc. 450, 141 N. Y. Supp. 535; Ross

N. E. 811; Shepard v. Carter, 86 Kan. 125, 38 L.R.A. (N.S.) 568, 119 Pac. 533; Haile v. Hale, 40 Okla. 101, 135 Pac. 1143; Gamble v. Rucker, 124 Tenn. 415, 137 S. W. 499; Adams v. Wm. Cameron & Co. — Tex. Civ. App. —, 161 S. W. 417; and that this presumption is one of the strongest known to the law (Bruns v. Cope, — Ind. —, 105 N. E. 471).

Every essential to the validity of such a marriage is presumed, including the capacity of the parties. Winter v. Dibble, 251 Ill. 200, 95 N. E. 1093.

So, where the public solemnization of a marriage by a minister is proved, and it appears that the public records where the license, if any, would have been recorded, have been destroyed, it will be presumed that the license was obtained. Clayton v. Haywood, — Tex. Civ. App. —, 133 S. W. 1082.

The law is so positive in requiring a party who attacks a marriage to take the burden of proving its invalidity, that such requirement is enforced even when it requires the proof of a negative. Chancey v. Whinnery, — Okla. —, 147 Pac. 1036.

The later cases also uphold the principle laid down in the earlier cases, that ordinarily the presumption in favor of the validity of a solemnized marriage shifts to the second marriage of a person during the lifetime of a former spouse.

It was held in Haile v. Hale, 40 Okla. 101, 135 Pac. 1143, that one who asserts the invalidity of a ceremonial marriage upon the ground that one of the parties had a spouse living at the time it was entered into has the burden of proving that the first marriage had not been dissolved.

Where a marriage is attacked, the presumption as to its validity must be over-

v. Sparks, 79 N. J. Eq. 649, 83 Atl. 1118; Roxbury v. Bridgewater, 85 Conn. 196, 82 Atl. 193; Re Meehan, 150 App. Div. 681, 135 N. Y. Supp. 723; Huff v. Huff, 20 Idaho, 450, 118 Pac. 1080; Shepard v. Carter, 86 Kan. 125, 38 L.R.A. (N.S.) 568, 119 Pac. 533; Jackson v. Phalen, 237 Mo. 153, 140 S. W. 882; McCord v. McCord, 13 Ariz. 377, 114 Pac. 968; Clayton v. Haywood, — Tex. Civ. App. —, 133 S. W. 1082; Suter v. Suter, 68 W. Va. 690, 70 S. E. 705, Ann. Cas. 1912B, 405; Re Fitzgibbons, 162 Mich. 416, 139 Am. St. Rep. 570, 127 N. W. 313; Sullivan v. Grand Lodge, K. P. 97 Miss. 218, 52 So. 360; Re Stanton, 123 N. Y. Supp. 458; Maier v. Brock, 222 Mo. 74, 133 Am. St. Rep. 513, 120 S. W. 1167, 17 Ann. Cas. 673; Reynolds, Ev. pp. 49, 69; Wingo v. Rudder, — Tex. Civ. App. —, 120 S. W. 1073.

Burke, J., delivered the opinion of the court:

Letters of administration were granted by the orphans' court of Baltimore city to Thomas C. McGuire on the estate of Mar-

come by cogent and convincing proof. Gamble v. Rucker, 124 Tenn. 415, 137 S. W. 499.

The first marriage of one who remarried after separation from the first spouse will be presumed to have been terminated by death or divorce, where the contrary does not appear. Winter v. Dibble, 251 Ill. 200, 95 N. E. 1093; Shepard v. Carter, 86 Kan. 125, 38 L.R.A. (N.S.) 568, 119 Pac. 533; Adams v. Wm. Cameron & Co. — Tex. Civ. App. —, 161 S. W. 417.

It may be presumed that a man obtained a divorce from his first wife, although there is no direct evidence of it, where he abandoned her, and, nine years later, married another with whom he lived for twenty-eight years and until his death, six children being born to them, and where he took some steps looking to a divorce before his second marriage, and his second wife had no knowledge that he had not obtained a divorce, and believed that they were lawfully married. Huff v. Huff, 20 Idaho, 450, 118 Pac. 1080.

And a man's second marriage, after desertion by his first wife, who eloped with another man, will be upheld by presuming a divorce from the first wife,—at least where it was presumably within the power of the person attacking the second marriage to establish that no divorce was in fact obtained. Re Grande, 80 Misc. 450, 141 N. Y. Supp. 535.

Where nothing further appears than that a woman was twice ceremonially married, ten years intervening between the two marriages, the law presumes that there were no legal obstacles to the second marriage, and, if necessary, that the first was dissolved by death or divorce. Jackson v. Phalen, 237 Mo. 142, 140 S. W. 879.

Where a man, having married a woman,

gery J. Richardson, who died intestate on April 13, 1913. He reduced the assets of the estate to cash, and upon his petition the court fixed November 27, 1913, as the day for the meeting of distributees, with a view of making distribution of the residue of the estate in the hands of the administrator to those entitled to receive the same.

A contest arose over one quarter of the estate. Upon the evidence embraced in the record, and after full hearing, the court ordered that the one quarter of the estate in controversy be distributed among the appellant and the appellees in equal portions. From this order the appellant has prosecuted this appeal.

The only next of kin of Margery J. Richardson were the children and descendants of two brothers and two sisters who predeceased her. One of her brothers was James Washington McGuire, who died in Honolulu, Hawaii, in July, 1912, and the dispute in this case concerns the one-fourth part of the estate, amounting to \$2,775, to which he would have been entitled if living.

In 1848 he married Mary Eliza Smith, and lived with her in Baltimore. They had one child, Mary E. Shaeffer, the appellant on this record. The record tells us very little about him or his wife during his residence in Baltimore. He was a ship carpenter, and was accustomed to be absent from his home for long periods of time. He left Baltimore in 1849, and went to California, and never returned, except on one occasion, when he looked for his wife and

child, but failed to find them. His wife went to Virginia to live prior to the Civil War, and in 1866 procured a divorce from him in that state on the ground of abandonment. She has not been seen or heard from for many years, and is presumed to be dead. The daughter saw her father last about the year 1854, when she was five years old. When seven years old she was taken to the home of Mrs. Richardson, her aunt, with whom she lived for about eight years, during which time her father sent \$50 every six months for her support. Very little is known of the father after he left Baltimore, until the year 1855, at which time he was residing in Honolulu. On the 14th of September, 1855, he was baptized and married in Honolulu, Hawaii, by the Reverend Father Herman, a priest of the Roman Catholic Church, to Maria Vanbergen, and lived with her in Honolulu as man and wife until his death in 1912. That this marriage was celebrated according to the rites and ceremonies of the Roman Catholic Church is clearly established by the evidence. We quote from the depositions of Mrs. Maria McGuire, Frank Andrade, and Charles B. Wilson:

Mrs. McGuire: "I was married to James Washington McGuire September 14, 1855, by and in the presence of the Reverend Father Herman, in Honolulu, territory of Hawaii, my father being also present, and he is now dead."

Frank Andrade: "While I did not see them actually married, from my early boy-

hood I learned that he had procured a divorce without living with her, and, upon returning, announced that he had procured it, and both parties thereafter married other partners, it was held that the former wife, to secure an interest in his property after his death, must overcome the presumption that a divorce was secured. *Shepard v. Carter*, 86 Kan. 125, 38 L.R.A. (N.S.) 568, 119 Pac. 533.

The bare presumption as to the continuance of a first marriage, the parties to which live together but a short time, does not overcome the presumption as to the validity of the second followed by cohabitation for twenty years and the birth of children, where the latter is attacked by collateral relatives of the party twice married, to defeat the children's inheritance. *Re Meehan*, 150 App. Div. 681, 135 N. Y. Supp. 723.

The presumption as to the validity of a person's marriage during the lifetime of a former spouse is not overcome by proof that the party to both marriages has not obtained a divorce from the former spouse; and it must be proved that neither party to the first marriage has obtained a divorce (*Chancey v. Whinnery*, — Okla. —, 147 Pac. 1036); and if it appears that neither party has obtained a divorce, it must

be established that the first marriage has not been annulled (*Lazarowicz v. Lazarowicz*, 154 N. Y. Supp. 107).

In order to overcome the presumption of the validity of person's second marriage during the lifetime of a former spouse, the subsistence of the prior marriage must be established by strict proof. *Ibid*.

The presumption of the validity of a second marriage is not overthrown by proof of a prior marriage, unattended with proof that there has been no divorce, and that the first spouse, who was absent for five years without being heard from before the second marriage, was still alive. *Roxbury v. Bridgewater*, 85 Conn. 196, 82 Atl. 193.

But proof that the first husband was alive and within the state less than five years before the wife remarried, and that they were never divorced, precludes, at least where she knew that he was living less than five years before her remarriage, a presumption of divorce, or of his death, under a statute providing that where any husband abandons his wife and remains outside the state for five years without being known to the wife to be living, his death shall be presumed, and a subsequent marriage by her shall be valid. *Goset v. Goset*, 112 Ark. 47, L.R.A.—, —, 164 S. W. 759. L. A. W.

hood about 1855, these two people, Mr. and Mrs. McGuire, were always known as a married couple, associating with some of the best families in Honolulu, passing each other off to their friends and associates as husband and wife, and at the same time rearing and educating a large family of children."

Charles B. Wilson: "I did not see the marriage ceremony performed, but I do know that Mr. and Mrs. McGuire were living together as married people generally do. When I met them in 1867 they had some children, and later on had other children, and I do know that it was generally known and understood that Mr. and Mrs. McGuire were married people, and in all the years that I have known them this fact has never been questioned."

The nine appellees on this record, whose ages range from fifty-eight to thirty years, three of whom reside in California, are children by this marriage. They claim to be legitimate children of James Washington McGuire, and, as such, entitled to share in the distribution of the portion of Mrs. Richardson's estate which he, if living, would have taken. Mary E. Schaeffer, the appellant, and the only issue of the first marriage, claims to be the only legitimate child of James Washington McGuire, and that she is entitled to have the whole share paid over to her.

The question arising from these conflicting contentions is the validity of the second marriage, which occurred on September 14, 1855.

Omitting the consideration of the evidence offered to support the claim set up by the appellees that James Washington McGuire secured a divorce from his wife in San Francisco prior to the second marriage, and considering the case upon the facts stated, the question is: Are they sufficient in law to show the validity of the second marriage? This precise question has not been decided by this court, and it cannot be denied that there is some conflict upon it in the decided cases.

It would be an interminable as well as a hopeless task, to discuss all the cases upon the subject, or to attempt to reconcile or distinguish them. But there is sound reason and abundant authority for holding that, under the circumstances stated, the contention of the appellant ought not to be sustained. Of course, if the first marriage was subsisting at the time James W. McGuire contracted the second, there can be no question that the last marriage was void; but there appears to be no imperative rule of law which requires us to hold, under the facts disclosed by this record, that the prior marriage was subsisting. When it is

shown that there has been a formal ceremony of marriage, such as that proved with respect to the marriage of September 14, 1855, the law presumes the competency of the parties to enter into the marriage contract, and when it is shown that the marriage was solemnized by a person acting as minister, and followed by cohabitation, it will be presumed that the person assuming to officiate at the ceremony was authorized to perform it, that a license was properly issued, and that, in the absence of additional or countervailing proof, it will be presumed that all the proceedings were regular and valid. 19 Am. & Eng. Enc. Law, 1203, 1204, and cases cited in the notes.

There appears to be a general concurrence of authority in favor of the proposition that when a marriage has been solemnized according to the forms of law, every presumption will be indulged in favor of its validity, or, as stated in *Bowman v. Little*, 101 Md. 273, 61 Atl. 223, 657, 1084, that "the law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy."

The tendency of the courts is to hold the second marriage valid, especially if there is issue which may be bastardized by a contrary holding; and if the marriage has not been questioned for many years, its validity will not be overcome by the mere proof of a prior marriage. In such case the presumption in favor of innocence, morality, and legitimacy will prevail over the presumption of the continuance of the former marriage, and it will be presumed that the first marriage was not binding at the time of the second. This doctrine is well supported by adjudged cases in many states. *Pittinger v. Pittinger*, 28 Colo. 308, 89 Am. St. Rep. 193, 64 Pac. 195; *Hallums v. Hallums*, 74 S. C. 407, 54 S. E. 613; *Hunter v. Hunter*, 111 Cal. 261, 31 L.R.A. 411, 52 Am. St. Rep. 180, 43 Pac. 756; *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322, 68 N. E. 81; *Wenning v. Teeple*, 144 Ind. 189, 41 N. E. 600; *Scott v. Scott*, 25 Ky. L. Rep. 1356, 77 S. W. 1122; *Maier v. Brock*, 222 Mo. 74, 133 Am. St. Rep. 613, 120 S. W. 1167, 17 Ann. Cas. 673; *Re Rash*, 21 Mont. 170, 69 Am. St. Rep. 649, 53 Pac. 312; *Wingo v. Rudder*, — Tex. Civ. App. —, 120 S. W. 1073; *Stevens v. Stevens*, 56 N. J. Eq. 488, 38 Atl. 460; *United States v. Green* (C. C.) 98 Fed. 63.

Proof of subsequent marriage alone makes out a *prima facie* case as to its validity. To overcome this *prima facie* case, proof of a former marriage is required, and also evidence from which it may be concluded that it has not been dissolved by death or divorce. *Re Colton*, 129 Iowa, 542, 105 N.

W. 1008; *Patterson v. Gaines*, 6 How. 550, 12 L. ed. 553.

It is said in *Wenning v. Teeple*, 144 Ind. 189, 41 N. E. 600, that "it is settled law in this state that when a marriage has been consummated in accordance with the forms of law, it is presumed that no legal impediments existed to the parties entering into such marriage, and the fact, if shown, that either or both of the parties have been previously married, and that such wife or husband of the first marriage is still living, does not destroy the prima facie legality of the last marriage. The presumption in such a case is that the former marriage has been legally dissolved, and the burden that it has not rests upon the party seeking to impeach the last marriage." *Boulden v. McIntire*, 119 Ind. 574, 12 Am. St. Rep. 453, 21 N. E. 445; *Yates v. Houston*, 3 Tex. 433; *Dixon v. People*, 18 Mich. 84; *Harris v. Harris*, 8 Ill. App. 57; *Greensborough v. Underhill*, 12 Vt. 604; *Rex v. Twynning*, 2 Barn. & Ald. 386, 20 Revised Rep. 480; *Squire v. State*, 46 Ind. 459; *Klein v. Laudman*, 29 Mo. 259; 1 Bishop, *Marr. & Div.* § 457.

In an elaborate note to the case of *Pittinger v. Pittinger*, to be found in 89 Am. St. Rep. 199, the author states: "If it is shown that a party to a marriage has contracted a previous marriage, and that his or her former spouse is still living, this has been held not to destroy the prima facie validity of the second marriage. In such a case it has been presumed that the first marriage has been dissolved by divorce, and that the burden to show that it has not rests on the person seeking to impeach the last marriage, notwithstanding he is thereby required to prove a negative. Here the presumption of the continuance of the first marriage is made to yield to the presumption in favor of the validity of the second marriage and of the innocence of the parties to it." And he cites many cases to support this statement.

In *Maier v. Brock*, 222 Mo. 74, 133 Am. St. Rep. 613, 120 S. W. 1167, 17 Ann. Cas. 673, the precise question presented by this appeal was decided. The facts in that case were that Josef Maier had married the appellant, Barbara, in Germany, in 1865, and that they had lived together as man and wife until 1866, when he left her and came to the United States. Shortly after he reached this country she heard from him once, but no more until the year 1885, when he visited Germany, and she then saw him for the last time. He went to Missouri some time between the years 1872 and 1874, L.R.A.1915E.

and took with him a second wife, who lived with him until her death. He then married Marie Balduff, with whom he lived until her death. Two daughters were born of this marriage, who were grown young ladies at the time of the trial of the case. He then married a fourth wife, from whom he was divorced, and on January 17, 1902, he again married, and lived with his fifth wife until his death. Of this marriage a posthumous child was born. Maier died in 1904, seised of real estate. Barbara Maier, whom he had married in Germany, instituted suit for the assignment of dower, claiming to be the only legitimate wife of the deceased. These facts presented for decision the main legal proposition in the case, viz.: That the subsequent marriages in this country raised a presumption that Maier had been divorced from his first wife prior to his subsequent marriages. In a well-considered opinion in which many cases were examined, the court sustained this proposition, and held the subsequent marriages valid. The same contention was made in that case in support of the appeal of Barbara Maier as was urged upon the court in behalf of Mary E. Shaeffer. The language of the concluding portion of the opinion may be appropriately applied in this case: "To lend our concurrence to the contention of counsel for appellant would be equivalent to holding Maier was a bigamist and had lived the life of a criminal for thirty years in our midst; that his wives were concubines, and his children bastards. Such a thought is abhorrent to all law, and repulsive to every sense of right and justice, and no court would be justified in so holding, except where the evidence in a case should show such facts to be true beyond a reasonable doubt. Christian marriage is the very foundation upon which the family and home are based, and upon them the state and the Republic rest; and without marriage and its legal maintenance the family circle would be dissolved, the home extinguished, and the state would become useless, and the Republic would decline, and, in lieu thereof, immorality, chaos, and anarchy would reign supreme."

In view of the conclusion we have reached upon the facts stated, it becomes unnecessary to discuss the evidence adduced by the appellees to show that a divorce was, in fact, obtained in San Francisco before the second marriage.

Order appealed from affirmed; costs to be paid out of the fund in controversy.

NEW YORK COURT OF APPEALS.

HARLOW I. HALL, By Guardian *ad Litem*,
Respt.,
v.
NEW YORK TELEPHONE COMPANY,
Appt.

(214 N. Y. 49, 108 N. E. 182.)

**Negligence — leaving alcohol in road —
anticipating injury.**

Leaving a bottle of denatured alcohol beside the road, after completing work in connection with which it has been used, does not render one liable for injury to a child who finds it and is burned in attempting to set it afire, since such result could not reasonably have been expected.

(February 2, 1915.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Orleans County in plaintiff's favor, and from an order denying a motion for new trial, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Hubbell, Taylor, Goodwin, & Moser, for appellant:

The defendant was not negligent.

Beetz v. Brooklyn, 10 App. Div. 382, 41 N. Y. Supp. 1009; Walsh v. Fitchburg R. Co. 145 N. Y. 301, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068; Fitzgerald v. Rodgers, 58 App. Div. 298, 68 N. Y. Supp. 946; Berman v. Schultz, 40 Misc. 212, 81 N. Y. Supp. 647; Vincent v. Crandall & G. Co. 131 App. Div. 200, 115 N. Y. Supp. 600.

Leaving the bottle of alcohol on the culvert was not the proximate cause of the accident.

Note. — Many cases closely analogous to HALL v. NEW YORK TELEPH. CO. are cited in the notes to Akin v. Bradley Engineering & Mach. Co. 14 L.R.A.(N.S.) 586; Finkbeiner v. Solomon, 24 L.R.A.(N.S.) 3257; and Juntti v. Oliver Iron Min. Co. 42 L.R.A.(N.S.) 840, on the liability for injury to children from explosives left accessible to them, including the question of proximate cause. See also later case, St. Louis, I. M. & S. R. Co. v. Waggoner, 52 L.R.A.(N.S.) 181.

The general question whether the intervening act of a child breaks the causal connection between the defendant's negligence and the injury is discussed in the note to United States-Natural Gas Co. v. Hicks, 23 L.R.A.(N.S.) 249.

Various other phases of the subject of liability for injury to children are treated in notes cited in the Index to L.R.A. Notes under the title "Negligence," §§ 22-23a. L.R.A.1915E.

Herr v. Lebanon, 149 Pa. 222, 16 L.R.A. 106, 34 Am. St. Rep. 603, 24 Atl. 207; Berman v. Schultz, 40 Misc. 212, 81 N. Y. Supp. 647; Vincent v. Crandall & G. Co. 131 App. Div. 200, 115 N. Y. Supp. 600; Carter v. Towne, 103 Mass. 507; Laidlaw v. Sage, 158 N. Y. 73, 44 L.R.A. 216, 52 N. E. 679; Hoffman v. King, 160 N. Y. 618, 46 L.R.A. 672, 73 Am. St. Rep. 715, 55 N. E. 401.

The plaintiff has not shown that he and his parents were free from negligence.

Nowakowski v. New York & N. S. Traction Co. 162 App. Div. 881, 148 N. Y. Supp. 456; Specht v. Waterbury Co. 208 N. Y. 374, 102 N. E. 569; Rider v. Syracuse Rapid Transit R. Co. 171 N. Y. 139, 58 L.R.A. 125, 63 N. E. 836.

Mr. Thomas A. Kirby, for respondent:

Leaving the bottle of denatured alcohol on the culvert was negligence upon the part of the defendant, and was the proximate cause of the injuries which the plaintiff sustained.

Statler v. George A. Ray Mfg. Co. 195 N. Y. 482, 88 N. E. 1063; Mullaney v. Spence, 15 Abb. Pr. N. S. 323; Nelson v. McLellan, 31 Wash. 208, 60 L.R.A. 793, 96 Am. St. Rep. 902, 71 Pac. 747, 13 Am. Neg. Rep. 627; Harriman v. Pittsburg, C. & St. L. R. Co. 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451; Wells v. Gallagher, 144 Ala. 363, 3 L.R.A.(N.S.) 759, 113 Am. St. Rep. 50, 39 So. 747.

Leaving the bottle of denatured alcohol on the culvert was the proximate cause of the accident, and no error was committed by the trial court in its charge to the jury as to the question of proximate cause.

Laible v. New York C. & H. R. R. Co. 13 App. Div. 579, 43 N. Y. Supp. 1003, 2 Am. Neg. Rep. 49; Murphy v. Leggett, 29 App. Div. 309, 51 N. Y. Supp. 472, 4 Am. Neg. Rep. 676; Cohen v. New York, 113 N. Y. 533, 4 L.R.A. 406, 10 Am. St. Rep. 506, 21 N. E. 700; Travell v. Baanerman, 71 App. Div. 439, 75 N. Y. Supp. 866; Iamurri v. Saginaw City Gas Co. 148 Mich. 27, 111 N. W. 884; Lane v. Atlantic Works, 111 Mass. 139; Hartman v. Berlin & J. Envelope Co. 71 Misc. 37, 127 N. Y. Supp. 187, affirmed in 146 App. Div. 926, 131 N. Y. Supp. 1119; Mills v. Bunke, 59 App. Div. 44, 69 N. Y. Supp. 96.

The plaintiff and his parents were free from negligence.

Neum v. Rochester R. Co. 165 N. Y. 146, 58 N. E. 876; Buscher v. New York Transp. Co. 106 App. Div. 493, 94 N. Y. Supp. 798, 18 Am. Neg. Rep. 575.

Hogan, J., delivered the opinion of the court:

This action was brought by the plaintiff, an infant, by his guardian *ad litem*, to re-

cover damages alleged to have been suffered by reason of the defendant's negligence. The infant at the time of the alleged injury was nine years of age, and resided with his father in the town of Clarendon, Orleans county, New York. The defendant was engaged in operating a telephone exchange, with telephone lines and equipment on the highways of the town of Clarendon; and on the 25th day of June, 1911, the employees of the defendant were engaged in making repairs to its lines on one of its poles on the east side of a public highway of the town, near to the premises occupied by the father of the infant, and in the course of making such repairs used denatured alcohol.

In the work of soldering some wires the employees of defendant used a kerosene blow torch, and the work of soldering was done in a ditch near the side of the road, so that the light of the torch would not blow out. Near the pole on which the work was being done was a small concrete culvert over the ditch at the side of the road. Upon this culvert the men placed a bottle containing the denatured alcohol, and, after completing their work, placed their tools on a wagon and started back to their office in the village of Holley, about 1 mile distant. They left the bottle of denatured alcohol used in the operation of the torch upon the culvert where they had been using the same. The younger brother of the plaintiff, who was seven years of age, saw the men soldering the wires, and saw them pour the alcohol out of the bottle into their lamp, and light it.

On Sunday afternoon the plaintiff and his younger brother, while passing along the highway, saw the bottle of alcohol, and the younger boy picked up the bottle and carried it home. The bottle was an ordinary pint bottle, marked with a label, which was printed in red ink, and contained the words "Denatured Alcohol" and the word "Poison" between skulls and crossbones. When the boys reached home their father and mother were away. They placed the bottle on the porch, and the plaintiff was told by his younger brother that he was going into the house to get some matches and light the "stuff" that was in the bottle. He procured some matches, one of which he gave to the plaintiff, and poured some of the alcohol on the grass outside the house near a swing. The plaintiff lighted his match with the intention of igniting the alcohol, but the match went out. He then sat down in the swing while Alfred, the younger brother, lit one of his matches and touched it to the alcohol on the grass. The alcohol immediately blazed up, burning the plaintiff, and this action was brought to recover the L.R.A.1915E.

damages alleged to have been sustained by him.

No evidence was offered in behalf of the defendant on the trial of this case, and we think, upon the facts as presented by the record, a clear case was presented for the disposition of the question involved as one of law by the court.

The contention of the plaintiff appears to be that the act of the servants of the defendant in leaving the bottle of alcohol in the highway constituted negligence. It must be conceded, however, that the alcohol, left untouched by the boys, was not of necessity dangerous. Neither was it such an apparatus or article as would induce or allure children to play with it. In order to hold the defendant responsible for the result of this accident it must be found that the accident was the natural and probable consequences of the act of the servant in having left the alcohol upon the highway. The law requires that the injury must so directly result from a wrongful act that, according to common experience and the usual course of events, it might under the particular circumstances have reasonably been expected. *Jex v. Straus*, 122 N. Y. 293, 25 N. E. 478.

We do not agree that the facts in this case created a condition the result of which might under the circumstances have been reasonably expected, and the liability of the defendant in this case, it seems to us, has been settled in analogous cases adverse to the claim of plaintiff. *Beetz v. Brooklyn*, 10 App. Div. 382, 41 N. Y. Supp. 1009; *Fitzgerald v. Rodgers*, 58 App. Div. 298, 68 N. Y. Supp. 946.

To hold the defendant liable in damages upon the facts in this case would, we think, establish a rule of liability beyond that of any of the adjudged cases.

The judgment should therefore be reversed, and a new trial granted, with costs to abide the event.

Willard Bartlett, Ch. J., and Hiscock, Collin, Cuddeback, Cardoso, and Seabury, JJ., concur.

NORTH DAKOTA SUPREME COURT.

JOSEPH STEIDL, Resp't.,

v.

DAVID AITKEN, Impleaded, etc., Appt.

(30 N. D. 281, 152 N. W. 276.)

Mortgage — forcible possession — conversion.

1. A mortgagee who, under the insecurity

Headnotes by BRUCE, J.

clause in his mortgage, seeks to obtain the possession of the property mortgaged, and does so maliciously and by force or fraud, is a trespasser, and as such is guilty of wrongful conversion which, under the provisions of § 6721, Compiled Laws of 1913, extinguishes the lien of the mortgage.

Same — mitigation — claim and delivery.

2. The provision contained in § 6721, Comp. Laws 1913, that, even though the wrongful conversion of the mortgaged property by the mortgagee will extinguish the lien of the mortgage, such mortgagee may, if an action is brought for the conversion of the property, prove the amount of the debt secured by the mortgage in mitigation of damages, does not apply to actions in claim and delivery.

Pleading — conversion by mortgagee — mitigation.

3. Even in an action of conversion against the mortgagee for the wrongful seizure of mortgaged property, such mortgagee must plead and prove the amount of his mortgage debt if he seeks to mitigate the damages for such unlawful seizure.

Replevin — alternative judgment — absence of specific valuation.

4. In a claim and delivery proceeding in which the plaintiff is shown to be entitled to the possession of property seized by the defendant, and in which the trial is had to a court without a jury, and in which no demand is made for a specific valuation of the property, a judgment for the return of the property which is specified, or in the alternative for the payment of a certain sum, being the aggregate value thereof, in case said return cannot be had, is not invalid because of a lack of a specific valuation of each article in said judgment.

Same — judgment — specific valuation.

5. Although in an action of claim and delivery, in cases where a return of the property cannot be had, and a judgment in the alternative is directed for the value thereof, such judgment may be in the aggregate, it need not specify the value of each article unless a demand for such specification has been made upon the trial.

(March 30, 1915.)

Note. — Chattel mortgage; effect of unlawful seizure of property by mortgagee assuming to act under mortgage.

- I. Effect on lien of mortgage, 193.
- II. Actions to recover possession.
 - a. In general, 194.
 - b. Where mortgagee is entitled to possession, 194.
 - c. Where mortgagee is not entitled to possession, 194.
 - d. Where mortgagee is entitled to possession at time of trial, but not at time of seizure, 195.
- III. Actions to recover personal judgments.
 - a. In general, 196.
 - b. Actions in trespass, 196.
 - c. Actions in trover, 198.
 - d. Measure of damages, 199.

Scope.

The subject of waiver of chattel mortgage lien, by attachment or execution, is considered in notes to *Dix v. Smith*, 50 L.R.A. 714; *Kansas City Line Stock Commission Co. v. Bank of Hamlin*, 24 L.R.A. (N.S.) 490; and *Ex parte Logan*, 51 L.R.A. (N.S.) 1068.

As to effect of unaccepted tender on lien of chattel mortgage, see note to *Parker v. Beasley*, 33 L.R.A. 231, subsection II.

As to liability of chattel mortgagee who seizes tenant's mortgaged property for use of leased premises, see note to *Cooley v. Ksir*, 43 L.R.A. (N.S.) 527.

Generally, as to effect of "danger," "safety," or "insecurity" clause in a chattel mortgage, see notes to *Robinson v. Gray*, 23 L.R.A. 780, and *Fleming v. Thorp*, 19 L.R.A. (N.S.) 915.

It is here assumed that the seizure of the property by the mortgagee was unlawful, so that the note does not cover, as a distinct L.R.A.1915E.

question, any one of the different questions covered by the notes just referred to. Only the effect of an unlawful seizure, not that of an unlawful sale or conversion after seizure, is here considered. The two acts, however, are so closely related, where both seizure and sale are unlawful, that they cannot always be distinguished. Some cases of that kind, where the court apparently treated the seizure alone as a conversion, have been incidentally cited, but the note is exhaustive only of cases where there was only an unlawful seizure.

I. Effect on lien of mortgage.

The holding in *STEIDL v. AITKEN*, that the unlawful seizure of the mortgaged property by the mortgagee divested the lien of the mortgage, is based upon a local statute, and, of course, is not authority in jurisdictions where no such statute has been enacted. That particular question has not been directly before the courts previously, but it will be seen that the theory upon which the holdings are based is somewhat inconsistent with the idea that the lien is divested, or at least with the idea that the debt is forfeited. Of course, where the action is for damages in any form (see III. *infra*), the mortgagee usually has and retains possession of the property, so that the question of lien does not arise; and in most actions for possession there is some adjustment of the claims of the parties in such manner that there is no further need for a lien. On the whole, it seems to be the rule that an unlawful seizure by the mortgagee does not, in the absence of statute, divest the lien of the mortgage, so that in case the mortgagor recovers possession, the property is still subject to the lien until the debt is paid, unless some adjustment was made in the order of court.

APPEAL by defendant Aitken from a judgment of the District Court for Walsh County in plaintiff's favor in an action brought to recover possession of certain personal property, and damages for the detention thereof. Affirmed.

Statement by Bruce, J.:

This is an action in claim and delivery to recover the possession of certain horses and other personal property, and damages for the detention thereof. The case was tried by the court without a jury. The learned trial judge, among other things, found that on September 9, 1912, the plaintiff, Joseph Steidl, was the legal and rightful owner and in possession of the property in controversy; that on the said 9th day of

September, 1912, the defendants wrongfully and unlawfully seized and took said personal property out of the custody and possession of the plaintiff, and that such seizure was made under the instructions of the defendant David Aitken; that at the time of such seizure and taking the defendant was absent from the immediate place of seizure; that said property was on the highway 5 miles from Park River and in the possession of the plaintiff's servants or hired men; that such seizure and taking was accomplished by fraud by the defendants; that the defendant Catherwood at said time represented that he was an officer of Walsh county, North Dakota, and that he had the necessary and sufficient papers to take said property, and partly exhibited to the said

II. Actions to recover possession.

a. In general.

The question, Who is entitled to possession of mortgaged chattels? is, of course, not here considered. The question here raised presupposes a decision on that point.

b. Where mortgagee is entitled to possession.

Where the mortgagee is legally entitled to possession on general principles of right of possession following legal title, by reason of default in payments, by virtue of the insecurity clause, because of breach of contract by the mortgagor, or for any other reason, the mortgagor can maintain no action against him solely for the purpose of recovering possession, even though the mortgagee has seized the property by force, obtained possession by fraud, or in other unlawful manner. The mortgagor's remedy in such circumstances is an action for damages. See *infra*, III.

A mortgagor can maintain no action looking solely to a recovery of possession of the chattels against the mortgagee, who, being entitled to possession, has seized the chattels in an unlawful manner. *Geiser Mfg. Co. v. Davis*, 110 Ark. 449, 162 S. E. 59 (but under a statute authorizing the court to adjudicate the amount of the mortgage debt in replevin, the suit could be maintained for that purpose); *Wells v. Connable*, 138 Mass. 513; *Brown v. Coon*, 59 Mich. 596, 26 N. W. 780 (unless tender of mortgage debt and demand of return are made); *Nichols v. Knutson*, 62 Minn. 237, 64 N. W. 391.

c. Where mortgagee is not entitled to possession.

If the mortgagor is legally entitled to possession of the property, he may maintain replevin to recover it from anyone withholding possession from him. So it has been held that he may recover possession from the mortgagee,

—where all the notes of a series secured L.R.A.1915E.

by the mortgage, except one, had been paid, and there was a failure of consideration for the unpaid note, the mortgagee having wrongfully taken possession of the property upon the refusal of the mortgagor to pay the note, *Hennessey v. Barnett*, 12 Colo. App. 254, 55 Pac. 197; *Hutt v. Bruckman*, 55 Ill. 441;

—where, according to the terms of the mortgage, the mortgagor was to have possession of the property until the mortgage debt was due, and the mortgagee took possession, and failed upon the trial to show that the debt was due, *Niven v. Burke*, 82 Ind. 455;

—where an assignee of the mortgage, who became such with knowledge of the fact that his predecessor had released for a valuable consideration, to a purchaser of the property, the lien of the mortgage, seized the property upon foreclosure proceedings, and did not return it to the owner (the assignee so acting is liable to the owner in an action for the recovery of the property or for its value), *Black v. Howell*, 56 Iowa, 630, 10 N. W. 216;

—where the consideration for the mortgage debt had wholly failed, and the mortgagee had taken possession of the property against the emphatic protests of the mortgagor, even though the latter brought the action without notice to the former to return the property, *Ruiter v. Plate*, 77 Iowa, 17, 41 N. W. 474;

—where the mortgage debt had been paid, and the mortgagee (his assignee in this particular case) obtained possession without the consent of mortgagor after payment, *Blanchard v. Kenton*, 4 Bibb, 451;

—where the mortgagee took the mortgaged property from the mortgagor by force after tender of the amount of the mortgage debt, alleging that there was more due, *Schayer v. Commonwealth Loan Co.* 163 Mass. 322, 39 N. E. 1110;

—where, before the mortgage note became due, the mortgagee got an officer to go with him and together they demanded the property, which the mortgagor refused to deliver up to them; the officer then displayed the mortgage and informed the mortgagor that

agents and employees of the plaintiff some kind of papers, but did not remove said papers from his pocket or from the envelop in which they were incased, but did in fact represent and state to said agents and servants that he was an officer of the law, and that he had the necessary papers, and that he then ordered and directed the said servants and agents of plaintiff to turn about and drive said property back to Park River; that the said servants, believing it to be their duty to obey the said Catherwood as an officer of the law clothed with proper papers, complied with the demand; that the said Catherwood was not acting as an officer of the law, nor did he have in his possession any papers in claim and delivery or any attachment or any papers or court

process whatever, nor had any action for the recovery of the possession of said property been instituted in Walsh county; that said taking was wrongful, unlawful, and malicious; that the only papers that the said Catherwood had in his possession were some promissory notes and a chattel mortgage which covered only a part of the property; that on arriving at Park River, the said property was turned over immediately to the defendant David Aitken; that the plaintiff made a personal and persistent demand upon the defendants for a return of said property; that the defendants, each and both of them, refused to return the same; that within a short time after the horses had been placed in a livery barn, the plaintiff and two of his agents and servants

his duty as an officer compelled him to take the property, whereupon the mortgagor consented and the property was taken, *Kidd v. Johnson*, 49 Mo. App. 486;

—where a mortgagee in a chattel mortgage had taken possession of the mortgaged property against the will of the mortgagor and it appeared that the mortgage was void for usury, *Johnson v. Simmons*, 61 Mo. App. 395;

—where possession by mortgagee was taken under the insecurity clause in the mortgage after mortgagor had tendered him the amount of the mortgage debt, *Ibid.*;

—where mortgagee took possession of the mortgaged property after extending time for payment of the mortgage debt, for a valuable consideration, and before the extended time had expired, *Cummings v. Badger Lumber Co.* 130 Mo. App. 557, 109 S. W. 68;

—where the mortgagee took possession of the property for default, but it was alleged that the mortgage had been altered by erasing the description of the property and inserting a description of other property without the consent of the mortgagor (as a fact, however, the court held that the evidence failed to support the allegation, and the decision of the trial court was reversed on that ground), *Holland v. Griffith*, 13 Neb. 472, 14 N. W. 387;

—where it was alleged that the mortgage under which mortgagee had taken possession for default was void for fraud and misrepresentation, it having been given for certain territory for the manufacture and sale of certain patented articles, the mortgagee or his agent representing that he owned the exclusive right so sold, when in fact he did not own it (the court held, however, that there was no evidence to support the allegation, and on this ground reversed the decision of the trial court), *Ibid.*;

—where the mortgagee wrongfully took possession under the insecurity clause in the mortgage, there being no default or other breach of duty on the part of the mortgagor, *Furlong v. Cox*, 77 Ill. 293; *Newlean v. Olson*, 22 Neb. 717; *Brashier v. Tolleth*, 31 Neb. 622, 48 N. W. 398 (ac-L.R.A.1915E.

tion barred by statute of limitation); *Hull v. Godfrey*, 31 Neb. 204, 47 N. W. 850 (action by junior mortgagees after tender); *Brown v. Hogan*, 49 Neb. 746, 69 N. W. 100; *First Nat. Bank v. Teat*, 4 Okla. 454, 46 Pac. 474;

—where the mortgagee took possession of the property under a clause allowing him to do so if the property suffered a diminution in value, and the jury found against a diminution, *Solomon v. Friend*, 42 Ill. App. 407.

And it has been held that where the mortgage expressly gives the mortgagor the right to possession until default, and the mortgagee attempts to take possession before that time, he may be restrained from so doing by an injunction. *Ford v. Ransom*, 8 Abb. Pr. N. S. 416; *Bank of State v. Gourdin, Speers*, Eq. 439.

But it has been held that mortgagor who has received the benefit of the consideration in the mortgage, and has failed to comply with the terms, cannot maintain an action in replevin to recover the mortgaged property from the mortgagee, on the ground that the consideration was illegal. *Dougherty v. Bonavia*, 124 Mass. 210.

d. Where mortgagee is entitled to possession at time of trial, but not at time of seizure.

It has been held that where the mortgagee wrongfully takes possession of the property before default, and the mortgagor brings replevin for the property, but after commencement of suit makes the default in payment of the debt, the court will permit mortgagee to keep possession for the purpose of foreclosing the mortgage, but will instruct the jury to award to the mortgagor damages for the usable value of the property during the time of its illegal detention. *McDonald v. Schantz*, — Okla. —, 146 Pac. 36.

In much the same way it has been held that where the mortgagee brings replevin prematurely, secures possession of the property, and at the time of the trial, but not at the time of bringing his suit, is entitled

attempted peaceably and quietly to recover the possession of the same, but the same were retaken by the defendant Andrew Catherwood by force and threats. The court further found that the defendant Aitken claimed that the plaintiff Steidl became indebted to him in the sum of \$1,400, on or about August 2, 1912, and that the plaintiff made, executed, and delivered to the said Aitken a chattel mortgage on the said property, but that none of the promissory notes which the said mortgage attempted to secure, nor any part of the said \$1,400, was due until long after September 9, 1912. The court further found that no default had been made in the conditions of the notes and mortgage at the time of said seizure, and that as a matter of fact the se-

curity was not unsafe or insecure. The court further found the aggregate market value of the personal property and the specific value of each article.

Upon the foregoing findings of fact the learned trial judge made the following conclusions of law: (1) That the plaintiff was at all times herein mentioned and now is the owner of the personal property hereinbefore described, and that the same was wrongfully and unlawfully seized and taken from him by the said defendants, as hereinbefore stated and found, and that the plaintiff is entitled to the immediate possession and return of each and all of the said personal property so seized and taken by the defendants, as hereinbefore described, and that the same be returned and delivered

to possession, the judgment should be for the defendant for costs, but no order for the return of the property will be made. *Chase Bros. Piano Co. v. Connors*, 182 Ill. App. 418.

And where the mortgagor brings replevin for the property of which the mortgagee is in possession legally, and obtains possession on his replevin bond, it was held in *Wildman v. Radenaker*, 20 Cal. 616, that the court should give judgment for the defendant to carry costs, but if plaintiff maintained a tender for the amount of the debt, no order should be made for a return of the property to the mortgagee, since such an order would but necessitate another action by the mortgagor in order to get possession on his tender. The case is not strictly in point as to facts, but it illustrates the principle upon which the court will award or refuse to award possession, according to the rights of the parties as they exist at the time of the trial.

III. Actions to recover personal judgments.

a. In general.

In actions by the mortgagor against the mortgagee for the recovery of personal judgments for unlawful seizure of the mortgaged property, the courts have not found it necessary to distinguish between cases in which the mortgagee was, and those in which he was not, legally entitled to possession of the property seized. In either case the mortgagee is liable, and practically the same measure of damages applies in either case. Perhaps in cases in which only the manner of taking possession was unlawful, the mortgagor is confined to an action in trespass, while he may sue in trover for conversion in cases where the mortgagee had no right to possession; but the measure of actual damages in either case is the difference between the market value of the property and the amount of the mortgage debt; special damages in either case must be alleged and proven, and in either case circumstances may entitle the mortgagor to vindictive damages.
L.R.A.1915E.

Thus, in *Daggett v. McClintock*, 56 Mich. 51, 22 N. W. 105, the mortgagees in possession of the property—a stock of goods the right to possession of which by the terms of the mortgage was reserved to the mortgagor for two specific purposes: First, “to dispose of the goods in the due course of his trade by sale;” and second, “to apply the whole of the proceeds to the discharge of the mortgage debt”—were made garnishees before the mortgage debt was paid. The question as to whether they had taken possession of the goods with the consent of the mortgagor or not was a disputed one. The trial court ruled that if they had the jury might determine the value of the goods, and if it exceeded the amount of the mortgage debt the garnishees must account for the balance. This ruling was held to be erroneous, and the appellate court said: This charge went, in our opinion, upon an erroneous view of the garnishee laws, and of the defendant's rights. No matter in whose possession the property may have been, the rights of property of McClintock were no more than the balance which might remain after the mortgage should be paid. Even a possession taken prematurely would not subject the mortgagees to liability for the price as a conversion of the whole. It would still remain in their hands as mortgagees, subject to McClintock's right of redemption on payment of so much of the debt as had not been realized out of sales, and, if he had not lost the right, possibly to reclamation by him until default. But as soon as any default occurred, their right of possession would be absolute, until all their debt should have been realized. In no case can they be held liable for the value of the whole property before they have disposed of it. And they cannot, even in case of conversion, be responsible except for the balance after their own debt is paid. See *Brink v. Freoff*, 40 Mich. 610, and second appeal in 44 Mich. 69.

b. Actions in trespass.

An action for trespass may be maintained by the mortgagor against a mortgagee who takes possession of the mortgaged property,

back into the possession of the plaintiff, and in case a return delivery or possession thereof cannot be made or had, then that the plaintiff have judgment against the defendant, David Aitken, for the actual value of the said personal property, to wit, for and in the sum of \$650. (2) That, as a matter of law, no default of any kind existed in the chattel mortgage to the defendant Aitken, under which he alone and only claimed and claims said property and his right to the possession thereof, and, further, that neither of the said defendants was or is entitled to the possession of said property, or any part thereof, and that the seizure and taking of said property from the plaintiff, by the defendants, as hereinbefore stated and found, was wrongful, un-

lawful, and malicious. That under the undisputed facts in this case, the defendant Aitken's remedy, if any at all, existing on September 9, 1912, was by proper and orderly action in claim and delivery, and that the law will not permit the defendants, or either of them, to justify their action in this case under the said chattel mortgage, no default having been made on the terms and conditions of said mortgage. (3) That the plaintiff is entitled to recover judgment against the defendant David Aitken for the sum of \$300 as damages for the unlawful and wrongful taking and detention of said property. (4) That the action is dismissed as to the defendant Catherwood without costs, as the evidence discloses that he was not in possession or control of the personal

—where the mortgagee indemnified a deputy sheriff, went with him to where the mortgaged property was, and took possession of the property against the protests of the mortgagor, who contended at the time that there was not much, if anything, owing upon the mortgage debt, and requested a settlement, even though the trespass took place after the law day of the mortgage in which the mortgagee was given the right to take possession of the property on default in payment; and the mortgagor is entitled to prove every payment that he had made upon the mortgage debt before the trespass, even though made after the law day of the mortgage, *Thornton v. Cochran*, 51 Ala. 415;

—where the finding of the jury may be based upon evidence that the mortgage was procured by fraud, even though the mortgagee's act in taking possession under the terms of the mortgage would have been legal, had the mortgage been legal, *Holman v. Ketchum*, 153 Ala. 360, 45 So. 206;

—where the mortgage debt had been paid and mortgagee through his agents acted upon the theory that there had been default, *McDougal v. Alston*, — Ala. —, 66 So. 683;

—where the mortgage (in this case a bill of sale treated as a mortgage) provided that upon default of payment of the entire amount of the debt, the mortgagees could "take possession of said horse and mare as their own property without any process of law;" the mortgagor had paid part and defaulted on part, but still had the right of redemption; the mortgagees had taken possession of the horse by force and converted him to their own use. It was held that because of the forcible taking (otherwise the mortgagees would not have been liable) the defendants were liable for the excess of the value of the property over the unpaid mortgage debt plus the actual damages directly resulting from the wrongful taking, but if its value did not exceed the debt and there were no actual injuries resulting directly from the wrongful taking, the damages would be nominal (on measure of damages, generally, see III. d, *infra*), *McClure v. Hill*, 36 Ark. 268; L.R.A.1915E.

—where the mortgage was held to be invalid for fraud and usury, and the mortgagee had committed a trespass upon the property of mortgagor in the absence of the latter, by finding his key, unlocking and entering the house, and carrying away the property found therein, *Kemmitt v. Adamson*, 44 Minn. 121, 46 N. W. 327;

—where the mortgaged property was taken by the mortgagee on replevin bond, the verdict in the replevin suit was for mortgagor, and the mortgagee sold the property during the pending of the replevin case, *Caldwell v. Ryan*, — Mo. App. —, 79 S. W. 743;

—where the mortgagee wrongfully took possession under the insecurity clause in the mortgage, there being no default or other breach of duty on the part of the mortgagor, *Brashier v. Tolleth*, 31 Neb. 622, 48 N. W. 398 (action barred by the statute of limitation); *Hawver v. Bell*, 64 Hun, 636, 46 N. Y. S. R. 447, 19 N. Y. Supp. 612, affirmed in 141 N. Y. 140, 36 N. E. 6;

—where the mortgagee for a valuable consideration had extended the time for payment of part of the mortgage note, and took possession before the extended time had expired, there being no default on the part of the mortgagor, if the extension of time was a valid agreement, and the mortgage expressly gave right of possession until default to the mortgagor, *Newsom v. Finch*, 25 Barb. 175;

—where the property was seized unlawfully by one who apparently was an assignee of the mortgage, it being shown that he was in a conspiracy with the mortgagee, acting merely as a tool or cat's paw for him, *Burghen v. Purdy*, 27 App. Div. 460, 50 N. Y. Supp. 546;

—where mortgagee attempted to justify a premature taking of the property on the ground that the mortgagor had violated the terms of the mortgage in respect to removal of property, which violation was denied by mortgagor (it was held to be a question of fact for the jury to decide), *Pugh v. Kraft*, 126 N. Y. Supp. 162;

—where the possession was taken forcibly, against the protests of mortgagor,

property at the time of the commencement of this action, but plaintiff was justified, under the circumstances of the case, in making him a party defendant. (5) That plaintiff is entitled to judgment against the defendant David Aitken for his costs and disbursements, to be taxed by the clerk.

On these findings and conclusions of law judgment was entered in favor of the plaintiff for the immediate return of the property mentioned, with the alternative that if such return and delivery could not be had forthwith, the plaintiff should have judgment in the sum of \$650, the actual value of such property, and in addition thereto the sum of \$300 as damages for the unlawful taking and detention. From this judgment

the defendant David Aitken has alone appealed.

Mr. H. C. DePuy, for appellant:

Defendant had a right of possession under his mortgage.

Ellestad v. Northwestern Elevator Co. 6 N. D. 88, 69 N. W. 44; Roy v. Goings, 96 Ill. 361, 36 Am. Rep. 151; Hogan v. Akin, 181 Ill. 448, 55 N. E. 137; Botsford v. Murphy, 47 Mich. 536, 11 N. W. 375; Rector-Wilhelmy Co. v. Nissen, 35 Neb. 716, 53 N. W. 670; J. I. Case Plow Works v. Marr, 33 Neb. 215, 49 N. W. 1119; Schouweiler v. Hough, 7 S. D. 163, 63 N. W. 777; Jones, Chat. Mortg. § 431, 7 Cyc. 12.

In claim and delivery the plaintiff's right to possession, and the defendant's unlawful

although the mortgage contained an insecurity clause providing for the taking of possession, "using all necessary force to do so" (the action was against the sheriff who took the property), McClellan v. Gaston, 18 Wash. 472, 51 Pac. 1062;

—where mortgagee took possession of the property under the insecurity clause in his mortgage, but failed to show such conditions as gave him the legal right to do so, Slingo v. Steele-Wedeles Co. 82 Ill. App. 139;

—where there had been default, and the mortgagee had the right to take possession and sell in accord with well established rules of law, but took possession by such force as amounted to a breach of the peace (merely a statement), Hawkins Furniture Co. v. Morris, 143 Ky. 738, 137 S. W. 527;

—where the mortgage was upon property connected with the business of a turpentine distillery, the mortgagees seized the property before the debt was due, claiming a forfeiture on the ground that there had been a suspension of business by the mortgagor, but the mortgage contained no clause providing for a forfeiture upon that ground, and the evidence was not clear on the fact of suspension, Anderson v. Holmes, 14 S. C. 162.

Under the Alabama statute providing that in detinue the sheriff must hold the property seized for five days in order that defendant may give bond and receive the property, and upon his failure to give bond the sheriff must restore the property to him, unless the plaintiff gives a bond within the next succeeding five days, the mortgagor can, if the sheriff seizes the mortgaged chattels in detinue by the mortgagee, and wrongfully delivers them to the plaintiff without a bond, sue both the sheriff and the mortgagee as joint tortfeasors if the mortgagee has wasted or used the chattels. Torbert v. McFarland, 172 Ala. 117, 55 So. 311.

c. Actions in trover.

A mortgagor of chattels may maintain an action of trover against the mortgagee,

—where the property was to remain in L.R.A.1915E.

the possession of the mortgagor until default, and the mortgagee took possession thereof before default, without the consent of the mortgagor, and where the latter had paid the mortgage debt, he is not obliged to receive the property back in payment of the damages, Fields v. Copeland, 121 Ala. 644, 26 So. 491;

—where the finding of the jury for plaintiff may be based upon evidence that the mortgage was procured by fraud, even though the mortgagee's act in taking possession under the terms of the mortgage would have been legal, had the mortgage been legal, Holman v. Ketcham, 163 Ala. 360, 45 So. 206;

—where mortgagee had agreed, for a valuable consideration, to extend the time of payment of a balance upon the mortgage debt, and took possession for default before the extended time had expired, but after the debt was due according to the terms of the mortgage, Pierce v. Hasbrouck, 49 Ill. 23;

—where the mortgaged property was taken and sold by the mortgagees against the protests of the mortgagor, and the jury found that the mortgage under which the seizure had been made had been superseded by a later one which had been paid, Kramer v. Gustin, 53 Mich. 291, 19 N. W. 1;

—where mortgagee wrongfully and without cause seized the mortgaged property under the insecurity clause in his mortgage, Roy v. Goings, 96 Ill. 361, 36 Am. Rep. 151.

It has been held that if the mortgagee of chattels takes possession of them tortiously, no tender or offer to restore them to the mortgagor will defeat the latter's right of action or mitigate the damages; *a fortiori*, where the property taken has deteriorated in condition or depreciated in value, will an offer to return not be sufficient. Fields v. Copeland, 121 Ala. 644, 26 So. 491.

Where a statute provides that an innocent purchaser of chattels for value shall have title free from the lien of an unrecorded mortgage thereon, such purchaser can maintain an action in trespass and trover against the mortgagee where the

detention, are the only issues involved, except incidentally demand, value, and damages, and it is immaterial whether defendant acquired possession in an unlawful manner.

Willis v. DeWitt, 3 S. D. 281, 52 N. W. 1090; Nichols v. Knutson, 62 Minn. 237, 64 N. W. 391; Kierbow v. Young, 20 S. D. 414, 8 L.R.A.(N.S.) 216, 107 N. W. 371, 11 Ann. Cas. 1148.

The evidence does not establish that the seizure by defendant was accomplished in an unlawful manner.

Bordeaux v. Hartman Furniture & Carpet Co. 115 Mo. App. 556, 91 S. W. 1020.

In claim and delivery, where the mortgagor's right of possession is devested by maturity of the debt and default in pay-

ment before trial, the mortgagor can, as against the mortgagee, recover nothing beyond such damages as he may have sustained up to the time of default in payment.

Deal v. D. M. Osborne & Co. 42 Minn. 835, 43 N. W. 835; Jones, Chat. Mortg. § 437; Ferris v. Johnson, 136 Mich. 227, 98 N. W. 1014; 7 Cyc. 16-18.

In a proper action the mortgagee is entitled to have his mortgage debt deducted from the damage sustained by the mortgagor through a wrongful taking, and this without pleading a counterclaim.

Cushing v. Seymour, S. & Co. 30 Minn. 301, 15 N. W. 249; Brink v. Freoff, 44 Mich. 69, 6 N. W. 94; Lovejoy v. Merchants' Bank, 5 N. D. 623, 67 N. W. 956; Angell v. Egger, 6 N. D. 398, 71 N. W. 547; Woodruff

purchase was made and possession given prior to the recording of the mortgage, if the mortgagee takes possession of the chattels, even though the mortgagee was legally entitled to possession as against the mortgagor, and the purchaser does not oppose the taking by actual force; and in such case a demand for the return of the chattels is not a prerequisite to the suit. Dixie v. Harrison, 163 Ala. 304, 50 So. 284.

d. Measure of damages.

The general rule is that the mortgagee, by unlawfully seizing the mortgaged chattels, incurs liability to the mortgagor or to those suing in his right for the full market value of the property seized, but is entitled to a recoupment in the amount of the mortgage debt; he is also liable for special damages if alleged and proven; vindictive damages are allowable only for malice. Unfried v. Libert, 20 Idaho, 708, 119 Pac. 885; Casey v. Ballou Bkg. Co. 98 Iowa, 107, 67 N. W. 98 (exemplary damages were allowed. For some reason deduction of mortgage debt was not asked); Zelenka v. Port Huron Machinery Co. 144 Iowa, 592, 123 N. W. 332 (exemplary damages not asked, mortgage debt previously paid); Jones v. Annis, 47 Kan. 478, 28 Pac. 156; Brown v. Phillips, 3 Bush, 656 (damages for the use of the property while held may also be added); Gaar, S. & Co. v. Lyons, 99 Ky. 672, 37 S. W. 73, 148; Keables v. Christie, 47 Mich. 594, 11 N. W. 400; Woods v. Gaar, S. & Co. 93 Mich. 143, 53 N. W. 14; Kearney v. Clutton, 101 Mich. 106, 45 Am. St. Rep. 394, 59 N. W. 419; Sherman v. Clark, 24 Minn. 37 (claim and delivery; alternative judgment; nothing said about recoupment); Cushing v. Seymour S. & Co. 30 Minn. 301, 15 N. W. 249; Torp v. Gulseth, 37 Minn. 135, 33 N. W. 550 (merely a statement of the rule); Deal v. D. M. Osborne & Co. 42 Minn. 102, 43 N. W. 835 (statement *arguendo*); Kemmitt v. Adamson, 44 Minn. 121, 46 N. W. 327 (exemplary damages allowed); Cummings v. Badger Lumber Co. 130 Mo. App. 557, 109 S. W. 68 (replevin with adjustment of accounts); Rector-Wil-

helmy Co. v. Nissen, 35 Neb. 716, 53 N. W. 670; Russell v. Butterfield, 21 Wend. 300 (statement *arguendo*); Cutler v. James Gould Co. 43 Hun, 516; Fischman v. Levin, 83 Misc. 107, 144 N. Y. Supp. 674; Warren v. Susman, 168 N. C. 457, 84 S. E. 760; Brook v. Bayless, 6 Okla. 568, 52 Pac. 738 (replevin with right to adjust account); Fitch v. Green, 39 Okla. 18, 134 Pac. 34 (exemplary damages allowed, but decision of trial court allowing them reversed for other errors); Becker v. McKenzie, — Or. —, 144 Pac. 434; Swank v. Elwert, 55 Or. 487, 105 Pac. 901; Finley v. Cudd, 42 S. C. 121, 20 S. E. 32 (action for possession or value as alternative); Crouch Hardware Co. v. Walker, 51 Tex. Civ. App. 571, 113 S. W. 163; Saxton v. Williams, 15 Wis. 292 (action by sheriff who held the property on a third party's attachment for debts of mortgagor, against mortgagee, who took possession from sheriff wrongfully); Harder v. Hosp. 69 Wis. 288, 34 N. W. 145 (the court spoke of the recoupment as an act of grace to defendant, as though he had no right to it); Rice v. Kahn, 70 Wis. 323, 35 N. W. 465; Kilpatrick v. Haley, 13 O. C. A. 480, 27 U. S. App. 752, 66 Fed. 133 (exemplary damages allowed).

And on the same principle it has been held that there can be no actual damage to mortgagor by a premature seizure under legal process, where the amount of the mortgage debt exceeds the value of the property, since under such circumstances the mortgagor has no interest. Botsford v. Murphy, 47 Mich. 536, 11 N. W. 375.

In Frappiea v. Johnson, 75 Vt. 397, 58 Atl. 100, it was held that the wrongful taking made the mortgagee liable for the value of the use of the property up to the time when the debt became due. The debt was the full purchase price of the property, so it seemed to have been the theory that the value of the property equaled the amount of the lien and canceled it. This was defendant's theory, and on his appeal the court refused to reverse on the ground of error in the theory, but it apparently considered the theory correct.

Damages, such as ordinarily and in the

v. King, 47 Wis. 261, 2 N. W. 452; Lloyd v. Goodwin, 12 Smedes & M. 223; 42 Century Dig. col. 2409; 7 Cyc. 17.

Mr. H. A. Libby, for respondent:

Plaintiff had the lawful and peaceable possession of this property, under the terms of the mortgage and under the laws of this state, when he was dispossessed of the same by the defendants, and such action on the part of the defendants was wrongful, unlawful, and malicious.

Jones, Chat. Mortg. 2d ed. 705; Thornton v. Cochran, 51 Ala. 415; Street v. Sinclair,

71 Ala. 110; Thorn v. Kemp, 98 Ala. 425, 13 So. 749; Kidd v. Johnson, 49 Mo. App. 486; Cole v. Wabash, St. L. & P. R. Co. 21 Mo. App. 443; Cobbe, Replevin, §§ 447-453; Kilpatrick v. Haley, 13 O. C. A. 480, 27 U. S. App. 752, 66 Fed. 183; McClure v. Hill, 36 Ark. 268; Niven v. Burke, 82 Ind. 455; First Nat. Bank. v. Teat, 4 Okla. 454, 46 Pac. 474; 7 Cyc. 12-14; Pray v. Caldwell, 50 Mich. 222, 15 N. W. 92; Rector-Wilhelmy Co. v. Nissen, 35 Neb. 716, 53 N. W. 670; Ferris v. Johnson, 136 Mich. 227, 98 N. W. 1014; Humpfer v. D. M.

natural, course of events might fairly be expected to result from a seizure of the property, and such as have actually resulted from an illegal seizure thereof by the mortgagee, may, if properly pleaded, be allowed to the mortgagor in addition to the interest he has in the property. Cushing v. Seymour & S. Co. 30 Minn. 301, 15 N. W. 249.

In Fuller v. McLeod, 91 S. C. 328, 74 S. E. 647, an action in claim and delivery was brought prematurely and wrongfully by the mortgagee to recover possession of two mules, the mortgaged property. In the same action the defendant was given the possession of the mules, and actual damages of \$6.75 for money expended for feed for the mules while they were in custody of the officer, and punitive damages, were allowed. A claim for personal expenses of mortgagee while detained at the place of seizure and his traveling expenses incurred in his effort to procure sureties was disallowed as special damages, on the ground that no special damages were alleged in the complaint.

And damages for assault and battery may be recovered where the mortgagee by his agents uses force in illegally taking possession of the mortgaged property, of which the mortgagor has the right to possession. Schayer v. Commonwealth Loan Co. 163 Mass. 322, 39 N. E. 1110.

Where mortgagee replevined the mortgaged property a short time before he was entitled to the possession of the property, in an action against him for damages it is error to allow damages for the value of the use of the property for a longer time than from the time mortgagee took possession until the time when he was entitled thereto. Ferris v. Johnson, 136 Mich. 227, 98 N. W. 1014; Deal v. D. M. Osborne & Co. 42 Minn. 102, 43 N. W. 835.

And it has been held that the mortgagee's seizing the property with malicious motives, although he had the right under the mortgage to seize it, if he believed on reasonable grounds that the debt was unsafe or insecure, will make him liable for punitive damages. Davenport v. Ledger, 80 Ill. 574.

And under the same circumstances the court in Grady v. Smith, 14 Ill. App. 305, by reference to other cases, practically instructed the trial court to rule on the new trial that the full amount of the mortgage debt should be allowed to the mortgagee by way of recoupment against the damages, L.R.A.1915E.

whether actual or vindictive, to which the mortgagee might be entitled.

But anticipated profits from the use of a threshing machine, prevented by the mortgagee's illegal seizure of the mortgaged machine, are too conjectural and uncertain to be allowed as special damages in a suit by the mortgagor against the mortgagee based upon the illegal seizure. Truman v. J. I. Case Threshing Mach. Co. 169 Mich. 153, 135 N. W. 89; Cushing v. Seymour S. & Co. 30 Minn. 301, 15 N. W. 249.

Declarations by the agent of the seller as to the amount that may be made by the use of the property, when not included in the contract of sale, are not admissible in evidence in a suit by the buyer against the seller for damages caused by an illegal seizure of the same property under a chattel mortgage given for the purchase price thereof. Truman v. J. I. Case Threshing Mach. Co. 169 Mich. 153, 135 N. W. 89.

It has been held that an illegal seizure and sale of the mortgaged property by the mortgagee deprive him of any right to collect the balance of the mortgage debt remaining unpaid after the proceeds of the sale have been applied to the payment of the debt, for the reason that the mortgagee has deprived himself of his security. Rein v. Callaway, 7 Idaho, 634, 65 Pac. 63.

It has been held that where the mortgagee is legally entitled to possession of the property, but becomes a wrongdoer by reason of the manner of acquiring possession only, he is, in the absence of proof of special damages resulting directly from the wrongful act, liable only for the value of the property at the time it was taken, less the amount of the mortgage debt. Bird v. Womack, 69 Ala. 390; Street v. Sinclair, 71 Ala. 110; McClure v. Hill, 36 Ark. 268; Jones v. Horn, 51 Ark. 19, 14 Am. St. Rep. 17, 9 S. W. 309; Atkinson v. Burt, 65 Ark. 316, 45 S. W. 987, 53 S. W. 404; Geiser Mfg. Co. v. Davis, 110 Ark. 449, 162 S. W. 59.

Cases like Jackson v. Hall, 84 N. C. 489, and Lomax v. Walk, 33 Or. 385, 54 Pac. 199, in which the right of the mortgagee to take possession before the maturity of the mortgage debt was conceded, but some liability was incurred by him as trustee, obviously are not within the scope of this note, and are not included herein.

J. W. M.

Osborne & Co. 2 S. D. 310, 50 N. W. 88; Braashier v. Tolleth, 81 Neb. 622, 48 N. W. 398.

Bruce, J., delivered the opinion of the court:

In the case before us the findings of the court have the same effect as those of a jury. We cannot say that there is not only some, but much, competent and credible testimony in support thereof; and, such being the case, we are bound thereby. *Jasper v. Hazen*, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454.

We are not called upon to decide in this case the much mooted question whether a belief in the insecurity of the debt, which is not founded upon the fact, will justify the taking possession of the property by the mortgagee before the maturity of the debt, nor are we required to pass upon the question as to whether a clause in a mortgage, to the effect that the mortgagee may take possession of the property "whenever he shall choose to do so," will be enforced by the courts, or be repudiated upon grounds of public policy. It is enough for us to say and to hold, as we must and should, that a mortgagee in such a case is not authorized by the law or by the contract to take other than quiet and peaceable possession of such property, or possession by means of some legal remedy such as claim and delivery. If he takes possession of it, either by force or fraud, he is a trespasser. *Thornton v. Cochran*, 51 Ala. 415; *Street v. Sinclair*, 71 Ala. 110; *Thorn v. Kemp*, 98 Ala. 425, 13 So. 749; *Kidd v. Johnson*, 49 Mo. App. 486; *Kilpatrick v. Haley*, 13 C. C. A. 480, 27 U. S. App. 752, 66 Fed. 133; *McClure v. Hill*, 36 Ark. 268; *First Nat. Bank v. Teat*, 4 Okla. 454, 46 Pac. 474; 7 Cyc. 12-14; *Cobbey, Chat. Mortg.* § 493, 870; *Ford v. Ransom*, 39 How. Pr. 429. Not only does he become a trespasser in such a case, but, when such seizure is accompanied by malice, under the provisions of § 6721, Compiled Laws of 1913, being § 4695, Rev. Codes 1895 (§ 6145, Rev. Codes 1905), the wrongful act. extinguishes his lien, and in any subsequent action in claim and delivery, whether brought by himself or against him by the person wronged, he can no longer assert or rely upon it. There is therefore no merit in defendant's contention that all the damages that can be recovered in this case is the value of the use of the property from the time of its seizure to the time of the maturity of the mortgage debt, if debt there was.

The seizure was actuated by malice, and accomplished by force and fraud, and was therefore wrongful. Such wrongful seizure extinguished the lien of the mortgage, and L.R.A.1915E.

therefore the plaintiff was entitled to the possession of the property. It is true that § 6721, Compiled Laws of 1913, provides that, even in such a case, and provided the debt secured is a valid one, "in an action for the conversion of personal property the defendant may show in mitigation of damages the amount due on any lien to which the plaintiff's rights were subject, and which was held or paid by the defendant or any person under whom he claims."

The action before us, however, is one in claim and delivery, and not in conversion. Technically speaking, it is an action of replevin or detainue. See *Willis v. De Witt*, 3 S. D. 281, 52 N. W. 1090; *Dow v. Dempsey*, 21 Wash. 99, 57 Pac. 355.

The mere fact that the statute provides for a recovery of the value of the property in case delivery cannot be made does not change the action into one of conversion or of trespass. *Dow v. Dempsey*, supra. At the time of the beginning of the action of claim and delivery, the lien had been extinguished by the force of the statute, and no claim of possession could be made by the defendant under his alleged notes and chattel mortgage, even if the same were valid. So, too, in the case at bar, there is no attempt made to plead the facts which are attempted to be relied upon in mitigation of damages, and that such facts must be specially pleaded is well settled. *Phillips*, Code Pl. § 385, p. 396; 5 Enc. Pl. & Pr. 773. It is true that the answer mentions the mortgage, but the mortgage is merely mentioned and relied upon as an excuse for the seizure. There is no attempt to plead or prove the mortgage debt in mitigation of damages. All the defendant asks for, indeed, is for judgment to the effect that he is entitled to the possession of the property. Such being the case, and the lien of the mortgage being extinguished, the contention of the defendant that all that the plaintiff can possibly recover is the value of the use of the property between the time of the seizure and the time when the alleged mortgage debt became due, which was some time after the seizure, but before the trial, can have no foundation.

We are not unmindful of the case of *Lovejoy v. Merchants' State Bank*, 5 N. D. 623, 67 N. W. 956, which held that in an action of conversion the amount secured by the mortgage might be offset or pleaded in mitigation of damages. That case, however, was an action of conversion and was specifically treated as such. The opinion was handed down in a case which arose under § 1718 of the Civil Code of 1877, which section contented itself with merely declaring the lien extinguished, although the appeal was argued after the section was amended by

§ 6145, Rev. Codes 1905 (§ 6721, Comp. Laws of 1913), which provided that "in an action for the conversion of personal property the defendant may show in mitigation of damages the amount due on any lien to which the plaintiff's rights were subject, and which was held or paid by the defendant or any person under whom he claims."

The decision held that in order to avoid a circuity of actions, and on account of the fact that the general rule of a necessity of a possession in the defendant at the time of the beginning of the action did not apply to actions for damages, the defendant, in an action for conversion, would be allowed to recoup the value of the specific lien, and that he might likewise mitigate the damages by limiting the plaintiff's recovery to the amount which would compensate him for the actual loss to him by such conversion. The court, however, emphasized the fact that the action was one of conversion, and distinguished the case then at bar from that of *Everett v. Buchanan*, 2 Dak. 249, 6 N. W. 439, 8 N. W. 31, by stating that the former action was one in claim and delivery. This very distinction the legislature seems also to have made and intended in the amendment contained in § 4695, Rev. Codes 1895 (§ 6145, Rev. Codes 1905; § 6721, Comp. Laws of 1913), which puts in statutory form the rule announced in *Lovejoy v. Merchants' State Bank*, supra, and which seems to have as expressly limited the right to actions in conversion as did the opinion just cited.

We have no fault to find with the trial court's estimate of the value of the property, nor with his assessment of damages. There was, it is true, a conflict in the testimony, but there was sufficient evidence on which the court could base its findings. *Jasper v. Hazen*, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; *First Nat. Bank v. Prior*, 10 N. D. 146, 86 N. W. 362; *State ex rel. Morrill v. Massey*, 10 N. D. 154, 86 N. W. 225.

Appellant contends that where the evidence establishes that the property consists of separate chattels which are in no way dependent upon one another for their value, a judgment cannot be rendered for the aggregate value of the property in case it cannot all be returned. This objection would, no doubt, be good in some jurisdictions. The rule, however, which it announces, has no application in North Dakota, or rather no application under the record in the case at bar. As intimated by us in the case of *Smith v. Willoughby*, 24 N. D. 1, 138 N. W. 7: "It does not seem . . . that under our peculiar statute such specific valuation is necessary, except where L.R.A.1915E.

it is demanded upon the trial, and the jury are instructed to ascertain the same."

See §§ 7036, 7075, Rev. Codes 1905, bearing §§ 7635 and 7682, respectively, of the Compiled Laws of 1913. See also 34 Cyc. 1535. There was no demand for a specific valuation in the case at bar. There was therefore no error in finding the value in the aggregate.

So, too, although the judgment was in the aggregate, there was a specific finding of fact as to the value of each chattel which was taken, and, if the motion or demand had been made in the court below, we have no doubt that the learned trial judge would have changed the judgment into a specific form.

The judgment of the District Court is affirmed.

Burke, J.:

I concur in the result only.

OHIO SUPREME COURT.

STATE OF OHIO, Plff. in Err.,

v.

JOHN LASECKI.

(— Ohio St. —, 106 N. E. 660.)

Evidence — partial incompetence — form of objection.

1. Where the question put to a witness is competent, or not objected to by counsel, and the witness answers, a part of which answer is competent and a part incompetent, a general objection to the whole answer is properly overruled, even though there be some objectionable matter in the answer. To save the objector's rights he should clearly indicate the part of the answer to which he objects, and move its exclusion. If the court overrules such motion, he should then save his exception.

Same — exclamation by child — res gestæ.

2. The exclamation of a boy four years of age, that "the bums killed pa with a broomstick," which was made from ten to thirty seconds after a fatal assault upon his father,

Headnotes by the Court.

Note. — Admissibility of declarations as res gestæ as affected by incompetency as a witness of person making them.

This note is concerned only with the admissibility of declarations as *res gestæ* of persons incompetent to testify, and does not, therefore, include cases of declarations of such persons, which are sought to be admitted in evidence on other grounds. Nor does it include the question of the admissibility of *res gestæ* declarations of dead persons.

made in the boy's presence, is competent evidence to go to the jury as explanatory and illustrative of the manner and means by which the father was assaulted, since the utterance of the boy under such circumstances, made at the earliest opportunity to make an outcry in the presence and hearing of others, was the spontaneous and impulsive language of the situation, free from any subterfuge, artifice, or motive to fabricate.

Same — rules for determining.

3. The doctrine of *res gestæ*, as applied to exclamations, should have its limits determined not by the strict meaning of the word "contemporaneous," but rather by the causal, logical, or psychological relation of such exclamations with the primary facts in controversy.

Same — to whom applicable.

4. This doctrine applies equally to participants, bystanders, and persons incompetent to be witnesses.

(February 24, 1914.)

The theory upon which *res gestæ* declarations are admitted in evidence without the sanctity of the oath of the declarant being that they derive their credibility from the stress of circumstances under which they are made, and not from the trustworthiness of the person making them, it would seem that, as a general rule, the fact that such person is incompetent to testify as a witness should not affect their admissibility in evidence. And such, it seems, is the law.

And even in cases where the declarations are those of a person of irrational mind, it would seem that they might safely, and should, be admitted with proper explanations to the jury as to the nature of the declarant's incompetency, leaving it to that body to determine the weight to be given such evidence. In many instances, of course, such evidence may be of little or no value, and in a proper case the court in its discretion might even refuse to admit the evidence at all.

Children.

There are many cases considering the admissibility as *res gestæ* of statements of children, especially in rape cases; but these cases generally turn upon the question whether the declarations are close enough in time, etc., to be *res gestæ*, and it does not appear that the question of the competency of the declarant to testify as a witness is at all involved. Such cases are therefore not included in this note.

The earlier cases on this phase of the question are included in the note to Kenney v. State, 65 L.R.A. 318, in which case it is held that the fact that a child is too young to be a competent witness because of inability to comprehend the obligation of an oath does not preclude the admission in evidence of its declarations as part of the *res gestæ*. This accords with the law as L.R.A.1915E.

ERROR to the Court of Appeals for Cuyahoga County to review a judgment reversing a judgment of the Court of Common Pleas convicting defendant of manslaughter. Reversed.

Statement by Wanamaker, J.:

On the evening of January 1, 1913, Mike Zacharias, in company with his little son, aged about four years, and certain other men, visited the saloon of his brother, William Zacharias, in Berea street, Berea. Across the street from William Zacharias' saloon, another saloon was kept by a man by the name of Frank Niec. Between 10 and 11 o'clock in the evening, the defendant, John Lasecki, accompanied by John Wisniewski and Ignatz Maslinski, left Niec's place. Just before they left, Niec passed to clubs over the bar to them. Some few minutes later they returned to Niec's place, without clubs, and went into a side room. At about this time Mike Zacharias was

stated in STATE v. LASECKI; Soto v. Territory, 12 Ariz. 36, 94 Pac. 1104; Hunter v. State, 54 Tex. Crim. Rep. 224, 130 Am. St. Rep. 887, 114 S. W. 124; Thomas v. State, 47 Tex. Crim. Rep. 534, 122 Am. St. Rep. 712, 84 S. W. 823; Beal-Doyle Dry Goods Co. v. Carr, 85 Ark. 479, 108 S. W. 1053, 14 Ann. Cas. 48; Grant v. State, 124 Ga. 757, 53 S. E. 334.

It will be observed that the rule is the same in both civil and criminal cases. Ibid.

The disqualification of infancy does not exclude the declaration, which would be otherwise admissible, of an infant, because, as has been said, "the principle of the present exception obviates the usual sources of untrustworthiness in children's testimony; because, furthermore, the orthodox rules for children's testimony are not in themselves meritorious; and, finally, because the oath test, which usually underlies the objection to children's testimony, is wholly inapplicable to them." Beal-Doyle Dry Goods Co. v. Carr, 85 Ark. 479, 108 S. W. 1053, 14 Ann. Cas. 48.

In Beal-Doyle Dry Goods Co. v. Carr, supra, it is stated that the Arkansas statute expressly places the incompetency of children as witnesses upon the ground of their presumed incapacity to understand the obligation of an oath, but that, since the circumstances under which such a declaration is made obviates the necessity of an oath, and affords sufficient guaranty of the truth of the declaration without resting on the sanctity of an oath, the reason for holding that the age of the child renders the declaration incompetent ceases.

In Grant v. State, 124 Ga. 757, 53 S. E. 334, where a little child, too young to appear in court as a witness, said to the defendant as he was leaving the room in which the homicide was committed, "Huss, you have shot mama," the court said: "These words, spoken by a little child immediate-

killed in the street not far distant from Niec's place. Testimony was also offered tending to show that several others left Zacharias's saloon with the deceased at about this time, including the deceased's little son. The party left the saloon for the purpose of taking a car to Cleveland. As they walked towards the car Mike and his son were the last of the party. An altercation was heard between Mike and some other men not of his party. The sound of two or three blows, as if by a club, was heard by the men ahead of him. One or more of these men ran back, and found the deceased lying on the ground, and also saw some men running away. As they came up to where Mike was lying, the boy, in a nervous and much frightened state

of mind, said, "The bums killed pa with a broomstick." The boy was then about 25 feet away from his father and out of the hearing of those who were fleeing from the scene of the attack.

The above statement of facts is taken verbatim from the opinion of the court of appeals, and it is on this exclamation of the boy that the court of appeals reversed the judgment of conviction obtained in the common pleas court, and which judgment of reversal the state asks to have reversed in this court.

Messrs. Cyrus Locher, Samuel Doerfler, and P. J. Mulligan, for the State:

The exclamation of the boy is admissible, for the reason that it was so closely con-

ly after the shocking occurrence, were clearly admissible as a part of the *res gestæ*. No declaration could have been freer 'from all suspicion of device or afterthought,' and it was, in point of time, almost concurrent with the act to which it referred. It was the very deed itself, speaking through the mouth of a babe."

In *Berry v. State*, 9 Ga. App. 868, 72 S. E. 433, it is held that the age of the declarant is a circumstance entitled to some consideration in determining whether, under the *res gestæ* rule, sufficient time has elapsed for the return of deliberate reason, so as to change the declarations from verbal acts to inadmissible hearsay.

Magill v. Southern R. Co. 95 S. C. 306, 78 S. E. 1033, holds that the admissibility of *res gestæ* statements of the injured party in a personal injury case, who was a small boy about nine years old, was not affected by the fact that he was dazed and shocked when the statements were made. What force and effect and credence the evidence should be given was for the jury.

Husband and wife.

Res gestæ declarations of husband and wife are admissible for or against each other, although each may be incompetent to testify as a witness in the case. *Cook v. State*, 22 Tex. App. 511, 3 S. W. 749; *Robbins v. State*, — Tex. Crim. Rep. —, 166 S. W. 528; *People v. Foley*, 64 Mich. 148, 31 N. W. 94; *Dunham v. State*, 8 Ga. App. 668, 70 S. E. 111; *Johnson v. Sherwin*, 3 Gray, 374; *McGowen v. McGowen*, 52 Tex. 657; *Rudd v. Rounds*, 64 Vt. 432, 25 Atl. 438; *Hanna v. Hanna*, 3 Tex. Civ. App. 51, 21 S. W. 720; *Cattison v. Cattison*, 22 Pa. 275; *Gilchrist v. Bale*, 8 Watts, 355, 34 Am. Dec. 469; *Miller v. Williamson*, 5 Md. 219, and see 2 Md. Ch. 94.

In *Cook v. State*, 22 Tex. App. 525, 3 S. W. 749, where the husband was being prosecuted for homicide, the court said: "With regard to the declarations of the wife, made during the progress of the difficulty, just preceding and subsequent to the shooting of Russell, they were admissible as verbal

acts, and were clearly parts of the *res gestæ*, and consequently did not come within the rule announced in article 735, Code of Criminal Procedure, which prohibits a husband and wife from testifying against each other in a criminal prosecution. . . . Mr. Wharton, in his work on Evidence, § 252, says: 'It is in any view clear that declarations which are the immediate accompaniments of an act are admissible as part of the *res gestæ*.' Again, in § 263, he says that 'the wife's declarations, forming a part of the *res gestæ*, are admissible against the husband.' This doctrine is maintained in civil cases at common law. *Johnson v. Sherwin*, 3 Gray, 374; *Walton v. Green*, 1 Car. & P. 621; *Gilchrist v. Bale*, 8 Watts, 355, 34 Am. Dec. 469; *Aveson v. Kinnaird*, 6 East, 188, 2 Smith, 286, 8 Revised Rep. 455; *Thompson v. Trevanion*, 1 Skinner, 402, 11 Eng. Rul. Cas. 282. At common law, the rule which in civil cases excluded the husband and wife from testifying against each other was the same as that which is announced by our statutes with regard to criminal cases. There is no law of this state which governs or regulates the admission of declarations of the wife affecting the husband, when they constitute a part of the *res gestæ*, and, there being no specific rules prescribed by statute, other rules of the Code relegate us to the common law for the rules which are to govern. Code Crim. Proc. arts. 27 and 725. We shall therefore adhere to the common-law rule as expressed in the authorities above cited, and hold the declarations of the wife admissible against the husband as a part of the *res gestæ*; for it is indispensable to a correct understanding of every transaction that every act attending it, verbal as well as physical, by whomsoever it may be committed, be placed before the court for its enlightenment. This rule as to *res gestæ* overrides all other rules known to the law governing the admissibility of testimony." This language is quoted in *Robbins v. State*, — Tex. Crim. Rep. —, 166 S. W. 528.

In *Dunham v. State*, 8 Ga. App. 668, 70 S. E. 111, it is held that "even though the defendant's wife was not a competent wit-

nected with the attack as to be part of the *res gestæ*.

Conrad v. State, 75 Ohio St. 52, 6 L.R.A. (N.S.) 1154, 78 N. E. 957, 8 Ann. Cas. 966; Bishop, New Crim. Proc. §§ 1085, 1086; Abbott, Trial Brief, Crim. p. 246; Travellers' Ins. Co. v. Mosley, 8 Wall. 397, 19 L. ed. 437; Whart. Ev. § 259; State v. Walker, 78 Mo. 380; Barrow v. State, 80 Ga. 191, 5 S. E. 64; Knigh v. State, 114 Ga. 48, 88 Am. St. Rep. 17, 39 S. E. 928; People v. McArron, 121 Mich. 1, 79 N. W. 944; State v. McCourry, 128 N. C. 594, 38 S. E. 883; Lander v. People, 104 Ill. 248; Surber v. State, 99 Ind. 71.

Mr. Henry Dunlaurence Niedzwiedzki, for defendant in error:

The declaration of the boy was not

ness, the statement attributed to her was admissible, both as a part of the *res gestæ* of the difficulty, and because, having been alleged to have been made in the defendant's presence, it was such a statement as might have required a denial on his part. According to the testimony objected to, the defendant's wife said to the prosecutor in the defendant's presence: 'Jim, go on home; Lymus [the defendant] is trying to kill you with a gun.'

In Johnson v. Sherwin, 3 Gray, 374, an action by a wife's father against her husband for necessities supplied her, it was held that "the reasons given by the wife for leaving her husband's house, not under oath, and she not a competent witness against her husband, could only be given in evidence as *res gestæ*, as connected with and part of the act of leaving her husband's house, and to this extent they were admitted."

Miller v. Williamson, 5 Md. 219, holds that while the husband was incompetent to testify in behalf of his wife, yet declarations of his, forming a part and parcel of the transaction in question, were nevertheless admissible in evidence in her behalf. This was an action involving the settlement of an estate.

In State v. Arnold, 55 Mo. 89, it is held that as to matters touching which a married woman is an incompetent witness, testimony concerning her declarations is inadmissible. But it does not seem that the declarations of the wife in this case were *res gestæ*.

Convicts and unpardoned felons.

That declarant is a convict or unpardoned felon does not affect the admissibility of his *res gestæ* declarations in evidence.

Thus, Flores v. State, — Tex. Crim. Rep. —, 79 S. W. 808, holds that the declaration of one at the time he was shot is admissible as *res gestæ*, even though he was at the very time an unpardoned convict.

And in Neely v. State, — Tex. Crim. Rep. —, 56 S. W. 625, it was held that the fact L.R.A.1915E.

admissible as forming part of the *res gestæ*.

Underhill, Crim. Ev. § 101; Whart. Crim. Ev. 262; Roscoe, Crim. Ev. § 23; Bishop, Crim. Proc. § 1087; Bradshaw v. Com. 10 Bush, 576; State v. Moore, 38 La. Ann. 66; State v. Riley, 42 La. Ann. 995, 8 So. 469; Flynn v. State, 43 Ark. 289; Baker v. State, 45 Tex. Crim. Rep. 392, 77 S. W. 618; Morton v. State, 91 Tenn. 437, 19 S. W. 225; People v. Roach, 17 Cal. 298.

Wanamaker, J., delivered the opinion of the court:

Was the exclamation of the boy competent testimony? Both sides agree that this is the only question in the case, and that the testimony is competent only upon the theory

that the deceased declarant would have been incompetent to testify, on account of a previous conviction for felony, would not exclude his declarations, made as a part and parcel of the *res gestæ*. In other words, the incompetency of one as a witness does not prevent that person's declaration at the time of the killing from being introduced as a part and parcel of the transaction. Prosecution was for homicide.

In Johnson v. State, 183 Ala. 79, 63 So. 163, in a prosecution of a convict for murder, testimony of another convict as to what he said and what defendant said at the time of the murder was held admissible as part of the *res gestæ*, but it does not expressly appear that the objection was to the competency of the declarant.

In a prosecution for the larceny of a hog, the accused has the right to prove by a competent witness that another person, accused with him of the theft of the hog, and previously convicted on a separate trial, asked him on the same day, and immediately preceding the alleged taking, "to go and help him get his hog." State v. Dellwood, 33 La. Ann. 1229. The court said: "We think the court erred in rejecting this evidence. The statement offered to be proved lacks no element necessary to constitute it a part of the *res gestæ*; and it seems to us to be legitimate evidence for the purpose of disproving the *animus furandi*. The competency of Jenkins as a witness, and his credibility, have no pertinency to the question. The purpose of the evidence was not to establish the truth of Jenkins's statement, but merely to prove the fact that the statement was made to witness, and that, whether true or false, defendant, believing it to be true, acted upon it. We therefore think that defendant's exception to the rejection of the testimony was well taken, and the case must be remanded on this ground."

Slaves.

According to the weight of authority the *res gestæ* declarations of a slave were admissible in evidence, although such persons,

that it is a part of the *res. gestæ* of the case.

The record discloses that the exclamation arose in the following manner:

"Q. You may tell if anything unusual happened there and what it was, anything out of the ordinary.

A. We was walking about 150 feet from the car, maybe 200, I couldn't tell you, and I heard the hitting twice, like that [indicating], and think there was an argument started, and the boy said that the bums had killed his papa with a broomstick. (Objection. Objection overruled. Exception.)"

It will be noted that there was no objection to the question, and that the objection is to the whole answer. Now, manifestly, the major part of the answer is competent and responsive to the question. If the exclamation of the boy be incompetent, the objection of counsel should have been addressed to that exclamation, asking an order from the court to exclude it from the consideration of the jury. But that was not done. Where objection is made to the entire answer, part of which is competent and part incompetent, there is but

one thing for the trial judge to do; that is, to overrule the objection; and in this case there was no error on the part of the trial court.

But we are not disposed to decide a case of this importance upon the mere failure of counsel to properly save his rights, and shall consider the case on its merits, as if the objection and exception had been properly made.

Was the exclamation a part of the *res. gestæ*?

Wharton's definition of *res. gestæ* is as follows: "Those circumstances which are the undesigned incidents of particular litigated acts, and are admissible where illustrative of such acts. These incidents may be separated from the act by lapse of time more or less appreciable. Their sole distinguishing feature is that they should be necessary incidents of the litigated act,—necessary in this sense: That they are part of the immediate preparations for, or emanations from, such acts, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act,—a relation not broken by individual wariness seeking to manufacture evidence for

were incompetent to testify as witnesses in the case. *Lewis v. Moses*, 6 Coldw. 193; *Yeatman v. Hart*, 6 Humph. 375; *Nored v. Adams*, 2 Head, 449; *Looper v. Bell*, 1 Head, 374; *Jones v. White*, 11 Humph. 368; *Kelly v. Cunningham*, 36 Ala. 78; *Stein v. State*, 37 Ala. 123; *Stone v. Watson*, 37 Ala. 279; *Barker v. Coleman*, 35 Ala. 221; *Holloway v. Cotten*, 33 Ala. 529; *Wilkinson v. Moseley*, 30 Ala. 562; *Rowland v. Walker*, 18 Ala. 749; *Eckles v. Bates*, 26 Ala. 655.

In the same connection, see *Lush v. McDaniel*, 35 N. C. (13 Ired. L.) 485, 57 Am. Dec. 566; *Biles v. Holmes*, 33 N. C. (11 Ired. L.) 16; *Roullhae v. White*, 31 N. C. (9 Ired. L.) 63; *Wallace v. McIntosh*, 49 N. C. (4 Jones, L.) 434; *Bell v. Morrisett*, 51 N. C. (6 Jones, L.) 178; *Henderson v. Crouse*, 52 N. C. (7 Jones, L.) 623; *Tilman v. Stringer*, 26 Ga. 171; *Gray v. Young*, Harp. L. 38; *McClintock v. Hunter*, Dud. L. 327; *Welch v. Brooks*, 10 Rich. L. 123; *Feagin v. Beasley*, 23 Ga. 17.

But in *Tumey v. Knox*, 7 T. B. Mon. 88, holding that statements of a negro slave as to his symptoms were not competent in an action for breach of warranty of soundness, it was said: "Slaves are not witnesses, by our laws, against the body of society; they are witnesses only against or for negroes or mulattoes. To receive the declaration or assertion of a slave against a party for or against whom not even his testimony upon oath, in the most solemn form and manner known to the law, would or could have been received, would be to undermine the statute, to reject the substance, and be cheated by the shadow." But the L.R.A.1915E.

court seems to have divided on the question.

In most of the cases above cited, the declaration sought to be admitted in evidence concerned the nature, symptoms, and effects of the sickness of the slave. Concerning the admissibility of these declarations, the court in *Yeatman v. Hart*, 6 Humph. 375, said: "When declarations are admitted as *res. gestæ*, it is not upon the ground that the party making them could be a witness, but they are 'verbal acts,' connected with the transaction, and calculated to illustrate its character. Thus, in an action for criminal conversation, the wife's letters are evidence to show upon what terms she lived with her husband, and their deportment towards each other. *Greenl. Ev.* § 102. But she would be incompetent to testify either for or against her husband. The statement of a sick slave, as to the seat of his pain, the nature, symptoms, and effects of his malady, is as well calculated to illustrate the character of his disease as would be the statements of any other person. They are therefore equally admissible for that purpose. But whether expressions indicating the nature and effects of a disease, uttered by the sick person, are real or feigned, is for the jury to determine."

Speaking in the same connection the court in *Fondren v. Durfee*, 39 Miss. 324, said: "Whenever the question to be determined is, whether a party was laboring under a particular disease, his own declaration, made at the time, and indicating the nature and symptoms of the disease, to a person standing in a relation which calls for truth

itself. Therefore declarations which are the immediate accompaniments of an act are admissible as part of the *res gesta*; remembering that immediateness is tested by closeness not of time, but by causal relation, as just explained." 7 Words & Phrases, 6130.

Again, Wharton says *res gesta* are the facts which form the environment of a litigated issue.

Bishop, in his New Criminal Procedure 2d ed. § 1085, uses the following: "But it is difficult, perhaps impossible, to formulate an available rule as to what shall be deemed of the transaction, and what shall not. It appears safe to say that the subsidiary act need not transpire at the same instant with the main one, or always even on the same day; and, in reason as well as in accordance with the current of the authorities, the time which divides the two is not the controlling consideration, though it may be taken into the account. Is it presumable that, distinctly and palpably, it influenced or was influenced by the main act, or proceeded from the same motive? If so, it is admissible, otherwise not."

Again, the same author, in § 1086, uses this language: "The admissibility of par-

ticular acts being conceded, whatever of a nature explanatory thereof was during their performances said, whether by the doers or by the lookers-on, by the parties to the litigation, or by third persons, may, subject to some apparent or real qualifications, be given in evidence whenever the acts are. . . . In a general sense, the declarations, from whatever source, must, to be thus admissible, be contemporaneous with the act they would illustrate. We may have cases apparently requiring them to be strictly so. But it is, at least, the better doctrine that they are competent whenever near enough to the act, either before or after it, to be probably prompted by the same motive, not an afterthought, and apparently to constitute of it a part; otherwise they are not competent."

Professor Wigmore, in his excellent work on Evidence, vol. 3, §§ 1745-1747, discusses this same question with large ability and logical analysis, showing the foundation of the principle in the doctrine of *res gesta* as applicable to exclamations and as constituting a striking exception to the hearsay rule. In § 1747 the author uses this language: "This general principle is based on the experience that, under certain exter-

and confidence in the declarant, must be received as competent evidence of the fact; for otherwise it would often be impossible to determine the character of the disease. They must be regarded as verbal acts, and are hence free alike from the objection of being hearsay and of being the testimony of a slave."

Concerning the admissibility of the acts and declarations of a slave apprentice, the court in Clancy v. Overman, 18 N. C. (1 Dev. & B. L.) 402, said: "This court is also of opinion that the evidence offered of the acts and declarations of the apprentice was improperly rejected. They may not have been of great importance, and they are not evidence because of any credit due to the party by whom they were done or uttered; but his acts are evidence because they are his acts; and his declarations are evidence because his disposition and temper are subjects of investigation; and these cannot be ascertained but through the medium of such external signs." This was an action of covenant by plaintiff for failure of defendant to teach and instruct such apprentice slave.

While a free negro, incompetent to testify as a witness, was in possession of certain property, his statements in explanation of the nature of such possession were held in state v. Emory, 51 N. C. (6 Jones, L.) 133, to be competent as part of the *res gesta*; but after he was turned out of possession his statement in reference to a fact alleged to have taken place before was held not to be aided by the principle of evidence referred to. L.R.A.1915E.

In Whaley v. State, 11 Ga. 123, a witness was permitted to testify in a prosecution for larceny of a negro, that in consequence of what was said to him by the negro he was induced to change his position in watching for the defendant.

And so in Grady v. State, 11 Ga. 253, it was held competent for a witness to state that certain acts were done in consequence of information received from a negro.

Insane persons.

It was held in Wilson v. State, 49 Tex. Crim. Rep. 50, 90 S. W. 312, that whether deceased was conscious and sane at the time he made the *res gesta* statements was not material. Citing Kenney v. State, — Tex. Crim. Rep. —, 65 L.R.A. 316, 79 S. W. 817.

But State v. Vaughn, 223 Mo. 149, 122 S. W. 677, holding that certain statements made by an insane woman incriminating the defendant were in no sense a part of the *res gesta*, intimates that even though such statements had been *res gesta*, they would not have been admitted because of the declarant's incompetency to testify as a witness.

Res gesta declarations of one made when robbed, two months before the trial, are admissible in evidence notwithstanding he has at the time of the trial been adjudged insane, there being nothing to indicate that he was not perfectly sane at the time the declarations were made. State v. Smith, 26 Wash. 354, 67 Pac. 70. W. W. A.

nal circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him, and may therefore be received as testimony to those facts. The ordinary situation presenting these conditions is an affray or a railroad accident. But the principle itself is a broad one. Its phrasings differ widely in different courts; but there is in the judicial opinion of to-day something of an approach to uniformity." The author cites a large number of cases in support of the doctrine.

It is impossible to reconcile the multitude of diverse decisions by courts of last resort on the proper scope and limitations of the old phrase *res gestæ*. Many of the states follow reverently and rigidly the old English rule that before any exclamation is admissible in evidence on the theory of *res gestæ*, it must be contemporaneous in time with the principal fact in litigation. That is, just as soon as it appears that it is subsequent in time to the principal fact, and merely narrative of it, such exclamation is not a part of the *res gestæ*, and is therefore not admissible.

This old English rule had its birth in a strange combination of circumstances. First, the inhumanity and barbarity of the penalties provided by the English law for criminal cases. A century ago 200 crimes in England were punishable by death. Second, the prisoner had no rights in an English court of justice, save the right to be convicted. He was not competent as a witness in his own behalf, nor indeed were any members of his family. He was not allowed the privilege of having his own counsel address the jury, and indeed, in earlier days, was not even allowed the privilege of counsel. He had no right of appeal, and many other prerogatives now enjoyed by the defendants were wholly unknown to the English law a century or more ago.

With these barbarous penalties and this outrageously unjust procedure it is little wonder that the humanity of the judge, as well as his love of legal casuistry, should

resort to a strained and technical construction of the law to overcome its barbarity.

Now, while this was none the less judge-made law, its evils were much mitigated by the fact that it was done in the name of justice and humanity. The judge's love for justice was greater than his love for law. These were the circumstances and conditions of the English law that gave rise to the technical formalism and procedure in English criminal courts a century and more ago. Naturally no other country has had as great an influence on our American courts as have our English brethren, because of our speaking a common language and having a common law, as well as a multitude of varied and very common interests. This procedure was adopted in many of our states, though the English cruel and barbarous conditions as to penalties and procedure never prevailed in such states; but such is the force of precedent that the English doctrine was faithfully followed by many of the courts of last resort, without the least justification for such superstrict interpretation of the rights of the accused, or such over-refined distinctions as to both the substantive and adjective law of the state.

The second class of states practically ignored the old English doctrine of contemporaneous character of facts or exclamation, and considered chiefly the causal connection or logical relation that the secondary facts sustain to the primary facts in controversy.

Now, applying the doctrine or test of causation, it would be expected not infrequently that there would be an appreciable interval between cause and effect, between those things that have a logical relation, such as the commission of an act and an impulsive exclamation concerning the same.

That the natural language of a given situation or environment would not always be contemporaneous with the primary fact is quite obvious. But is it therefore any less a part or incident of the primary fact of the situation? The outcry of the injured party immediately after the assault should be as relevant as during the assault, because he may be bound and gagged or unconscious by reason of an assault, so that he could not make an outcry, which, if made during the assault, would be competent according to all authorities; but by reason of its being delayed ten or twenty seconds after the assault it would not then be competent. This makes the relevancy or relation of the facts turn on a few paltry seconds of time, rather than upon the natural and logical relation of the facts.

Now, when the exclamation is the combined result of the tragic circumstances of the situation making an awful and fear-

ful impression upon the human mind, especially that of a child seeing its own father murderously assaulted, the child being overwhelmed with fear and grief because of the darkness of the night, the absence of a helping hand, grief at parental loss, with nobody to appeal to, all these combined placing the child under natural and extreme excitement, and then, after a few seconds, someone comes into his presence to help, what is more natural, indeed necessary, in such situation than just such an exclamation as we have in this case, "The bums killed pa with a broomstick?"

The language proceeds from impulse, from the natural and necessary impressions made by the acts of the parties in controversy, so that the human mind in its helplessness or despair, or its natural and necessary anxiety, acts under an impulse or a spontaneous influence that is a sort of echo or reaction from the general situation. The time limit recognized by those courts that fall under this second class, which disregard the strict contemporary character, is placed at a point where there is no opportunity given for fabricating or manufacturing some statement or story according to one's self-interest.

If the father had made some declaration during the assault, all authorities agree that it would be competent, but if he had been unconscious, or partially unconscious, by reason of the severity of the assault, so that he was unable to make any exclamation until a minute or so afterward, would his exclamation be therefore incompetent? We think this is too much like hairsplitting.

But it is said the boy was not participating, that he was a mere by-stander, and that therefore his exclamations are not competent. Under the old English rule this was true. But what reason could possibly exist for such a rule, excepting the bald protection of the defendant, it is difficult to understand. Ordinarily in other cases bystanders, are presumed to be rather more impartial, more disinterested, than those who are the active participants, and the average mind would feel this fact should rather strengthen the probative force of the exclamation than weaken it.

Again, it is urged that the boy was not old enough to be a witness, and therefore his exclamation should not be admitted. But exclamations are not admitted on the ground of the legal competency of the person making them, but because they are a part or reflection of the transaction. By the same token the growl of a dog or the neighing of a horse is also competent as *res gestæ*. The exclamation in this case should be just as competent, yes more so, L.R.A.1915E.

than the exclamation of a female person who has been assaulted in a case of rape, which the authorities all agree is allowed as a part of the natural and necessary language of a person who has been brutally assaulted, though the exclamation may be made even some days after the occurrence of the criminal assault, if there be a reasonable explanation for the delay.

An interesting incident in the life of Lincoln will serve to illustrate these involuntary acts upon the part of children that are really only a reflection, a natural sequence to certain prior facts. His biographer, Holland, says: "At one time Abraham was obliged to take his grist upon the back of his father's horse, and go 50 miles to get it ground. The mill itself was very crude and driven by horse power. The customers were obliged to wait their turn without reference to their distance from home, and then use their own horse to propel the machinery. On one occasion Abraham, having arrived at his turn, fastened his mare to the lever and was following her closely upon her rounds. When urging her with a switch and 'clucking' to her in the usual way, he received a kick from her which prostrated him and made him insensible. With the first instant of returning consciousness he finished the 'cluck.'" This was one of the most striking and convincing facts as to what Abraham was doing when he became unconscious. What stronger proof that he was driving the horse could be given than this exclamation as soon as consciousness returned?

So, in the case at bar, the causal, logical, and psychological relation of the whole situation as affecting the boy and his innocent, spontaneous, impulsive, natural, and necessary outcry was exactly in keeping with all human experience, and what all men recognize in everyday life as tending to prove certain facts. Why should not the same rules obtain in courts of justice to prove the same kind of facts? The rules of evidence are presumed to be based upon the credibility of human experience.

A most interesting case from Georgia, *Grant v. State*, 124 Ga. 757, 53 S. E. 334, is singularly analogous to the case at bar: "(4) Exception was taken to the refusal of the court to exclude the following testimony: 'Mary's [deceased's] child said, "Huss [defendant], you have shot mama.'" The testimony quoted was that of Jake Colbert, a witness for the state, and it was objected to 'on the ground that the solicitor general, in opening the case to the jury, had stated that Mary Johnson's [deceased's] child, the one referred to by the witness Colbert, was too young to be a competent witness or to testify.' And mo-

vant adds that this (the foregoing statement of the solicitor general) 'was true, and allowing Colbert to testify as to what the child said was in effect allowing the child to testify.' We cannot agree with counsel that permitting the witness to testify to the words of a little child, too young to be brought into court as a witness, was equivalent to permitting the child itself to testify. It appears from the evidence that the witness Colbert, at the sound of the shots which slew the deceased, ran immediately from an adjoining room into the one where the homicide was committed, and said twice to the defendant, 'Have you shot Mary?' The defendant made no answer, but the child, as the defendant silently left the room, uttered the words, 'Huss, you have shot mama.' These words, spoken by a little child immediately after the shocking occurrence, were clearly admissible as a part of the *res gestæ*. No declaration could have been freer 'from all suspicion of device or afterthought,' and it was, in point of time, almost concurrent with the act to which it referred. It was the very deed itself speaking through the mouth of a babe."

In another case the supreme court of Georgia, in *Kirk v. State*, 73 Ga. 620, held as follows: "Evidence that immediately after the deceased was shot, a person near by halloed and asked him what was the matter, and who had shot him, to which he replied that the defendant had shot him, was admissible both as part of the *res gestæ* and as corroborating the dying declarations of the deceased."

The supreme court of Minnesota, in *State v. Williams*, 96 Minn. 351, 105 N. W. 265, held a statement, to the effect that the defendant shot the deceased and herself, made by a party other than the deceased, but who was mortally wounded at the time of the homicide, and made in close connection with the event and under circumstances precluding any suspicion of fabrication, was properly received in evidence. The court in its decision uses this language: "It is the contention of the defendant that the statement in question was simply the narration of a past transaction and not so connected with the main fact, the shooting, as to illustrate its character. On the other hand, the state claims that the evidence was clearly admissible as a part of the *res gestæ*. We are of the opinion that the evidence was properly received. The record shows that Mrs. Keller was one of the victims of the tragedy; that her statement or declaration to Mrs. Kline was made within a few minutes after the shooting took place. It was not mere self-serving, hearsay evidence; for the statement was a nat-

ural and instinctive declaration, made in close connection with the shooting, and under circumstances precluding any suspicion of fabrication." The evidence was admitted as a part of the *res gestæ*. In an unofficially reported case of *Collins v. Com.*, 24 Ky. L. Rep. 884, 70 S. W. 187, the following is held: "The exclamations of the wife and daughter of H. immediately succeeding the shooting were competent as a part of the *res gestæ*."

The supreme court of Illinois has held in *Lander v. People*, 104 Ill. 248, as follows: "The true test of the admissibility of such testimony is that the act, declaration, or exclamation must be so intimately interwoven with the principal fact or event which it characterizes as to be regarded a part of the transaction itself, and also to clearly negative any premeditation or purpose to manufacture testimony." Under this doctrine the court held no error was committed on the trial of one upon the charge of rape, where two witnesses were called who were near by, and witnessed the perpetration of the offense, and testified that they saw and readily recognized the accused near the scene of the transaction on the next day thereafter, and that one called the attention of the other to the accused, exclaiming, "There goes the man!" and that the other replied, "Yea, there he goes." The defendant objected to the witnesses repeating their exclamations made at the time, but the court permitted the same.

Many more decisions under the same line might be cited and discussed, but the best-considered cases, where the courts have gotten away from the old English rule, prefer the test of causal connection, logical or psychological relation and association, as the true and proper test of relevancy.

Underhill in his excellent work on *Criminal Evidence*, 2d ed. § 93, p. 174, uses this language: "These declarations must possess three characteristics: First, they must have been uttered contemporaneously with and grow out of the act upon which they have a bearing, so as to be spontaneous, and not narrative; second, they must qualify, illustrate, explain, or unfold its character or significance, so as, third, to be connected with it in such a manner that the declaration and the act form a single and indivisible transaction." This doctrine would seem to disqualify the exclamation according to the author's judgment. But just prior to this rule announcing the qualifications necessary to admit the evidence, he uses this language (§ 93, p. 173): "Usually statements made by third persons not produced as witnesses are objectionable as hearsay. But, it has been remarked,

here the events speak for themselves, giving out their fullest meaning through the unprompted language of the participants. The spontaneous character of the language is assumed to preclude the probability of its premeditation or fabrication. Its utterance on the spur of the moment is regarded, with a good deal of reason, as a guaranty of its truth. These instinctive utterances are as much original evidence as are the events whence they emanate, or of which they form an inseparable part. Their value as evidence does not depend in the slightest degree upon our confidence in the credibility of the declarant, or upon our knowledge of him as a man who habitually tells the truth. He is regarded merely as the channel through which the events describe themselves contemporaneously, or nearly so, with their occurrence."

So that, taking all that Underhill says upon this subject, it is apparent that he does not intend to give the word "contemporaneously" that strict construction required by the English rule, but the liberal construction, which he indicates by the language "or nearly so," that is now recognized and applied by many of our American states.

To cite other authorities would be superfluous. We feel, however, that it is but just to say that the judgment of the court of appeals in this case finds abundant warrant in the former decisions of this court in analogous cases.

We believe, however, that the demands of justice, as well as the probative force and effect of such exclamations, made where there is a maximum probability as to their truth, and a minimum possibility of artifice or fabrication by reason of their being the natural, spontaneous, and sometimes, as in this case, the necessary language of a child, require that the old rule should be relaxed and liberalized so as to meet the naturalness and necessities of the case, as well as to put the jury and court in possession of all the facts, circumstances, and environment immediately before and after the principal fact in controversy.

The state contended before the court of appeals that, if the admission of the boy's exclamation was error, such error was not prejudicial, because, first, the word "bums" identified nobody; and second, there was other evidence tending to show that the fatal wound was made with a stick or a club. This contention of the state was over-ruled by the court of appeals, and in this respect the court was undoubtedly right. The exclamation of the boy under the circumstances, that it was made in its relation to the transaction, being the sole eyewitness save and except the defendant, speaking under great excitement and im-

pulse, freed from opportunity or occasion to dissemble or fabricate,—all these things undoubtedly gave the boy's exclamation great weight with the court and jury. But the primary reason for such great weight was by reason of its causal connection, its logical relation to the facts in the case, and because it was the natural language of the whole situation speaking through the little boy. That relation made it competent, though it be not strictly contemporaneous.

We find no other error in the record of the Court of Appeals. The judgment of the Court of Appeals is reversed and the judgment of the Court of Common Pleas is affirmed, and cause remanded to the Court of Common Pleas for further proceedings according to law.

Nichols, Ch. J., and Johnson, Donahue, Newman, and Wilkin, JJ., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

N. COY

v.

TITLE GUARANTEE & TRUST COMPANY et al.

MULTNOMAH COUNTY, OREGON, et al.,
Interveners, Respts.,

R. S. HOWARD, JR., Receiver of the Title
Guarantee & Trust Company, Intervener,
Appt.

(220 Fed. 90.)

Tax — effect of receivership on liability for.

The property of a corporation is not relieved from taxation, by placing it in the hands of a receiver, but the claim for taxes is paramount to all other claims, although under the laws of the state taxes are neither a lien nor a debt.

(February 1, 1915.)

Note. — Taxes: taxation of property in hands of receiver.

- I. Introductory, 211.
- II. Ordinary taxes, general rule, 212.
- III. Exceptions or limitations to the rule, 215.
- IV. Manner of assessment, 218.
- V. Franchise taxes, 220.
- VI. National banks, 223.
- VII. Leave of court, 223.
- VIII. Miscellaneous, 224.

I. Introductory.

This note does not include taxes assessed before receivership.

Questions as to the taxation of property

A PPEAL by the receiver of the Title Guarantee & Trust Company from an order of the District Court of the United States for the District of Oregon, Wolverton, J., allowing petitioners' claim for taxes alleged to have been assessed against certain property of the defendant corporation while in the hands of the receiver. Affirmed.

The facts are stated in the opinion.

Argued before Gilbert, Ross, and Morrow, Circuit Judges.

Mr. William C. Bristol, for appellant:

The property of the corporation in the hands of the receiver was not subject to taxation.

in the hands of a receiver arise in general solely as to personal property (though there are cases where there is a question as to whether the tax on real property sold by a receiver should be paid by the purchaser, or out of the proceeds of sale).

The matter is often directly covered by the statute.

It is the general rule that the receiver must pay taxes based on the personal property in his hands at the time of assessment, and while there is some dissent from this rule, its general acceptance is indicated by the comparatively few cases on the subject.

There is also some difference of opinion as to the manner of assessment, whether it should be made to the receiver or the prior holder, but here again the scarcity of cases indicates that it is usually immaterial to which of the two the assessment is made.

But those cases which hold that the receiver is not liable for personal property taxes assessed to him, if they are to be construed as meaning that the assessment should be made to the prior holder and that he may deduct his debts, in effect deny the general rule, for the prior holder is in general insolvent or nearly so.

For priority of claims for taxes against the assets of a debtor, see the note to *Bibbins v. Clark*, 29 L.R.A. 278.

For priority as between taxes and costs and fees in bankruptcy, see note to *State v. Lovell*, 31 L.R.A. (N.S.) 988.

For priority of claims against the property in hands of receiver over recorded liens, see note to *First Nat. Bank v. Cook*, 2 L.R.A. (N.S.) 1012.

The subject of the taxation of trust funds in the hands of a chancellor is not included. See *Swope v. Fraser*, — N. J. Eq. —, 58 Atl. 531; *State v. Elizabeth*, 65 N. J. L. 479, 47 Atl. 459, affirmed in 66 N. J. L. 687, 52 Atl. 1130. See also, generally, as to funds in chancery in the hands of a register or other officer belonging to suitors in court, in *Re Kellinger*, 9 Paige, 62, holding that the same must be assessed to the owner, and not to the register or clerk.

It is not intended to include the case where a trustee appointed by the court to sell property pays taxes which are not due and in arrear (see *Wheeler v. Addison*, 54 L.R.A.1915E.

Marion County v. Woodburn Mercantile Co. 60 Or. 367, 41 L.R.A. (N.S.) 730, 119 Pac. 487; *Multnomah County v. Portland Cracker Co.* 49 Or. 346, 90 Pac. 155; *Ming Yue v. Coos Bay, R. & E. R. & Nav. Co.* 24 Or. 392, 33 Pac. 641; *Stemmer v. Scottish Ins. Co.* 33 Or. 66, 49 Pac. 588, 53 Pac. 498; *Denny v. McCown*, 34 Or. 48, 54 Pac. 952; *Prince George's County v. Clarke*, 36 Md. 206; *Blakistone v. State*, 117 Md. 237, 83 Atl. 151; *Pennsylvania Steel Co. v. New York City R. Co.* 176 Fed. 477; *Gay v. Hudson River Electric Power Co.* 190 Fed. 777; *Lane County v. Oregon*, 7 Wall. 71, 19 L. ed. 101; *Phipps v. Kelly*, 12 Or. 213,

Md. 41), nor the case of a receiver of one who has covenanted to pay the taxes by way of rent (see *Wells v. Higgins*, 132 N. Y. 459, 30 N. E. 861; *Clyde v. Richmond & D. R. Co.* 63 Fed. 21; *Dysart v. Brown*, 100 Ga. 1, 26 S. E. 767), nor cases where the tax was assessed after the filing of the petition, but before the appointment of the receiver (see *Re United Mut. F. Ins. Co.* 22 R. I. 108, 46 Atl. 273).

The questions whether property sold was free of the lien, and whether the sale was properly made as to the lien, are not included. See, for example, *First Nat. Bank v. Ewing*, 43 C. C. A. 150, 103 Fed. 168, writ of certiorari denied in 179 U. S. 686, 45 L. ed. 386, 21 Sup. Ct. Rep. 919; *Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co.* 84 Fed. 744; *Stoner v. Bitters*, 151 Ind. 575, 52 N. E. 149.

II. Ordinary taxes, general rule.

Property in the hands of a receiver is in general subject to assessment and taxation. *Stevens v. New York & O. M. R. Co.* 13 Blatchf. 104, Fed. Cas. No. 13,405; *Walters v. Western & A. R. Co.* 68 Fed. 1002; *Ledoux v. La Bee*, 83 Fed. 761; *Atlantic Trust Co. v. Dana*, 62 C. C. A. 657, 128 Fed. 209; *Cox v. Title Guarantee & T. Co.*; *Yuba County v. Adams*, 7 Cal. 37; *Schmidt v. Failey*, 148 Ind. 150, 37 L.R.A. 442, 47 N. E. 326; *Youtsey v. Com.* 110 Ky. 555, 62 S. W. 262; *Philadelphia & R. R. Co. v. Com.* 104 Pa. 80; *Com. v. Runk*, 26 Pa. 235; *Campbell v. Wiggins*, 2 Tex. Civ. App. 1, 20 S. W. 730, affirmed in 85 Tex. 425, 21 S. W. 599; *Campbell v. Riviere*, — Tex. Civ. App. —, 22 S. W. 993; *Hewitt v. Traders' Bank*, 18 Wash. 326, 51 Pac. 468. See also as inferring the same rule *Farmers' Loan & T. Co. v. Fidelity Ins. Trust & S. D. Co.* — Tex. Civ. App. —, 41 S. W. 113. See also, where it is not entirely clear from the report that the tax was assessed after the receiver was appointed, *Re Pleasant Hill Lumber Co.* 126 La. 743, 52 So. 1010; *Greeley v. Provident Sav. Bank*, 98 Mo. 458, 11 S. W. 980.

For California cases, see *infra*, IV.; also *People v. Lardner*, next subdiv.

For Connecticut cases, see *infra*, III.

In *Re Tyler*, 149 U. S. 164, 37 L. ed. 689,

6 Pac. 767; *Pierce County v. Merrill*, 19 Wash. 175, 52 Pac. 854; *Pennsylvania Steel Co. v. New York City R. Co.* 193 Fed. 287, 117 C. C. A. 556, 198 Fed. 774; *United States v. Whitridge*, 231 U. S. 144, 58 L. ed. 159, 34 Sup. Ct. Rep. 24.

Messrs. Walter H. Evans, Robert F. Maguire, and George Mowry, for interveners respondents:

Taxes assessed prior to the year 1913 upon the personal property of the corporation in the hands of a receiver constitute a claim which the receiver should be directed by the court to pay from the assets of the corporation.

13 Sup. Ct. Rep. 785, *infra*, VII, the court stated that undoubtedly property in the possession of a receiver appointed by the court is "not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law."

In *Guttersen v. Lebanon Iron & Steel Co.* 151 Fed. 72, the court said that it was proper for the receivers to pay "taxes, past and current, which had to be paid, or the personal property would be liable to be levied upon, and which the receivers therefore properly took care of, in order to protect it, without any order."

The receiver must pay taxes on all the assets of an insolvent bank in his possession; he is not entitled to deduct a debt. *Hewitt v. Traders' Bank*, 18 Wash. 326, 51 Pac. 468.

Moneys taxed "as money in possession" of the liquidators of a bank are properly taxed under a statute providing that all property held, controlled, or administered in various capacities, including that of liquidator, shall be taxed: *State ex rel. St. Amand v. Bank of Commerce*, 50 La. Ann. 696, 23 So. 464, reversing the judgment of the lower court, which had overruled the tax on the ground that the money was in the hands of the liquidators as officers of the court.

Where the state of Georgia, having a railroad, leased it to a company with a proviso in effect that it should be exempt from taxes except as to a certain amount on the income, the exemption to be confined to property used for railroad purposes, and when the lease was about to expire, the assets of the company passed to the hands of receivers, it was held that after the expiration of the lease and the charter, the assets in the hands of the receivers were subject to taxation. *Walters v. Western & A. R. Co.* 68 Fed. 1002.

In *Schmidt v. Failey*, 148 Ind. 150, 37 L.R.A. 442, 47 N. E. 326, it was held that money on deposit to the credit of the receiver of a mutual benefit and assessment society organized under the voluntary association laws of the state of Indiana, in said state, was properly taxable within the L.R.A. 1015E.

Coy v. Title Guarantee & T. Co. 212 Fed. 520; 2 Cooley, Tax. 3d ed. p. 834; *High, Receivers*, 4th ed. § 881a; *Wisswall v. Kunz*, 173 Ill. 110, 50 N. E. 184; 34 Cyc. 346; 23 Am. & Eng. Enc. Law, 1072; *George v. St. Louis Cable & W. R. Co.* 44 Fed. 117; *Ex parte Chamberlain*, 55 Fed. 704; *State, New Jersey Southern R. Co. Prosecutors, v. Railroad Comrs.* 41 N. J. L. 235; *Philadelphia & R. R. Co. v. Com.* 104 Pa. 80; *First Nat. Bank v. Ewing*, 43 C. C. A. 150, 103 Fed. 195; *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 481, 29 L. ed. 979, 6 Sup. Ct. Rep. 809; *Ledoux v. La Bee*, 83 Fed. 761; *First Nat. Bank v. Illinois Steel Co.*

statute providing that "all property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation," and this was so notwithstanding the fact that money in the hands of the receiver had been received by him from the receivers of corporations in other states by order of the courts of those states, and that the beneficiaries entitled to the money were residents of other states; the court referring also to the statute which provided that "personal property of nonresidents of the state should be assessed to the owner or to the person having control thereof, . . . except . . . where such property is in transit." Compare *Brooks v. Hartford*, 61 Conn. 112, 23 Atl. 697, *infra*, III.

In *Ledoux v. La Bee*, 83 Fed. 761, it was held that where the receiver had not appeared before the taxing board of assessors and equalization, and applied to have any errors either of valuation or listing of the property corrected, it was too late for him to ask a court of equity to interfere with the listing or valuation of the property.

County treasurer—proceeds of execution sales.

The proceeds of an execution sale of goods, placed by the order of the court in the hands of the county treasurer to be kept by him until the court's further order, are subject to taxation in the hands of such treasurer, and are properly taxable to him. *People v. Lardner*, 30 Cal. 242. The court said: "By § 4 of the revenue act of 1861, 'all property of every kind and nature whatsoever, within this state,' is made subject to taxation,—subject, however, to exceptions. Property *in custodia legis*, not being included within the exceptions, falls, of course, under the general rule. To this extent the judgment is furthermore sustained by the case *Re Kellinger*, 9 Paige, 62." The court does not point out how its decision is supported by the case in Paige, which holds that the court of chancery was not taxable for funds in its hands, stating that its register and clerks were not so taxable.

United States court receivers.

The rule is not altered by the fact that the receiver is one appointed by a United

174 Ill. 140, 51 N. E. 200, affirming judgment 72 Ill. App. 640; *Duryee v. United States Credit System Co.* 55 N. J. Eq. 311, 37 Atl. 155; *United States Nat. Bank v. Logan County*, — Okla. —, 51 Pac. 97; *Gray v. Logan County*, 7 Okla. 321, 54 Pac. 485; *Blakistone v. State*, 117 Md. 237, 83 Atl. 151; *Greeley v. Provident Sav. Bank*, 98 Mo. 458, 11 S. W. 980.

Ross, Circuit Judge, delivered the opinion of the court:

This suit was originally brought in the circuit court for the district of Oregon, in which that court on the 6th day of November, 1907, appointed a receiver of all the property of the Title Guarantee & Trust Company, who duly qualified and took

possession of its property as the officer of the court, and which receivership, it appears, has continued ever since,—having passed to the district court under the new Judicial Code.

The present appeal grows out of certain intervention proceedings which took place in the court below for the recovery of certain state, county, city, and school taxes alleged to have been levied upon certain personal property of the insolvent corporation in the possession of the receiver, for the years 1908, 1909, 1910, and 1911, with certain penalties and interest added thereto for delinquency,—one of the petitions in intervention being filed by the county of Multnomah, of the state of Oregon, in which the taxes alleged to have been levied

States court. *Stevens v. New York & O. M. R. Co.* 13 Blatchf. 104, Fed. Cas. No. 13,405; *Walters v. Western & A. R. Co.* 68 Fed. 1002; *Ledoux v. La Bee*, 83 Fed. 761; *Atlantic Trust Co. v. Dana*, 62 C. C. A. 657, 128 Fed. 209; *Philadelphia & R. R. Co. v. Com.* 104 Pa. 80; *Com. v. Buffalo, N. Y. & P. R. Co.* 2 Dauphin, Co. Rep. 216; *People ex rel. Joline v. Williams*, 200 N. Y. 528, 94 N. E. 1097, *infra*, V.

In *Swarts v. Hammer*, 56 C. C. A. 92, 120 Fed. 256, affirmed in 194 U. S. 441, 48 L. ed. 1060, 24 Sup. Ct. Rep. 695, the court, in sustaining a tax on money deposited to the credit of a trustee in bankruptcy, said: "It has never been questioned but what property in the custody and control of receivers and trustees of the Federal courts was subject to taxation under the state law, the same as other like property. *Judson*, Taxn. § 407, and cases cited."

Cases of limited application.

Where business is carried on by the receivers to use up the materials on hand at the time of the receivership, all the taxes on real and personal property assessed during the receivership should be paid by the receiver in full. *Gehr v. Mont Alto Iron Co.* 174 Pa. 430, 34 Atl. 638.

Where land attached in a vendor's lien suit in chancery is rented out by a special commissioner, the accruing taxes should be paid out of the rents. *Camden v. Haymond*, 9 W. Va. 680.

Property of an estate in litigation, which is in the hands of a special commissioner who is keeping it invested under the order of the court, is liable for taxes, and he should list it. *Spaulding v. Com.* 88 Ky. 135, 10 S. W. 420.

In *Myers v. Com.* 110 Va. 600, 66 S. E. 824, it was held that a fund in the hands of a receiver and on deposit to the credit of the chancery court of the city, in a creditors' suit, where there had been no report of debts at the time of the assessment, was subject to assessment for a state tax under the Virginia statute, which exempted such funds after a report of debts. See also to L.R.A.1915E.

same effect, as to city taxes, *Myers v. Richmond*, 110 Va. 605, 66 S. E. 826.

Penalties and interest.

It is not intended to take up the general question of tax penalties and interest in relation to property in the hands of a receiver, but only to refer to those cases where the question arose in relation to taxes assessed during the receivership. Only a few cases seem to take up this question.

In *First Nat. Bank v. Ewing*, 43 C. C. A. 150, 103 Fed. 168, it was held that, there being sufficient funds from the sale of property in the receiver's hands to pay tax liens and the judicial costs, the accrued interest, penalties, and costs upon the taxes should also be allowed.

It will be observed that the principal case agrees with the court below in its ruling in respect to penalties and interest, referring to page 524 of the report in 212 Fed. It was there held that, inasmuch as the taxing officers were advised that the receiver would resist the payment of taxes assessed against personal property in his hands, and as the statute required the collector to proceed immediately to collect taxes as they became delinquent, he should have applied to the court in order to compel the receiver to pay the taxes as soon as they became delinquent, and that therefore the penalties and interest which had accrued at that time were all that ought to have been paid, but that those that accrued afterward by reason of the failure of the collector to apply to the court ought not to be paid, as the estate ought not to be burdened with them.

In *Blakistone v. State*, 117 Md. 237, 83 Atl. 151, where the taxes, which seem to have been chiefly, if not wholly, on real property, had been paid with interest, it was held that the collector of taxes could not obtain payment of a penalty from the receiver for failure to pay the taxes, where he did not, at any time during the receivership, make application to the court to order payment of the taxes, and took no steps to secure the payment thereof or the

and due are alleged to be "a first and prior lien and claim" upon all of the property in the hands of the receiver; and in the other petition, which was filed on behalf of the state of Oregon, the county of Multnomah, and the city of Portland thereof, it was alleged that the corporation mentioned "is indebted" to those interveners on account of taxes upon personal property of the insolvent corporation, with penalties and interest, in certain specified amounts for the years 1908, 1909, 1910, and 1911. Both petitions prayed an order of the court directing the receiver to pay the amounts so claimed. The receiver contested the petitions in the court below, in which the decision was against him, and from the

final order of the court directing the payments he brings the present appeal.

The answers of the receivers to the petitions in intervention denied that either intervenor ever had any lien or preferred claim of any nature upon any of the property of the Title Guarantee & Trust Company in the hands of the receiver, or that any "indebtedness" existed by reason of the alleged assessments, and set up in defense, among other things: That "as matter of law, on and after the 6th day of November, 1907, no property or funds or assets of the Title Guarantee & Trust Company were assessed as such to the Title Guarantee & Trust Company; that the same were on that date, and ever since have been, and are now, *in custodia legis*; and that the

penalty until long after the receivership terminated and the distributions under the order of the court of all moneys in the hands of the receiver had been made; but the court considered also that the matter was *res judicata*.

But in *Gray v. Logan County*, 7 Okla. 321, 54 Pac. 485, it was held that real estate of a national bank during its receivership was properly taxable, and that the penalties provided by law for the nonpayment of such taxes ran and accumulated while the property was in the hands of a receiver, and that the fact that the penalties accrued was his fault, and not the fault of the territory or the county.

In *Sparks v. Lowndes County*, 98 Ga. 284, 25 S. E. 426, it was held where the statute required that executions for taxes should bear interest at 7 per cent, that the receiver of a railroad should pay this interest, and that it was not in the nature of a penalty; the court observed, however, that here the property in the hands of the receiver earned amply sufficient to pay the taxes and the interest thereon.

Certificates.

It is not unusual to find in the cases mention of certificates given by the receiver to raise money for taxes, but it often does not appear whether these taxes were assessed before or during the receivership.

Where the receiver of a railroad has no property with which to pay current expenses, it is proper to permit him to issue certificates for that purpose, including certificates for the purpose of raising money to pay the taxes. *Central Trust Co. v. Tappan*, 25 N. Y. S. R. 635, 6 N. Y. Supp. 918.

In *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. Rep. 809, the court approved a certificate issued to borrow money to pay off tax liens, which presumably were liens that accrued during the receivership, but the case does not seem to be explicit on this point.
L.R.A.1915E.

III. Exceptions or limitations to the rule.

In some jurisdictions it is held that personal property at least is not taxable to the receiver. The reader will distinguish cases of this class from those discussed in § IV., where the receiver as such is required to pay taxes although the property is assessed to the original owner.

In some of the cases the theory prevails that the receiver cannot be taxed unless he has technically the title to the property. *Howard County v. Strother*, 71 Iowa, 683, 33 N. W. 238; *Re Boyd*, 138 Iowa, 583, 17 L.R.A.(N.S.) 1220, 116 N. W. 700 (*obiter*); *City Nat. Bank v. Charles Baker Co.* 180 Mass. 40, 16 N. E. 223.

Compare *Wiswall v. Kunz*, 173 Ill. 110, 50 N. E. 184, *infra*, IV.

In *Brooks v. Hartford*, 61 Conn. 112, 23 Atl. 697, *infra*, it was considered that the personal property of a dissolved corporation did not "belong" to its receivers for the purpose of taxation.

If the doctrine that the receiver cannot be taxed, as he is not the owner, simply means that, as a matter of administrative detail, the original owner should be nominally taxed and the receiver should pay the tax as if he, as receiver, were the owner and without deductions, then no important principle is involved; but if such doctrine means that the original owner should be taxed as if there were no receivership, then, if the original owner is insolvent and may deduct his debts, the property will escape taxation; and if this latter meaning is the one intended, then the cases holding that the receiver is not taxable are to be considered as denying the general rule that property in the hands of a receiver is subject to assessment and taxation.

Iowa.

In Iowa the doctrine prevails that the receiver is not taxable as such, as he has not the title to the property.

Where litigation arose between creditors as to their liens on certain property, and the court appointed a receiver, and af-

Title Guarantee & Trust Company, under a bill of complaint in this court, was then in liquidation and being wound up."

The appellant's counsel thus states "the single importance and pertinent question" presented by the appeal: "Whether, under the laws of the state of Oregon, prior to the amendment of 1913, a personal property tax assessment in the name of a defunct corporation, through merely placing its name upon the tax-roll, after it had ceased business, and after all of its property of every kind had been surrendered to its creditors, and while said property was being administered and distributed through and by a court and receiver, can be made and enforced, with penalties and interest, after several years' delay, by an

intervention in the receivership cause, prosecuted by the authorities as a preferred lien or claim, or by *indebitatus assumpsit*, when the laws of the state at the time of intervention do not provide for such cases, and the supreme court of the state has expressly denied such a tax to be either a lien or a debt, and declared equity courts without power to render judgment therefor."

We regard it as wholly unimportant that under the laws of Oregon taxes levied upon personal property do not constitute a lien thereon, nor a "debt." The statutes of that state do declare the personal property of every individual liable to taxation, and that like property of every private corporation is likewise liable, and shall be

terward he resigned and another receiver was appointed, it was held that the liens of the creditors were superior to the subsequent taxes assessed against one or the other receiver. The court considered that the county did not have any claims, so far as the personal property was concerned, which it could enforce against the property; that it had a personal claim against the owning debtor, but no lien, and that other liens had attached sufficient to absorb the property; also that the assessments were not enforceable against the receivers as such, so as to justify a motion to have the taxes so assessed payable out of the proceeds of the sale of the property; that the receivers did not own the property, but held it under the appointment and order of the court as custodian, the title being still in the original owner until disposed of under the order of the court, and the proceeds belonging to the lienholders entitled thereto. *Howard County v. Strother*, 71 Iowa, 683, 33 N. W. 238.

In *Re Boyd*, 138 Iowa, 583, 17 L.R.A. (N.S.) 1220, 116 N. W. 700, in holding that a referee appointed to sell lands in partition was not liable to be taxed on the contract for sale which he made, the court observed that he was not a receiver nor a trustee, and had no title to the property, and said further: "A receiver who holds funds awaiting distribution is not regarded as an owner or trustee within the meaning of the law. *Brooks v. Hartford*, 61 Conn. 112, 23 Atl. 697. Indeed, the rule as to receivers seems to be that, unless the title to the property is vested in them, they are not regarded as owners for the purposes of taxation. 1 *Cooley*, Taxn. p. 663; *Jagard*, Taxn. p. 275."

Connecticut.

The Connecticut cases are brought together here on account of the decision in *Brooks v. Hartford*, *infra*. As will be seen, it has been held in Connecticut that the personal property of a dissolved insolvent mutual life insurance company was not assessable in the hands of its receiver (*Ibid*); L.R.A.1915E.

that the real property of a corporation in the hands of a receiver was taxable (*Lamkin v. Baldwin & L. Mfg. Co. infra*); and that the bank deposits of a receiver of a solvent foreign corporation are taxable (*Pope v. Hartford, infra*).

Bank deposits and bonds in the hands of receivers of a mutual life insurance company assessed after such company had been dissolved (the dissolution taking place after the order appointing the receivers) are not taxable in the hands of such receivers, and they are not required to render the same for taxation. The property does not "belong" to them within the taxing statute, nor are they covered by the statute requiring every trustee residing in the state, having in his hands personal property liable to taxation belonging to the trust estate, to make return, as that related to investments of property in the hands of trustees in some permanent form, from which interest or income is sought to be derived. *Brooks v. Hartford*, 61 Conn. 112, 23 Atl. 697, where the court further commented on the fact that most of the property in the hands of the trustees was money from collection of property in other states, and that the creditors owning it lived mostly in other states. The court stated that on the dissolution of the company the property equitably belonged to its creditors.

In *Lamkin v. Baldwin & L. Mfg. Co.* 72 Conn. 57, 44 L.R.A. 786, 43 Atl. 593, in holding that real estate of a corporation in the hands of a receiver was properly assessed to the corporation, and that the taxes should be paid, said: "The title to the land remained in the corporation; only the possession passing to the receiver. It was therefore properly listed for taxation in the name of the corporation. Gen. Stat. § 3805. As to cash realized by a receiver from sales, and held temporarily to await an order of distribution, a different rule may, under certain circumstances, be applied. *Brooks v. Hartford*," *supra*.

In *Pope v. Hartford*, 82 Conn. 406, 74 Atl. 751, it was held that not only real estate and investments in mechanical and manufacturing operations, but also depos-

assessed in the name of such corporation in the county where its principal place of business is, unless otherwise specially provided by law, and require, among other things, the assessor to put down on his roll the names of all persons assessable in his county, and among other property the personal property owned by or taxable to such person. L. O. L. §§ 3560, 3563, 3593.

It is too clear for argument that the appointment of a receiver and the taking of property into the hands of the court through its officer do not withdraw it from taxation. It remains subject to assessment and to the payment of all legal taxes thereon while in *custodia legis*, to the same extent as it was while in the possession of the owner. And whether or not such taxes be

its in bank, were taxable in the hands of a local ancillary receiver of a corporation of another state which was carrying on business under the court's authority, and that such cash should be listed either in the name of the receiver or of the estate. It appeared that the corporation was solvent, not all of such deposits being required for the payment of its debts. The court distinguished the Brooks Case, as there the corporation had been dissolved and the decree dissolving it vested the entire beneficial interest in the assets remaining in the receivers' hands in the creditors. The court also refers to the observation as to cash made in the Lamkin Case, and says: "This is not saying that under all circumstances a different rule should be applied. The expression was guarded, and does not warrant the inference attempted to be drawn from it, that that case is controlling in all cases as to the status under the tax law of cash awaiting distribution in the hands of receivers. In the present case the receivers had carried on the business of the corporation."

Massachusetts.

In Massachusetts the cases are confusing. In the City Nat. Bank Case, *infra*, it was held that personal property was not assessable to the receiver, as he was not the owner. In the Waite Case, *infra*, the receiver was directed to pay the taxes, but it is not entirely clear how the property was assessed, nor whether the assessment was made before or after the appointment of the receiver.

Money in the hands of the receiver of a corporation, proceeds of property sold by him, is not assessable in the absence of an assignment or of a statute, the court stating that the taxation of corporate property was not changed by the appointment of a receiver, and holding that he was not the owner of the personal estate, and that the tax was not within the statute taxing property held by assignees in insolvency, bankruptcy, or for the benefit of creditors after a voluntary assignment, as those words did not extend to receivers by any possible L.R.A.1915E.

a lien or a debt by the laws of the government within whose jurisdiction the property is situated, such taxes are and should be regarded by the courts as a preferred and paramount claim over all other claims, for they are essential to the existence and maintenance of the very government under which the property is acquired and protected.

"A court," says Cooley on Taxation, 3d ed. vol. 2, p. 834, "having in its charge or under its control a fund or other property upon which taxes are due, will, as the representative of the sovereignty, direct them to be paid without raising any question of the means of enforcement by process, and before all other claims except judicial costs. Thus, upon proper application and suitable

construction; and the petition of the city to intervene and make the taxes a preferred claim was denied. City Nat. Bank v. Charles Baker Co. 180 Mass. 40, 61 N. E. 223. The court stated that the property in question was as much the property of the corporation as its real property, which had been assessed to the corporation and the tax on which had been paid, but it did not say that if the personal property had been assessed to the corporation, it would have ordered the receiver to pay the tax with or without deduction.

In Waite v. Worcester Brewing Co. 176 Mass. 283, 57 N. E. 460, where it is not entirely clear whether the taxes, which covered both real and personal property, were assessed before the receiver was appointed or not, but it is alleged that "the property of the brewing company in the hands of the receivers was duly assessed in 1898 for taxes," it was held that the receiver, who had sold the property assessed, should pay the taxes from the proceeds, the court considering that the case was governed by the statute which provided: "In the settlement of estates by receivers the following claims shall be entitled to priority and to be first paid in full in their order: First. All debts due to the United States, and all debts due to and taxes assessed by this commonwealth, or by any county, city or town therein"; and the court also held that the taxes were entitled to a preference, and was of the opinion that water rates should also be allowed as a preferred claim, although it said that that question was not before it, as the city had not appealed from the decree to the contrary.

Tennessee.

In Tennessee it is considered that the statute touching fiduciaries does not apply to funds temporarily held.

Thus, it was held that the clerk and master appointed receiver of an insolvent corporation is not taxable by the tax authorities, as the statute is designed to reach funds not merely in transit, but such as are held as trust funds to be loaned out or in-

proof, a receiver will be ordered to satisfy a tax assessed against the property in his hands, and a like direction will be made in other cases where funds are held subject to the authority of the court."

In *High on Receivers*, 4th ed. § 811a, it is said: "Taxes levied upon personal property in the hands of a receiver become a charge upon the estate, and are properly payable by the receiver as a part of the cost and expenses of the administration of the trust. And the fact that the taxes is assessed in the name of the insolvent over whom the receiver is appointed, rather than in the name of the receiver, constitutes no

objection against the validity of the tax, nor will it avail against the tax that there is no averment or proof that there are sufficient funds in the hands of the receiver to pay the tax in question."

See also *High Receivers*, 4th ed. § 140a; 34 Cyc. 346; *Re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; *First Nat. Bank v. Ewing*, 43 C. C. A. 150, 103 Fed. 195; *George v. St. Louis Cable & W. R. Co.* (C. C.) 44 Fed. 117; *Greeley v. Provident Sav. Bank*, 98 Mo. 458, 11 S. W. 980; *Wiswall v. Kunz*, 173 Ill. 110, 50 N. E. 184.

The case of *United States v. Whitridge*, 231 U. S. 144, at pages 148, 149, 58 L.

vested. The statute referred to by the court is "that persons acting as executors, administrators, guardians, agents or attorneys, clerks of any court, or in any fiduciary capacity whatever, shall make a return of the property, moneys, credits, and effects held or controlled by them in either of said capacities, separate from their individual returns, and the same shall be listed separately for taxation; provided, that every such trust estate shall be entitled to the same exemption as if owned by a single taxpayer." *Schoolfield v. Schoolfield*, 103 Tenn. 63, 52 S. W. 887, the court deciding the case upon the authority of *Carhart v. Jones*, — Tenn. —, 37 S. W. 565, where it was held that the clerk or master was not taxable for notes or deferred payments on the foreclosure of a vendor's lien, and where the court apparently considered that the property was taxable only to its owner, and that the provision for exemption in the statute so indicated.

So property consisting of money, notes, and choses in action, in the hands of a receiver appointed for the purpose of winding up an insolvent corporation, is not subject to taxation in his hands, and if the receiver wrongfully renders the same for taxation, the tax cannot be collected from him. *Thompson v. Evans*, 2 Tenn. Ch. App. 61.

The foregoing Tennessee cases do not refer to *Ex parte Riddle*, 8 Heisk. 817, holding that the clerk and master of the chancery court, having in his hands as clerk the funds of various parties subject to distribution under the orders of the court, ought to report said funds for assessment, and if the owners are not *sui juris*, or their rights not settled, the assessment should be in the name of the clerk, the statute providing "that persons acting as executors, administrators, guardians, agents, or attorneys, or in any fiduciary capacity, whatever, shall make a return of the property, money, credits and effects held by them in either of said capacities, separate from their individual returns, and the same shall be listed separately for taxation, etc."

Miscellaneous.

It has been held in Virginia that notes in possession of a commissioner, executed for L.R.A.1915E.

the purchase price of property sold under a decree of the court, are not subject to taxation, as the statute expressly excludes "evidence of debt executed for the purchase price of property," from the list the receiver is required to furnish to the commissioner of the revenue. *Fulkerson v. Bristol*, 95 Va. 1, 27 S. E. 815.

But when the commissioner proceeded under the statute authorizing the court to grant relief from an erroneous assessment within a certain time, he could be given relief only for the taxes for the years which were within that time. *Ibid*.

IV. Manner of assessment.

The question as to the administrative regularity of the assessment, whether in form it should be to the original owner or to the receiver, depends, of course, upon the local system of taxation.

As property of original owner.

In some of the cases it is held that property in the hands of receivers is properly assessed as property of the corporation. *Stevens v. New York & O. M. R. Co.* 13 Blatchf. 104, Fed. Cas. No. 13,405; *Cox v. Title Guarantee & T. Co.*; *State, New Jersey Southern R. Co., Prosecutors, v. Railroad Comrs. and Philadelphia & R. R. Co. v. Com. infra*; *Lamkin v. Baldwin & L. Mfg. Co.* 72 Conn. 57, 44 L.R.A. 786, supra, III. (real estate). It has also been held that a tax on personal property so assessed is at least collectable from the receiver. *Midland Guaranty & T. Co. v. Douglas County and Wiswall v. Kunz, infra*, where it is stated, however, that such property should be assessed to the receiver. The assessment seems to have been so made to the original owner in the following cases, cited in II., viz., *Com. v. Runk*, 26 Pa. 235; *Campbell v. Wiggins*, 2 Tex. Civ. App. 1, 20 S. W. 730, affirmed in 85 Tex. 425, 21 S. W. 599.

That personal property is assessed to a corporation which is in the hands of a receiver does not affect the validity of a tax, although it should be assessed to the receiver, and the court in such circumstances properly orders the receiver to pay the tax. *Wiswall v. Kunz*, 173 Ill. 110, 50 N. E. 184.

ed. 159, at page 162, 34 Sup. Ct. Rep. 24, 25, 26, so much relied upon by the appellant, is not at all in point. That case did not involve any tax upon any property of any character, but was a proceeding to recover from the receiver of an insolvent corporation the corporation tax provided for by the corporation tax law of 1909, which law, as stated by the supreme court, imposed an excise or privileged tax, and was not in any sense a tax upon property or upon income merely as income,—the court saying: “A reference to the language of the act is sufficient to show that it does not in terms impose a tax upon

corporate property or franchises as such, nor upon the income arising from the conduct of business, unless it be carried on by the corporation. Nor does it in terms impose any duty upon the receivers of corporations, or of corporate property, with respect to paying taxes upon the income arising from their management of the corporate assets, or with respect to making any return of such income. And we are unable to perceive that such receivers are within the spirit and purpose of the act, any more than they are within its letter. True, they may hold, for the time, all the franchises and property of the corpora-

In COY v. TITLE GUARANTEE & T. Co. the assessments for some of the years in question were made to the corporation, and those for other years to the corporation followed by the name and designation of the receiver.

In State, New Jersey Southern R. Co., Prosecutors, v. Railroad Comrs. 41 N. J. L. 235, where the statute provided for a tax which was in effect a tax *in personam*, and not *in rem*, that is, the corporation was the person taxed, and the property with respect to which the tax was made entered into the assessment only as a means of determining the quantum of the tax, it was held that railroad companies themselves in the hands of receivers were properly taxed.

Where a railroad is being operated by receivers of the company appointed by a United States court, the gross receipts of such receivers are taxable under the act taxing gross receipts of railroads, and the assessment is properly made against the railroad, as the order appointing the receivers did not change the title of the road. Philadelphia & R. R. Co. v. Com. 104 Pa. 80; Com. v. Buffalo, N. Y. & P. R. Co. 2 Dauphin Co. Rep. 216. In the Philadelphia Case the state argued that the tax was a tax on the franchise of the corporation, but the court did not it seems decide this question.

Where it did not appear whether taxes against a railroad company were assessed against the receiver or against the company, and such taxes were by the statute to be assessed as if taxes on personal property, and personal property taxes became a lien on the 1st of November, and the railroad had been sold prior to that date and was utterly insolvent, the court concluded that if the taxes were assessed against the railroad company, the entire taxes would be lost, unless they were collectable from the receiver under the statute, and held that they were collectable from the receiver under the sections of the statute of Nebraska which provided: “10915. When property is assessed to any person as agent for another, or in a representative capacity, such person shall have a lien upon such property, or any property of his principal in his possession, for the taxes thereon until he is indemnified against the payment thereof, or, if he has paid the taxes, until he is re-L.R.A.1915E.

imbursed therefor.” “10927. Personal property shall be listed in the manner following: . . . Seventh. The property of corporations whose assets are in the hands of receivers, by such receivers.” Midland Guaranty & T. Co. v. Douglas County, 133 C. C. A. 274, 217 Fed. 358.

As property of the receiver.

Other cases hold that the property should be taxed to the receiver. San Luis Obispo v. Pettit; Los Angeles v. Los Angeles City Water Co.; and Wiswall v. Kunz,—*infra*. See also to the same effect cases cited *supra*. II., viz., Schmidt v. Failey; Youtsey v. Com.; Hewitt v. Traders' Bank; People v. Lardner (county treasurer); and State ex rel. St. Amand v. Bank of Commerce (liquidator of bank).

Money in the hands of the county treasurer, which is in litigation, must be assessed to him, and not to the owner, under a statute which provides: “Section 3647. Money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver must be assessed to such treasurer, clerk, or receiver, and the taxes be paid thereon under the direction of the court.” San Luis Obispo v. Pettit, 87 Cal. 499, 25 Pac. 694.

In Los Angeles v. Los Angeles City Water Co. 137 Cal. 699, 70 Pac. 770, the court, in affirming an order directing the receiver to pay the taxes, said, after quoting § 3647 of the Political Code: “Under this section of the Code the court was authorized to ascertain the amount of taxes to be paid, and to order that the tax be paid by the receiver, he being in possession of the fund.”

In San Luis Obispo v. Pettit, *supra*, where a county treasurer having funds in his hands in litigation reported the deposit to the assessor, who did not assess it to him, probably acting under a mistaken view of the law that it should be assessed to the plaintiff in the suit, and the tax was not paid, and in the following year the property was assessed to the county treasurer on the theory that it had escaped assessment the preceding year, and the amount of the assessment was doubled, it was held that the property had escaped assessment in the preceding year within the terms of the stat-

tion, excepting its primary franchise of corporate existence. In the present cases, the receivers were authorized and required to manage and operate the railroads and to discharge the public obligations of the corporations in this behalf. But they did this as officers of the court, and subject to the orders of the court, not as officers of the respective corporations, nor with the advantages that inhere in corporate organization as such. The possession and control of the receivers constituted, on the

contrary, an ouster of corporate management and control, with the accompanying advantages and privileges."

We also agree with the court below in its ruling in respect to the penalties and interest, for the reasons stated in its opinion at page 524, 212 Fed.

The judgment is affirmed.

Petition for rehearing denied March 8, 1915.

ute, for that meant a valid assessment, the statute providing: "Any property discovered by the assessor to have escaped assessment for the last preceding year, if such property is in the ownership or under the control of the same person who owned or controlled it for such preceding year, may be assessed at double its value."

In *Wiswall v. Kunz*, 173 Ill. 110, 50 N. E. 184, the court said of the receiver: "He is not the owner of the property so in his possession. Property held by a receiver is liable to assessment for taxation. Whilst it should be assessed to the receiver, yet the fact that it is assessed in the name of the party for whom the receiver holds possession does not affect the validity of the tax, and it is within the power of the court appointing the receiver to allow the amount of the tax as a claim against the receiver, and order the same paid by him to the tax collector. The taxes upon this property in the hands of the receiver, assessed after his appointment, may properly be regarded as part of the costs and expenses of the receivership, and may be ordered paid in full as other costs and expenses."

In *Palmer v. Pettingill*, 6 Idaho, 346, 55 Pac. 653, it was held that property was properly assessed in the name of the corporation, A. B. receiver, under the provisions of the statute which were as follows: "Money and property in litigation in possession of a county treasurer, of a court, clerk or receiver must be assessed to such treasurer, clerk or receiver and the taxes paid thereon under the direction of the court;" and that the court ought to have directed the receiver to pay the taxes, but inasmuch as the statute did not make a tax on personal property a lien on such property or on other personal property of the delinquent, at least until after seizure by the collector, the taxes were not a lien on the property, and that therefore one to whom the receiver had sold the property properly recovered against the collector for taking it and selling it.

It has been held that the taxes cannot be collected from the receiver where they are assessed against the corporation of the property of which he has been appointed receiver. *Lucking v. Ballantyne*; *State v. Red River Valley Elevator Co.*; and *Re Mallory*, — *infra* (where the statute vested the title in the receiver).

Where the owner of personal property

gave a mortgage upon it, and the next day a receiver was appointed of the property, and thereafter the property was assessed to the original owner, a corporation, it was held that the lien of the mortgage was superior to the taxes, under a statute providing that "all city taxes upon personal property shall be and remain a lien thereon until paid and no transfer of the personal property assessed shall operate to divest or destroy such liens;" and that the transfer in the statute applied to transfers after the lien, and that whether the receiver was or was not liable to taxation on the property (which the court did not decide), he was under no obligation to pay the tax assessed against the original owner. *Lucking v. Ballantyne*, 132 Mich. 584, 94 N. W. 8.

Where the statute required property to be listed by the receiver, and where some of the grain elevators of a corporation were assessed to the corporation and some to its receiver, there being no finding of how much tax was assessed against the corporation and how much against the receiver, it was held that, as there could not be a recovery against the receiver for a tax assessed against the corporation, a judgment against the receiver for the whole tax must be reversed and a new trial ordered. *State v. Red River Valley Elevator Co.* 69 Minn. 131, 72 N. W. 80.

In *Re Mallory*, 18 N. Y. S. R. 499, 2 N. Y. Supp. 437, where a receiver had been appointed for a railroad company in an action to dissolve it, it was held that an assessment thereafter made against the railroad company, and not the receiver, was invalid, and could not be collected against the receiver, the statute vesting him with the title. The court said: "He was thus, by virtue of his appointment, vested with all the estate, real and personal, of the corporation, and became trustee of such estate for the benefit of its creditors and stockholders. . . . The receiver was therefore both the owner and the occupant of the real estate of the railroad company, and the assessment, not having been made to him, was invalid, and cannot be collected."

V. Franchise taxes.

It is difficult to reconcile the cases on the imposition of franchise taxes upon corporations in the hands of receivers. There

is a class of cases which seems to be decided on the theory that the corporation at the time of the assessment was practically, if not actually, dissolved, and so there was no taxable franchise. See the Maine, Massachusetts, and Vermont cases *infra*. The United States Supreme Court, while stating that the statute involved did not impose a tax upon corporate franchises as such, takes the view that a corporation carried on by receivers is not itself operating anything, while the New York courts in effect consider that the operation by the receiver is a use of the franchise.

The New Jersey cases go upon the theory that the tax, while in terms a franchise tax, was not really such, but an imposition upon corporate existence, and so is rightly imposed during such corporate existence.

Theory that corporation is practically dissolved.

An annual license or franchise tax assessed as of July 1st, 1910, and for the year beginning on that date, is not a good claim against a corporation which passed into the hands of receivers by order of the court made in April, 1910, under proceedings to force a dissolution, although the statute makes the franchise tax a preferred debt in case of insolvency. *Johnson v. Monson Consol. State Co.* 108 Me. 296, 80 Atl. 750; *Johnson v. Johnson Bros.* 108 Me. 272, 80 Atl. 741, Ann. Cas. 1913A, 1303, where the court said: "This so-called tax is not levied on property, but is imposed on the corporation in the nature of an annual license fee for the right to continue to exercise the privileges conferred upon it by the state. . . . The defendant corporation had passed into the hands of receivers by order of court in April, 1910, under proceedings for its dissolution. The defendant thereafter had no right to exercise for itself any of the privileges conferred upon it by the state. Its franchise—its rights to do business for itself—had ceased, and the state had taken possession of its assets for distribution among its then existing creditors."

A savings bank corporation which, in the latter part of December, had been placed in the hands of a receiver and prohibited perpetually from transacting the business for which it was incorporated, is not liable for taxes on its deposits, to be assessed one half on the average amount for the six months preceding the 1st day of the following May, the court considering the tax as one on the franchise to do business, and that it was to be assessed as of the 1st of May. *Com. v. Lancaster Sav. Bank*, 123 Mass. 493.

Where an insolvent savings bank is placed in the hands of a receiver on February 1st by order enjoining it from doing business, and has since done no business, and the receiver has done none except to proceed in the winding up of its affairs, such bank has ceased to be doing business within the meaning of the statute, and con- L.R.A.1915E.

sequently ceased to be liable to pay the franchise tax imposed by such statute, which provided that "a state tax . . . is hereby assessed upon the property, business or corporate franchises of this state, of . . . savings banks. . . . Every . . . savings bank . . . incorporated by this state, and doing business herein, shall pay a tax" at a certain rate, upon deposits, which "shall be paid semi-annually, one half in the month of February and one half in the month of August, and shall be based upon the returns for the six months terminating with the last day of December, and June next preceding." The court stated that it was clear that this was a franchise tax. *State v. Bradford Sav. Bank & T. Co.* 71 Vt. 234, 44 Atl. 349.

United States Supreme Court.

The income derived from the management of a street railway line by a receiver authorized and required by the order for his appointment to manage and operate such railway, and to discharge his public duties subject to the supervision of the court, is not subject to the excise or privilege tax imposed by the United States corporation tax law of 1909 upon the carrying on or doing business by a corporation, as the receivers were acting as officers of the court, and not as officers of the corporation, and the possession and control of the receivers constituted an ouster of corporate management. *United States v. Whitridge*, 231 U. S. 144, 58 L. ed. 159, 34 Snp. Ct. Rep. 24. The view taken by the court is shown by the passage quoted in *COY v. TITLE GUARANTEE & T. Co.* The statute provided: "That every corporation . . . organized for profit and having a capital stock represented by shares . . . organized under the laws of the United States or of any state . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation."

New York.

A tax to be computed on the gross earnings in the state of a railroad, "as a tax upon its corporate franchise or business in" the state, is payable by the receiver who is operating the road and collecting such gross earnings, notwithstanding he is receiver in a suit to foreclose mortgages which antedate the taxes. *Central Trust Co. v. New York City & N. R. Co.* 110 N. Y. 250, 1 L.R.A. 260, 18 N. E. 92. The court said: "Under this order of the court he takes possession of all the property of the corporation, and proceeds to operate, that is, to run, its trains, and to do all that was formerly done under the direction of the board of directors. In this way he uses the franchise which has been conferred by the state upon the company, and he uses it as an officer of the court which is administering the affairs of the company, and, through the court, he acts as the company to the same extent *pro hac vice* as if the

board of directors were operating the railroad. It is the franchise which is being used in both cases, only in one case it is used for the company and substantially by it, by means of its board of directors; while in the other case the same franchise is being used and the road is operated under it by an officer of the court." The court distinguished *Com. v. Lancaster Sav. Bank*, supra, stating that there the corporation was practically dissolved, but that in the New York case it was not dissolved in form or in substance.

Upon the authority of this case, the court in *People ex rel. Joline v. Williams*, 200 N. Y. 528, 94 N. E. 1097, sustained a tax imposed as a tax on franchise or business, based on the gross earnings of a street railroad company operated by receivers appointed by the United States court, which court had decreed that the corporation was insolvent and that its property constituted a fund in which its creditors were interested, and the receivers claimed that the corporation was for all practical purposes dissolved. The tax was imposed under § 186 of the tax law, providing that a corporation of this class "shall pay to the state for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity within this state, an annual tax which shall be 1 per centum upon its gross earnings," etc. (This was one of the corporations involved in the United States tax case supra.)

So, it was held that where the receiver appointed in an action to foreclose a mortgage on a ferry company continues to operate the ferry, the annual franchise tax upon the corporation levied during the receivership is a lien upon its property prior to encumbrances of record, and that where all the property of the ferry company, save its franchise to be a corporation, is sold subject to all taxes which might be liens thereon at the time of the sale, the purchaser takes the property subject to such lien. *New York Terminal Co. v. Gaus*, 204 N. Y. 512, 98 N. E. 11. The judges of the court stood four to three on the question whether the franchise tax was superior or not to a prior mortgage. The statute provided that, "for the privilege of doing business or exercising its corporate franchises in this state every corporation, joint stock company or association, doing business in this state, shall pay to the state treasurer annually, in advance, an annual tax to be computed upon the basis of the amount of its capital stock, employed during the preceding year within this state," and that this tax "shall be due and payable on or before the 15th day of January in each year," and "such tax shall be a lien upon and bind all the real and personal property" of the corporation, "from the time when it is payable until the same is paid in full." The court overruled the contention that the provisions for a franchise tax did not apply where the corporation was in the hands of a receiver and had ceased itself to operate, and said: "I think the fallacy of the

contention is in an evident assumption that, in his conduct of the business of the corporation, the corporate franchise is not being used by the receiver. . . . The receiver who was appointed of this corporation continued to operate its ferry business. . . . As he had no individual interest, but only the official possession of the property, the receiver could only have operated under the corporate franchise. That he was not a general receiver, as in sequestration proceedings, but only a receiver of the mortgaged property *pendente lite*, however marked the distinction, is not material to our consideration. By virtue of his appointment this receiver took possession of the mortgaged property and received the earnings as the officer of the court. The title to the property was not changed, but remained in the company, the mortgagor, until the sale under the decree in the action. . . . The corporation was not dissolved; its franchise to conduct the ferry business was in existence, and any operation must have been by virtue of that franchise. The right of its officers to operate was taken away, for the time, by the court, and was conferred upon the receiver, as its officer. Operation, therefore, could only have been under the corporate franchise."

See also *Philadelphia & R. R. Co. v. Com.* 104 Pa. 80, supra, IV.

Kansas.

In *State ex rel. Dawson v. Sessions*, — Kan. —, 147 Pac. 789, where it seems that the tax in question was a tax on a foreign corporation to pay an annual fee as a condition to doing business in the state, it was held that where a receiver is carrying on the business of a corporation as a going concern, he is in effect exercising its corporate franchise and the state properly looks to him to pay the tax imposed upon it, the court citing the first and last of the three preceding New York cases. It does not appear, however, whether the receiver was appointed before or after the tax had been assessed.

New Jersey.

A corporation in the hands of a receiver is liable to the "annual license fee or franchise tax" on the amount issued of its capital stock. *Re United States Car Co.* 60 N. J. Eq. 514, 43 Atl. 673, holding that, although the statute designated an imposition of this kind as a license fee or franchise tax, it certainly was not a tax on the corporate franchises, and not a tax at all, but really an arbitrary imposition laid upon the corporation without regard to the value of its property or its franchises, and without regard to whether it was exercising the latter or not, solely as a condition of its continued existence, and that, as the statute provided that such tax should be a preferred debt in case of insolvency, it must be paid, the statute also providing that all the real and personal property of an insolvent corporation and all its franchises, rights, privi-

leges, and effects shall, upon the appointment of a receiver, forthwith vest in him, and the corporation shall be divested of the title thereto.

This case was followed in *Duryea v. American Woodworking Mach. Co.* 133 Fed. 329, and in *Conkling v. United States Ship-building Co.* 148 Fed. 129, holding that the receiver should pay as a preferred claim the annual (New Jersey) license fee or franchise tax imposed during his receivership.

It was also followed in *Chesapeake & O. R. Co. v. Atlantic Transp. Co.* 62 N. J. Eq. 751, 48 Atl. 997, where it was held that the franchise tax was to be paid and was preferred over other liabilities, but not over the allowance to the receiver and the expenses of winding up the corporation.

Where the return of a corporation on which the assessment for a franchise tax was computed was made May 8, and the assessment was made June 5, and between the two dates a receiver was appointed, it was held that this did not interfere with the taxability of the corporation, the court observing that putting a corporation in charge of a receiver does not work a dissolution. *Kirkpatrick v. State Assessors*, 57 N. J. L. 53, 29 Atl. 442, where, however, the court ordered that testimony should be taken for purposes of seeing whether the corporation was taxable on other grounds or not.

In view of the later cases probably the *obiter* observations in *Re George Mather's Sons Co.* 52 N. J. Eq. 607, 30 Atl. 321, are no longer of interest.

Miscellaneous.

It may be noted that the "franchise tax accruing during the receivership" on a railway company was paid by the receiver in *Farmers' Loan & T. Co. v. Fidelity Ins. Trust & S. D. Co.* — *Tex. Civ. App.* —, 41 S. W. 113, but the court does not discuss the general question.

VI. National banks.

The personal assets and personal property of an insolvent national bank in the hands of a receiver appointed by the Comptroller of the Currency in accordance with a provision of § 5234 of the Revised Statutes, Comp. Stat. 1913, § 9821, are exempt from taxation under state laws. *Rosenblatt v. Johnston*, 104 U. S. 462, 26 L. ed. 832.

Where the capital stock of a national bank was assessed at 25 per cent of its face value against the stockholders, but the aggregate assessed value of the shares of such stock was placed upon the tax roll in the name of the bank, it was held that these taxes were not collectable from the receiver. The court said that these taxes were in no sense the obligation of the bank, such shares of stock are the personal property of the holder, and taxes thereon are recoverable, as other personal property taxes against the property of the person holding such stock. *Gray v. Logan County*, 7 Okla. 321, 54 Pac. 485.

L.R.A.1915E.

But real estate of a national bank is properly taxable during receivership, and the penalties on the taxes thereon are also collectable. *Ibid.*

VII. Leave of court.

The receiver is the officer of the court and property in his possession is not to be interfered with without leave of the court, but it is not unusual for the court to refuse to enjoin the tax officer from collecting a just tax. *Stevens v. New York & O. M. R. Co.* 13 Blatchf. 104, Fed. Cas. No. 13,405.

Sometimes in practice, where a sale for taxes of the property has been made by the tax officer without leave of the court, the court, in canceling such sale, will order the receiver to sell enough property to provide funds to pay the taxes. But the proper practice is for the tax officer to apply to the court for an order requiring the receiver to pay the tax; on the other hand, if a tax is of doubtful legality, the receiver should apply to the court for instructions.

The collector of taxes assessed during the receivership may not issue his warrant and seize property in the hands of receivers without leave of the court. *Re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; *Ledoux v. La Bee*, 83 Fed. 761.

Re Tyler, supra, was followed in *Oakes v. Myers*, 68 Fed. 807, but it was probably not necessary to the decision.

See also, to similar effect, in a case where it does not appear whether the tax was assessed during or before the receivership, *King v. Wooten*, 4 C. C. A. 519, 2 U. S. App. 651, 54 Fed. 612.

In *Weaver v. Duncan*, — *Tenn.* —, 56 S. W. 39, it was held that property in the hands of a receiver is not subject to sale for taxes, the court apparently deciding the case on general grounds, and also on the ground that there was a statute prohibiting the sale of lands against which bills had been filed and were pending.

Similarly, a collector may not sell land for taxes after a court of equity has appointed trustees to sell the land for another purpose. *Prince George's County v. Clarke*, 36 Md. 206, where, however, the collector's sale was not shown to be otherwise regular.

In *Virginia, T. & C. Steel & I. Co. v. Bristol Land Co.* 88 Fed. 184 (where it seems probable that some of the taxes at least had accrued during the receivership, although the report is not very clear in this respect), tax officers who had sold land in possession of a receiver were perpetually enjoined, but the court, considering the taxes valid, directed that the property should be sold to provide money to pay them, it appearing that the receiver had no money for that purpose.

In *Cleveland v. McCravy*, 46 S. C. 252, 24 S. E. 175 (where it does not appear whether the taxes were assessed before the receiver was appointed or not), the sheriff levied on the property in the hands of a United States court receiver for the taxes, and the

receiver paid the taxes and also the sheriff's commissions for making the levy under protest, and it was held that the receiver was entitled to recover from the sheriff such commissions as the sheriff had no authority to levy on property under the control of any court.

Court protecting property in receiver's hands.

While it is not intended to go into the general question of equitable jurisdiction, it should be stated that it is not necessary, in order that a court of equity should protect the assets in the hands of a receiver against tax officers, that the receiver should show that he had no adequate remedy at law, for the court has jurisdiction to inquire into the legality of any claim sought to be enforced against the property, or the legality and lawfulness of any invasion of the possession of its receiver, independent of any grounds of equitable jurisdiction. *Ledoux v. La Bee*, supra, holding that the fact that the property seized by the collector, which he was about to sell, was personal property, would not block the receiver's action on the ground that he had a complete remedy at law. The court quoted from *Re Tyler*, 149 U. S. 181, 37 L. ed. 694, 13 Sup. Ct. Rep. 785, where, in sustaining an order punishing for contempt a tax officer who has disobeyed the court's injunction, the Supreme Court said the question of inadequacy of the remedy at law could not be inquired into. But it may be noted that in *Robinson v. Wilmington*, 13 C. C. A. 177, 25 U. S. App. 144, 68 Fed. 856, where it seems probable that the taxes were assessed before the receivership, the court considered that it ought not to interfere with a tax officer without some ground of general equitable jurisdiction; also that in *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 26 Fed. 11, the court considered that it should not interfere with the state collector for the county, who had issued his warrant and levied on an engine belonging to the railroad and in the possession of the receivers; but whether the tax was levied before the receivers were appointed does not appear.

Ordering sale for taxes.

The court will often order a sale if necessary to provide money to pay the taxes. *Ledoux v. LaBee*, supra. See also *Virginia, T. & C. Steel & I. Co. v. Bristol Land Co.* supra.

Duty of receiver.

"Receivers are not bound to pay a tax in their judgment unlawful, without the order of the court; and when they consider the legality of the tax questionable, it is their right—their manifest duty—to apply to the court either for instruction or protection. Especially is this the case when the question arises between the receiver and persons in the state, county, and municipal L.R.A.1915E.

government, as to the proper construction to be given to the law, upon which individuals may well differ, and it is his right and manifest duty to go to the court, whose creature he is, for instruction." *Ex parte Chamberlain*, 55 Fed. 704.

The receiver properly proceeds by petition in the same suit in which he was appointed, where he wishes to protect the property in his possession against tax officers or others. *Virginia, T. & C. Steel & I. Co. v. Bristol Land Co.* supra.

So an application by a tax collector for an order that a receiver pay taxes should be made in the action in which the receiver is appointed. *Re Mallory*, 50 Hun, 601, 18 N. Y. S. R. 499, 2 N. Y. Supp. 437, where, however, the application was defeated on the merits.

VIII. Miscellaneous.

In *Comer v. Polk County*, 27 C. C. A. 1, 52 U. S. App. 399, 81 Fed. 921, where the A railroad company bought the B company's railroad, and afterward the defendants were appointed receivers of the A company, and still later a separate receiver in a separate suit was appointed of the B company, it was held that the defendants could not thereafter be charged to pay taxes which had accrued on the B railroad during the time that they as receivers operated the property of both railroads, where there was no proof that they had assets belonging to the B company, or that they had converted the revenues derived from the corporation to the improvement and betterment of the A company, or had paid the same to the holders of its bonds, and that, if there was no diversion, there could be no restoration.

It was held in *Com. v. Philadelphia & R. Coal & I. Co.* 137 Pa. 481, 20 Atl. 531, 580, that where a corporation is in the hands of receivers, and the treasurer of the receivers is the treasurer of the corporation, it is his duty, where the receivers pay the interest on bonds of the corporation, to deduct from such interest due to residents of Pennsylvania the tax on the bonds under the statute, and where he fails to do so, the company is responsible for it.

Where, after the receivers were appointed, the state authorities endeavored to tax a bridge for five years last past, as property which has escaped taxation, the court granted an injunction *pendente lite* against the enforcement of the tax, in order that the question should be stayed until it came on in the regular course of proceedings for the final hearing on the point. *Clark v. McGhee*, 31 O. C. A. 321, 59 U. S. App. 69, 87 Fed. 789.

It may be noted that where the circuit court of the United States directed that a certain person called the receiver of the court should take certain money and receive the interest thereon, pay over the interest to a certain widow, who out of it should support and educate her children, and the widow married again, it was held that the

husband was properly taxed for the fund under the statute providing that "all personal property, held in trust by any executor, administrator, or trustee, the income of which is to be paid to any married woman, or other person, shall be assessed to the husband of such married woman, or to such other person." *Bates v. Boston*, 5 Cush. 93.

It may be noted that in *Ryan v. Gallatin County*, 14 Ill. 78, it was held that personal property in the hands of the assignees of a certain bank which was in liquidation under a special statute of the legislature directing the assignment was liable for taxes, and in *Dunlap v. Gallatin County*, 15 Ill. 9, that a judgment for taxes in favor of the county against some of the same assignees was a lien on the assigned real estate.

In the following cases it does not appear whether the tax in question was assessed before or during the receivership. *George v. St. Louis Cable & W. R. Co.* 44 Fed. 117; *McLeod v. New Albany*, 13 C. C. A. 525, 24 U. S. App. 601, 66 Fed. 378; *Burleigh v. Chehalis County*, 75 Fed. 873; *Northern P. R. Co. v. Galvin*, 85 Fed. 811; *Clark v. McGhee*, supra; *St. Joseph & D. C. R. Co. v. Smith*, 19 Kan. 225; *Schenck v. Consumers' Coal Co.* 26 Abb. N. C. 356, 14 N. Y. Supp. 343. B. B. B.

MAINE SUPREME JUDICIAL COURT.

JAMES CROSBY, Admr., etc., of Howard Crosby, Deceased,

v.

MAINE CENTRAL RAILROAD COMPANY.

(— Me. —, 93 Atl. 744.)

Railroad — crossing accident — negligence of child guest in vehicle.

A twelve-year-old boy riding in a delivery wagon by permission of the driver is negli-

Note. — Personal contributory negligence of person riding in vehicle driven or controlled by another at railroad crossing.

Generally, as to imputed negligence of driver to passenger, see notes to *Schultz v. Old Colony Street R. Co.* 8 L.R.A. (N.S.) 597, and *Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co.* L.R.A.1915A, 761.

As to imputed or contributory negligence of passenger riding in automobile driven by another precluding recovery against third person for injuries, see note to *Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co.* L.R.A.1915B, 953.

While this note is confined to the question of personal or direct negligence on the part of the passenger, and is therefore not concerned with the question considered in the notes above referred to, whether the negligence of the driver is imputable to the passenger, it may be observed that both L.R.A.1915E.

gent in permitting the vehicle to be driven over a railroad crossing with which he is familiar, while all its occupants are engaged in play, and paying no attention to the possible approach of trains, so as to preclude recovery for injury caused by the vehicle being struck by a train while on the crossing.

(April 3, 1915.)

MOTION by defendant for new trial of an action brought in the Supreme Judicial Court for Oxford County, to recover damages for the alleged negligent killing of plaintiff's intestate, which resulted in a verdict for plaintiff. Sustained.

The facts are stated in the opinion.

Messrs. Bisbee & Parker and White & Carter, for defendant:

The exercise of due care is the performance of some duty which the plaintiff's intestate owned.

Colomb v. Portland & B. Street R. Co. 100 Me. 418, 61 Atl. 898, 19 Am. Neg. Rep. 9; *Wyman v. Berry*, 106 Me. 49, 75 Atl. 123, 20 Ann. Cas. 439; *Blumenthal v. Boston & M. R. Co.* 97 Me. 256, 54 Atl. 747; *McLane v. Perkins*, 92 Me. 44, 43 L.R.A. 487, 42 Atl. 255; *Garland v. Hewes*, 101 Me. 549, 64 Atl. 914; *Chase v. Maine C. R. Co.* 78 Me. 346, 5 Atl. 771; *McCarthy v. Bangor & A. R. Co.* 112 Me. 1, L.R.A. 1915B, 140, 90 Atl. 490; *Smith v. Maine C. R. Co.* 87 Me. 339, 32 Atl. 967; *Burke v. Broadway & S. Ave. R. Co.* 49 Barb. 529; *Athason v. United Traction Co.* 90 App. Div. 571, 88 N. Y. Supp. 176.

The passenger, either gratuitous or for hire, owes some duty, although it may not be as great as the person in whose control the team is.

Denis v. Lewiston, B. & B. Street R. Co. 104 Me. 39, 70 Atl. 1047; *Chase v. Maine*

questions are likely to arise in the same case, for if the defendant is unsuccessful in its contention that the negligence of the driver is imputable to the person riding with him, it is likely to claim that the latter was personally negligent, irrespective of the doctrine of imputed negligence.

A majority of the cases hold that a person approaching a railroad crossing must look out for himself, and the fact that he is riding with another does not relieve him of the responsibility of exercising reasonable care for his own safety. *Griffith v. Baltimore & O. R. Co.* 44 Fed. 574, affirmed in 159 U. S. 603, 40 L. ed. 274, 16 Sup. Ct. Rep. 105; *Partridge v. Boston & M. R. Co.* 107 C. C. A. 49, 184 Fed. 211; *Nehrbas v. Central P. R. Co.* 62 Cal. 320; *Colorado & S. R. Co. v. Thomas*, 33 Colo. 517, 70 L.R.A. 681, 81 Pac. 801, 3 Ann. Cas. 700, 18 Am. Neg. Rep. 316; *Chicago, S. F. & C. R. Co. v. Bentz*, 38 Ill. App. 485; *Cincinnati, I. St. L. & C. R. Co. v. Grames*,

C. R. Co. 78 Me. 346, 5 Atl. 771; McCarthy v. Bangor & A. R. Co. 112 Me. 1, L.R.A.1915B, 140, 90 Atl. 490; Smith v. Maine C. R. Co. 87 Me. 339, 32 Atl. 967.

Plaintiff cannot recover, for his intestate was guilty of contributory negligence.

Colomb v. Portland & B. Street R. Co. 100 Me. 418, 61 Atl. 898, 19 Am. Neg. Rep. 9; Blumenthal v. Boston & M. R. Co. 97 Me. 256, 54 Atl. 747; Warren v. Bangor, O. & O. T. R. Co. 95 Me. 115, 49 Atl. 609, 10 Am. Neg. Rep. 67; Butler v. Rockland, T. & C. Street R. Co. 99 Me. 149, 100 Am. St. Rep. 267, 58 Atl. 775; Denis v. Lewiston, B. & B. Street R. Co. 104 Me. 39, 70 Atl. 1047; McCarthy v. Bangor & A. R. Co. 112 Me. 1, L.R.A.1915B, 140, 90

Atl. 490; Giberson v. Bangor & A. R. Co. 89 Me. 343, 36 Atl. 400; Chicago & G. T. R. Co. v. Hoffman, 82 Ill. App. 453.

Messrs. George A. Hutchins and Matthew McCarthy for plaintiff.

Cornish, J., delivered the opinion of the court:

This is an action on the case brought under Rev. Stat. chap. 89, §§ 9, 10, by James Crosby, administrator, to recover damages by reason of the death of his intestate, Howard Crosby.

The accident by which the intestate, whom we shall hereafter designate as the plaintiff, for the sake of convenience, lost his life, occurred on the afternoon of Sat-

8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421; Lake Shore & M. S. R. Co. v. Boyts, 16 Ind. App. 640, 45 N. E. 812; New York, C. & St. L. R. Co. v. Robbins, 38 Ind. App. 172, 76 N. E. 804; Miller v. Louisville, N. A. & C. R. Co. 128 Ind. 97, 25 Am. St. Rep. 416, 27 N. E. 339; Wood v. Maine C. R. Co. 101 Me. 469, 64 Atl. 833; Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274; Richfield v. Michigan C. R. Co. 110 Mich. 406, 68 N. W. 218; Hinkley v. Wabash R. Co. 162 Mich. 546, 127 N. W. 668; Hutchinson v. St. Paul, M. & M. R. Co. 32 Minn. 398, 21 N. W. 212; Howe v. Minneapolis, St. P. & S. Ste. M. R. Co. 62 Minn. 71, 30 L.R.A. 684, 54 Am. St. Rep. 616, 64 N. W. 102; Finley v. Chicago, M. & St. P. R. Co. 71 Minn. 471, 74 N. W. 174; Byars v. Wabash R. Co. 161 Mo. App. 692, 141 S. W. 926; Mason v. Northern P. R. Co. 45 Mont. 474, 124 Pac. 271; Bennett v. New York C. & H. R. R. Co. 16 N. Y. Supp. 765, affirmed without opinion in 133 N. Y. 563, 30 N. E. 1149; Crawford v. Delaware, L. & W. R. Co. 24 Jones & S. 607, 1 N. Y. Supp. 339, affirmed in 121 N. Y. 652, 24 N. E. 1092; Flanagan v. New York C. & H. R. R. Co. 70 App. Div. 505, 75 N. Y. Supp. 225, affirmed in 173 N. Y. 631, 66 N. E. 1108; Hoag v. New York C. & H. R. R. Co. 111 N. Y. 199, 18 N. E. 648; Mittelsdorfer v. West Jersey & S. R. Co. 77 N. J. L. 698, 73 Atl. 538; Crossman v. P. & R. R. Co. 2 Chester, Co. Rep. 350; Atlantic & D. R. Co. v. Ironmonger, 95 Va. 625, 29 S. E. 319; Loach v. B. C. Electric R. Co. 16 D. L. R. 245, 27 West. L. Rep. (Can.) 407, 6 W. W. R. 322, 17 Can. Ry. Cas. 21, 19 B. C. 177; see also cases in note in L.R.A.1915A, 765, et seq.

The rule as stated in Elliott on Railroads, vol. 3, 2d ed. § 1174, is that if the person riding in the vehicle knows that the driver is negligent, and he takes no precaution to guard against injury, he cannot recover, for in such case the negligence is his own, and not simply that of the driver. The plaintiff cannot rightfully omit to use care in blind dependence upon another, but must use care proportionate to the danger of which the facts convey knowledge.

L.R.A.1915E.

In Cahill v. Cincinnati, N. O. & T. P. R. Co. 92 Ky. 345, 18 S. W. 2, the court says: "But to decide that failure of a person to look along a railroad before attempting to cross it is under all circumstances, and necessarily, negligence, would be arbitrary and without reason; for there may be evidence sufficient to satisfy a person of ordinary carefulness, the track is clear, without taking that precaution,—as when he knows it is not usual train time, and does not hear the signal he knows it is customary for the company to give and him to hear. A person thus reasoning and acting, it seems to us, cannot upon principle be regarded as negligent, even if he does fall short of the measure of vigilance needed to prevent being injured by a passenger train running hours behind time, at an extraordinary rate of speed and without any signal of its approach."

Other authorities allow a person riding with another to rely, at least to some extent, upon a driver whom he believes to be careful and competent. See East Tennessee, V. & G. R. Co. v. Markens, 88 Ga. 60, 14 L.R.A. 281, 13 S. E. 855, 11 Am. Neg. Cas. 313; Wilson v. New York, H. H. & H. R. Co. 18 R. I. 598, 29 Atl. 300; Marsh v. Kansas City Southern R. Co. 104 Mo. App. 577, 78 S. W. 284; Cotton v. Willmar & S. F. R. Co. 99 Minn. 372, 8 L.R.A. (N.S.) 654, 116 Am. St. Rep. 422, 109 N. W. 835, 9 Ann. Cas. 935; Byars v. Wabash R. Co. 161 Mo. App. 692, 141 S. W. 926, subsequently set out.

Companion or guest.

Additional to the cases in the present note under this heading, the following set out in note in 8 L.R.A. (N.S.) 671, et seq., may be referred to: Chicago, S. F. & C. R. Co. v. Bentz, 88 Ill. App. 485; Aurelius v. Lake Erie & W. R. Co. 19 Ind. App. 584, 49 N. E. 857; Bush v. Union P. R. Co. 62 Kan. 709, 64 Pac. 624; Missouri, K. & T. R. Co. v. Bussey, 66 Kan. 735, 71 Pac. 263; Allyn v. Boston & A. R. Co. 105 Mass. 77; State v. Boston & M. R. Co. 80 Me. 430, 15 Atl. 36, 11 Am. Neg. Cas. 642; Smith v. Maine C. R. Co. 87 Me. 339, 32 Atl. 967;

urday, March 9, 1912, at the Lincoln avenue grade crossing in the town of Rumford. The plaintiff, a boy lacking only two months of being twelve years of age, had left his home in Mexico, a town across the Androscoggin river from Rumford, at 11:30 o'clock in the forenoon to carry dinner, as he was accustomed to do when not in school, to his father, who was employed in one of the Rumford mills. He obtained the consent of his mother to attend the moving pictures in the afternoon, which he did, in company with Fred Clark, a companion nine or ten years of age. After the moving picture show was over, and at about 4:30 o'clock, the two boys started for home, and on the way accosted one

Memont, the driver of a bakery team, with whom they were both acquainted, for a ride. Memont assented, and the boys got into the team; Memont sitting on the right and driving, Clark on the left, and the plaintiff in the middle. The team consisted of a single horse and a low covered baker's pung. On their way to Mexico they had to pass over Lincoln avenue, a public highway, and the usual traveled road between the two towns, across which the tracks of the Maine Central Railroad Company run practically at right angles and at grade. No automatic crossing signals, gates, nor flagman are maintained at this crossing, but there is the usual standard crossing sign. On reaching this crossing the team

Alabama & V. R. Co. v. Davis, 69 Miss. 444, 13 So. 693; Zimmerman v. Union R. Co. 3 App. Div. 219, 38 N. Y. Supp. 362; Bronson v. New York C. & H. R. Co. 24 App. Div. 262, 48 N. Y. Supp. 257; Lewin v. Lehigh Valley R. Co. 41 App. Div. 89, 58 N. Y. Supp. 113, later appeal in 52 App. Div. 69, 65 N. Y. Supp. 49, affirmed in 165 N. Y. 667, 59 N. E. 301; Smith v. New York C. & H. R. Co. 38 Hun, 33; Durkee v. Delaware & H. Canal Co. 88 Hun, 471, 34 N. Y. Supp. 978; De Loge v. New York C. & H. R. Co. 92 Hun, 149, 36 N. Y. Supp. 697, affirmed in 157 N. Y. 688, 51 N. E. 1090; Dean v. Pennsylvania R. Co. 129 Pa. 514, 6 L.R.A. 143, 15 Am. St. Rep. 733, 18 Atl. 718; O'Toole v. Pittsburgh & L. E. R. Co. 158 Pa. 99, 22 L.R.A. 606, 38 Am. St. Rep. 830, 27 Atl. 737.

Where a woman riding in a carriage with a man driving was injured by a train at a railroad crossing, the court in Partridge v. Boston & M. R. Co. 187 O. C. A. 49, 184 Fed. 211, in holding it a question for the jury whether she was guilty of contributory negligence, upheld a charge to the effect that while a woman riding, as was this plaintiff, was not expected to exercise the same degree of care as the man driving, she was not expected to shut her eyes and do nothing, but it was her duty to act like a prudent person, and not be careless. She could not hide behind the fact that another was driving the vehicle in which she was riding, and thus relieve herself of her own negligence.

So, a person riding in a buggy, upon the seat with the driver, is bound to exercise care, upon approaching a railroad crossing, to determine whether or not a train is approaching; and no recovery can be had for his death, resulting from a collision with a train, where, knowing that a train is approaching, he joins with the driver in testing the danger of attempting to cross the tracks in front of the train. Colorado & S. R. Co. v. Thomas, 33 Colo. 517, 70 L.R.A. 681, 81 Pac. 801, 3 Ann. Cas. 700, 18 Am. Neg. Rep. 316.

So, a person injured at a railroad crossing while riding in a cutter as the guest of another who was driving was held L.R.A.1915E.

guilty of contributory negligence as a matter of law, in Lake Shore & M. S. R. Co. v. Boyts, 16 Ind. App. 640, 45 N. E. 812, where it appeared that he was familiar with the crossing and its surroundings; that he knew when approaching the crossing the time of the arrival of a local freight train from the north; that he knew the train had arrived, a part of which without the engine he saw standing at the depot; that when within 30 feet of the crossing, he had an obstructed view of the side track, looking south a distance of 60 feet, which increased as he approached the track to 80 feet at 20 feet from the track; and that he failed to look and listen for an approaching train as required by law.

So, where a woman riding with the owner of the wagon and team, who was driving, was injured at a railroad crossing when a locomotive struck the rig, the court in Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274, in holding plaintiff guilty of contributory negligence, stated that it must be laid down as a principle of law that persons about to cross a railroad track are bound to recognize and to make use of the sense of hearing as well as of sight,—and if either cannot be rendered available, the obligation to use the other is the stronger,—to ascertain, before attempting to cross it, whether a train is in dangerous proximity; and if they neglect to do this, but venture blindly upon the track without any effort to ascertain whether a train is approaching, it must be at their own risk. Such conduct is of itself negligence, and should be so pronounced by the court as matter of law.

So, plaintiff's intestate, a woman, while riding in a buggy with another woman who was driving, having attempted to cross before a train, was held guilty of contributory negligence in Richfield v. Michigan C. R. Co. 110 Mich. 406, 68 N. W. 218, the court stating that the rule that where, by the negligence of the defendant, the plaintiff was put in a place of danger, and if in an attempt to extricate himself from it he did not take the best hazard, he would not be charged with contributory negligence, was inapplicable to this case. There

was struck by a special train, consisting of an engine and single car, on its way north from Rumford. The pump was demolished, Memont and the plaintiff were killed, but Clark fortunately escaped without injury. These facts are not in dispute.

The plaintiff contends that the defendant was negligent (1) in running its train at an excessive rate of speed, and greater than allowed by statute at a crossing near the compact part of the town (Rev. Stat. chap. 52, § 86), and (2) in failing to give the necessary signals and warning by sounding the whistle and ringing the bell, as required by Public Laws 1905, chap. 94. A large number of witnesses testified as to the

issues of fact raised by these allegations, but it is unnecessary to consider the force and effect of their testimony, or to pass upon the question of the defendant's negligence, further than to say that a careful study of the evidence on these points leads to the conclusion that the train was moving at the rate of between 18 and 25 miles per hour, and that the customary signals were given. The positive evidence introduced by the defendant on the question of signals is hardly overcome by the evidence of the plaintiff, largely negative in character. The plaintiff, however, is precluded from recovering because of his own want of due care, and that is the only question

is not a particle of showing that the women exercised the least care in approaching this crossing. They were familiar with the streets and the crossing, and yet drove along laughing and talking, and apparently giving no heed to the approach of a train. If they had been exercising any care, they would have heard or seen what others saw and heard. They were not drawn into a position of peril by the negligence of the defendant, but, by their own negligence, had placed themselves in such a position, and being there took their chance of crossing in front of the train. We think the court should have directed a verdict in favor of the defendant.

But in the following cases the question of the contributory negligence of one injured at a railroad crossing while riding as the guest or companion of another was held properly submitted to the jury, and a finding for plaintiff upheld:

—where one approached a crossing seated on a wagon with his face to the rear, and the driver, who was facing the crossing, was well acquainted with the time of regular trains, and the train which caused the injury was a special, which failed to ring a bell or sound a whistle as it approached the crossing at a place where obstacles intervened between the highway and approaching trains, *Illinois Southern R. Co. v. Hamill*, 226 Ill. 88, 80 N. E. 745, affirming 128 Ill. App. 152;

—where plaintiff, a woman, was injured by a train at a crossing while riding in a single buggy driven by a farm hand who was seated between her and her mother, her contributory negligence was held a question for the jury in view of the contradictory testimony respecting the care she exercised in approaching the crossing, *Hinkley v. Wabash R. Co.* 162 Mich. 546, 127 N. W. 668;

—where the driver and guest, when within 25 or 30 feet of the crossing, looked both ways, but saw no train, and when they looked again the train was upon them, going at an unusual and dangerous rate of speed, the whistle on the locomotive not having been blown, and the silence of the automatic signal being an implied invitation to the deceased and his companion *L.R.A.1915E.*

to cross the tracks, *Flanagan v. New York C. & H. R. R. Co.* 70 App. Div. 505, 75 N. Y. Supp. 225, affirmed in 173 N. Y. 631, 68 N. E. 1108;

—where both plaintiff's intestate and the driver looked and listened, but did not hear an approaching train, or see it because of the obstructions, *Osborne v. Southern R. Co.* 160 N. C. 309, 76 S. E. 16;

—where the person riding did not look because she saw the driver was looking, and an attempt upon her part to watch for the train in the situation as it existed might have interfered with the observations of the driver, *Mittelsdorfer v. West Jersey & S. R. Co.* 77 N. J. L. 698, 73 Atl. 538;

—where a man riding with another as guest looked when 25 or 30 feet from the track, but did not see the approaching train, the court stating that plaintiff's evidence that she looked and did not see the train is not incredible. The train was coming around a curve, behind her. As she sat facing the west, with two others in the seat, doubtless unable to turn around and look back of her, it is not improbable that the cars were not in her line of vision, looking to the left as far as she could see, *Miles v. Fonda, J. & G. R. Co.* 86 Hun, 508, 33 N. Y. Supp. 729, affirmed without opinion in 155 N. Y. 679, 50 N. E. 1119.

In *Howe v. Minneapolis, St. P. & S. Ste. M. R. Co.* 62 Minn. 71, 30 L.R.A. 684, 54 Am. St. Rep. 616, 64 N. W. 102, the plaintiff was, at the invitation of the owner, riding in a wagon driven by him. He had no control over the driver or his management of the team. There was no relation of master and servant or principal and agent between them; neither were they engaged in any joint enterprise. There was no evidence that the plaintiff knew that the driver was incompetent for not keeping a proper lookout for trains when approaching a railway crossing. It was held that plaintiff's negligence was a question for the jury, notwithstanding the fact that it appeared that if he had exercised the degree of vigilance in "looking and listening" required of one having the control and management of a team, he would have

that needs discussion here. Failing in that, his case fails. What took place immediately prior to the accident is not left to conjecture, but is intelligently and graphically described by the Clarke boy, the survivor of the sad accident, and that testimony alone ends the plaintiff's case. His own version is as follows:

Q. Did you turn down Lincoln avenue in front of Stanley Bisbee's?

A. Yes, sir.

Q. That was downhill?

A. Yes, sir.

Q. How was he driving the horse then?

A. Trotting him.

Q. That was the top of the hill?

A. Yes, sir.

Q. Did he whip him or anything on the way down?

A. He did when he was about halfway.

Q. When he was about halfway down he whipped him?

A. Yes, sir.

Q. Did the horse kick or trot or run when he whipped him?

A. Trotted all the way.

Q. Along about then what were you and Howard doing?

A. Laughing at him.

Q. Laughing at who?

A. Mr. Mement.

discovered the approaching team in time to have avoided injury.

Where it was held that the evidence failed to show contributory negligence on the part of one killed at a railroad crossing while riding with another who was driving, the court in *Marsh v. Kansas City Southern R. Co.* 104 Mo. App. 577, 78 S. W. 284, stated that there was nothing to show that plaintiff's intestate had any reason to distrust the care and prudence of the driver. He was not with him in the driver's seat, but was in the rear seated on the bottom of the wagon bed. It is not reasonable, observed the court, to expect that he should have the same care of the team that the driver had, or that he should observe every act of the driver, whether of commission or omission.

Where a person killed at a railroad crossing, upon approaching the same in a wagon as a guest, warned the driver that a train was coming when all were in a position of apparent safety, and went to the driver's assistance when he realized that there was danger of the team getting upon the track, it was held in *Byars v. Wabash R. Co.* 161 Mo. App. 692, 141 S. W. 926, that he did all that the law required of him with respect to looking and listening, and that the evidence was sufficient to sustain the jury's finding that he acted as a reasonably prudent man should have acted under the circumstances. The court stated: "There is no evidence in the case that he knew that the driver was inefficient or the team difficult to hold back, and he had a right to assume, until the contrary appeared, that the driver could and would avoid going upon the track. As soon as he realized there was danger of going upon the track, he made a quick effort to avoid it. It is true that what he did was not sufficient to avert the impending disaster. He might perhaps have made a quick jump from the wagon and thus escaped death at least; but his conduct in that respect is not to be measured with nicety without regard to the circumstances under which he acted."

Whether it is the duty of one riding as a guest of another to stop upon approaching a railroad crossing, as well as to look

and listen, is stated to be a question of fact for the jury, in *Byars v. Wabash R. Co.* supra.

Where a passenger was injured while crossing a railroad track in a sleigh, the court in *Wilson v. New York, N. H. & H. R. Co.* 18 R. I. 598, 29 Atl. 300, stated: "We think that . . . [the plaintiff] had a right to rely to some extent on the presumption that the driver, who, standing in the front of the sleigh by the dashboard, would have a better opportunity to see in front of the sleigh, would exercise due care, there having been nothing in his conduct to give reason to suppose that he was not a careful and prudent driver. As the plaintiff did not know of the immediate proximity of the crossing, and did not hear, though he was listening, the signals of the approaching train, we do not think it could be said as a matter of law that he was guilty of contributory negligence because he did not request the driver to stop and look and listen, to ascertain whether a train was approaching; and if not, the question was properly left to the jury. Moreover, the rule which requires a person who is about to cross a railroad to stop and look and listen for an approaching train is certainly not to be more strictly applied to a passenger in a sleigh than to the driver, if the driver were suing instead of the passenger."

In rendering a verdict for plaintiff against the railroad company, where one while lying in a wagon driven by another was killed at a public crossing, the court in *Brunswick & W. R. Co. v. Hoover*, 74 Ga. 426, stated that if the railroad company had, in compliance with its statutory duty, continuously blown its whistle and checked the speed of its train so as to be under control at the crossing, no harm would have been done, but life would have been saved. So that, even if there had been negligence by deceased or his driver, it would have been contributory, and not the sole cause and real cause of the disaster. In Georgia contributory negligence reduces the amount, but does not bar the recovery of damages.

It is held in *Loach v. B. C. Electric R. Co.* 16 D. L. R. 245, 27 West. L. Rep.

Q. What for?
 A. For hitting him and pulling him back.
 Q. What was he doing that for?
 A. To make him go.
 Q. To make him go faster?
 A. Yes, sir.
 Q. Did you and Howard think anything about any train?
 A. No, sir.
 Q. You knew there was a railroad track there?
 A. Yes, sir.
 Q. You didn't pay any attention to it?
 A. No, sir.
 Q. You and Howard were fooling and playing?
 A. Yes, sir.
 Q. Did Mr. Memont stop the horse at all?

A. He tried to down to the track.
 Q. That was when the horse was right on the track?
 A. Yes, sir.
 Q. And just when you got hit and didn't know any more?
 A. Yes, sir.
 Q. And right up to that time you and Howard had been fooling and playing between yourselves all the time?
 A. Yes, sir.
 Q. And had not thought anything about the train?
 A. No, sir.

Such conduct on the part of the driver, Memont, a man of mature years, was inexcusably and grossly careless, and it could

(Can.) 407, 6 W. W. R. 322, 17 Can. Ry. Cas. 21, 19 B. C. 177, that a person riding on a wagon with permission of the driver is not bound to exercise extraordinary care upon approaching the crossing of an electric railway; and a recovery for his death at a crossing by being struck by a car will not be defeated on the ground of his failure to take extraordinary precautions to see that the road was clear, where the car which killed him was going at an excessive rate of speed, and the motorman, had it not been for defective brakes which the railroad company maintained, could have stopped the car and avoided the accident. Macdonald, C. J. A., and McPhillips, J. A., dissented, being of the opinion that the jury, in finding deceased guilty of contributory negligence in not taking extraordinary precautions to see that the road was clear, meant nothing less than that deceased did not take ordinary or reasonable care. "If there were any doubt about this," said Macdonald, "if the evidence were at all equivocal; if it were uncertain what the plaintiff's negligence consisted of; I should not hold the answer a sufficient finding of contributory negligence; but the jury could not, I think, have done otherwise than find the deceased guilty of want of reasonable care; his negligence was identical with that of the driver, who was found guilty of want of ordinary care by the answer to another question."

Plaintiff's contributory negligence was held a question for the jury in *McCaffrey v. Delaware & H. Canal Co.* 41 N. Y. S. R. 221, 16 N. Y. Supp. 495, where she was injured by a train at a crossing while riding with her sister in the rear seat of a two-seated carriage driven by a coachman in the front seat. The court observed that a person situated as was this plaintiff is bound to look and listen, and is not to omit some reasonable and prudent effort to see that the crossing is safe. He is not bound, however, to jump, or to seize the reins. If such a person is silent, it does not follow as a matter of law that he is negligent. "The defendant says that she should have L.R.A.1915E.

apprised the driver of the danger. But the driver was in a far better position to see any danger. Why should she tell him what he could see for himself? He was not her servant, and she had no right to control him. If the danger was as apparent to him as to her, what good to tell him of it? He had a much more unobstructed view than she had. She was behind him and the seats were very near together. He was in the middle or near the middle of the front seat, thus obstructing her view. The plaintiff saw the gates open. True she had been over this same crossing on Sundays before. But it does not appear that she knew that the gates were never lowered on Sundays. Of course, when she had crossed they were open. She had on previous occasions seen them raised and lowered. . . . The learned justice charged that if negligent she could not recover. And the jury found that she was not. . . . It has been often said that the question of contributory negligence is nearly always one for the jury. It is especially so in a case like this where it is quite doubtful whether any watchfulness on plaintiff's part would have enabled her to interfere with the driver without causing an evil fully as great as that which happened. We think that this question was properly submitted to the jury."

Children.

Where plaintiff, while riding in a buggy with her mother, who was driving, was injured at a railroad crossing, the court in *Griffith v. Baltimore & O. R. Co.* 44 Fed. 575, stated that it was just as much the duty of a daughter riding in a wagon with her mother driving, to look and listen, as it was the duty of the mother, and just as much her duty to suggest that they should stop and look and listen, as it was the duty of the mother to stop and look and listen, and her duty to protest if that was not done.

When a daughter while riding in a wagon with her father, who was driving, was injured by a train at a highway crossing, it

not with reason be contended that any recovery could be had on his part. Warren v. Bangor, O. & O. T. R. Co. 95 Me. 115, 49 Atl. 609, 10 Am. Neg. Rep. 67; Day v. Boston & M. R. Co. 96 Me. 207, 90 Am. St. Rep. 335, 52 Atl. 771, 12 Am. Neg. Rep. 452; Blumenthal v. Boston & M. R. Co. 97 Me. 255, 54 Atl. 747; and many other cases to the same effect.

But the plaintiff is likewise prevented from maintaining his action, not on the ground of imputed negligence, a doctrine which does not obtain in this state (State v. Boston & M. R. Co. 80 Me. 430, 15 Atl. 36, 11 Am. Neg. Cas. 642), but because of his own want of due care. He was a boy about twelve years of age and was *sui juris*. Grant v. Bangor R. & Electric Co.

100 Me. 133, 83 Atl. 121. He was in possession of all his faculties, a regular attendant at school, and was bright and intelligent. He was familiar with the crossing and its approaches, as he had occasion frequently to pass over it, and knew it was a place of danger, and yet, as one of the party of three, he approached and reached the crossing without taking the slightest precaution, either by looking or listening, to ascertain whether or not a train was drawing near. He was at the moment thoughtless and reckless. Children *sui juris* are not relieved from exercising prudence and care merely because they are children. The well-established rule is that they are bound to exercise that degree or extent of care which ordinarily prudent

was held in Cincinnati, I. St. L. & C. R. Co. v. Howard, 124 Ind. 280, 8 L.R.A. 593, 19 Am. St. Rep. 96, 24 N. E. 892, that she was bound, in order to recover of the railroad company for injuries received, to establish her personal freedom from contributory negligence; that she had no right to assume that no train was approaching, if her view was obstructed, from the fact that no whistle was sounded, and such fact could not be considered in determining the question of her negligence.

In Baltimore & O. R. Co. v. Griffith, 159 U. S. 603, 40 L. ed. 274, 16 Sup. Ct. Rep. 105, affirming 44 Fed. 574, the contributory negligence of a daughter injured at a railroad crossing while riding in a buggy drawn by a gentle horse driven by her mother was held a question for the jury, it appearing that they drove slowly, stopping, looking, and listening at a low place where a train could be seen, and neither saw nor heard anything, and stopped again and listened 40 or 50 yards from the track, and then drove on, listening all the time and hearing nothing, and were struck just as they got to the railroad cut by a train behind time coming around a curve.

On the question of the contributory negligence of a child injured at a crossing by a train while riding in a cutter driven by a man, the court in Bennett v. New York C. & H. R. R. Co. 40 N. Y. S. R. 948, 16 N. Y. Supp. 765, affirmed in 133 N. Y. 563, 30 N. E. 1149, stated that the court did not intend the remark that "the degree of care and caution which the plaintiff should exercise must not be measured by a person of mature years," as a direction to the jury, but a suggestion that, in considering the plaintiff's conduct, it was their duty to consider and give proper weight to the fact that she was a child and must have been so understood by the jury.

Where a girl sixteen years of age, while being driven home by her brother in a top buggy, was struck by a train at a crossing, the court in Mason v. Northern P. R. Co. 45 Mont. 474, 124 Pac. 271, upheld an instruction that a child is bound to exercise only the care of those of his own age and L.R.A.1915E.

understanding, and that if plaintiff and her brother exercised such care, neither of them was guilty of contributory negligence precluding a recovery for the injury alleged. So, instructions making it the duty of a person approaching a railroad track with the intention of crossing to keep a constant lookout in both directions, and to stop if necessary, and look for a train at the last available point and at the last moment of time before crossing, were in this case held to impose too great a burden, such person being only required to exercise reasonable care for his own safety.

Where a child fifteen years old, while riding in a buggy with a man who was driving, was killed at a railroad crossing by a train, the court in Allen v. Kansas City, M. & B. R. Co. — Miss. —, 32 So. 3, stated that it could not be safely said that any negligence on the part of the child contributing to such injury, if any such negligence there was, was so manifest that it should have been declared by the court rather than found by the jury, to whom such questions usually belong.

So, plaintiff's contributory negligence was held properly submitted to the jury where a girl fifteen years old approached a crossing in a wagon driven by another, both of them looking and listening for indications of danger, when, without warning, a switch engine backed down upon them. Hutchinson v. St. Paul, M. & M. R. Co. 32 Minn. 398, 21 N. W. 212.

Where five children, one of them driving, were killed at a crossing while returning from a May-day picnic in a light wagon drawn by a gentle horse, there being obstructions preventing a view of the track until close to the crossing, and there being no proof that the children were heedless, the court stated that they were not bound to exercise more care than a prudent person approaching such a place would ordinarily exercise for his protection, and a finding of the jury on the question of contributory negligence would not be disturbed. Nehrbaas v. Central P. R. Co. 62 Cal. 320.

Where a boy fourteen years old, while

children of their age and experience are accustomed to use under similar circumstances. The standard is the conduct of boys who are ordinarily careful. Measured by this standard, the plaintiff falls far below the requirement. Not only did he not exercise the ordinary care of boys of his age under like conditions, but he failed to exercise any degree of caution whatever. A certain amount of heedlessness is to be expected in a boy of his age, and may be consistent with due care on his part, but nothing but utter inattention existed here. He was "fooling and playing" with his companion up to the very instant of the col-

lision. Entirely oblivious to all danger, thoughtlessly, rashly, and recklessly he went to his death. Such conduct must be condemned as grossly negligent even in a boy twelve years of age, and brings this case within the decisions in *Hayes v. Norcross*, 162 Mass. 546, 39 N. E. 282 (the case of a child of about six years of age); *Gleason v. Smith*, 180 Mass. 6, 55 L.R.A. 622, 91 Am. St. Rep. 261, 61 N. E. 220, 10 Am. Neg. Rep. 599 (a boy of twelve); *Godfrey v. Boston Elev. R. Co.* 215 Mass. 432, 102 N. E. 862 (a boy of seven); *Brown v. European & N. A. R. Co.* 58 Me. 384 (a boy of nine); *Colomb v. Portland &*

riding with his brother, who was driving a team attached to a load of wheat, was injured by a train at a railroad crossing, it was held in *Qincinnati, I. St. L. & C. R. Co. v. Grames*, 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421, that the facts found by the jury were sufficient to warrant the court in inferring that plaintiff exercised care commensurate with the danger encountered, and therefore was not guilty of contributory negligence precluding a recovery for injuries sustained, it appearing that both plaintiff and his brother, when within 50 feet of the tracks, stopped, looked, and listened for an approaching train, but could neither see nor hear one on account of obstructions; that from the point from where they stopped, the team approached the track on a walk, both plaintiff and his brother looking and listening; that the train which caused the injury approached the crossing without warning.

Where a boy twelve years old, though warned by the driver to keep off, jumped upon a wagon as it was crossing a railroad track, the court stated that if the jury should find that the boy was bright and intelligent and of sufficient mental capacity and knowledge to comprehend the danger at this crossing and to know that he ought to stop, look, and listen, and use all reasonable care and prudence to protect himself, and that he failed to do this, then his parents cannot recover because of the negligence of the defendant company in failing, if it did fail, to give a proper signal before reaching the crossing, and in failing to properly operate the safety gates. *Bracken v. Pennsylvania R. Co.* 32 Pa. Super. Ct. 22.

It is to be remembered that the scope of the note excludes the question whether the negligence of the husband as husband or as driver is imputable to the wife, and *vice versa*.

Husband and wife.

While a husband and wife may sustain such relations to each other that the negligence of one will be imputed to the other, the husband in these cases seems to be treated as no different from any other driver, and the marital relation is not con- L.R.A.1915E.

sidered as affecting the personal negligence of the wife.

A wife riding in a vehicle with her husband, who is driving, is bound to take such precaution for her own safety when approaching a railroad crossing, as is reasonable under the circumstances. *Willfong v. Omaha & St. L. R. Co.* 116 Iowa, 548, 90 N. W. 358.

In *Finley v. Chicago, M. & St. P. R. Co.* 71 Minn. 471, 74 N. W. 174, a wife was riding in a wagon with her husband, who was driving. She had no control over him in the management of the team. He was not her servant or agent, and they were not engaged in a joint enterprise. The wagon was struck by an engine at a crossing and plaintiff was thrown out and injured. It was held a question for the jury whether she was guilty of contributory negligence in failing herself to look and listen, or to observe that her husband was not using due care to look and listen, if such was the fact.

Where both husband and wife were killed at a crossing in attempting to pass before a passenger train, the court in *Hoag v. New York C. & H. R. R. Co.* 111 N. Y. 199, 18 N. E. 648, said: "She had no right because her husband was driving to omit some reasonable and prudent effort to see for herself that the crossing was safe. But the strong probability is that she did see the train and her husband did also, and that he for some reason undertook to cross in its front, miscalculating perhaps its distance and speed and his opportunity. She was not bound to suspect that purpose until she saw it being executed. Before that she might reasonably expect him to stop and wait. When she saw he was about to make the attempt, they must have been very close to the tracks. She was not bound to jump from the wagon. That might seem to her as dangerous as to sit still. She could not be required to seize the reins or interfere with the driver. That is almost always dangerous and imprudent. She might have begged her husband to stop, and we do not know that she did not, but if she did not and sat silent it does not follow as matter of law that she was negligent. Her husband seems to have been ordinarily a careful man. Having his wife

B. Street R. Co. 100 Me. 418, 61 Atl. 898, 19 Am. Neg. Rep. 9 (a girl of nearly eleven). The very recent case of McCarthy v. Bangor & A. R. R. Co. 112 Me. 1, L.R.A. 1915B, 140, 90 Atl. 490, where two boys of about fourteen riding in a milk cart were struck at a grade crossing, is strikingly in point in many of its features, and the principles of law there laid down apply with equal force here.

The case of Wood v. Maine C. R. Co. 101 Me. 469, 64 Atl. 833, relied on by the plaintiff, is readily distinguished, because in that case the plaintiff was a passenger for hire riding in the rear seat

of a public stage, and such a passenger has a right to rely in some measure upon the watchfulness of the driver, and is not, as a matter of law, required to be so alert in looking and listening for an approaching train as he. But in the case at bar the plaintiff evidently placed no reliance upon the driver or his watchfulness, and he had no occasion to do so. All three, sitting on the same seat, were apparently playfellows together, much as they would have been had they been walking on the street instead of driving, and in their sport had gone blindly upon the crossing, as in Godfrey v. Boston Elev. R. Co. 215 Mass. 432,

with him, one would think would make him more so. He stopped twice before he crossed the freight tracks. She was hardly blamable when both saw the coming train, for thinking and expecting that he would stop again. When she saw that, instead of stopping, he meant to cross, she should have spoken, perhaps, but she may have been so near the engine as to have scarcely had time, or so paralyzed with fright at the impending danger as to have lost her judgment and prudence for the moment. The degree of care to be exercised varies with circumstances and emergencies. If the deceased was silent it does not follow as matter of law that she was negligent. Which of the two inferences we have named should be drawn, and if the latter, whether the surrounding circumstances sufficiently show that the deceased was not in fault, were questions which we think should have gone to the jury."

In Hajsek v. Chicago, B. & Q. R. Co. 5 Neb. (Unof.) 67, 97 N. W. 327, plaintiff and her husband, as they neared the railroad crossing, and while 90 or 100 feet from the track, looked both ways and listened for an approaching train, at which time neither saw nor heard anything to indicate the approach of a train. It was shown that a train under the circumstances indicated would have been visible for several hundred feet before it reached the crossing. The headlight on the engine was burning. If plaintiff or her husband had listened or looked, they could scarcely have helped seeing the train. They were both seated on a spring seat on the wagon, and the opportunities for observation of plaintiff were equal, if not superior, to those of her husband, who was driving the team. The failure of plaintiff to look and listen for the train during the time they were passing over the 90 or 100 feet, and during which time the train would have moved half a mile, was held such contributory negligence as precluded her from recovering against the railroad company.

So, a recovery was denied where a wife riding in a wagon with her husband, who was driving, knew that the crossing was an unusually dangerous one, but failed to look or listen or warn her husband, the facts showing that if she had looked she could

have seen and would have seen the approaching train. Miller v. Louisville, N. A. & C. R. Co. 128 Ind. 97, 25 Am. St. Rep. 416, 27 N. E. 339. In the above case the engineer thought the husband did not intend to cross, for he stopped the wagon just before the train reached the crossing, but drove on again entering the crossing in time to be struck by the train.

So, a wife riding in a wagon driven by her husband may be held guilty of negligence precluding recovery for injury at crossing, where, in approaching the same, she fails to look and listen, although the railroad company was also guilty of negligence by running at an unlawful speed within city limits, and failing to blow the whistle and ring the bell as provided by statute. Toledo & O. C. R. Co. v. Eather-ton, 20 Ohio C. C. 297, 11 Ohio C. D. 253.

But it was held that a verdict for a wife would not be disturbed where she was riding in a wagon with her husband, who was driving. It could not be said that she must have heard the train had she listened, and (there being a curve and embankment) must have seen the train had she looked in time to avoid injury. New York C. & St. L. R. Co. v. Robbins, 88 Ind. App. 172, 76 N. E. 804. It is stated, however, in this case, that a wife must look out for her own safety in such a case.

Employer and employees.

Where a woman carrying a baby was injured by a train at a crossing while riding with her employer, the court in Crawford v. Delaware, L. & W. R. Co. 24 Jones & S. 607, 1 N. Y. Supp. 339, affirmed in 121 N. Y. 652, 24 N. E. 1092, upheld a charge that plaintiff was bound to show due care on her part, and negligence on that of defendant; and that if she knew she was approaching a track, she had no right to assume the driver would be careful, but must watch out for herself; but if she did not know it, she was bound to use only such care as one with her knowledge would ordinarily exercise under the circumstances; and it was for the jury to decide whether she was negligent, and whether defendant took such precautions as were necessary to warn travelers

102 N. E. 652, *supra*. The fact that the older man was driving rendered the plaintiff no less careless in this case. Nor does the fact that in approaching the crossing the vision was obstructed by the higher banks, the trees, and a wood yard change the situation. The more dangerous the crossing, the greater the care demanded of the traveler. At a point 50 feet from the crossing there was a clear view of the track for a long distance. Had the plaintiff looked then he could have seen the approaching train, but it is admitted that he did not. The difficulty of seeing and hearing the train is therefore immaterial,

as it is the absence of even the smallest effort on the plaintiff's part, not his inability to see or hear with reasonable effort, which convicts him of contributory negligence. *Day v. Boston & M. R. Co.* 96 Me. 207, 90 Am. St. Rep. 335, 52 Atl. 771, 12 Am. Neg. Rep. 452.

The accident was deplorable; but unless we are prepared to hold that, in every instance where a child of tender years is injured by the negligence of another, he is entitled to recover, we cannot sustain this verdict.

Motion sustained.

Verdict set aside.

approaching the track, so that they could hear or see trains if they had listened or looked.

Where plaintiff, while riding on a load of hay driven by his employer, was killed by a train at a crossing, it was held in *Massoth v. Delaware & H. Canal Co.* 64 N. Y. 524, affirming 8 Hun, 314, that the question of plaintiff's contributory negligence was properly left to the jury, and that a charge that, there being no evidence affirmatively showing that the "deceased either looked or listened, or did anything to guard against the dangers of the crossing," it was to be presumed that he did not look and was negligent, was properly refused.

Passenger for hire.

The rule requiring a traveler to look out for trains approaching a crossing is not relaxed, because of the fact that one is being carried in a vehicle owned and driven by another. It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger and avoid it, if practicable. *Brickell v. New York C. & H. R. R. Co.* 120 N. Y. 290, 17 Am. St. Rep. 648, 24 N. E. 449.

It has been held that the primary duty of caring for the safety of the vehicle and passengers rests upon the driver, and unless the danger is obvious or is known to the passenger, the latter may rely upon the assumption that the driver will exercise proper care and caution in approaching a place of danger. But if the passenger knows that the driver is incompetent or careless, or sees that the driver is not aware of the danger and is not taking proper precautions, it is his duty to notify him of the danger; and a failure to do so is negligence. *Cotton v. Willmar & S. F. R. Co.* 99 Minn. 372, 8 L.R.A. (N.S.) 654, 116 Am. St. Rep. 422, 109 N. W. 835, 9 Ann. Cas. 935.

So one who hires a team, vehicle, and driver, with whom he takes passage, is bound to check or remonstrate with the driver in case the latter attempts to cross a railroad track without stopping or listening for approaching trains, and no recovery can be had in case he is killed by

the driver's attempt to cross heedless of an approaching train, when he is in an open carriage and can readily discover the peril of the driver's act. *Illinois C. R. Co. v. McLeod*, 78 Miss. 334, 52 L.R.A. 954, 84 Am. St. Rep. 630, 29 So. 76.

So, one who hires a liveryman to drive him to a certain place must, in order to recover for injury by train at a railroad crossing, have exercised ordinary care, and have been free from personal negligence. *Louisville & N. R. Co. v. Molloy*, 122 Ky. 219, 91 S. W. 685.

So, one riding beside an employed driver in an open buggy hired for the journey has been held guilty of contributory negligence precluding a recovery from the railroad company for injury at a railroad crossing, where, upon nearing the crossing, a train could have been seen for a distance of 1,325 feet, and such person failed to stop, look, or listen. *Dryden v. Pennsylvania R. Co.* 211 Pa. 620, 61 Atl. 249.

So, a passenger in a carryall injured in a collision with a passing train while crossing a railroad track, who is familiar with the location and knows that a train is about due, is guilty of contributory negligence, if he permits himself to be carried upon the track while his fellow passengers in the vehicle are making such a noise by singing and shouting that an approaching train cannot be heard, and he utters no warnings or expostulations, and is favorably situated to alight without danger. *Koehler v. Rochester & L. O. R. Co.* 66 Hun, 566, 21 N. Y. Supp. 844.

When, however, passengers for hire riding in a public carriage are about to cross a railroad track, it cannot be said as a matter of law that it is negligence on their part if they are not as alert as the driver of the team, over whom they have no direct control, in looking and listening for an approaching train before attempting to cross the track; but it is a question of fact for a jury, under all the circumstances, to determine whether or not such passengers were in the exercise of ordinary care. *Wood v. Maine C. R. Co.* 101 Me. 469, 64 Atl. 833.

So, where, before reaching a crossing, a passenger told the driver of the hack that a train was coming, and requested him to

step, it was held in *Wabash R. Co. v. Mc-Nown*, 53 Ind. App. 116, 99 N. E. 126, petition for rehearing overruled in 53 Ind. App. 134, 100 N. E. 383, that she was not guilty of contributory negligence precluding recovery for injury by train, as she had done all that the law required.

And it has been held, however, that a female passenger in a public hack is under no duty to supervise the driver at a public crossing, nor to look or listen for approaching trains, unless she has some reason to distrust the diligence of the driver himself in respect to these matters. *East Tennessee, V. & G. R. Co. v. Markens*, 88 Ga. 60, 14 L.R.A. 281, 13 S. E. 853, 11 Am. Neg. Cas. 313. J. D. C.

LOUISIANA SUPREME COURT.

STATE OF LOUISIANA EX REL. OLIVER
LANGG

v.

MATTHEW J. LONG, Criminal Sheriff.

(136 La. 1, 66 So. 377.)

Courts-martial — power to create.

1. The provisions of the state Constitution, establishing the judiciary department of the state government and vesting the judicial power of the state in certain named and designated courts, do not preclude the exercise by the general assembly of the power granted by other provisions of the Constitution to establish as an instrumentality of the executive department a "well-regulated militia," declared by the Constitution to be necessary "to the security of a free state," to provide by law how such militia shall be organized and trained, and, incidentally, to authorize the creation of courts-martial, as one of the ancient and recognized methods by which such instrumentality may be regulated and disciplined.

Militia — contract right — power to change.

2. Enlistment in the Active Militia of the state, save in times of war or public

Headnotes by MONBOE, Ch. J.

Note. — Power to change the duties or field of service of militiamen.

Aside from the decision in *STATE EX REL. LANGG v. LONG*, to the effect that enlistment in the Active Militia of a state, save in the time of war or public danger or disturbance, is voluntary, and is a "contract;" and that the state has no power, by the repeal of the law under which it was entered into (which is the measure of the rights and obligations of the parties thereto), and the substitution of another law in its stead, to impose upon the other contracting party more onerous conditions and obligations to which he has not given his assent; and the cases of *State ex rel. Harris v. Long*, 136 L.R.A.1915E.

danger or disturbance, is voluntary, and is a "contract," and the state has no power, by the repeal of the law under which it was entered into (and which is the measure of the rights and obligations of the parties thereto) and the substitution of another law in its stead, to impose upon the other contracting party more onerous conditions and obligations to which he has not given his assent.

Same — enlistment — method.

3. Considering together the several provisions of act 191 of 1912, upon the subject of enlistment, the conclusion is well-nigh irresistible that, in the contemplation of that statute, the taking of the prescribed oath is the determinative act. But, without saying that no one can be held to have enlisted without having taken such oath, the court finds that the evidence here adduced, of acts and omissions by relator, is insufficient to establish such intention or consent on his part.

Habeas corpus — jurisdiction of court-martial.

4. The question of the jurisdiction of a court-martial is open to inquiry on habeas corpus issued from a court having authority to issue that writ; and the action of such court in the premises may be reviewed by this court in the exercise of the jurisdiction conferred by article 94 of the Constitution.

(November 4, 1914.)

APPPLICATION for writs of certiorari and prohibition to review a judgment of the Criminal District Court for the Parish of Orleans discharging a writ of habeas corpus issued to secure relator's release from custody to which he was alleged to have been unlawfully committed. Reversed.

The facts are stated in the opinion.

Messrs. A. Miles Coe and H. M. Wilkinson for applicant.

Messrs. R. G. Pleasant, Attorney General, and Joseph E. Generelly for respondent.

Mr. Frank D. Chretien *in propria persona*.

La. 12, 66 So. 380; *State ex rel. Larue v. Long*, 136 La. 13, 66 So. 380; and *State ex rel. De Russy v. Long*, 136 La. 13, 66 So. 381,—which rest upon the decision in the *LANGG CASE*,—no other cases have been found passing upon the question here involved. The decision in the *LANGG CASE* seems in accord with the present system of voluntary service in the Militia, and will doubtlessly remain the law on the question until the adoption of another system of service, or the state by the contract of enlistment reserves to itself the right to increase the duties or field of service, which, it seems, there is no legal objection to its doing.

W. W. A.

Monroe, Ch. J., delivered the opinion of the court:

Relator was prosecuted before a court-martial of the First Separate Troop of Cavalry, Louisiana National Guard, upon a charge of being absent from ordered drill, inspection, and instruction, in violation of article 15, § 98, of act 191 of 1912, was convicted, and sentenced to pay a fine of \$10, or suffer imprisonment for ten days, and was imprisoned in conformity to the sentence, whereupon he obtained from the judge of division "B" of the criminal district court, a writ of habeas corpus, directing the sheriff, to whose custody he had been committed, to produce him, and to show cause, etc.; but, after hearing, the writ was discharged. Relator then applied to this court for writs of certiorari and prohibition, upon which application an order nisi was issued, the effect of which has been to bring the ruling so made by the judge *a quo* before us for review. The points mainly relied on are: (1) That there exists no authority, under the Constitution of this state, for the creation of courts-martial; (2) that even though such court were authorized, relator would not have been subject to its jurisdiction, for the reason that he had ceased to be a member of the state Militia.

1. The distinction between courts-martial and the courts which pertain to the judicial branches of the state and the Federal governments has long been recognized. In *Dynes v. Hoover*, 20 How. 65, 15 L. ed. 838, plaintiff, having been convicted by a naval court-martial of attempting to desert from the Navy, and sentenced to imprisonment, and the Secretary of the Navy having approved the sentence, the President issued an order to the marshal to receive the convict and commit him to the penitentiary, whereupon the convict brought an action of trespass and false imprisonment against the marshal in the circuit court of the United States for the District of Columbia, and by way of demurrer set up want of jurisdiction in the court-martial and in the President. Considering the question so presented, the Supreme Court said: "Among the powers conferred upon Congress by the 8th section of the first article of the Constitution, are the following: 'To provide and maintain a navy;' 'to make rules for the government of the land and naval forces.' And the 8th amendment, which requires a presentment of a grand jury in cases of capital or otherwise infamous crime, expressly excepts from its operation 'cases arising in the land or naval forces.' And by the 2d section of the 2d article of the Constitution it is declared that 'the President shall be commander in chief of

the Army and Navy of the United States, and of the Militia of the several states when called into the actual service of the United States.' These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practised by civilized nations, and that the power so to do is given without any connection between it and the 3d article of the Constitution, defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other."

What has thus been said of the power of Congress to make rules for the government of the land and naval forces of the United States may also be said of the power of the general assembly of Louisiana to make rules for the government of the land and naval forces of the state. Article 8 of the state Constitution declares that a "well-regulated Militia" is "necessary to the security of a free state." Article 298 declares that "the general assembly shall have authority to provide by law how the Militia . . . shall be organized, officered, trained, armed, and equipped, and of whom it shall consist."

And article 9 declares that "prosecutions shall be by indictment or information; but the legislature may provide for the prosecution of misdemeanors on affidavits; provided, that no person shall be held to answer for a capital crime unless on a presentment or indictment by a grand jury, except in cases arising in the Militia when in actual service in time of war or public danger."

The recognition of the necessity for a "well-regulated militia," the grant of authority to provide by law how the Militia shall be organized, trained, etc., and the exception with respect to capital cases arising in the Militia when in actual service in time of war or public danger, concern the Militia as an instrumentality of the executive department of the government, and concern the methods, other than through appeals to the judiciary, by which that instrumentality may be made effective. And, though courts-martial, created or authorized in the exercise of the power thus impliedly, if not expressly granted, may and do discharge judicial functions, and are therefore in some sense courts, they are not the courts to which article 84 of the Constitution refers, in declaring that the judicial power of the state shall be vested in certain named courts and in others thereafter provided in the Constitution, and which are instrumentalities of the judiciary department. And, to that effect is the jurisprudence of the Supreme Court of the United States, and of perhaps the great-

er number of the courts of last resort of the states. 27 Cyc. 496, 497, note.

There is some contrariety of opinion among the state courts as to the manner and extent in, and to, which the rulings of courts-martial, in matters affecting the Militia of the different states, may be reviewed and controlled. *State ex rel. Poole v. Nichols*, 20 L.R.A. (N.S.) 413, note (18 N. D. 232, 119 N. W. 632). But, no one denies that the question of jurisdiction is always open to inquiry upon a writ of habeas corpus (*Ex parte Carll*, 27 L. ed. 288, note [106 U. S. 521, 1 Sup. Ct. Rep. 535, 4 Am. Crim. Rep. 253]); and, as no appeal lies in this case, there can be no question of the authority of this court to review, in the manner here proposed, the action of the district court, in discharging that writ. Const. art. 94; *Garland's Code of Practice* (Roehl), art. 855, p. 629, and authorities there cited.

2. Acts 181 of 1904 and 191 of 1912 alike divide the Militia into "active and reserve," and confer upon the "governor the power, under certain conditions, to order" that there be drafted, from the reserve into the Active Militia, as many persons, subject to militia duty, as may be needed. But those conditions did not arise, and that power was not exercised under the act of 1904, and have not arisen and has not been exercised under the act of 1912. Enlistment in the Active Militia was and is purely voluntary, therefore, under both statutes. The act of 1912 imposes many conditions and obligations that were not contained in the act of 1904, and is apparently intended to operate as a piece of legislation complete in itself and covering the entire subject with which it deals. The title reads:

"An Act to Define and Provide for the Organizing and Disciplining of the Militia, to Provide Penalties for the Violation of the Same, to Prescribe the Duties of the Governor, the Adjutant General, and all Officers and Enlisted Men thereof, to Define Military Offenses, to Provide Penalties therefor and the Method of Enforcing the Same, to Provide for the Pay, Transportation, and Subsistence of the Militia when Called into Actual Service, and to Repeal All Laws in Conflict therewith, especially Act 181, Approved July 6, 1904."

The last section reads:

"That all laws and parts of laws in conflict with the provisions of this act, especially act No. 181 of the general assembly of Louisiana, approved July 6, 1904, and all acts amendatory thereof, be and the same are hereby repealed."

It is quite true that it contains also the L.R.A.1915E.

§§ 2 and 15 which the learned judge, made respondent, has quoted in his opinion, and which declare, in effect (§ 2) that "the Active Militia" and the National Guard "of the state shall consist of the regularly enlisted, organized, and uniformed military forces, who have heretofore participated or shall hereafter participate in apportionment of the annual appropriation provided by § 1661 of the Revised Statutes of the United States, as amended" (Comp. Stat. 1913, § 3054), and (§ 15) "shall consist of the necessary staff department, the commissioned officers heretofore or hereinafter retired, the organization forming the National Guard at this date, and such other . . . as . . . may be enlisted as (or) commissioned therein." But relator had become a member of the "regularly . . . enlisted . . . force" by virtue of his acceptance of an offer which, reduced to definite terms as act No. 181 of 1904, the state had made, to grant him certain privileges, and, under certain conditions, to feed, clothe, pay, and pension him, in consideration of his assuming certain specified obligations and consenting to subject himself, for a specified term, to certain rules and regulations. In other words, he was a member of the force, referred to in the act of 1912, by virtue of a contract, which, by the act of 1912, the state assumed to "repeal," and for which it assumed to substitute that act.

In *Re Grimley* (United States v. Grimley) 137 U. S. 147, 34 L. ed. 636, 11 Sup. Ct. Rep. 54, it appeared that the defendant (in error) was forty years old at the time of his alleged enlistment, whereas the law required that recruits should be effective, able-bodied men, between the ages of sixteen and thirty-five, and the question was, whether he could be punished, by court-martial, for desertion. The Supreme Court said: "The government, as contracting party, offers contract and service. Grimley accepts such contract, declaring that he possesses all the qualifications prescribed in the government's offer. The contract is duly signed. Grimley has made an untrue statement in regard to his qualifications. The government makes no objection because of the untruth. The qualification is one for the benefit of the government, one of the contracting parties. Who can take advantage of Grimley's lack of qualification? Obviously only the party for whose benefit it was inserted. Such is the ordinary law of contracts."

The case of the relator now before us is quite different. He made no untrue statement, and is not now trying to gain advantage by reason of any wrong committed by him. The state has undertaken to repeal

the law which contained the offer that he accepted, and which was the sole measure of his rights and obligations under the contract so made, and to substitute in its place another law, purporting to impose upon him conditions and obligations which differ from, and are harsher and more onerous, in material respects, than those to which he had agreed; and his answer to the attempt to enforce those conditions and obligations is, "I have not consented to them," which we think is sufficient.

It is said that, after the passage of the act of 1912, relator attended some of the musters or drills of his company, and that, when he failed so to do, he was prosecuted before courts-martial and fined, and that on two occasions he paid the fines, from which it is deduced that he accepted the new contract thus tendered, or sought to be imposed on, him, and became an enlisted man according to its terms. The evidence, however, fails to convince us that the acts attributed to him amounted to an enlistment; for at that time the act of 1912 had never been authoritatively interpreted or construed with the act of 1904, nor has it ever since then been so interpreted or construed. The contention in this case has been that it operated, at once, upon all persons who were then members of the Active Militia, and, whether with or without their knowledge or consent, imposed its conditions and obligations upon them; and we assume that such was the view taken by the captain of relator's troop, by whom he is prosecuted, and that, taking that view, he felt it to be his duty to enforce the act to the extent of his ability. Relator and other members of the "troop" were therefore in the position of being required to comply with the provisions of the new law or else to submit to the consequences; and it is not surprising that, for a time at least, they should have chosen the alternative first mentioned. But the new law did not have the effect thus attributed to it, and acts that may have been performed by relator, as an enlisted man, under what he erroneously believed to be the compulsion of a highly penal statute, as construed and administered by his superior officers, contained none of the elements of a voluntary enlistment and contract. The fact that, when apparently he began to realize the true situation that had been brought about, he refused to be bound by the act of 1912, because he was unwilling to accept it as his contract of employment, and that he was court-martialed on account of such refusal, and on two occasions paid the fines imposed on him as the alternative of imprisonment, can hardly be regarded as evidence of a voluntary re-enlistment, L.R.A.1915E.

the more especially when we consider that the act of 1912 contains the following provisions and requirements upon the subject of enlistment, which were entirely ignored, to wit:

"Section 40. . . . That every person who enlists or re-enlists in the Active Militia of this state shall sign and make oath to an enlistment paper, which shall be filed in the office of the adjutant general. . . . A person making a false oath to any statement contained in such enlistment paper shall, upon conviction, be deemed guilty of false swearing and punished accordingly. . . ."

"Section 98. . . . That the military forces of this state shall be governed by the following rules and articles. . . ."

"Art. 1. Enlistment in the Active Militia of this state shall be voluntary, and every person who enlists therein shall take and subscribe an oath (or affirmation) in the following words:

"I, . . . do solemnly swear (or affirm) that I will support the Constitution and laws of the United States and the Constitution and laws of the state of Louisiana; that I will obey the orders of the governor, as commander in chief of the military forces of the state, and of all other officers appointed over me, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as a citizen soldier in the service of the state of Louisiana, according to the best of my ability and understanding. So help me God. . . ."

"Art. 2. No enlisted man, duly sworn, shall be discharged . . . without a discharge in writing, approved by his commanding officer. . . ."

The oath referred to in § 40 evidently relates to the qualifications required of persons who enter the service by means of enlistment papers, as contradistinguished from those who receive commissions, whilst that prescribed by § 98, being an oath of allegiance, obedience, etc., is required, as we imagine, of all persons who enter the service, though the language of the statute is, "every person who enlists." However that may be, it is certainly required, as is the oath referred to in § 40, of the man who enlists. Whether the two oaths are, as a matter of custom, combined into one or taken separately does not appear, and is a matter of no present concern. What does concern this case, however, is that, taking the several provisions that have been quoted together, the conclusion is well-nigh irresistible that, in the contemplation of the law, the taking of the oath is determinative of the enlistment; and, though we will not say that no man can be held to have enlist-

ed without having taken the oath, we are of opinion that, to so hold, the evidence of the intention to enlist should be very much stronger than that which has been here presented.

In the case of *United States v. Grimley*, supra, the question was presented whether the defendant (in error) had in fact enlisted, and the court quoted the oath which he had taken, and which read, in part, as follows:

"I, John Grimley, born in Armagh, in the state of Ireland, aged twenty-eight years and — months, and by occupation a groom, do hereby acknowledge to have voluntarily enlisted, this 18th day of February, 1888, as a soldier in the Army of the United States of America."

After which the opinion proceeds:

"The question presented is whether the petitioner had in fact enlisted and become a soldier. It will be noticed that, in this oath of allegiance is an acknowledgment that he had enlisted, and that it was not an agreement to enlist. . . . Section 1342 of the Revised Statutes, Comp. Stat. 1913, § 2308, provides that the Army of the United States shall be governed by certain rules and articles thereafter stated. Article 2 provides:

"These rules and articles shall be read to every enlisted man, at the time of, or within six days after, his enlistment; and he shall thereupon take an oath or affirmation." . . . Obviously the oath is the final act in the matter of enlistment. . . . We conclude . . . that the taking of the oath of allegiance is the pivotal fact which changes the status from that of civilian to that of soldier."

It is true that the court also recognizes that the receipt of pay may operate as, or be, the equivalent of, an enlistment; but it does not appear that any oath whatever was taken by the relator now before the court, or that he received any pay, and the evidence fails, in our opinion, to show any enlistment or intention to enlist, as resulting from any other acts or omissions on his part, after the passage of the act of 1912. He is not insisting upon the maintenance of his contract as represented by the act of 1904, but is merely resisting the attempt to force upon him, as a contract of enlistment, the act of 1912, and in so doing we are of opinion that he is sustained by the facts and the law.

It is therefore ordered that the judgment of the District Court, here made the subject of review, be set aside, that the writ of habeas corpus, issued by that court at the instance of relator, be now reinstated and sustained, and that relator be discharged.

L.R.A.1915E.

MISSISSIPPI SUPREME COURT.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Appt.,

HENRY SCOTT,

(— Miss. —, 67 So. 491.)

Common law — what constitutes.

1. The common law consists of those principles and rules of action which have been from time to time adopted and acted upon by the courts when administering justice in cases not governed by any written law, arising out of the private disputes of individuals.

Appeal — partial new trial — right to award.

2. An appellate court has power under the common law, upon reversing a case, to award a new trial upon the question of damages only.

New trial — limited to question of damages — statutory authority.

3. Power to grant a new trial as to the question of damages only is conferred by a statute providing that every new trial granted shall be on such terms as the court shall direct.

Appeal — partial new trial — statutory authority.

4. An appellate court may grant a new trial upon the question of damages only, under statutory authority to render such decree as should have been rendered, unless it be necessary that some matter of fact be ascertained or damages be assessed by a jury, when the action shall be proceeded with in the court below according to the direction of the appellate court.

Same — statutory permission — limitation of other authority.

5. Statutory authority to limit a new trial to certain issues upon reversing a judgment on appeal does not nullify the common-law power of the court to limit the trial to other issues.

Jury — constitutional right — limiting new trial.

6. The constitutional right of trial by jury is not infringed by limiting a new trial to the question of damages upon the reversal of a judgment on appeal.

Note. — Power to limit the issues in granting new trial.

I. Scope, 240.

II. Power of appellate court.

a. In general, 240.

b. Particular applications.

1. Liability in general, 248.

2. Proximate cause and contributory negligence, 249.

3. Damages, 250.

4. Miscellaneous, 255.

III. Power of trial court.

a. In general, 258.

b. Damages, 260.

Constitutional law — due process — partial new trial.

7. Awarding a new trial upon the question of damages only, upon reversing a judgment, does not deprive defendant of his property without due process of law.

Appeal — new trial — power of trial court.

8. Upon reversal of a judgment and award of a new trial upon the question of damages only, the trial court has no power to permit evidence upon other questions to go to the jury.

(March 1, 1915.)

A PPEAL by defendant from a judgment of the Circuit Court for Warren County in plaintiff's favor in an action brought

to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servants. Affirmed.

The facts are stated in the opinion.

Rule 13 of the supreme court, referred to in the opinion, is as follows: "New Trial as to Damages Only.—When a judgment is reversed and a new trial ordered because the damages are excessive or inadequate, and for no other reason, such judgment shall be set aside only in respect of damages, and shall stand good in all other respects."

Messrs. Charles N. Burch and H. D. Minor, with Messrs. Mayes & Mayes, for appellant:

§ 13 of the supreme court violates § 31 of the Constitution of the state.

I. Scope.

This note is confined to cases where the issue upon which a new trial was granted affected the entire cause of action or right of recovery, and does not include cases where the judgment related to several separate rights or causes of action, or several tracts of land or articles of personal property, and was affirmed in part and reversed and remanded in part for a new trial. The general question of the divisibility of a judgment is not within the scope of the note; neither is the question of granting a new trial to certain only of the parties to the action, or on clearly separable issues not affecting the merits of the case, as that of jurisdiction.

A distinction has been made between the powers of a court of law and of a court of equity to grant a new trial on a single issue. *Chandler v. Chicago & A. R. Co.* 251 Mo. 592, 158 S. W. 35. In this case, where the action for wrongful death of the plaintiff's husband was brought nine months after the death, and the petition was defective in that it failed to make any averments that would toll the statute requiring the bringing of the action within six months, it was held that, upon reversal of the judgment for the plaintiff, the cause should be remanded for amendment of the petition and a new trial, but that the new trial should not be of the issue alone as to whether the action was barred. The court said: "It is further argued that if the judgment is reversed, it should be reversed only on the one point, and not generally, and that the cause should be set down for a rehearing on an amended petition on that sole issue. In equity, where the issues rest with the chancellor, and a jury fills no office of substance, that course is sensible where occasion demands. It is within precedent.

But in a case at law, triable to a jury, to send the case below on one question of fact, to be tried out before another jury, leaving other issues of fact foreclosed by a former verdict, is contrary to our statutory scheme for jury trial. It would result in awkward situations and complications not L.R.A.1915E.

conducive to the orderly administration of justice."

The weight of authority, however, is that, in a proper case, the appellate and trial courts may limit the issues in granting a new trial even in an action at law, and so *a fortiori* the power would seem to exist in equity cases, and it seems generally to have been exercised in the latter class of cases without question. The note, therefore, is confined, in general, to actions at law, and does not purport to cover that class of cases where in equity single issues have been re-committed to the trial court or a referee.

There seems generally to be no distinction made between the power at common law of the appellate and of the trial court in regard to granting a partial new trial and while, for convenience, the cases have been grouped, as far as possible, according to the facts, under separate headings as regards these two classes of courts, it should be observed that the cases in one group support generally the principle upon which the cases rest in the other group; also that the rule has frequently been broadly stated, the inference being that it might apply to either the appellate or trial court.

In the cases in the note in which the power to grant a new trial of part of the issues only was exercised, there seemed, unless otherwise indicated, to be no statute specially conferring the power.

As to power of trial court to cure an excessive verdict by requiring or permitting a reduction where the true measure of damages is not ascertainable upon mere computation, see note to *Tunnel Min. & Leasing Co. v. Cooper*, 39 L.R.A. (N.S.) 1064.

II. Power of appellate court.

a. In general.

As above stated, the rule appears to be well established that in a proper case, one in which the error necessitating a new trial relates only to one or more of the issues, which are so distinct from the others that it is clear the findings on the other issues were not affected by the error, and that a

Smith v. Smith, 1 How. (Miss.) 102; Isom v. Mississippi O. R. Co. 36 Miss. 300; Lewis v. Garrett, 8 How. (Miss.) 434; Peck v. Critchlow, 7 How. (Miss.) 243; Scott v. Nichols, 27 Miss. 24, 61 Am. Dec. 503; Aldridge v. Bogus Phalia Drainage Dist. — Miss. —, 64 So. 377; Slocum v. New York L. Ins. Co. 228 U. S. 384, 57 L. ed. 879, 33 Sup. Ct. Rep. 633, Ann. Cas. 1914D, 1029; Benton v. Collins, 125 N. C. 83, 47 L.R.A. 33, 34 S. E. 242; State v. Gideon, 41 Am. St. Rep. 639, note; 4 Am. & Eng. Enc. Law, 661, note "J."

The court not only had no power to pass the rule, but is excluded from so doing by the statute law of the state.

11 Cyc. 740; State v. Gideon, 41 Am. St. Rep. 639, note; Vanatta v. Anderson, 8

Binn. 417; Harres v. Com. 35 Pa. 416; Adams v. Carter, 92 Miss. 579, 47 So. 409, 16 Ann. Cas. 76.

When a court has power to make such rule, it must be enforced with great care and caution so that it does not embarrass either party in the fair trial of his case.

Simmons v. Fish, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588; Doody v. Boston & M. R. Co. — N. H. —, 89 Atl. 487.

The rule violates the 14th Amendment to the Constitution of the United States, in that it deprives us of our property without due process.

Re Friedrich, 51 Fed. 747, 149 U. S. 70, 37 L. ed. 653, 13 Sup. Ct. Rep. 793.

Messrs. Hudson & McKay, for appellee: This court had the inherent or constitu-

new trial can be had of the issues affected by the error without complication or prejudice of the rights of any of the parties, an appellate court may, under the common law, grant a new trial restricted to the issue or issues as to which the error occurred.

A leading case on the question of the power to grant a partial new trial is *Lisbon v. Lyman*, 49 N. H. 553, in which, after an extended review of the authorities, the court reached the conclusion that under the common law the appellate court has power, upon setting aside a verdict for an error in the trial of an issue not affecting the trial of any of the other issues, to grant a new trial on the issue only as to which there is error. The action was for the support of a pauper, and the error related solely to the issue of payment of taxes in the defendant town by the father of the pauper, this being essential to establish a settlement of the pauper in the town, and to render it chargeable for his support. The court took the position that, the general principle being well settled that in the correction of errors no more is destroyed than is practically necessary, no peculiar and exceptional practice should be followed simply because an error is to be corrected by a new trial; that the rule declared in a few of the early English cases denying the power to limit the issues on granting a new trial was based on an erroneous theory of the indivisibility of the verdict, and on adherence to forms which are now obsolete or which have never been followed in this country; and that the power to impose a limitation of this kind in a proper case is such a reasonable, convenient, just, and necessary application of a familiar and elementary rule that it must be regarded as having been from the beginning a part of the common law, although through mistakes of some judges it had not always been so recognized. "The entire practice of granting new trials," it was said, "is an innovation which has grown up gradually. . . . The ancient forms of process and procedure have been remodeled piecemeal by the courts. When a practice has thus been for L.R.A.1915E.

ages undergoing improvement and reform, its history cannot be expected to be an exhibition of symmetry, regularity, and order, and its precedents are to be taken with the allowance made for the ancient authorities of the progressive sciences."

Regarding the right of a party to a new trial of all the issues, the court in *Lisbon v. Lyman*, supra, after an extended review of the authorities, said: "These authorities and many others illustrate the general principle that when an error has happened in a trial, the party prejudiced by it has a right to a correction of the error, but has not a right to a new trial if the error can be otherwise corrected; and when it can be corrected only by a new trial, it is still the correction of the error, and not the new trial, to which he is primarily entitled. The correction of the error is the end; the new trial is a means. There is no general rule that when there has been an error in a trial, the party prejudiced by it has a legal right to a new trial. He has a legal right to a cure of the error, but not to his choice of the remedies. If a new trial is necessary, he receives it, not because it is a general right, but because it happens, in a particular case, to be the only available remedy. . . . When the erroneous part of a case is cured, the general principles of our jurisprudence do not require the application of the remedy to other parts of the case which do not need it. When the remedy goes far enough to cure the error, the legal right of the complaining party to redress is satisfied and exhausted, for his legal right is merely to have the error corrected. That is an elementary principle too well settled to be questioned. . . . It is claimed by the defendant in this case, that limiting a new trial to a single point is an exercise of arbitrary power under the name of judicial discretion. This claim is based on the proposition that when there has been a mistrial, there is a legal right to a new trial; and that proposition, as we have seen, is unsound. The defendant has a legal right to nothing more than a correction of the error of the former trial. It happens in this case that the error can-

tionally granted right, power, and jurisdiction to adopt Rule 13; to apply the principles of the rule, in the absence of its prior formal adoption, and in the absence of, or even contrary to, a statute; and to apply the rule, or its principles, to the case at bar.

Smith v. Whittlesey, 7 Ann. Cas. 114 and note, 79 Conn. 189, 63 Atl. 1085; *Thwaites v. Sainsbury*, 7 Bing. 437; *Stroud v. Stroud*, 7 Mann. & G. 417; *San Diego Land & Town Co. v. Neale*, 78 Cal. 65, 3 L.R.A. 83, 20 Pac. 372; *Boyd v. Brown*, 17 Pick. 453; *Pickett v. Wilmington & W. R. Co.* 117 N. C. 616, 30 L.R.A. 267, 53 Am. St. Rep. 611, 23 S. E. 264; *Simmons v. Fish*, Ann. Cas. 1918D, 588, and note, 210 Mass. 563, 97 N. E. 102; *Clark v. New*

York, N. H. & H. R. Co. 33 R. I. 83, 80 Atl. 406; *McKay v. New England Dredging Co.* 93 Me. 201, 44 Atl. 614; 4 Enc. L. & P. 661; 29 Cyc. 738.

Smith, Ch. J., delivered the opinion of the court:

This suit was instituted in the court below by appellee to recover from appellant damages for an injury received by him while in appellant's employ by reason of the negligence of its servants. On the trial of the cause there was a verdict and judgment for appellee for the sum of \$100, from which he appealed to this court, and obtained a reversal thereof for the reason that the damages allowed him were inadequate. 103 Miss. 522, 60 So. 215. In reversing the

not be corrected without a new trial. Therefore, indirectly, secondarily, and consequently, the defendant has a legal right to a new trial. A new trial of what? Upon every ground of legal principle, strict logic, common sense, and natural justice, the defendant has a legal right to nothing more than a new trial that will correct the error, the correction of which is all the defendant is entitled to; and such a new trial is of that part of the case only which contains the error. In granting a new trial of that part of the case, the defendant's right is not limited, but is maintained in its widest and fullest extent. Nor is the new trial limited; it does not first exist as a new trial of all the questions involved in the case; it is originally a new trial of one question, and it continues to be, without limitation, what it is at first. The plaintiff cannot complain that in this action, brought by the plaintiff as a remedy, other actions are not tried; and in a new trial of a question, granted to the defendant as a remedy for an error in the former trial of that question, the defendant cannot complain that other questions are not tried; there is no restriction, but, on the contrary, there is in each of these instances an ample and complete enjoyment of an adequate remedy. But if a new trial were granted to the defendant, of questions which have been correctly tried and rightfully decided, that would be an exercise of arbitrary power of which the plaintiff and the public would have reason to complain. Such an unnecessary new trial would be an unnecessary expense and burden to the plaintiff and the public. And if public rights are to be disregarded, and the rights of the parties alone are considered, it must be remembered that the party who has obtained a verdict has rights as well as the other party. Upon general principles, the plaintiff in this case has as clear a right to the verdict upon the questions that were rightly tried, as the defendant has to a new trial of the question that was wrongly tried. And when the defendant asks the court to deprive the plaintiff of the ground fairly and legally won, and to put the plain-

tiff to another expensive, laborious, and vexatious campaign to recover the same ground a second time, it is for the defendant to show how such an extraordinary, unjust, and unconscionable demand can be sustained."

In an earlier case in that state, *Knowles v. Dow*, 22 N. H. 387, 55 Am. Dec. 163, the court said that no practice existed there, to its knowledge, of setting aside a verdict in part.

But in *Bank of Newbury v. Eastman*, 44 N. H. 431, the court said that, although there might be no practice in that state authorizing it to set aside a verdict in part, yet it was especially empowered to do so in that instance by the agreement of the parties, to which it saw no legal objection. And the rule laid down in *Lisbon v. Lyman*, 49 N. H. 553, has been followed in *Butler v. Northumberland*, 50 N. H. 33; *Wood v. Wood*, 52 N. H. 422; *Foot v. Merrill*, 54 N. H. 490, 20 Am. Rep. 151; *Ela v. Ela*, 72 N. H. 216, 55 Atl. 358; *Winnipisogee Lake Cotton & W. Mfg. Co. v. Laconia*, 73 N. H. 337, 61 Atl. 676; *Piper v. Boston & M. R. Co.* 75 N. H. 435, 75 Atl. 1041.

Referring to *Lisbon v. Lyman*, supra, the court in *Janvrin v. Fogg*, 49 N. H. 340, said that it had there adopted "a rule somewhat new in this state, though long since established in some other jurisdictions, that where a general verdict depends upon the finding of several disputed facts or questions, some of which were not and could not have been affected by any error in the ruling of the court, and others of which were or may have been thus injuriously affected, the verdict will not be wholly set aside, and the case thrown open again to a new trial on all points, as the practice has heretofore been; but that such parts of the verdict, such findings of fact, as have been had upon the merits, and to which no valid objection can be made, shall remain undisturbed, and that the verdict shall be set aside and a new trial granted only on those points necessary to correct some error or mistake; and that verdicts are to be treated like judgments, awards, and other legal proceedings, which may be good in part and bad in

judgment, however, the new trial directed was restricted to the ascertainment of damages only, and, in so far as it settled the question of liability, the judgment was permitted to remain in full force and effect. On return of the cause to the court below it was again tried in accordance with the directions of this court, and resulted in the award to appellee of damages in the sum of \$6,750. Appellant's principal assignment of error is that this court was without power, in reversing and remanding this cause, to direct that it be tried on the question of damages only, and that therefore the court below erred in restricting the trial to that issue.

Two questions arise on this assignment of error: First, Has this court, independent

part, in which case the court will, if the position of the case admit of it, preserve that which is good and correct that only which is erroneous."

In *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588, the court, after citing decisions in that state in which new trials were granted as to damages or other specific issues only, said: "This review of our cases demonstrates that this court continuously from early times has exercised the power of narrowing a new trial to specific points in cases where the error committed at the trial was so limited in character as with justice to both parties to be separable from the other issues determined by the first verdict. It has done this as a part of its inherent judicial authority, and not under any statute. It has exercised the power in a great variety of cases touching divers kinds of issues involved in general verdicts. The guiding principle is that, although a verdict ought not to stand which is tainted with illegality, there ought to be but one fair trial upon any issue, and that parties ought not to be compelled to try anew a question once disposed of by a decision against which no illegality can be shown. Thus, the parties and the commonwealth have been saved the expense, annoyance, and delay of a retrial of issues, once settled by a trial as to which no reversible error appears. . . . It is a power which ought to be exercised with great caution, with a careful regard to the rights of both parties, and only in those infrequent cases where it is certain and plain that the error which has crept into one element of the verdict by no means can have affected its other elements. But when a proper occasion clearly exists, it is in the interests of justice to exercise the power."

And in *Winn v. Columbia Ins. Co.* 12 Pick 279, the court said that "There are many cases so situated that it would be highly proper to grant a new trial as to a particular point, or for the purpose of correcting a particular error or mistake. . . . This is analogous to the case of judg-

of Rule 13 (102 Miss. 905, 59 So. ix), adopted by it some time since, the right to limit the issues when awarding a new trial? and, second, if not, had it the power to assume such a right by the adoption of this rule?

All of the powers with which this court is vested, and which are not conferred upon it by the Constitution, either expressly or by necessary implication, are derived: (1) From statutes; and (2) from the common law. Taking up first the second of these sources from which our power is derived, and since it has been held that it "is undoubtedly the rule at common law" that in awarding a new trial because of inadequate or excessive damages the court is without power to limit the issue to the assessment

ments, awards, and other legal proceedings, good in part and bad in part, where the court will, if the position of the cause will admit of it, preserve that which is good, and correct that only which is erroneous."

It is, however, settled beyond controversy, it was said in *Table Rock Lumber Co. v. Branch*, 158 N. C. 251, 73 S. E. 164, that it is entirely discretionary with the court, superior or supreme, whether it will grant a partial new trial.

And the appellate court, it was said in *Ela v. Ela*, 72 N. H. 216, 55 Atl. 358, cannot revise the action of the trial court in refusing to restrict a new trial granted on the ground of newly discovered evidence, to certain issues any more than it can revise its action on the main question.

A new trial may be had as to a part of the issues in a case, under the California Code of Civil Procedure, which neither expressly forbids nor authorizes such a course, but defines a new trial as a "re-examination of an issue of fact." *San Diego Land & Town Co. v. Neale*, 78 Cal. 63, 3 L.R.A. 83, 20 Pac. 372.

"The right of a party to move for a new trial upon a single issue is well established, . . . and, if the motion be made for a new trial as to the entire action, the court may grant it in part and deny it in part, leaving its former determination upon a portion of the issues to remain. This court has frequently remanded a cause with directions to the trial court to find upon a single issue, leaving the other findings to remain as a part of the record. . . . The trial court has the same right in this respect before an appeal as this court has after an appeal, to limit the scope of a new trial." *Duff v. Duff*, 101 Cal. 1, 35 Pac. 437.

And in *Robinson v. Muir*, 151 Cal. 118, 90 Pac. 521, the court said: "It has long been settled that upon an appeal from a judgment an appellate court may order a new trial as to a part of the issues, leaving the decision in force as to the remainder." To a similar effect is *San Diego Land & Town Co. v. Neale*, *supra*, subsequent appeal in 88 Cal. 50, 11 L.R.A. 604, 25 Pac.

of damages only (*Farrar v. Wheeler*, 75 C. C. A. 386, 145 Fed. 482), it will not be unprofitable to first answer the question: What is the common law?

In 1 Kent's Commentaries, 471, it is said: "The common law includes those principles, usages, and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature."

In *Kansas v. Colorado*, 206 U. S. 48, 51 L. ed. 956, 27 Sup. Ct. Rep. 655, the Supreme Court of the United States, after quoting this passage from Kent, proceeded as follows (italics ours): "As it does not rest on any statute or other written declara-

tion of the sovereign, there must, *as to each principle thereof, be a first statement. Those statements are found in the decisions of courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For, after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes.*"

In *Forbes v. Scannell*, 13 Cal. 266, it was said, quoting from an opinion delivered by Cushing, when attorney general, construing a statute, that "by 'common law' is intended that law which is to be found in the decisions of the courts of justice of the United States, both Federal and state

977; and see *Argenti v. San Francisco*, 30 Cal. 458.

It should clearly appear that the matter involved in the issue upon which the new trial is granted is entirely distinct and separable from the matters involved in the other issues. *Benton v. Collins*, 125 N. C. 83, 47 L.R.A. 33, 34 S. E. 242. As approving this statement of the rule, see *Norfolk Southern R. Co. v. Ferebee*, 238 U. S. 269, 59 L. ed. —, 35 Sup. St. Rep. 781; *Moss v. Campbells' Creek R. Co.* — W. Va. —, L.R.A.1915C, 1183, 83 S. E. 721; *Hall v. Hall*, 131 N. C. 185, 42 S. E. 562; *Jarrett v. High Point Trunk & Bag Co.* 144 N. C. 299, 58 S. E. 937; *Jones v. Life Ins. Co.* 153 N. C. 388, 69 S. E. 266; *Table Rock Lumber Co. v. Branch*, 158 N. C. 251, 73 S. E. 164; also *Silver Valley Min. Co. v. North Carolina Smelting Co.* 122 N. C. 542, 29 S. E. 940, 19 Mor. Min. Rep. 339, applying the principle.

In *Rushing v. Seaboard Air Line R. Co.* 149 N. C. 158, 62 S. E. 890, the court said that it was the almost uniform practice in that court, in its discretion, if it clearly appeared that the matter involved was entirely distinct and separate from the matters involved in the other issues, and that the new trial could be had without danger of complications with other matters, to restrict the new trial to the issue or issues affected by the error.

"Ordinarily, for an error committed during the progress of the trial, in the improper admission or rejection of evidence, or in the charge to the jury, material upon any issue, the verdict is set aside entirely, for the obvious reason that it cannot be seen to what extent it may have influenced the jury upon the other findings. It will be set aside in part only when it plainly appears the erroneous ruling would not and did not enter into their consideration in passing upon the remaining issues. The character of the new trial is therefore rather a matter of sound discretion than of strict right." *Burton v. Wilmington & W. R. Co.* 84 N. C. 192.

And in *Gregg v. Wilmington*, 155 N. C. 18, 70 S. E. 1070, the rule was approved L.R.A.1915E.

that while the power to set aside the answer to a particular issue may exist under certain circumstances, it should not be exercised except in a clear case; and that where the questions involved are so interwoven that they cannot be separated and a new trial allowed as to one or more issues, without prejudicing the rights of one or more of the parties, or preventing a full and just trial of the whole matter, the power to grant a partial new trial should not be exercised.

"The power to award a partial new trial, or an inquiry of damages where they have been erroneously assessed, without disturbing the findings which dispose of the merits of the case, is both convenient and useful, however delicate and difficult may be its application in particular cases. It certainly should not be exercised except in a clear case." *Holmes v. Godwin*, 71 N. C. 306. But it was settled, the court said, that in a proper case it might grant a partial and restricted new trial, citing *Key v. Allen*, 7 N. C. (3 Murph.) 523. The rule was said to be that, "if the jury omit to find a matter which goes to the very point of the issue, the new trial must be *in toto*, but where all the material issues are found correctly, and the error does not touch the merits, the court may award an inquiry or partial new trial, to correct the error." The rule above indicated, as to the necessity for a new trial *in toto* where the error affects the merits of the case, does not, however, appear to be generally followed, but was approved and applied in *Merony v. McIntyre*, 82 N. C. 103.

The court in *Browne v. Dyson*, 38 App. D. C. 5, intimated that where some of the issues were so distinct from the others that they might be retried separately without complication, the order for a new trial might be limited in its effect, but held that that case was not within the rule.

In *Oberbeck v. Mayer*, 59 Mo. App. 289, the court said: "Where the error in the trial relates to certain issues only, which are in no way dependent for their proper trial on certain other issues already satisfactorily tried, no valid reason is percepti-

courts, as distinguished from that law which is found in the statute law of the United States and of the several states."

In *Murray v. Chicago & N. W. R. Co.* 35 C. C. A. 62, 92 Fed. 868, it was said that (*italics ours*) "it has always been assumed that the Federal courts were endowed with a power and jurisdiction adequate to the decision of every cause, and every question in a cause presented for their consideration, and of applying to their solution and decision any rule of the common law . . . applicable to the case, and that would aid them in reaching a just result, which is the end for which courts were created. If a case is presented not covered by any law, written or unwritten, their powers are adequate, and it is their duty

to adopt such rule of the decision as right and justice in the particular case seem to demand. *It is true that in such a case the decision makes the law, and not the law the decision, but this is the way the common law itself was made, and the process is still going on.*"

Numerous other utterances of this character may be cited from the decisions of the courts. Indeed, "the fundamental idea of law is that of a rule or principle underlying a series of judicial decisions." "Courts and Legislation," by Prof. Roscoe Pound; *Proceedings of the Bar Association of Tennessee*, 1912, p. 81.

Discarding, then, the archaic theory characterized by Austin as "the childish fiction employed by our judges that ju-

ble why a cause may not be remanded for the trial of the issue erroneously tried, and for that alone." The court said also that the supreme court of that state had repeatedly held that a cause may be remanded for the retrial of specific issues only, leaving the findings on other issues in the case intact, citing *Hurok v. Erskine*, 50 Mo. 116, and *Chouteau v. Allen*, 70 Mo. 290; s. c. subsequent appeal in 74 Mo. 56; but see *Chandler v. Chicago & A. R. Co.* under I. *supra*.

The new trial, it was said in *Fry v. Stowers*, 98 Va. 417, 36 N. E. 482, "may be limited to a single point, as to a single issue in the case, or a particular question, without reopening the whole case, or even, it seems, as to part of the demand sued for, letting the judgment stand for the residue. The new trial may be granted upon any terms which, in the discretion of the court, shall seem requisite to achieve the ends of justice in the particular case." See, however, *Gardner v. Vidal*, 6 Rand. (Va.) 106, in which the court said that "there is no example of a verdict being set aside as to one issue, and suffered to stand as to others, and trying a cause by piecemeal."

Although the facts in all the cases do not bring them within the class of decisions covered in this note, the rule laid down in several Indiana cases seems in conflict with the weight of authority as to the power of the appellate or trial court to grant a new trial of part only of the issues. Thus, in *Kahle v. Crown Oil Co.* 180 Ind. 143, 100 N. E. 681; the court said: "It is the rule that a new trial can be granted only as to the whole case."

And in *Peed v. Brenneman*, 72 Ind. 288, it was said: "A new trial implies a re-examination of all, and not a part only, of the issues between the parties as to whom it is granted." See also *Doyle v. Kiser*, 12 Ind. 475; *Johnson v. McCulloch*, 89 Ind. 270; and *Bennett v. Closson*, 138 Ind. 542, 38 N. E. 46.

In *Peed v. Brenneman*, *supra*, where a number of landowners remonstrated against the establishment of a highway, on the ground that it was not of public utility, and L.R.A.1915E.

claimed damages in case it should be established, and the jury found that the road would be of public utility, but found neither for nor against one of the remonstrants on the question of damages, it was held that the remonstrant was entitled to a venire de novo for the trial of the whole case, including the question of the public utility of the proposed highway; and that this would open up the whole question of utility, not as to him only, but as to the other remonstrants.

A distinction was made in *Hill v. American Surety Co.* 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691, as to the power to grant a partial new trial in an action at law, where the right to a jury trial had been waived, and in cases where the appeal was from a jury trial, it being held that the power existed in the former class of cases, although the rule was otherwise with reference to appeals from jury trials. The distinction, it was said, resulted from the inability of the supreme court to decide questions of fact in the latter class of cases, while in the former class express statutory authority was given therefor.

And a distinction was made in *Lavelle v. Corrigno*, 86 Hun, 135, 33 N. Y. Supp. 376, between the power of the court to grant a new trial with respect to one distinct issue out of a number of issues involved in the trial, and with respect to one out of a number of questions of fact which go to make up an issue. The court said: "It is undoubtedly true that, with respect to questions of fact that go to make up an issue, where one of these, if set aside, would necessarily result in the setting aside of other questions of fact connected with it, and tending to sustain the verdict, all questions connected with the same issue would necessarily fall with it if a new trial were granted. The position, however, is entirely different where there are separate and distinct issues. In such a case, granting a new trial as to the one does not necessarily involve the others; and where, as here, all the parties agree that the verdict upon all other points was right, it would be useless to have the parties again go through the

diary or common law is not made by them, but is a miraculous something, made by nobody, existing . . . from eternity, and merely declared from time to time by the judges," and expressing the idea embodied in these authorities in slightly different language, the common law consists of those principles and rules of action which have been from time to time adopted and acted upon by the courts when administering justice in cases not governed by any written law, arising out of the private disputes of individuals. The common law thus brought into existence, while, in most respects, the "soul of reason," is not always arrived at by an application of the rules of logic, for its basis in the last analysis is nothing more nor less than ex-

pediency (Holmes, "Common Law," pp. 35 and 68); and it is, after all, but "the product of experience of time, and the necessities of men living under a form of government." *Noonan v. State*, 1 Smedes & M. 573; Holmes, "Common Law," index headings "Law" and "Experience." It is not unchangeable, and no one will contend that it is complete and perfect, though it has been and always will be "in constant process of improvement by means of the decisions of the courts in all common-law jurisdictions" (24 *Harvard L. Rev.* 29), and "at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient." Holmes, "Common Law," p. 1.

In *Noonan v. State*, supra, it was said

form of establishing what nobody is contending against." In this case, an action for the partition of real estate where the issue as to whether certain claimants were the descendants of a former owner of the property was distinct from other issues in the action, it was held that the new trial granted because the evidence did not sustain the verdict against the claimants might be confined to the single issue of heirship. See also *Farrar v. Wheeler*, under II. b, 3, infra.

Where there was no evidence to support the answer of the jury to one of the issues submitted to them, and it was apparent from their answer that they were prepared to find a verdict unsupported by evidence, it was held that a new trial should be granted on all the issues. *Re Booth*, 53 *Hun*, 629, 6 *N. Y. Supp.* 41.

So, where the findings on several issues were so inconsistent as to require a reversal of the judgment, it was held in *L'Artiste Pub. Co. v. Walker*, 9 *Misc.* 491, 30 *N. Y. Supp.* 229, that a new trial must be ordered of all the issues. See also *Gregg v. Wilmington*, 155 *N. C.* 18, 70 *S. E.* 1070.

And where there had been a change in the personnel of the trial court, it was held that the appellate court should not limit the issues in granting a new trial. *Walker v. Walker*, — *R. I.* —, 86 *Atl.* 894.

Without passing upon the question whether, in reversing a judgment, the appellate court could restrict the new trial to such issues as were not passed upon by the jury at the first trial, the court in *Hodges v. Easton*, 106 *U. S.* 408, 27 *L. ed.* 169, 1 *Sup. Ct. Rep.* 307, held that in any event there should be no restriction where the case, as to the issues triable by jury, was not submitted to the jury in the mode required by law.

The power of the appellate court to restrict the new trial to the single issue as to which the error occurred in the first trial was recognized in *Merrick v. Betts*, 217 *Mass.* 502, 105 *N. E.* 384; but it was held that the general entry "Exceptions sustained" on a former appeal meant that there should be a wholly new trial upon all *L.R.A.*1915E.

the issues open on the record, although the error related only to one of the issues.

So, in *Table Rock Lumber Co. v. Branch*, 158 *N. C.* 251, 73 *S. E.* 164, it was held that the granting of a new trial in general terms, nothing having been said by way of limitation of the issues, means a new trial of the whole case on all the issues, and not merely a part of them.

In *Zaleski v. Clark*, 45 *Conn.* 397, the court said: "While, however, an unqualified order granting a new trial would properly be taken to be an order for an entire new trial of whatever issue of fact was involved in the former mistrial, we have no doubt of the power of the court to make a qualified order for a new trial, making it apply only to such part of a case as would admit of correction without an entire retrial of the issue. The whole matter of new trials addresses itself largely to the discretion of the court, and that discretion we think extends to any qualification of its order that may be necessary to do justice to the parties."

Distinction where new trial is matter of right and where it is only a matter of discretion.

A distinction has been made as to the power of the court to limit the issues in granting a new trial, where the new trial is granted in the discretion of the court for a cause not arising out of an illegal or erroneous act of the court, and where the new trial is granted as matter of right because of error in the instructions or admission of illegal evidence. *Tuttle v. Gates*, 24 *Me.* 395. As to the former class of cases, it was said that the new trial cannot be claimed as a matter of right, but may be granted upon such terms or conditions as the court might consider reasonable, and that this appeared to have been the practice; while as to the latter class of cases the court said that the party aggrieved was entitled to a new trial as matter of right, and the court could impose no conditions unless it acquired some authority from his consent to dispose of the case otherwise;

that "that the common law, like the common atmosphere around every living being, is gladly received by all framers of government, is certainly very true, but that it was adopted to remain perpetual, unaltered, and unalterable, and not to be tempered to our habits, wants, and customs, we conceive was never designed by the wisdom of those who established our fundamental law."

The growth of the common law by means of judicial decisions is nowhere better exemplified than by the cases of *Western U. Teleg. Co. v. Allen*, 66 Miss. 549, 6 So. 461; and *Moss Point Lumber Co. v. Harrison County*, 89 Miss. 448, 42 So. 290, 873. In the first of these cases this court adopted and acted upon a rule unknown to the early common law, and which had been altogether

repudiated by the modern decisions of the English courts. In the course of its opinion the court said, with reference to the growth of the law of common carriers, that "the courts then [that is, in the early history of the English law], as the courts now, conscious of the needs of the public, expanded the principles of the law, fitted them to the exigencies of the occasion, and imposed a degree of liability unknown to other contract relations, but required for the safety and protection of the public."

In the second of these cases the court had under consideration the liability of a tenant for years for waste. Under the common law as it was when adopted in this country, a tenant for years was not liable therefor, but this rule of law had been

that if the court might in this class of cases open a case again for the trial of a particular point without disturbing the general verdict, it should possess the power to form a new issue without the consent or action of the party; or, if the verdict was entirely set aside, a right to limit the inquiry to a particular point, although there were other points vitally affecting the merits and presented as issues to be tried, and that such a power would scarcely be claimed by a court governed solely by the rules of a common law.

Also in *Foster v. Browning*, 4 R. I. 47, 67 Am. Dec. 505, the above distinction was recognized, the court refusing to limit the new trial where a new trial was granted because of erroneous instructions as to one of the issues. The action was trespass, and the defenses were a prescriptive right of way and a license; and the jury returned a verdict denying the right of way by prescription, but upheld the claim of the defendant as to the license, and justified the trespass on that ground; and it was held that the new trial, granted because of error in the instructions on the issue of license, should be general, and not restricted to that issue.

And in *McNab v. Stewart*, 15 U. C. C. P. 189, where the issues on a new trial were confined to those relating to part of the premises in dispute, the court said that, "in granting new trials, when there are several issues, the rule seems to be that if the new trial be ordered *ex debito justitiæ*, the whole record is thrown open; but if it is by the discretion of the court, it may be upon one issue only," citing *Macclesfield v. Bradley*, 7 Mees. & W. 570, 9 Dowl. P. C. 312, 10 L. J. Exch. N. S. 182.

See also *Mahony v. Frasi*, under II. b, 3, *infra*.

English and Canadian cases.

It is undoubtedly true, it was said, however, in *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588, that in England there can be no limitation of a new trial to a specific issue without consent of L.R.A.1915E.

both parties, a new trial there meaning a new trial as to all the issues.

There appears to be few English cases directly in point within the limitation adopted for the scope of this note. In Bull. N. P. 326, it is said: "Where one issue out of four was against evidence, the court granted a new trial not only as to that issue (for that they said cannot be), but for the whole." *Rex v. Pool*, E. 1734, being cited. So, in *Bernasconi v. Farebrother*, 3 Barn. & Ad. 372; *Swain v. Hall*, 3 Wils. 45; *Huddleston v. Brigstock*, Barnes, 436; and *Parker v. Godin*, 2 Strange, 813, the theory of the indivisibility of the verdict, or the technical difficulty in awarding a venire de novo to retry part of the case, appear to have been successfully invoked to defeat a partial new trial. But in other cases, as stated in *YAZOO & M. VALLEY R. Co. v. SCOTT*, it appears that a partial new trial was granted (see cases cited in reported case). In some cases, as *Cheyney's Case*, 10 Coke, 118, and *Harbert's Case*, *Skinner*, 595, the question whether an omission in the verdict might be supplied by a writ of inquiry was determined largely by the consideration whether the omitted point was one as to which the writ of attaint would lie. In fact, it appears (see discussion of English cases in *Lisbon v. Lyman*, 49 N. H. 553, and *Clark v. New York*, N. H. & H. R. Co. 33 R. I. 83, 80 Atl. 406, Ann. Cas. 1913B, 356) from cases not directly within the scope of the note, as where the question was whether a new trial could be granted as to certain parties or on certain counts only, that the development of the law in England has been away from the theory that a new trial, if granted at all, must be granted *in toto*, and that most of the reasons urged there against limiting the issues on a retrial are without force in this country. As supporting the principle that a new trial may be limited to certain issues only, see also *Delissor v. Provincial Ins. Co.* 8 N. S. 20, and *Scott v. Bank of New Brunswick*, 21 Can. S. C. 30, and *McNab v. Stewart*, 15 U. C. C. P. 189; also *Mahony v. Frasi*, under II. b, 3, *infra*. In *Irvine v. Parker*, 24 Can. Law

changed in England, and such a tenant made so liable, by the statutes of Marlbridge and Gloucester, long prior to the adoption by us of the common law. These statutes, however, were excluded from operation in this country by the provisions of the ordinance organizing the territory of Mississippi, and of the Constitution of 1817 (Schedule, ¶ 5). *Boarman v. Catlett*, 13 Smedes & M. 152. Nevertheless, the court, after pointing out that the early common-law rule in this regard had been changed by several of its former decisions, and made to conform to the principle contained in these statutes, held the tenant liable. In the course of its opinion the court, among other things, said: "Over six hundred years ago the rule exempting the

tenant from waste was considered harsh and unjust towards the lessor, and the very purpose of these statutes was to relieve the law from this species of wrong. To say that this principle has not been adopted as a part of our jurisprudence would be to say that our courts and laws have not kept pace with the development of the law in extracting from it just rules of right."

Returning now to the particular point here under consideration, an examination of the English decisions will disclose that those courts have generally, though not always, declined to limit the issues when awarding a new trial. The ground upon which these decisions seem to proceed is that the verdict of a jury is indivisible, and the judgment rendered thereon is an en-

Times Occ. N. 138, Canadian Dig. (1901-5) 1166, the court held that that was not a proper case for limiting the issues in granting a new trial, but that there must be a new trial of all the issues.

The supreme court of Canada has statutory power, it appears, in case prejudice necessitating a new trial affects a part only of the issues in controversy, to direct a new trial as to such issues only. *Central Vermont R. Co. v. Franthere*, 35 Can. S. C. 68.

Motion for partial new trial only.

It has been said that while it is competent for the appellate court to direct a new trial as to one of the issues, leaving the verdict to stand as to the others, if, in the exercise of a sound discretion, such a course is deemed proper, and while this course may be pursued by the trial court, a party cannot, as a matter of right, move for a new trial as to only one of the issues; that the motion must be for a new trial, and while counsel may suggest or ask that it be partial, he cannot demand it as of right, and by his motion attempt to restrict the action of the court to one or more issues without forfeiting his right to have the refusal of the motion reviewed. *Nathan v. Charlotte Street R. Co.* 118 N. C. 1066, 24 S. E. 511; *Burnett v. Roanoke Mills Co.* 152 N. C. 35, 67 S. E. 30.

And where the plaintiff recovered a verdict for damages which he regarded as inadequate, and moved "that the verdict as to damages be set aside and a new trial ordered on the question of damages only," and the court allowed the motion, it was held in *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588, that the procedure was improper, and that exceptions by the defendant could be sustained. The court said: "By the unusual form of his motion the plaintiff sought not a setting aside of the verdict, but simply one aspect of it. Indeed, it is not a motion for a new trial at all, but only that one feature of the verdict be disregarded and that a new jury pass upon that feature. L.R.A.1915E.

This is not correct practice. The only motion known to the law in this connection is one for setting aside the verdict and ordering a new trial. If granted, the entire verdict is set aside. A verdict as the foundation of a judgment in law is an elemental entity, and cannot be 'divided by a judge.' It must either stand or be set aside. If it is set aside, the new trial may be restricted, as has been pointed out. That is a determination which can be made logically only after the verdict is set aside. But the plaintiff, by the form of his motion, apparently undertook to give to the court no opportunity to set aside the verdict as a whole, and the form in which the decision of the court was expressed restricts its scope to the phrase of the motion, and does not go beyond it. It follows that the verdict has not been set aside."

See also *Clark v. New York, N. H. & H. R. Co.* under III., b, *infra*.

b. Particular applications.

1. Liability in general.

A new trial was granted in *Griffin v. Boston & M. R. Co.* 87 Vt. 278, 89 Atl. 220, an action to recover damages for personal injuries, upon the question of liability only; the finding as to the amount of damages being allowed to stand. The court said: "It was the former practice of this court, when a judgment was reversed on exceptions, to treat the whole adjudication as wiped out, and remand the case for trial *de novo*. . . . But occasion was taken in *Marshall v. Dalton Paper Mills*, 82 Vt. 489, 24 L.R.A. (N.S.) 128, 74 Atl. 108, to put the court in line with the authorities by adopting a more logical rule, and it was therein held that, when the error affected only the question of damages, retrial would be awarded on that question only. And this holding has been followed since, and has become the settled rule of the court. . . . The application of the rule depends upon the divisibility of the judgment, and, in a proper case, applies as well when the error affects only the question of liability,

tirety, must in all cases be dealt with as such, and therefore must be affirmed or reversed *in toto*. Why this result should follow when the issues determined by the jury are, in fact, separable, and when no harm will result from retaining the verdict and judgment upon those issues not affected by error, does not appear; and we dare say no good reason can be assigned therefor. *Edie v. East India Co.* 1 W. Bl. 295, was an action on two bills of exchange in which there was a verdict for the plaintiff on one of them, and for the defendant on the other. In setting aside this verdict because of the error in the finding for defendant, Lord Mansfield said (*italics ours*): "There is a verdict in part for the plaintiff;

as is shown by the cases. . . . In making this application of the rule, courts should act with caution; for, as was pointed out in *McBride v. Huckins*, 76 N. H. 206, 81 Atl. 528, an error may ostensibly relate to one of these questions only, but be of such a character as to have a prejudicial effect on the other, in which case a full retrial should be awarded. Then, again, cases may arise in which it may appear, from one thing or another, that the assessment on retrial should be changed one way or the other. To such cases, the rule should not be applied. But in the case before us no error is found which affects the assessment of damages, and, since counsel (though given the opportunity) make no suggestion that they are unfair, or that any error of the court or misconduct of counsel affected them, they ought to stand as assessed. Judgment reversed, and cause remanded for retrial on the question of liability only, and with directions that, if the verdict therein is for the plaintiff, judgment be rendered for the damages found by the first jury, with interest thereon."

But where the error in an action against surgeons for malpractice and for an assault was in an instruction charging them with a higher degree of skill than the law required, it was held in *McBride v. Huckins*, 76 N. H. 206, 81 Atl. 528, that the verdict should be set aside and a new trial granted on the question of damages, as well as on the issue of liability. The court said: "While it is true that when the error found to exist in a trial does not apply to or affect all the issues covered by the verdict, a new trial of the entire case is not ordinarily ordered, but only so much of it is set aside as the error related to, . . . it must clearly appear that the effect of the error did not extend to all the issues tried. If the error ostensibly relates to the question of liability, it may still be of such a character as to have had a prejudicial effect on the jury's assessment of damages. If, for instance, it should be erroneously ruled in an action for negligence that the defendant's previous conviction for theft might be considered on the question of liability, it L.R.A.1915E.

. . . but for form's sake we must set the whole verdict aside."

Since the only reason that could be assigned by the greatest of English judges for this practice was that it is required for form's sake, it is fair to assume that no better reason exists. All of the English cases holding that a partial new trial may not be granted that have come under our observation were decided after the year A. D. 1700, and may therefore not be a part of the common law adopted by us, as to which we do not deem it necessary to express an opinion, for the reason that, as we have heretofore pointed out, the common law as it now exists is not necessarily the same as it was when originally adopted. Even the English courts recognize the fact

would require little argument to show that it probably had a very prejudicial effect upon the jury's assessment of damages. . . . It was held in the former opinion that the court erred in instructing the jury that the law imposed upon the defendants the degree of skill possessed by surgeons generally, instead of that possessed by physicians and surgeons whose practice is confined to localities similar in general characteristics to the localities in which the defendants practised. . . . If the law required them to have and exercise the skill of the best surgeons, and they had only the skill of country physicians, the jury might be convinced that they acted maliciously or wantonly in assuming to undertake to diagnose the case with reference to the necessity of amputation. It would be a wilful breach of their duty to the plaintiff, which would authorize the jury to apply what is called a liberal rule of damages. . . . The erroneous standard of skill by which the jury were guided may have had in their minds a material bearing upon the question of damages; and as it was higher than the law requires, its obvious tendency was to increase the amount of the verdict."

And in *Rittenhouse v. Wilmington Street R. Co.* 120 N. C. 544, 26 S. E. 922, 2 Am. Neg. Rep. 224, a new trial was granted upon all the issues, although the appellant requested a new trial upon the issues other than that of the amount of damages. Whether the new trial should be partial or not was held to be in the discretion of the court, and in this case, it was said, the majority of the court were of the opinion that the new trial should be unrestricted and upon all the issues.

2. Proximate cause and contributory negligence.

A new trial may be granted on the issue of proximate cause only, where the only error relates to that issue, and the answers of the jury to questions submitted to them fairly settle all the other issues. *Burke v. Hodge*, 211 Mass. 156, 97 N. E. 920, Ann. Cas. 1913B, 381.

that the common law is not unchangeable, and that the common law of the time of Edward I. is not necessarily the same as that of the time of Edward the Confessor, and that the common law of James I. is not necessarily the same as that of the time of Edward I. In several of the English cases, however, the indivisibility of the verdict seems not to have been considered as a bar to a partial new trial, as will appear from an examination of *Hutchinson v. Piper*, 4 Taunt. 555; *Rex v. Mawbey*, 6 T. R. 619, 3 Revised Rep. 282; *Thwaites v. Sainsbury*, 7 Bing. 437; *Price v. Harris*, 10 Bing. 331, 3 Moore & S. 838, 3 L. J. C. P. N. S. 73; *Stroud v. Stroud*, 7 Mann. & G. 417; *Moore v. Tuckwell*, 1 C. B. 607, 15 L. J. C. P. N. S. 153; *Clement v. Lewis*, 3

Brod. & B. 297, 7 J. B. Moore, 209, 10 Price, 181, 22 Revised Rep. 533. Most of the English decisions examined by us in this connection will be found referred to in the case of *Clark v. New York*, N. H. & H. R. Co. 33 R. I. 83, 80 Atl. 406, Ann. Cas. 1913B, 356.

All doubt as to the power of the English courts to award a partial new trial, however, has now been cleared up by a rule of court adopted under the present judicature act, which provides that "a new trial may be ordered on any question without interfering with the finding or decision upon any other question." The Annual Practice (1915) p. 713.

Turning now to the American decisions, it appears from the cases collated in the

So, under similar circumstances, a new trial may be granted on the issue of contributory negligence only. *Georgia R. & Bkg. Co. v. Daniel*, 89 Ga. 463, 15 S. E. 538.

A new trial has been granted in an action against a railroad company for personal injuries on the issues only of the alleged negligence of the defendant and the contributory negligence of the plaintiff. *Tillett v. Lynchburg & D. R. Co.* 115 N. C. 662, 20 S. E. 480, petition for rehearing dismissed in 116 N. C. 937, 21 S. E. 698, later appeal in 118 N. C. 1031, 24 S. E. 111, 6 Am. Neg. Cas. 128.

3. Damages.

The rule is well established, in accord with *YAZOO & M. VALLEY R. Co. v. SOOTR*, that an appellate court has power at common law, upon reversing a case, to award a new trial upon the question of damages only. In the cases in which this power has been exercised, the error has usually been in the instructions or admission or rejection of evidence affecting the measure of damages. No distinction appears generally to be made, however, as to the power to limit the issues where a new trial is granted because of error of this kind, and where it is granted because of excessive or inadequate damages, unless the damages are so excessive as to indicate that the jury were influenced by passion or prejudice or other improper motive. The following cases support the proposition that an appellate court has power at common law to grant a new trial on the question of damages only (unless otherwise indicated the error necessitating a new trial was in the instructions, admission or rejection of evidence, or other ruling of the trial court affecting the measure of damages, and the decision was, so far as appears, not under a special statute authorizing the granting of a partial new trial):

Fed.—*Farrar v. Wheeler*, 75 C. C. A. 386, 145 Fed. 482 (statute held to confer power).
L.R.A.1915E.

Ala.—*Boyd v. Gilchrist*, 15 Ala. 849 (where the trial court erroneously rendered judgment for the plaintiff without a jury to assess the damages); *Patterson v. Blakenev*, 33 Ala. 338 (same).

Conn.—*Davenport v. Bradley*, 4 Conn. 309 (assessment of damages by trial court in a sum greater than that demanded in the complaint); *Olyma v. Kennedy*, 64 Conn. 310, 42 Am. St. Rep. 194, 29 Atl. 539; *Broughel v. Southern New England Teleph. Co.* 72 Conn. 617, 49 L.R.A. 404, 45 Atl. 435; *Smith v. Whittlesey*, 79 Conn. 189, 63 Atl. 1085, 7 Ann. Cas. 114.

Ga.—*Powell v. Augusta & S. R. Co.* 77 Ga. 192, 3 S. E. 757 (excessive damages); *Southern R. Co. v. O'Bryan*, 119 Ga. 147, 45 S. E. 1000.

Kan.—*Evans v. Moseley*, 84 Kan. 322, 50 L.R.A.(N.S.) 889, 114 Pac. 374, later appeal in 87 Kan. 447, 124 Pac. 422.

Ky.—*Gaar, S. & Co. v. Lyons*, 99 Ky. 672, 37 S. W. 73, 148.

La.—*See Iberville Parish v. Texas & P. R. Co.* 122 La. 388, 47 So. 692, later appeal in 129 La. 890, 57 So. 163.

Me.—*McKay v. New England Dredging Co.* 93 Me. 201, 44 Atl. 614 (excessive damages).

Mass.—*Winn v. Columbian Ins. Co.* 12 Pick. 279; *Boyd v. Brown*, 17 Pick. 453 (excessive damages); *Ryder v. Hathaway*, 21 Pick. 298; *Dyer v. Rich*, 1 Met. 180; *Haley v. Dorchester Mut. F. Ins. Co.* 12 Gray, 545; *Kent v. Whitney*, 9 Allen, 62, 85 Am. Dec. 739; *Negus v. Simpson*, 99 Mass. 395; *Hunter v. Farren*, 127 Mass. 485, 34 Am. Dec. 423; *Browning v. Carson*, 163 Mass. 255, 39 N. E. 1037; *Richmond v. Ames*, 164 Mass. 467, 41 N. E. 671; *DeForge v. New York, N. H. & H. R. Co.* 178 Mass. 59, 86 Am. St. Rep. 464, 59 N. E. 669, 9 Am. Neg. Rep. 501; *Whipple v. Rich*, 180 Mass. 477, 63 N. E. 5; *Magnolia Metal Co. v. Gale*, 189 Mass. 124, 75 N. E. 219; *Morrison v. Richardson*, 194 Mass. 370, 80 N. E. 468; *Stynes v. Boston Elev. R. Co.* 206 Mass. 75, 30 L.R.A.(N.S.) 737, 91 N. E. 998; *Montgomery Door & Sash Co. v. Atlantic Lumber Co.* 206 Mass. 144, 92 N. E. 71; *Thomson v. Pentecost*, 206 Mass. 505, 92 N. E.

notes to 2 R. C. L. 287; 4 Enc. L. & P. 662; *Smith v. Whittlesey*, 7 Ann. Cas. 114; and *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588, that the right to limit the issues when ordering a new trial is exercised by a large number, if not a majority, of the American courts, without any statutory authority so to do.

In the note to *Smith v. Whittlesey* it is said that "it seems probable that the practice is a departure from the ancient common law, due to a desire to eliminate unnecessary litigation and expense, and made practicable by the discretion with which the appellate court is invested in respect of the granting of new trials. . . . However the practice may have arisen, it is undoubtedly the rule, as stated in the report-

ed case, that in remanding a cause for a new trial, the reviewing court will, when error exists only in respect of one or more of several issues, and the judgment in other respects is free from error, order the trial court to find upon the issues in respect of which the error was made, leaving the other findings to remain as part of the record.

. . . As to whether, when the judgment is erroneous only in respect to damages, the court has the right to limit the issues in remanding the case for a new trial to that question, it has been held that it is 'undoubtedly' the rule at common law that the entire verdict must be set aside, and a venire de novo ordered covering all of the questions submitted to the jury. *Farrar v. Wheeler*, 75 C. C. A. 386, 145

1021, later appeal in 210 Mass. 223, 96 N. E. 335; *Hetherington v. William Firth Co.* 210 Mass. 8, 95 N. E. 961.

Minn.—*Stevens v. Wisconsin Farm Land Co.* 124 Minn. 421, 145 N. W. 173.

Miss.—*YAZOO & M. VALLEY R. Co. v. SCOTT* (see also former appeal in 103 Miss. 522, 60 So. 215).

Mont.—*Brunnell v. Cook*, 13 Mont. 497, 34 Pac. 1015; *Haggerty Bros. v. Laab*, 34 Mont. 517, 87 Pac. 907; see also *Osmer v. Furey*, 32 Mont. 581, 81 Pac. 345.

N. H.—*Foot v. Merrill*, 54 N. H. 490, 20 Am. Rep. 151.

N. M.—*De Palma v. Weinman*, 15 N. M. 92, 24 L.R.A.(N.S.) 423, 103 Pac. 782.

N. Y.—*Finch v. Brown*, 13 Wend. 601.

N. C.—*Burton v. Wilmington & W. R. Co.* 84 N. C. 192; *Van Lindley v. Richmond & D. R. Co.* 88 N. C. 547; *Crawford v. Geiser Mfg. Co.* 88 N. C. 554; *Roberts v. Richmond & D. R. Co.* 88 N. C. 560; *Jones v. Mial*, 89 N. C. 89; *Price v. Deal*, 90 N. C. 290; *Boing v. Raleigh & G. R. Co.* 91 N. C. 199; *Jones v. Coffey*, 109 N. C. 515, 14 S. E. 84; *Pickett v. Wilmington & W. R. Co.* 117 N. C. 616, 30 L.R.A. 257, 53 Am. St. Rep. 611, 23 S. E. 284; *Farmers' Co-Operative Mfg. Co. v. Albemarle & R. R. Co.* 117 N. C. 579, 29 L.R.A. 700, 53 Am. St. Rep. 606, 23 S. E. 43; *Silver Valley Min. Co. v. North Carolina Smelting Co.* 122 N. C. 542, 29 S. E. 940, 19 Mor. Min. Rep. 339; *Strother v. Aberdeen & A. R. Co.* 123 N. C. 197, 31 S. E. 386; *Gray v. Little*, 126 N. C. 385, 35 S. E. 611; *Wilkie v. Raleigh & C. F. R. Co.* 128 N. C. 113, 38 S. E. 289; *Rushing v. Seaboard Air Line R. Co.* 149 N. C. 158, 62 S. E. 890; *Sloan v. Hart*, 150 N. C. 269, 21 L.R.A.(N.S.) 239, 134 Am. St. Rep. 911, 63 S. E. 1037, later appeal in 153 N. C. 183, 69 S. E. 50; *Johnson v. Seaboard Air Line R. Co.* 163 N. C. 431, 79 S. E. 690, Ann. Cas. 1915B, 598, 4 N. C. O. A. 627; *Ferebee v. Norfolk Southern R. Co.* 163 N. C. 351, 52 L.R.A.(N.S.) 1114, 79 S. E. 685, judgment on second trial affirmed in 167 N. C. 290, 83 S. E. 360, and 238 U. S. 269, 59 L. ed. —, 35 Sup. Ct. Rep. 781.

Okla.—*Curtis & G. Co. v. Pigg*, 39 Okla. 31, 134 Pac. 1125 (at least where liability L.R.A.1915E.

is established as matter of law on the defendant's own evidence).

R. I.—*Woods v. Nichols*, 22 R. I. 225, 47 Atl. 211; *Angell v. Reynolds*, 26 R. I. 160, 106 Am. St. Rep. 707, 58 Atl. 625; *McCabe v. Narragansett Electric Lighting Co.* 26 R. I. 427, 59 Atl. 112 (excessive damages); *Reynolds v. Narragansett Electric Lighting Co.* 26 R. I. 457, 59 Atl. 393 (same); *McDonald v. Rhode Island Co.* 26 R. I. 467, 59 Atl. 391 (same); *MacGregor v. Rhode Island Co.* 27 R. I. 85, 60 Atl. 761 (same); see also *Angell v. Lewis*, 20 R. I. 391, 78 Am. St. Rep. 881, 39 Atl. 521, 4 Am. Neg. Rep. 348; and *Newhall v. Egan*, 28 R. I. 584, 68 Atl. 471.

S. C.—*Laney v. Bradford*, 4 Rich. L. 1.

Tex. Civ. App.—*Marshall v. San Antonio*, — Tex. Civ. App. —, 63 S. W. 138.

Vt.—*Marshall v. Dalton Paper Mills*, 52 Vt. 489, 24 L.R.A.(N.S.) 128, 74 Atl. 108; *Austin v. Langlois*, 83 Vt. 104, 74 Atl. 489; *Kennett v. Tudor*, 85 Vt. 190, 81 Atl. 633.

Wis.—*Braunsdorf v. Fellner*, 76 Wis. 1, 45 N. W. 97 (the claim for damages was, however, in the nature of a counterclaim).

As indicated in *YAZOO & M. VALLEY R. Co. v. SCOTT*, the statement in *Farrar v. Wheeler*, 75 C. C. A. 386, 145 Fed. 482, that it is undoubtedly the rule of the common law, that, although an error relates only to the rule as to damages, the entire verdict must be set aside by the appellate court and a venire de novo ordered covering all the questions submitted to the jury, does not appear to be sustained by the authorities. And it was held in that case that the circuit court of appeals had power to grant a new trial on the question of damages only, where there was error in the instructions on that question, by virtue of a statute authorizing it to affirm, modify, or reverse any judgment, decree, or order, or to direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case might require.

It was held, however, in *Farrar v. Wheeler*, supra, that while the new trial might, under the statute, be granted on the issue

Fed. 486. See also *Peed v. Brenneman*, 72 Ind. 288. But in a number of cases the courts have, apparently in the absence of statute, limited the inquiry of the jury on the new trial to an ascertainment of damages."

The two cases cited in this note, where it was held that at common law a new trial for the assessment of damages only could not be awarded, are *Farrar v. Wheeler* and *Peed v. Brenneman*, supra. In the first of these cases the court exercised the right to limit the issue by virtue of a statute, no authority was cited for the statement that no such right existed at common law, and it is not clear whether by this statement the court meant the early or the present common law. The second case cites in support

of its holding *Clement v. Lewis*, 3 Brod. & B. 297, 7 J. B. Moore, 200, 10 Price, 181, 22 Revised Rep. 533. That case was decided in the exchequer chamber in 1822, and it appears from the report thereof that, where error appeared in the assessment of damages only, writs of inquiry were frequently awarded for the correct ascertainment thereof, the verdict and judgment in other respects being permitted to remain; but in that particular case the new trial was not limited to the assessment of damages only, because the verdict, having wholly failed to assess any damages at all, was void. In *Simmons v. Fish*, supra, the Massachusetts supreme judicial court, after reviewing its prior decisions, said: "This review of our cases demonstrates that this court con-

of damages only, it should not be limited to determination of a single question of fact entering into that issue. The action was brought by a minor through his father as next friend for personal injuries, and the instructions erroneously allowed the jury to consider in assessing damages the loss of the plaintiff's services during his minority, and it was held that the jury on the new trial should not be instructed to pass only on the question of the value of the plaintiff's services during minority, and deduct the value thereof from the verdict already found, but should determine the entire question of damages. The court said that to limit the new trial to the determination of the value of the services, and to direct the deduction of their value from the amount of the verdict already rendered, would be a refining of the proceedings beyond anything heretofore known, and would probably be illegal, because it would be impossible to put a new jury in the place of the old one, and to obtain any correct determination of the amount by which the verdict already assessed was enhanced by reason of the error which occurred.

Regarding the possibility that the verdict was a compromise between the allowance of proper damages and a verdict for the defendant, and that a limitation to the question of damages only in granting a new trial would be unjust, it was said in *Farrar v. Wheeler*, supra: "The petition also calls our attention to the fact that injustice may be done because of the well-known number of instances in which the jurors who are opposed to each other on the question of any verdict whatever compromise on a result far smaller than they would willingly assess if the liability was unquestioned. On the other hand, there can be no doubt that in many cases the damages are increased by the fact that the defendant who is sued insists on litigating the whole matter, and thus, perhaps, brings out at great length aggravating circumstances which otherwise would not appear, impressing the sympathies of the jury beyond what they otherwise would be impressed. Such considerations, however, are too fugitive to be taken into account by L.R.A.1915E.

an appellate tribunal, which deals only with questions of law. If they have any consideration at all, it is with the trial court, which may weigh all such matters in determining whether to set aside the verdict if it appears improper."

It appears from *Clark v. New York*, N. H. & H. R. Co. 33 R. I. 83, 80 Atl. 406, Ann. Cas. 1913B, 356, that the above decisions in Rhode Island, in which new trials were granted on the question of damages only, were rendered under a statute authorizing the supreme court to award a new trial and to "make such other or further orders as to costs or otherwise, in the cause, as to law and justice shall appertain;" but the statute was, it appears, regarded as not conferring upon the supreme court additional powers in respect to limiting the issues.

In *McNeil v. Lyons*, 20 R. I. 672, 40 Atl. 831, 4 Am. Neg. Rep. 728, the court said that, as the evidence was not all before it, it could not properly grant the plaintiff's request that the new trial should be had on the question of damages only, as it might be that the defendant had a good defense on the merits of the case; but that if the plaintiff desired a new trial generally, the same might be granted.

And in *Smith v. Wilmington & W. R. Co.* 126 N. C. 712, 36 S. E. 170, the court refused to limit the new trial to the question of damages only, where a new trial was granted because of error in the instructions on that issue, but it was uncertain whether the case on appeal presented the testimony as it was on the trial. The court said that otherwise it would have restricted the new trial to the issue of damages.

If injustice to one or both of the parties might result from granting a new trial on the issue of damages only, where there is error in the instructions or admission of evidence relating to this issue, the appellate court may extend a new trial to all the issues, the question as to an entire or partial new trial being in the discretion of the court. *Hawk v. Pine Lumber Co.* 149 N. C. 10, 62 S. E. 752, where the new trial was granted on all the issues.

In *Mahony v. Frasi*, 1 Crompt. & M. 325,

tinuously from early times has exercised the power of narrowing a new trial to specific points in cases where the error committed at the trial was so limited in character as, with justice to both parties, to be separable from the other issues determined by the first verdict. It has done this as a part of its inherent judicial authority, and not under any statute. It has exercised the power in a great variety of cases touching divers kinds of issues involved in general verdicts. The guiding principle is that, although a verdict ought not to stand which is tainted with illegality, there ought to be but one fair trial upon any issue, and that parties ought not to be compelled to try anew a question once disposed of by a

decision against which no illegality can be shown."

It will be observed that the courts here referred its right to limit the issues to its "inherent judicial authority." This, however, is but another way of saying that it thereby exercised one of its common-law powers; the rule that a court possesses certain inherent powers being derived from the common law.

Looking to the whole body of modern decisions dealing with the question here under consideration, most of which are referred to in the authorities hereinbefore cited, we find that it has often been held, in the absence of statutes so providing, that the issues may be limited when a new trial is awarded. Consequently, that such is now

the court, in granting a new trial because of an erroneous rule adopted as to the measure of damages in an action of trespass, refused to limit the new trial to the issue of damages, saying that "if, in respect of circumstances which have occurred at the trial, it be a matter of right in any party to have a new trial, the courts cannot confine or limit the inquiry; where it is only a matter of indulgence they may."

In an action brought under the Federal employers' liability act, a new trial was granted in *Ferebee v. Norfolk Southern R. Co.* 163 N. C. 351, 52 L.R.A. (N.S.) 1114, 79 S. E. 685, on the issue of damages only, there having been error in the admission of evidence on this issue, but no error as to the other issues separately submitted to the jury, namely, the negligence of the defendant and the contributory negligence of the plaintiff, the findings on which were for the plaintiff. Judgment rendered on the second trial assessing damages for the plaintiff was affirmed in 167 N. C. 290, 83 S. E. 360, and 238 U. S. 269, 59 L. ed. —, 35 Sup. Ct. Rep. 781. On the appeal to the Federal Supreme Court, it was contended that it was error for the supreme court of North Carolina to grant a partial new trial in which the question of damages only could be considered, inasmuch as the employers' liability act entitled the defendant in all cases to prove contributory negligence in mitigation of damages. The court said, however, that the record in this instance, in connection with the special-finding first verdict, showed that in this case the issues as to the amount of damages and contributory negligence were in fact separable, so that the splitting up of the issues in granting a partial new trial did not operate in this particular instance to deprive the defendant of a Federal right; for it appeared that the plaintiff was not guilty of contributory negligence. The Federal Supreme Court, however, said that the practice of limiting the issues in this way in granting a new trial was not to be commended; that damages and contributory negligence are so blended and interwoven, and the conduct of the plaintiff at the time L.R.A.1915E.

of the accident is so important a matter in the assessment of damages, that the instances would be rare to which it would be proper to submit to a jury the question of damages without also permitting them to consider the conduct of the plaintiff at the time of the injury.

No sound distinction, it was said in *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588, can be made in regard to the power of the court to limit the issue to that of damages only in granting a new trial, between a case where a verdict for excessive damages has been returned and one in which inadequate damages have been awarded. The court said, however, that "it is only in exceptional and extremely rare instances that the inadequacy of damages will not be so interwoven with liability that justice can be done without a new trial upon the whole case. Although we do not say that there cannot be such a case, it is hard to conceive of one." In this case, the jury awarded only \$200 damages for the loss of an eye, and the verdict was regarded as a compromise, the setting aside of which and the awarding of a new trial as to damages only would result in injustice to the defendant. See also *Doody v. Boston & M. R. Co.* under III. b, *infra*.

Where the declaration in an action for the death of an employee contained two counts, one under the employers' liability act and the other at common law on account of the negligence of the defendant, and the trial court erroneously directed a verdict for the defendant on the first count, and on the second count the jury found for the plaintiff, it was held in *Dulligan v. Barber Asphalt Paving Co.* 201 Mass. 227, 87 N. E. 567, that the new trial granted on the first count should not be limited to the question of damages, as the responsibility of an employer under the employers' liability act was in some material respects different from his common-law responsibility for negligence. A new trial was granted on the first count and the verdict on the second count was allowed to stand.

In *Seaboard Air-Line R. Co. v. Randolph*, 129 Ga. 796, 59 S. E. 1110, the court, in

the rule of the common law ought to, and will by us in this connection, be considered as settled. *Lux v. Haggin*, 69 Cal. 385, 4 Pac. 919, 10 Pac. 674.

The right of an appellate court to limit the issues, if separable, when awarding a new trial in equity, has never been questioned, and all of the reasons which support this practice apply with equal force when awarding a new trial at law in a cause wherein the issues are separable. The fundamental distinction between courts of law and equity—that is, that the one acts *in rem* and the other *in personam*—that is made to account for most of the differences between the procedure of the two systems cannot serve that purpose here; for in this connection whether the proceeding is *in rem*

or *in personam* is wholly immaterial in so far as convenience, practicability, right, and justice are concerned. The only practical difference between the two systems, in so far as the question here under consideration is concerned, is that the issues in equity can be more frequently and easily separated than at law. The practice in which this and other American courts have long indulged, of affirming without the consent of the defendant a judgment erroneous only because the damages awarded are excessive, when the plaintiff will agree to remit such portion thereof as will reduce the amount to what the court considers reasonable, is an innovation both upon the early common law and as it exists in England to-day (*Watt v. Watt*, [1905] A. C. 115, 2 Ann.

granting a new trial because of excessive damages, in an action for the homicide of the plaintiff's husband, refused to limit the new trial to the assessment of damages, saying it did not think it would be proper to do so under the facts of the case.

So, in *Porter v. Sherman County Bkg. Co.* 40 Neb. 274, 58 N. W. 274, the court said that it was probable that it might remand the case for the purpose of assessing the damages only, but such a course was held improper under the circumstances of that case.

However, in *Cerny v. Paxton & G. Co.* 83 Neb. 88, 119 N. W. 14, the power of the supreme court in that state to limit the new trial to the question of damages, where there had been a general verdict for the plaintiff and a reversal because of error in the instructions as to the measure of damages, was denied. On the first appeal, 78 Neb. 134, 10 L.R.A. (N.S.) 640, 110 N. W. 882, the judgment for the plaintiff was reversed and the cause remanded for further proceedings because of an erroneous instruction on the question of damages. A second trial resulted in a verdict for the defendant, and on the second appeal the plaintiff contended that on the second trial the court should have submitted to the jury only the question of damages. In overruling this contention the supreme court said: "Whatever may be the rule where a case is tried by a court which states its conclusions of law and of fact separately, or to a jury to whom is submitted special findings, the practice has been to regard the setting aside of a general verdict by a jury as necessitating a re-examination of all the questions submitted to the jury in the trial which resulted in such verdict. The statutes regarding the course of procedure do not specifically provide for setting aside a verdict in part. On the contrary, the remedy provided for errors committed during a trial, as prescribed by § 314 of the Code [Civ. Proc.], is a new trial. We think we may say it is the universal practice for a trial court, upon granting a new trial under said section, to examine all the issues of the case, and that such

a practice as setting aside a verdict as to some part of the issues of fact, and submitting such part to another jury, is altogether unknown. . . . We are satisfied that where the error preceded the verdict, and the verdict is a general one, there must be a new trial upon all the issues of fact. The plaintiff cites and quotes largely from the opinion in the case of *Lisbon v. Lyman*, 49 N. H. 553; and it must be conceded that that case sustains the plaintiff's contention to the extent that this court should have upon the former hearing sent back the case for a new trial upon the one question of the measure of damages. The considerations urged by the writer of the opinion in that case would have carried great weight if addressed to a legislative body having the power to take away from the verdict of the jury its omnibus character, and provide for specific findings of the different issues submitted to that body. They fail, however, to convince us that such is the law; and, until the nature of the trial by jury is modified, and the character of their verdict is essentially altered, we doubt the beneficial effect of any attempt of the courts to by construction change the law so as to split the verdict of the jury into component parts, and try the several issues by different juries. We therefore must adhere to the rule that, where a general verdict is set aside for errors occurring at the trial, no part of such verdict can be left to stand, but a new trial must be awarded upon all the issues of fact."

The whole case is opened, and not merely the question of damages, by the granting of a motion for a new trial on the merits, and where it does not appear for what reasons a new trial is awarded, it will be presumed in the appellate court that it is upon the merits. *Brenner v. Coerber*, 42 Ill. 497.

In *Re Opinion of Justices*, 207 Mass. 606, 94 N. E. 846, it was held to be within the constitutional power of the legislature to provide that whenever a verdict is set aside and a new trial granted, if it appears that the sole ground for granting the new trial was that the damages awarded were inadequate or excessive, the new trial shall be limited to the question of the amount of

Cas. 672), and is probably of more doubtful propriety than is the right here under consideration; for in exercising the former the court substitutes its own judgment as to the amount of damages to be awarded for that of the jury, and permits the recovery thereof without it having ever been awarded by any jury, while in the exercise of the latter it simply submits that question to another jury. If the theory of the indivisibility of a verdict in a case wherein the verdict is erroneous only because of excessive damages is a bar to limiting the new trial to that issue only, *a fortiori* it is also a bar to the setting aside of the verdict as to the amount of damages, and the entering of a judgment without the consent of the defendant for such an amount

damages. And see *Edwards v. Willey*, 218 Mass. 363, 105 N. E. 986, applying the statute.

But it was also held in *Re Opinion of Justices*, supra, that it was not within the constitutional power of the legislature to provide that if a verdict rendered in behalf of a plaintiff is set aside, and at a subsequent trial a verdict is again rendered in behalf of the plaintiff, a new trial, if granted, shall be limited to the question of damages, unless the verdict is set aside and a new trial is granted on the ground of fraud.

4. Miscellaneous.

Under the following circumstances it has been held that the appellate court might limit the issues in granting a new trial:

—where an action was brought by the plaintiff as master of a house of correction to recover a sum expended for the support of a pauper, and, there having been a proper trial on the merits as to the other parts of the case, but incompetent evidence having been admitted on the question of the appointment of the plaintiff as master, the new trial was limited to determination of the latter question, *Robbins v. Townsend*, 20 Pick. 345;

—where, in an action for the support of a pauper, it was necessary, in order to establish a settlement in the defendant town, to show that the father of the pauper had enlisted during the Civil War "as a part of the quota" of the town, and incompetent evidence was admitted to prove a credit to the quota of the town, the new trial being restricted to determination of the question whether such credit was actually allowed, *Wayland v. Ware* 109 Mass. 248. (If upon another trial the jury should find that such credit was allowed, it was said that the plaintiff would be entitled to a general verdict and judgment for the amount ascertained by the verdict at the former trial, with interest from that time; otherwise, the verdict and judgment would be for the defendant);

—where the defense interposed to an action of trespass was that the defendant

as the court considers reasonable. The practice of so doing, however, has not only become thoroughly embedded in our jurisprudence, but a statute (§ 4910 of the Code of 1906) by which the trial court was attempted to be deprived of this right was declared void by this court, on the ground that the right to so control and revise the verdict was a part of "the right of trial by jury," which § 31 of our Constitution provides "shall remain inviolate" (*Yazoo & M. Valley R. Co. v. Wallace*, 90 Miss. 609, 122 Am. St. Rep. 321, 43 So. 469).

The cases wherein this court has limited the issues when awarding a new trial by virtue of the provisions of such statutes as §§ 778, 4944, and 4945 of the Code of 1906, are, of course, not in point here, and

was the collector of taxes, and that the goods in question were taken in the levying of a tax, and a new trial was granted to determine the single issue whether the defendant was duly sworn as collector for the year for which the tax was assessed, *Sprague v. Bailey*, 19 Pick. 436;

—where, in an action on a bond given by a bank cashier, the only exception sustained to the verdict for the plaintiff was as to the proof of the execution of the bond, and the new trial granted was confined to the single point whether the bond was duly executed, *Amherst Bank v. Root*, 2 Met. 523;

—where, in an action against the principal and surety on a contract, the defense was interposed as to the surety that at the time of its execution he was incompetent to contract, and, incompetent evidence having been admitted on this issue, the new trial ordered was confined to the single issue of the surety's competency, *Hubbell v. Bissell*, 2 Allen, 196;

—where the trial court erroneously directed a verdict for the plaintiff in an action by an insurance company against creditors of the insured to recover insurance money paid to the creditors in ignorance of the fraud of the insured in burning the property, and a new trial was granted of the issues of the amount and validity of the creditors' claims, the plaintiff being entitled to recover only any excess of the amount paid over their valid claims, *Lamar Ins. Co. v. Abbott*, 131 Mass. 397;

—where, in an action on a fire insurance policy, the court erroneously excluded evidence relating to fraud on the part of the insured, and the cause was remanded for retrial upon this issue, *Dunn v. Springfield F. & M. Ins. Co.* 104 La. 31, 28 So. 931;

—where, in an action on a fire insurance policy, the instructions on the issue pleaded as a defense, that the plaintiff had wilfully burned the property, were erroneous, and a new trial was granted on this issue only, *Blackburn v. St. Paul F. & M. Ins. Co.* 116 N. C. 821, 21 S. E. 922;

—where, in an action on a life insurance policy brought in reliance upon the presump-

an examination of our digests does not disclose any other cases in which this right has been exercised. Two cases, however, have come under our observation, wherein this right was exercised in the absence of statutory authority therefor, and it may be that there are other such cases buried in our reports.

In *Bedford v. Louisville, N. O. & T. R. Co.* 65 Miss. 385, 4 So. 121, the declaration, in substance, alleged "that defendant by carelessness and negligence in running its trains killed two mares and a colt, on February 27, 1887, and injured a gray mare, on March 3, 1887, all the property of plaintiff."

At the close of the evidence the court instructed the jury to find for the defendant,

and there was a verdict and judgment accordingly. An appeal being taken to this court, the judgment was reversed in part and affirmed in part, and a new trial awarded upon one issue only; the language of the court in so doing being as follows: "It was wrong to instruct the jury . . . as to the gray mare. . . . In all else the judgment is affirmed; but, as to the action for killing the gray mare, the judgment is reversed, and a new trial awarded."

In *Taylor v. Barbour*, 90 Miss. 888, 122 Am. St. Rep. 328, 44 So. 988, the plaintiff instituted two different suits before a justice of the peace to recover of the defendant upon two claims, one for \$60, and the other for \$125. On appeal to the circuit court, both these suits were consolidated

tion of the death of the insured after an unexplained absence of over seven years, the plaintiff obtained judgment, and, while a petition for rehearing was pending in the appellate court, new evidence was discovered tending to show that the insured was still living, and a new trial was granted on that issue alone, *Caldwell v. Modern Woodmen*, 90 Kan. 175, 133 Pac. 843; see also *Schneider v. Etna L. Ins. Co.* 30 La. Ann. 1198, to a somewhat similar effect;

—where, in an action by the insured to reform a life insurance policy on the ground of mistake on his part, and fraud on the part of the defendant at the time of its execution, the jury found for the plaintiff on certain issues, as the false representation, the plaintiff's reliance thereon, as well as on an issue of waiver set up as a defense, and there was error in the instructions relating to the latter issue, a new trial being granted as to it alone, *Jones v. Life Ins. Co.* 153 N. C. 388, 49 S. E. 266;

—where, in an action on a builder's bond against a contractor and his sureties, the only error related to the issue of the identity of the contract guaranteed, *Oberbeck v. Mayer*, 59 Mo. App. 289;

—where the issues submitted to the jury in a will contest case were undue influence and incompetency, and the only error was in the exclusion of evidence on the former issue, *Gorham v. Moor*, 197 Mass. 522, 84 N. E. 436;

—where, in an action by a wife for injuries to her husband, there was error in the admission of evidence relating to the mental condition of the husband when he signed a release of the defendant from liability, and as to the extent of his injury, and a new trial was granted on these issues, the verdict for the plaintiff on the issue of negligence being allowed to stand, *Genest v. Odell Mfg. Co.* 75 N. H. 365, 74 Atl. 593;

—where, in an action against the principal and surety on the bond of a bank officer, a plea of fraud in obtaining the defendants as sureties on the bond was erroneously stricken from the answer, and, after judgment for the plaintiff, the cause was remanded for a new trial upon that plea L.R.A.1915E.

only, the findings otherwise being allowed to stand, *Third Nat. Bank v. Owen*, 101 Mo. 558, 14 S. W. 632;

—where a special finding in an action to recover damages for personal injuries caused by a collision with a train at a street crossing, that the bell was rung as the engine approached the crossing, was not affected by any erroneous ruling, and was allowed to stand as an established fact in the case, although a new trial was granted upon other issues, *Denton v. Missouri K. & T. R. Co.* 90 Kan. 51, 47 L.R.A. (N.S.) 820, 133 Pac. 558, Ann. Cas. 1915B, 639 (decided under statute providing that the new trial shall be only of the issues as to which the verdict appears to be wrong when such issues are separable; see also *McCullough v. S. J. Hayde Contracting Co.* 82 Kan. 734, 109 Pac. 176, applying the statute);

—where the judgment was reversed and the cause remanded with instructions to try only the issue whether a sale of property belonging to the debtor, one of the defendants, to his codefendant, was fraudulent as to creditors, *Shirley v. Waco Tap R. Co.* 78 Tex. 131, 10 S. W. 543, later appeal in — *Tex. Civ. App.* —, 24 S. W. 809. As sustaining the power of the courts to grant a new trial on part of the issues only, see also *Hirams v. Coit*, Dall. Dig. 449, cited in 3 Century Dig. Col. 2656;

—where, in a contest over real estate, the cause was remanded for a new trial on the issues of limitation and valuable improvements, which were not submitted to the jury on the first trial, the findings on the other issues being allowed to stand, *Day v. Needham*, 2 Tex. Civ. App. 680, 22 S. W. 103;

—where, in an action for conversion, a new trial was granted as to the value of the property at the time of the conversion, *Chicago Title & T. Co. v. O'Marr*, 18 Mont. 568, 46 Pac. 809, 47 Pac. 4, later appeal in 25 Mont. 242, 64 Pac. 506;

—where, in an action for the alleged wrongful killing of plaintiff's intestate, there was no error in the trial on the merits, but there was technical error in the overruling of a demurrer to the declaration, in

and tried as one. At the close of the evidence there was a peremptory instruction to find for the plaintiff for the amount sued for, and the verdict returned, as it appears in the original record in the case, was in the following language: "We, the jury, find for the plaintiff in the sum of \$185,"—this being the total of both demands. This verdict was correct in so far as the claim for \$125 was concerned, but was erroneous in so far as it awarded a recovery on the \$60 claim. It was therefore affirmed in so far as it awarded a recovery on the first claim, and reversed in so far as it awarded a recovery on the second, or \$60, claim, and was remanded for trial on that issue only.

If the theory that a verdict of a jury is

in all cases indivisible is correct, then in these cases there should have been a general, and not a partial, new trial, and they were, to that extent, wrongly decided. The truth is that the theory is fallacious; such verdicts being divisible or not, according to the circumstances of the particular case. In the cases just cited the issues, though not separated in the verdict, were in fact separable, and the court simply exercised its power derived both from the common law and from the statutes hereinafter referred to, of limiting the new trial to those issues with reference to which error was committed on the former trial.

Turning now to the first-mentioned source from which this court derives its powers,—that is, the statutes or written law,—the

that the appointment and qualification of the plaintiff as administratrix were not averred, and a new trial, on an appeal from a judgment for the plaintiff, was granted only as to the omitted averment when supplied, *Moss v. Campbells Creek R. Co.* — W. Va. —, L.R.A.1915C, 1183, 83 S. E. 721;

—where, in an action of replevin, the court erroneously charged the jury that their verdict should be for the plaintiff in case they found the negative of a certain issue which was material only on the plea of property, and the jury so found, and a new trial was granted on the issues raised on the plea of *non cepit*, the finding on the issues of title and right of possession in favor of the plaintiff being allowed to stand, *Leiter v. Lyons*, 24 R. I. 42, 52 Atl. 78;

—where the per cent of commission to which a county treasurer was entitled on insurance money collected on public buildings depended on the date of its collection, and a judgment was rendered for the treasurer for the higher rate, but the date of the collection did not appear, the judgment being reversed and the cause remanded for determination of this issue, *Wall v. McConnell*, 65 Tex. 397, see also later appeal in 67 Tex. 352, 5 S. W. 681, where it was held that the lower court correctly refused to reopen the entire case when it was called for retrial after being remanded;

—where, in an action to recover damages from two towns for injuries to the plaintiff from a defective bridge between the towns, the holding of the trial court that the defendants were jointly liable was erroneous, and since, under that ruling, no evidence was offered to show in which town the defect was located, the cause was remanded on appeal from a judgment for the plaintiff for the determination of that question only, *Haley v. Calef*, 28 R. I. 333, 67 Atl. 323;

—where the plaintiff was only one of the tenants in common, but the judgment erroneously awarded her all the damages in an action to try title to land and for damages, the cause being remanded for trial of the plaintiff's interest in the damages, *Nona* L.R.A.1915E.

Mills Co. v. Jackson, — Tex. Civ. App. —, 159 S. W. 832 (decided under a rule of court authorizing partial new trials);

—where, in an action to establish the title of a purchaser at execution sale under an attachment, various issues were properly submitted to the jury, but error was committed in the admission of evidence and in the instructions as to one of the issues, whether the attachment creditor had actual knowledge at the time of the attachment, of the existence of an unrecorded deed to the defendant from the debtor, who was the holder of the record title, *Hughes v. Williams*, 218 Mass. 448, 105 N. E. 1056;

—where, in an action to determine respective water rights, a finding that the rights of owners of second-class lands to the surplus water were superior to the rights of the owners of third-class or pasture lands was not sustained by the evidence, and a new trial was granted solely of the issues whether the owners of the third-class lands did not have superior rights by reason of continuous adverse use of the water, and whether they did not have the right to use a certain ditch to carry water to their land, *Rose v. Mesmer*, 142 Cal. 322, 75 Pac. 905.

In reversing a judgment for the defendant on a *scire facias* to subject the defendant as special bail, to which the defenses were *nul tiel record* and the statute of limitations, because of error of law in determination of the former issue, the court in *Trice v. Turrentine*, 35 N. C. (13 Ired. L.) 212, stated that the only point left open in sending the case back to the lower court was upon the plea of *nul tiel record*, and that the verdict was not disturbed upon the other issues.

In *Barnes v. Brown*, 69 N. C. 439, the court directed submission to a jury of the single issue whether there had been a part payment of the mortgage in a contest between those representing the mortgagor and the mortgagee, the jury having found simply that the mortgage had not been paid in full.

Following the course adopted in *Barnes v. Brown*, *supra*, the court in *Allen v. Baker*,

right to limit the issues when awarding a new trial is conferred upon it, certainly by one, and probably by two, of our statutes. Section 800 of the Code of 1906 is as follows: "Every new trial granted shall be on such terms as the court shall direct," etc. The only difference between the present form of this statute and its form as it appeared in the earlier Codes (Hutchinson's Mississippi Code, § 73 of chapter 61, page 876) is that it formerly read: "Every new trial granted at law shall be on such terms and conditions as the court shall direct," etc.—the words "and conditions" being now omitted. The words "terms" and "conditions," however, as here used, are synonymous. The word "term" means "that which limits the extent of anything," and, when

used in the plural, means "propositions, limitations, or provisions stated or offered, as in contracts, for the acceptance of another, and determining the nature and scope of the agreement." A "condition" is "that which limits or modifies the existence or character of something,—a restriction or qualification." Webster's New Int. Dict. If the statute read, "Every new trial granted at law shall be within such limitations as the court shall direct," no one would question the right of the court under it to limit the issues. The only difference between a statute so worded and the one here in question is that the latter includes the former, and more. It is simply broader and more comprehensive. It is true that this section of the Code appears in the chap-

96 N. C. 91, 41 Am. Rep. 444, on appeal from a judgment for the plaintiff in an action for breach of a contract of marriage, retained the case, and, without depriving the plaintiff of the benefit of the verdict in her favor upon the issues already submitted, directed findings upon other issues not previously submitted to the jury.

In *Mitchell v. Mitchell*, 122 N. C. 332, 29 S. E. 367, the appellate court granted a new trial as to two of the issues involved on which the jury had changed their verdict, after having separated and being recalled to reconsider these two issues.

In *Ward v. Acklen*, 9 La. Ann. 443, the appellate court affirmed a judgment in an action for work done and supplies furnished by the plaintiff to the defendants, to which the defense was payment, in so far as it established the amount of the plaintiff's claim and certain credits to which the defendants were entitled by virtue of payments proved, but remanded the case solely to ascertain to what further credits, if any, the defendants were entitled by virtue of payments alleged, as to which the trial court had erroneously excluded evidence.

Where the court in a replevin action erroneously rendered judgment for the plaintiff for the return of the property or payment of a certain sum, without proof of the value of the property, it was held in *Whittaker v. Goodwin*, 97 Miss. 663, 53 So. 413, that reversal of the judgment because of the error would not necessitate a new trial of the entire case, but that the cause should be remanded for the purpose only of awarding a writ of inquiry to assess the value.

In *Tunis v. Lakeport Agricultural Park Asso.* 98 Cal. 285, 33 Pac. 63, 447, the supreme court reversed a judgment for the plaintiff in an action to foreclose a mechanics' lien, with directions to the trial court to determine the single issue as to the quantity of land required for the convenient use and occupation of the building on which the plaintiff had a lien, the trial court having erroneously determined the

amount of land which the statute provided might be sold in such cases as required for the convenient use and occupation of buildings subject to the lien.

In *Billings v. Everett*, 52 Cal. 661, the court reversed a judgment for the plaintiff in an action on a note, and remanded the cause to the lower court to find upon an issue of an alleged parole agreement, which, if made, would be a defense, and as to which the trial court had failed to make a finding.

And in *Watson v. Cornell*, 52 Cal. 91, the court reversed a judgment for the plaintiff in an action to enjoin diversion of water used by the plaintiff for irrigation purposes, with directions to the trial court to find upon certain issues, as the capacity of the plaintiff's irrigation ditches, the extent to which he had appropriated the water, and whether the diversion had been with his consent, upon which no findings had been made.

Also, in *Kinsey v. Green*, 51 Cal. 379, in an action against a husband and wife to quiet title to land conveyed by the husband alone to the plaintiff, where the right of the defendants to a homestead out of the land was involved, the court remanded the case to the lower court to find the value of the land at the date of the conveyance.

III. Power of trial court.

a. In general.

The authorities generally uphold the power of the trial court, in its discretion, to grant a new trial of a part only of the issues in cases where such power may be exercised by the appellate court. As before indicated, the courts have frequently stated the rule as to the power to grant a new trial, in general terms implying that it is applicable to either the trial or appellate court.

"It is within the power of the trial court, where there is more than one issue of fact in a case and such issues are distinct and separable in their nature, to order a new trial of one issue and refuse it as to the others. . . . These cases declare also that when such new trial is granted, it

ter on Circuit Courts, but the power therein conferred upon the trial court may be exercised by this court on appeal, under §§ 4909 and 4919 of the Code.

Moreover, § 4919 seems also to contemplate that this court, in remanding a case to a lower court for a new trial, may direct that the issues be limited. This section is as follows (italics ours): "The supreme court shall hear and determine all cases properly brought before it at the return term, unless cause be shown for a continuance; and in case the judgment, sentence, or decree of the court below be reversed, the supreme court shall render such judgment, sentence, or decree as the court below should have rendered; *unless it be necessary, in consequence of its decision,*

that some matter of fact be ascertained, or damages be assessed by a jury, or where the matter to be determined is uncertain; in either of which cases the suit, action or prosecution shall be remanded for a final decision; and when so remanded, shall be proceeded with in the court below according to the direction of the supreme court, or according to law in the absence of such directions."

In *Powell v. Augusta & S. R. Co.* 77 Ga. 192, 3 S. E. 757, the supreme court of Georgia, in awarding a new trial, limited the issues to the assessment of damages only, and stated that by so doing it exercised the power of direction conferred upon it by § 218, ¶ 2, and § 4284, of the Georgia Code. These sections are as follows:

opens for examination only the issue upon which it is ordered; that the determination of the other issues remains in the record, and that they cannot be retried." *Re Everts*, 163 Cal. 449, 125 Pac. 1058, where the trial court in a will contest case, in which the grounds of contest were unsoundness of mind, undue influence, and fraud, granted a new trial of the issue of insanity, and refused a new trial of the other issues, after the jury had found that the decedent was of unsound mind, but that the will was not procured by fraud or undue influence.

"It is in the power of the superior court to grant a new trial on one or more of several issues, and to let the verdict on the others stand, . . . but this is in the discretion of the court, and not a right of the party." *Hall v. Hall*, 131 N. O. 185, 42 S. E. 562; *Rushing v. Seaboard Air Line R. Co.* 149 N. C. 158, 62 S. E. 890.

In *Flinn v. Mowry*, 131 Cal. 481, 63 Pac. 724, 1006, the court stated that the right of the trial court to limit its order for a new trial to a portion of the issues in the case was well established.

"In granting a new trial as to certain particular issues only, the trial court should with great certainty recite the issues in terms upon which the new trial is to be had. This should be done in order that both counsel and the trial court, and this court upon appeal, may know exactly the questions involved within the scope of the order. . . . As a rule which should be

invariably followed, an order granting a new trial *pro tanto* should not, as in this case, grant the order as to the issues covered by certain numbered findings of fact; for such an order leaves the matter open as to what issues are really included within its scope, and often makes it difficult, if not impossible, for the trial court, or for this court, to say what issues the court had in mind when the order was made. . . . In the present case, by our construction of the order, it grants a new trial as to so many important questions raised by the pleadings that we deem it the better course that the whole case shall then be retried."

L.R.A.1915E.

Mountain Tunnel Gravel Min. Co. v. Bryan, 111 Cal. 36, 43 Pac. 410.

In *J. L. Smathers & Co. v. Toxaway Hotel Co.* 167 N. C. 469, 83 S. E. 844, it was held that the trial court properly granted a new trial on the issue only as to whether certain interveners were innocent purchasers for value of notes given for personal property, the sale of which was alleged to have been fraudulently made by the plaintiff's debtor, and properly refused to submit for retrial issues properly settled at the first trial as to the plaintiff's claim and the fraudulent nature of the transaction.

And in *Seccomb v. Provincial Ins. Co.* 4 Allen, 152, the court granted a motion for a new trial for the purpose of determining the issue only whether Smyrna could be regarded, in a commercial sense, as a port in Europe, so as to bring the voyage of the vessel insured within the terms of the policy of insurance on which the action was brought.

Limitation of the issues in granting a new trial was imposed in *Fallbrook Irrig. Dist. v. Abila*, 106 Cal. 355, 39 Pac. 794, under a statute providing that the order granting a new trial must specify the issues to be re-examined on the new trial, and that the findings of the court upon the other issues should not be affected by the order granting a new trial. The issues in the case were the validity of the organization of an irrigation district, and the validity of the proceedings for the issuance of bonds, and a new trial was granted as to the issue only whether or not the petition for the organization of the irrigation district was signed by fifty freeholders owning land in the district.

In *Duff v. Duff*, 101 Cal. 1, 35 Pac. 437, and on an earlier appeal in the same case in 87 Cal. 104, 23 Pac. 874, 25 Pac. 265, the power of the trial court to grant a new trial was upheld, in an action involving the title to real estate, as to the issue whether a valuable consideration had been paid for a conveyance of certain of the property to the defendant.

Also, in *Woodward v. Horst*, 10 Iowa, 120, approved in *Dawson v. Wisner*, 11 Iowa, 6,

"218. (205) (211) Powers Enumerated. The supreme court has authority—

"2. To hear and determine all causes, civil and criminal, that may come before it, and to grant judgments of affirmance or reversal, or any other order, direction or decree required therein, and if necessary to make a final disposition of the cause, but in the manner prescribed elsewhere in this Code."

"4284. (219) (4180) Decision Shall be Entered on Minutes. The decision in each case shall be entered on the minutes, and it shall be within the power of the supreme court to award such order and direction to

the cause in the court below as may be consistent with the law and justice of the case."

The statute under which the United States Supreme Court and the Federal courts of appeal exercise the right to limit the issues when ordering a new trial reads as follows: "The supreme court may affirm, modify, or reverse any judgment, decree or order of a circuit court, or district court, acting as a circuit court, or of a district court in prize causes, lawfully brought before it for review, or may direct such judgment, decree or order to be rendered, or such further proceedings to be had by the

the power of the trial court to grant a new trial of part of the issues only was upheld, the new trial being granted in this instance as to part of an account. The court said: "It may be admitted that as a general rule a new trial when granted is awarded for the entire case, and that ordinarily courts will not dispose of a cause by piecemeal. And yet when not attended with too much confusion or inconvenience, or where it can be done without prejudice to the rights of parties, there is no substantial or valid objection to departing from the general rule."

See also, as upholding the power of the trial court to grant a partial new trial under facts not strictly within the scope of the note, *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74 (holding that the trial court had power to grant a new trial in a divorce action, of the issues affecting property rights only); *Ramsdell v. Clark*, 20 Mont. 103, 49 Pac. 591 (holding that trial court might grant a new trial of issues in one cause of action, only where this could be done readily and without confusion resulting on the new trial); and *Hamilton v. Nelson*, 22 Mont. 539, 57 Pac. 146 (same).

b. Damages.

In *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588, the court, while admitting that in most of the cases in that state, in which there had been a limitation of the issues in granting a new trial, the limitation had been imposed by the supreme court, stated that on principle, where a verdict is properly set aside by a trial court, that court may limit the new trial to the question of damages, if it is convinced, upon a review of the whole case, that the jury has fairly settled the issues of liability upon sufficient evidence.

And in *Clark v. New York, N. H. & H. R. Co.* 33 R. I. 83, 80 Atl. 406, Ann. Cas. 1913B, 356, later appeal in 35 R. I. 479, 87 Atl. 206, it was held that the superior courts in that state had power to grant a new trial on the issue of damages only. This power was held to exist under the common law, and to be conferred on the superior courts (the court saying that under the charter and Constitution of the state the jurisdiction of its courts as to new trials

had always depended entirely upon statute) by a statute providing that a motion for a new trial might be filed for any reason for which a new trial is usually granted at common law, other than error of law occurring at the trial, and that the court might set aside the verdict and order a new trial, with or without terms. The court, after reviewing the authorities, stated that it was satisfied that the claim that the indivisibility of the verdict constitutes an obstacle at common law to the granting of a new trial otherwise than upon all the issues is untenable; and that, as it found that new trials had been and were granted at common law, not only generally, but upon such part of the issues as the court in its discretion deemed necessary for the attainment of justice, the conclusion necessarily followed that, by the statute above indicated, the power so to grant such new trials was given to the superior court. The new trial sought in this instance was for inadequacy of the damages.

The motion for a new trial in *Clark v. New York, N. H. & H. R. Co.* supra, in the superior court, was for a new trial on the issue of damages only, but the court said that, "while the trial judge may limit the inquiry upon the new trial to the question of damages alone, he must be left to work out and decide the matter in his discretion. A party cannot demand on a motion for a new trial, that, without regard to the views of the trial judge, the findings which are in his favor shall remain undisturbed, while only those which are prejudicial or unsatisfactory to him shall be passed upon. While the trial judge may grant a new trial on the question of damages or upon a single issue where the evidence bearing upon it is separable from and does not hinge upon that bearing upon other issues, and he thinks such action proper, it is nevertheless always within his discretion in granting a new trial to make it general instead of partial. A party, by moving for a new trial on the question of damages only, cannot restrict the judge as to prevent the exercise of his sound judicial discretion."

The power of the trial court to grant a new trial on the issue of damages only, where that issue is distinct and separable from the other issues, was upheld in *Benton v. Col-*

inferior court, as the justice of the case may require." *Farrar v. Wheeler*, 75 C. C. A. 390, 145 Fed. 486.

The case relied upon by counsel for appellant as supporting their contention that this court is without the power to limit the issues when ordering a new trial is *Adams v. Carter*, 92 Miss. 579, 47 So. 409, 16 Ann. Cas. 76. In that case the plaintiff, having recovered only a portion of his demand, coerced the payment of the amount recovered by means of an execution, and then appealed, whereupon a plea was filed in this court by appellees setting up the payment by them of the amount recovered

in the court below as a bar to the appeal. This plea was sustained, and the appeal was dismissed. In its opinion the court, after referring to the fact that we have no statute "authorizing an appeal from a part of a judgment at law in a civil case," stated that a judgment at law is "an entire thing" which must be "appealed from as an entirety," and that all it "could possibly do in this case under our procedure would be, in case of error, to reverse the judgment and remand the cause for a new trial in the court below," and concluded by saying that "in view, therefore, of the case made by the record, and in view of the wide dis-

lines, 125 N. C. 83, 47 L.R.A. 33, 34 S. E. 242. In this case the trial court set aside the verdict as to damages on the ground that the damages assessed were inadequate, and allowed the verdict to stand as to the issues of the defendant's liability and of the fraudulent intent of the defendant in executing a deed of trust so as to hinder and delay creditors. Such partial trials it was said, was not of strict legal right, but of sound legal discretion. In regard to the contention of the defendant that on a second trial various matters favorable to him on the issue as to the amount of damages might have been cut off which would have been relevant and competent on the first trial under the issue of his liability, and that therefore the defendant might suffer by limiting the new trial to damages only, the court said that whatever evidence could have been introduced upon the first trial upon the issue of liability, in mitigation of damages, could be gone into on the second trial upon the issue as to damages.

But where the trial court sustained the verdict as to liability, but set it aside as to damages, because they were inadequate, and ordered a new trial upon the latter issue, the court in *Doddy v. Boston & M. R. Co.* — N. H. —, 89 Atl. 487, Ann. Cas. 1914C, 846, in holding that the issues on the new trial should not have been thus limited, said: "It should be borne in mind that the error is not chargeable to anything that occurred in the trial before the jury retired; it is not due to any misdirection of the court upon the question of damages, or to the erroneous admission or rejection of evidence exclusively applicable to that subject, or to unwarranted remarks of counsel in support of a small verdict. In such cases the reason for the error is disclosed by the record, and its correction may be accomplished by a limited new trial. But in this case it appears that the error, however it was caused, occurred while the jury were deliberating upon their verdict, and that they failed entirely to apply the law as stated on the question of damages," so that "no reasonable man, fully comprehending the law as stated by the court, could agree that the verdict returned was compensation for the injuries proved by the evidence." The effect of the finding is that L.R.A.1915E.

the jury were guilty of misconduct in reaching a verdict which was inconsistent with the facts of the case. It was solely the result of their perverseness. The charge of the court was plain, simple, and direct, and clearly announced the rule of compensation. In fact, it is more than probable that it was a compromise verdict, concurred in by some member of the jury on the question of liability in consideration of the smallness of the damages. It is hardly conceivable that reasonable men should conscientiously observe the instructions of the court upon that question, and then deliberately disregard the instructions upon the question of damages. The only reasonable inference of the way the jury came to an agreement, in view of the findings of the court, is that they compromised their differences as to the defendant's liability by returning an inadequate sum for the damages. And this conclusion is strengthened by the fact that upon the evidence the question of liability was one of much doubt, upon which reasonable men might easily differ."

Without deciding whether in an action at law a new trial might be granted as to part of the issues only, the court in *Treat v. Hiles*, 75 Wis. 265, 44 N. W. 1088, held that it was error for the trial court to grant a new trial on the issue of damages only, where the action was for breach of contract, and the special verdict failed to establish the existence of the contract as a binding obligation on the defendant.

In *Jarrett v. High Point Trunk & Bag Co.* 144 N. C. 299, 56 S. E. 937, the court, while not passing on the power of trial courts to grant a new trial on the issue of damages only, cautioned them in regard to that practice, saying that the question whether the practice should be allowed would be left open for future consideration, and approving the statement of the court in an earlier case (*Benton v. Collins*, 125 N. C. 83, 47 L.R.A. 33, 34 S. E. 242) that "before such partial new trials, however, are granted, it should clearly appear that the matter involved is entirely distinct and separable from the matters involved in the other issues, and that the new trial can be had without danger of complications with other matters."

R. E. H.

inction between the equity and common-law procedure as to this court's power in reversing an equity decree and a judgment at law, and in view of the absence of any statute such as exists in Kentucky and other states, we are constrained to hold that the plea in bar is well taken. It might be well for the legislature to provide by statute that this court should have the power to affirm in part and reverse in part, as justice might require, where the appeal is from a judgment at law; but, in the absence of such a statute, we are held down to the well-settled rule indicated in appeals from judgments of courts at law."

The Kentucky statute referred to provides that, when a party recovers judgment for a part of his demand, the enforcement of such judgment shall not bar an appeal as to the part not recovered.

It will be observed that the question there presented to the court for decision was not whether or not it had the right to limit the issues when ordering a new trial, but whether or not the appellant was barred of his appeal because of his having accepted the fruits of his judgment; so that the case, therefore, is not determinative of the issue here, though it may be conceded that the court would have decided it otherwise had it been of the opinion that it possessed the power here in question. The non-existence of this power was assumed by the court apparently without investigation; certainly without citation of authority.

The supposed "indivisibility of a verdict" and "entirety of a judgment," however, have not been permitted to cause an appellant to be barred of his appeal in all of the cases wherein he has recovered and accepted a part of his demand only. The character of the cases in which this result has not been permitted will be found set forth in the brief of counsel for the appellee in *Adams v. Carter*, 92 Miss. at page 584, 47 So. 409, 16 Ann. Cas. 76, and designated by him as the first, third, fourth, and fifth exceptions to the general rule. A partial new trial is not a matter of right, and will be awarded only when the issues are clearly separable, and when no injustice will result therefrom. This fact, it is more than probable, accounts in part for the rule applied in *Adams v. Carter*. If the "indivisibility of the verdict" and the "entirety of the judgment" are valid reasons for not awarding a partial new trial, it must be either because such trials are impossible, or at least impractical, or because injustice will generally result therefrom. The first of these reasons is, of course, absurd; and that the second is without foundation in fact has been demonstrated by the experience of most of the American courts. The L.R.A.1915E.

truth is that the rule, if such, in fact; there be, that a judgment at law must at all times be dealt with as an entirety, is purely an arbitrary one, and, when carried to an extreme, as will be demonstrated by an examination of the cases wherein it has been so dealt with, results in many absurdities. Be that as it may, the question decided in *Adams v. Carter*, supra, hereinbefore stated, was not the one here under consideration.

In *McNairy v. Gathings*, 57 Miss. 215, the verdict of the jury was erroneous in so far as it attempted to assess the amount of damages to be awarded the plaintiff, for the reason it was arrived at by the taking into consideration of an improper element. Upon this judgment a verdict was entered, and afterwards "a motion was made by the plaintiff to vacate this judgment and award him a writ of inquiry to assess the value of the cotton. This motion was based upon the theory that, inasmuch as the value of the money paid for the cotton was not in issue by the pleadings, and was a matter with which the jury had no concern, so much of the finding as related to it was to be treated as surplusage, and the verdict regarded as a general finding for the plaintiff, with a failure to assess the damages to which he was entitled. This motion was overruled, but a subsequent motion by the plaintiff to set aside the verdict as being contrary to the law and evidence was sustained, and a new trial awarded. The new trial was had, and resulted in a verdict for the defendant."

The ground upon which a reversal of this judgment was sought was that the court erred "in refusing to award a writ of inquiry upon the former verdict." It was held that the court below was correct both in refusing to award the writ of inquiry and in setting aside the verdict and awarding a new trial. It will be observed that the court was not there requested to affirm in part and reverse in part, but to disregard that portion of the judgment entirely by which it was sought to assess the damages, and to proceed as if the jury had not responded at all to that issue. This the court declined to do, and then, upon request of counsel for the plaintiff, set aside the verdict *in toto*, and awarded a new trial generally. It may be that both counsel for the plaintiff and the court were of the opinion that, unless the attempted assessment of damages could be treated as a nullity, the judgment must be affirmed or reversed as an entirety; but nevertheless that was not the point the court was called upon to decide, and consequently it was not before it for consideration. The case therefore is not strictly in point here, and was not cited

by counsel for appellant probably for that reason.

In arriving at our conclusion in this matter we have not left out of view the suggestion of counsel for appellant that under the rule of *expressio unius est exclusio alterius*, the grant of power to this court to reverse partially, contained in §§ 4944 and 4945 of the Code, impliedly prohibits it from so doing in cases not coming within the provisions of these sections. In so far as the right of this court to limit the issues when ordering a new trial is derived from the common law, this rule has no application. A great many of our statutes dealing not only with the substantive, but also with the adjective, law, consist merely of codifications, sometimes general, but in most cases only partial, of some particular rule or principle of the common law; and, should the courts hold that, when any rule or principle of the common law is by the legislature partially incorporated into a statute, the remainder of the rule is thereby repealed or annulled, endless trouble and confusion would result, necessitating in all cases a complete codification of the subject dealt with by the statute. In so far as this argument applies to the construction we have placed upon §§ 800 and 4919 of the Code, it will be sufficient to say that the rule here invoked has served its purpose when by invoking it we determine that no such right is conferred upon this court by §§ 4944 and 4945 of the Code, and that such right, if statutory, must be found in some other statute.

One of the objections of counsel for appellant to the exercise by this court of the right here in question is that it is prohibited from so doing by § 31 of our Constitution, which provides that "the right of trial by jury shall remain inviolate."

There is no merit in this contention, for the reason that appellant's liability was determined by the jury on the first trial, and by limiting the issue on the second trial solely to the ascertainment of damages, the court thereby simply preserved the fruits of the former trial in so far as it was not affected by error. If it be true, as was held in *Yazoo & M. Valley R. Co. v. Wallace*, 90 Miss. 609, 122 Am. St. Rep. 321, 43 So. 469, that the trial court, when, with the consent of the plaintiff, it reduces the amount of damages awarded to what it considers reasonable, and renders judgment therefor without the consent of the defendant, not only does not thereby violate § 31 of the Constitution, but, on the contrary, its right to so control and revise the verdict is a part of "the right of trial by jury" expressly guaranteed by that section, it follows *a fortiori* that the exercise by the court of

the right here in question does not violate that section. It also necessarily follows from that decision that there is no merit in the contention that by the exercise of this right we deprived appellant of its property without due process of law.

Having arrived at the conclusion that this court has the right, both at common law and by statute, to limit the issues when awarding a new trial, it becomes unnecessary for us to determine whether or not, in the absence thereof, rule No. 13, recently adopted by us, and so vigorously assailed by counsel, would be valid.

But it is said by counsel for appellant, in effect, conceding that this court is vested with the right here in question, it should not have been exercised in the case at bar, for the reason that it appears from the opinion rendered on the former appeal that the reason the verdict was set aside, in so far as it fixed the amount of damages, was that the amount awarded was "so grossly inadequate as to indicate that, in arriving at its verdict, the jury were influenced by prejudice, passion, or corruption," from which they say that it appears that the entire verdict, and not simply that portion of it awarding damages, was tainted by passion, prejudice, or corruption, and therefore should not have been permitted to stand in any respect.

The right to limit the issues when ordering a new trial should be exercised only when it is clear that no injustice will result from so doing. Particularly is this true when the only error in the verdict is in the amount of damages assessed, and it appears that this error was not the result of any ruling by, or charge from, the trial judge, but was committed solely by the jury itself after retiring to consider of its verdict; for in that case it is more difficult to say that the entire verdict was not affected by the same cause from which resulted the error in the amount of damages. It is manifest, however, from the opinion on the former appeal, that what the court meant was not that it appeared from the record that the entire verdict was tainted by passion, prejudice, or corruption, but simply that the indications were that the inadequate amount of damages awarded was the result thereof. There is no merit, therefore, in this assignment of error, and in reaching the conclusion we have left altogether out of view the "law of the case" rule.

The next assignment of error argued in the brief of counsel for appellant is that "the court erred in excluding from the jury the evidence as to liability." There is no merit in this assignment, for the reason that, under the judgment rendered by us on the former appeal, the court below was

without power to permit the question of appellant's liability to be again litigated, so that evidence relating only to that issue was, of course, inadmissible. It is not contended that any negligence on the part of appellee contributed to his injury; consequently no question growing out of our concurrent negligence statute (chapter 135, Laws of 1910) arises in this connection.

Affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH OF MASSACHUSETTS

v.

ARTHUR KINGSBURY.

(199 Mass. 542, 85 N. E. 848.)

Automobile — exclusion from highway — power.

1. The legislature may, with a view to the safety of the public, provide for the complete exclusion of automobiles from a highway on which, in its judgment, such machines should not be allowed.

Legislature — delegation of power — automobiles on streets.

2. The legislature may delegate to boards of aldermen in cities, and to selectmen in towns, the power to exclude automobiles from certain streets within their jurisdictions, from which, in their judgment, the public welfare demands such exclusion.

(October 19, 1908.)

Note. — Power to prohibit use of automobile upon public thoroughfares.

The above question is covered in a section of the note to *Christy v. Elliott*, 1 L.R.A.(N.S.) 221, and the note to *State v. Mayo*, 26 L.R.A.(N.S.) 502, and the present note is supplementary to them.

For a note as to forbidding or restricting teaming on certain public ways, see *Illinois Malleable Iron Co. v. Lincoln Park Comrs.* 51 L.R.A.(N.S.) 1203.

In a case decided subsequently to the earlier notes, it is laid down as a well-settled rule that, in the absence of any constitutional restriction or limitation, the legislature of a state, in the exercise of its police power, has the right to prohibit automobiles from passing over certain streets or public ways in a city or town. *State v. Phillips*, 107 Me. 249, 78 Atl. 283.

And in this case a special legislative act prohibiting the operation of automobiles on any highway or street within such of the four towns on the island of Mt. Desert as accepted the provisions of the act was held not to violate the "natural, inherent, and unalienable rights," specified in § 1 of art. 1 of the Constitution of Maine, or the 14th Amendment of the Federal Constitution, declaring that no state should deny any person "the equal protection of the laws," it L.R.A.1915E.

EXCEPTIONS by defendant to rulings of the Superior Court for Franklin County made during the trial of a complaint charging him with the violation of a statute as to the use of automobiles, which resulted in his conviction. Overruled.

The facts are stated in the opinion.

Messrs. Charles N. Stoddard and Philip H. Ball, for defendant:

Automobiles have as much right to pass over the highways as horse-drawn vehicles.

Chicago v. Banker, 112 Ill. App. 94; *McIntyre v. Orner*, 166 Ind. 57, 4 L.R.A.(N.S.) 1180, 117 Am. St. Rep. 359, 76 N. E. 750, 8 Ann. Cas. 1087; *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522; *Indiana Springs Co. v. Brown*, 165 Ind. 465, 1 L.R.A.(N.S.) 238, 74 N. E. 615, 6 Ann. Cas. 656, 18 Am. Neg. Rep. 392; *Com. v. Morrison*, 197 Mass. 203, 14 L.R.A.(N.S.) 194, 125 Am. St. Rep. 338, 83 N. E. 415; *Howe v. West End Street R. Co.* 167 Mass. 46, 44 N. E. 886; *White v. Blanchard Bros. Granite Co.* 178 Mass. 363, 59 N. E. 1025; *New England Teleph. & Teleg. Co. v. Boston Terminal Co.* 182 Mass. 397, 65 N. E. 835; *Shinkle v. McCullough*, 116 Ky. 960, 105 Am. St. Rep. 249, 77 S. W. 196, 15 Am. Neg. Rep. 63; *Nason v. West*, 31 Misc. 583, 65 N. Y. Supp. 651; *Moses v. Pittsburgh, Ft. W. & C. R. Co.* 21 Ill. 516; *Knight v. Lanier*, 69 App. Div. 454, 74 N. Y. Supp. 999, 12 Am. Neg. Rep. 157; *Bogue v. Bennett*, 156 Ind. 478, 83 Am. St. Rep. 212, 60 N. E. 143; *Starr v. Camden & A.*

being held that the right to use the public highways is not an absolute and unqualified right, but one which is subject to limitation whenever necessary to provide for public safety, and that the 14th Amendment was not designed to impair the police powers of the state. *Ibid.*

And this statute was also upheld as against the objection that it made an arbitrary classification with respect to the subjects over which it operated, since it operated alike upon all persons and property under the same circumstances and conditions. *Ibid.*

And it was held that the legislature, in enacting the law, must be presumed to have had under consideration all the necessary and pertinent information respecting the towns to be affected by the act, such as the character and extent of their population, and the location and condition of the highways and streets, and also the fact that the act might be rejected by one or more of the towns, and that this might result in the inhabitants of a town rejecting the provisions of the act being unable to reach the mainland by automobile on account of the other towns having accepted the act, and it was held that the legislature had determined that the statute was reasonable and expedient, and that its judgment must be deemed conclusive. *Ibid.*

R. Co. 24 N. J. L. 592; Cooley, Torts, 2d ed. 734-736; Cooley, Const. Lim. 4th ed. 694.

An act giving the selectmen of a town authority to exclude automobiles from particular ways is unconstitutional, as it abridges the privileges and immunities of citizens of the United States.

Com. v. Boyd, 188 Mass. 79, 108 Am. St. Rep. 464, 74 N. E. 255; Com. v. Stodder, 2 Cush. 562, 48 Am. Dec. 679.

The acts excluding automobiles from highways are an unreasonable exercise of the police power.

24 Am. & Eng. Enc. Law, 33, 34; Charlotte v. Pembroke Iron Works, 82 Me. 393, 8 L.R.A. 828, 19 Atl. 902; State v. Boardman, 93 Me. 73, 46 L.R.A. 750, 44 Atl. 118; Indiana Springs Co. v. Brown, 165 Ind. 465, 1 L.R.A. (N.S.) 238, 74 N. E. 615, 6 Ann. Cas. 656, 18 Am. Neg. Rep. 392; Nason v. West, 31 Misc. 583, 65 N. Y. Supp. 651.

Mr. Richard W. Irwin for the Commonwealth.

Knowlton, Ch. J., delivered the opinion of the court:

The defendant was convicted of having operated an automobile in violation of law, over a highway legally laid out in the town of Ashfield, from which automobiles were excluded under the authority of the statutes. He took exception to the refusal of the trial judge to make certain rulings requested, which, in a variety of forms,

raised the question whether the Stat. 1905, p. 289, chap. 366, § 1, as amended by the Stat. 1906, p. 425, chap. 412, § 9, and the Stat. 1907, p. 153, chap. 203, were constitutional. The first of these statutes authorizes boards of aldermen in cities, and boards of selectmen in towns, to "make special regulations as to the speed of automobiles and motor cycles, and as to the use of such vehicles on particular roads, including their complete exclusion therefrom." These regulations must be published in one or more newspapers and posted conspicuously on signboards. On protest in writing within sixty days, made by not less than fifty residents of Massachusetts, at least ten of whom are taxpayers of the city or town, the Massachusetts highway commission, after notice and a hearing, may approve the regulations, and if there is such a protest the special regulations are of no validity without such approval. The Stat. 1907, p. 153, chap. 203, prescribes penalties for violation of the regulations. The contention of the defendant is that the legislature had no constitutional right to enact such a law.

Automobiles are vehicles of great speed and power, whose appearance is frightful to most horses that are unaccustomed to them. The use of them introduces a new element of danger to ordinary travelers on the highways, as well as to those riding in the automobiles. In order to protect the public great care should be exercised

In *People ex rel. Cavanagh v. Waldo*, 72 Misc. 416, 131 N. Y. Supp. 307, affirmed in 149 App. Div. 927, 133 N. Y. Supp. 1139, which was affirmed in 205 N. Y. 589, 98 N. E. 1111, where a writ of habeas corpus was obtained by one who had been arrested for operating an automobile in violation of a legislative act authorizing the commissioner of parks of the boroughs of Brooklyn and Queens, by rules and regulations, to restrict the use and occupation of a certain part of the main drive of Ocean boulevard to horses and light carriages, and to exclude therefrom all kinds of vehicles, including bicycles and motor vehicles, this act was held not invalid on the ground that it diverted public property to the benefit of private individuals, or on the ground that it denied to any person the equal protection of the laws, since every member of the public had an equal right to share in the privileges granted in the drive. The court in this case further said that the act might well find support as a police regulation.

In *People v. Rosenheimer*, 209 N. Y. 115, 46 L.R.A. (N.S.) 977, 102 N. E. 530, Ann. Cas. 1915A, 161, the court upheld the validity of a statute making it a crime for one whose automobile caused an injury to leave the place of the accident without leaving his name, on the ground that the legislature might, if it saw fit, prohibit altogether the

use of motor vehicles upon the highways or streets of the state. Generally, as to the power to require one who has caused an injury to identify himself, see note to *Ex parte Kneeder*, 40 L.R.A. (N.S.) 622.

The decision in *Fifth Ave. Coach Co. v. New York*, 194 N. Y. 19, 21 L.R.A. (N.S.) 744, 86 N. E. 824, 16 Ann. Cas. 695, set out in the note in 26 L.R.A. (N.S.) 503, was affirmed in 221 U. S. 467, 55 L. ed. 816, 31 Sup. Ct. Rep. 709, the ordinance in question, which provided that no advertising trucks, vans, or wagons should be allowed in the streets of the borough of Manhattan, being held a valid exercise of the police power, and not a violation of the equal protection of law clause of the Constitution, nor an impairment of the obligation of contract, where, at the time advertising contracts were entered into, an ordinance almost identical in terms existed, and the company's charter conferred no right to use its stages for advertising purposes.

See also *Clausen v. De Medina*, 82 N. J. L. 491, 81 Atl. 924, set out in note in 51 L.R.A. (N.S.) 1204, where a rule of a board of boulevard commissioners forbidding the use of automobiles, locomobiles, trucks, carts, and other vehicles on a certain road was held invalid in a prosecution against the driver of a wagon.

J. T. W.

in the use of them. Statutory regulation of their speed while running on the highways is reasonable and proper for the promotion of the safety of the public. It is the duty of the legislature, in the exercise of the police power, to consider the risks that arise from the use of new inventions applying the forces of nature in previously unknown ways. The general principle is too familiar to need discussion. It has been applied to automobiles in different states with the approval of the courts. *Com. v. Boyd*, 188 Mass. 79, 108 Am. St. Rep. 464, 74 N. E. 255; *Christy v. Elliott*, 216 Ill. 31, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 74 N. E. 1035, 3 Ann. Cas. 487; *People v. Schneider*, 139 Mich. 673, 69 L.R.A. 345, 103 N. W. 172, 5 Ann. Cas. 790; *People v. MacWilliams*, 91 App. Div. 176, 86 N. Y. Supp. 357.

It seems too plain for discussion that, with a view to the safety of the public, the legislature may pass laws regulating the speed of such machines when running upon highways. The same principle is applicable to a determination by the legislature that there are some streets and ways on which such machines should not be allowed at all. In some parts of the state, where there is but little travel, public necessity and convenience have required the construction of ways which are steep and narrow, over which it might be difficult to run an automobile, and where it would be very dangerous for the occupants if automobiles were used upon them. In such places it might be much more dangerous for travelers with horses and with vehicles of other kinds if automobiles were allowed there. No one has a right to use the streets and public places as he chooses, without regard to the safety of other persons who are rightly there. In choosing his vehicle, everyone must consider whether it is of a kind which will put in peril those using the streets differently in a reasonable way. In parks and cemeteries and private grounds, where narrow roads with precipitous banks are sometimes constructed for carriages drawn by horses, it has been a common practice to exclude automobiles altogether, chiefly because of the danger of their frightening horses.

The general principle referred to was applied long ago to a different kind of vehicle, in *Com. v. Stodder*, 2 Cush. 562, 48 Am. Dec. 679, a case which relates to an ordinance of the city of Boston, prescribing the streets on which certain omnibuses might be run and excluding them from other

streets. A part of the opinion is as follows: "We perceive nothing objectionable in an ordinance by the mayor and aldermen, providing for the safety and convenience of the public generally, by prescribing by a general by-law or ordinance certain streets or portions of streets to be used for travel by vehicles exposing, by their manner of use, the lives and limbs of the public generally who may have occasion to use the public streets, if such vehicles are permitted to use the public streets indiscriminately; and such regulations and restrictions might be warranted, even to effect the minor object, that of preventing the greatly obstructing the free and convenient use of the streets for general purposes, by interdicting carriages of unusual size, or drawn by an unusual number of animals, or those of such character as would greatly interfere with the public convenience and safety. To take a strong case: Suppose the proprietor of the omnibuses from Roxbury should deem it expedient to propel his carriages by steam power, passing through Washington street at a rapid rate, would it not be a lawful and proper regulation for the mayor and aldermen to prohibit the using of Washington street by vehicles propelled by steam power? We cannot doubt that it would be."

The right of the legislature, acting under the police power, to prescribe that automobiles shall not pass over certain streets or public ways in a city or town, seems to us well established both upon principle and authority.

It is contended that this power cannot be delegated to a board of aldermen or selectmen, or to the Massachusetts highway commission. The question involved in this contention was fully considered and was decided in *Brodline v. Revere*, 182 Mass. 598, 66 N. E. 607. It also arose in *Com. v. Crowninshield*, 187 Mass. 221, 68 L.R.A. 245, 72 N. E. 963. It was decided in favor of the commonwealth's contention in *Nelson v. State Bd. of Health*, 186 Mass. 330, 71 N. E. 693, and was discussed and similarly decided in *Com. v. Sisson*, 189 Mass. 247, 1 L.R.A.(N.S.) 752, 109 Am. St. Rep. 630, 75 N. E. 619. In *Com. v. Stodder*, *ubi supra*, and in *Com. v. Mulhall*, 162 Mass. 496, 44 Am. St. Rep. 387, 39 N. E. 183, the prohibition was by an ordinance passed by a local board. These cases make further discussion unnecessary.

Exceptions overruled.

OKLAHOMA SUPREME COURT.

W. J. ANNEAR, by Next Friend, Plff. in Err.,
v.

D. L. R. SWARTZ.

(— Okla. —, 148 Pac. 706.)

Trial — demurrer to evidence — effect.

1. On a demurrer to evidence, it must be taken that he who interposes it admits all the facts which the evidence in the slightest degree tends to prove, and all the inferences or conclusions which may be reasonably and logically drawn therefrom, and the court will not weigh conflicting evidence, but will treat as withdrawn all evidence which is most favorable to the party demurring.

Weapon — injury from discharge of gun — liability.

2. Where a person is injured by the accidental discharge of a gun in the hands of another, the test of liability is not whether the injury was accidentally inflicted, but whether the defendant is free from all blame.

Evidence — negligent handling of gun — sufficiency.

3. So, where two persons were hunting together, and the gun of the defendant had a hammer, the thumb hold of which was worn smooth, and the defendant, seeing the plaintiff and knowing the gun was pointed toward him, attempts to let down the

hammer, which slips through his fingers and the gun is thereby discharged, and the plaintiff injured, held, sufficient evidence to take the case to the jury on the issue of negligence, and it was error to sustain a demurrer thereto.

(April 27, 1915.)

ERROR to the District Court for Major County to review a judgment in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by his negligent discharge of a gun. **Reversed.**

Statement by DEVEREUX, C.:

The petition alleges, in substance, that on the 3d day of March, 1911, the defendant carelessly, negligently, and recklessly pointed toward the plaintiff a loaded shotgun, and so carelessly, negligently, and recklessly handled the gun that he caused the same to be discharged at the plaintiff, by which the plaintiff was wounded in the ankle so severely that it was necessary to amputate the leg. The answer was a general denial. The evidence tends to show that the plaintiff was an employee of the defendant, and on the day of the accident the two went duck hunting, that there was only one gun, which belonged to the defendant, and this gun had a small hammer, and that the thumb grip was worn, to use the language of the witness, "pretty slick." After arriving at the point where they expected to

Headnotes by DEVEREUX, C.

Note.—Civil liability for injury by negligent discharge of firearms.

This is a continuation of notes to *Sieffer v. Paysee*, 4 L.R.A.(N.S.) 119, and *Rudd v. Byrnes*, 26 L.R.A.(N.S.) 134.

For other notes treating of the different phases of liability for injuries by the use of firearms, consult Index to L.R.A. Notes under the title "Firearms."

Where persons while hunting accidentally shot a farmer, it was held in *Manning v. Jones*, 95 Ark. 359, 129 S. W. 791, a question for the jury whether the gun was discharged by either of the defendants, and, if so, whether he was at the time in the exercise of such care and caution to avoid injury to others as a prudent man would observe under the circumstances surrounding him. The court stated that, assuming that the defendants had a right to be on the premises and to hunt there, this fact of itself did not absolve them from liability under the facts stated. The test of liability is not whether the injury was accidentally inflicted, but whether the defendants were free from blame. The reasonable care which persons using firearms are bound to take in order to avoid injury to others is a care proportionate to the probability of injury; and the principle is applicable that he who does what is more than ordinarily

dangerous is bound to use more than ordinary care. Whether, in case of an injury proceeding from such a cause, ordinary or reasonable care was used by the person inflicting it, will in almost every case present a question for a jury.

So, where defendant, who had been firing at a target about 135 feet distant, while repairing his pistol, accidentally shot and killed a bystander, a finding of negligence was in *Glueck v. Scheld*, 125 Cal. 288, 57 Pac. 1003, 6 Am. Neg. Rep. 249, held justified. As to the contention that deceased was guilty of contributory negligence in occupying a position in spite of a warning that it was dangerous, the court said that deceased was not killed by reason of his proximity to the target; that his position of danger, namely 40 feet from the target and 150 feet from defendant, if it was a dangerous one, did not contribute to the accident.

It is stated in *State use of Johnston v. Cunningham*, — Miss. —, 51 L.R.A.(N.S.) 1179, 65 So. 115, that the highest degree of care is exacted of a person handling firearms. They are extraordinarily dangerous and in using them extraordinary care should be exercised to prevent injury to others.

It is stated in *Harper v. Holcomb*, 146 Wis. 183, 130 N. W. 1128, that it is incumbent upon a person, in the deer hunting

find the ducks, the plaintiff and defendant lay down together, about 2 or 3 feet apart, in thin grass about 18 inches high. After remaining for some time ducks flew over them, but too high to shoot, although the defendant cocked the gun and made ready to fire at them. The ducks lighted in a pond some little distance from where the parties were, and the plaintiff suggested to the defendant that they go to this pond, and got up from the ground and started toward the other pond; that in getting up the plaintiff not only stated to the defendant that they had better go to the other pond, but made sufficient noise to have attracted the attention of the defendant, and that when plaintiff got up from the ground and started toward the other pond the defendant was looking at him. After going about 5 or 6 feet, and while the defendant was still lying on the ground, plaintiff turned to see why he was not coming, as he had not heard him get up, and just as he turned the gun fired, and the plaintiff was wounded in the ankle so severely as to make an amputation of the foot necessary. This took place in the daytime, and the defendant was looking at the plaintiff when he got up, and that the defendant was looking in his direction at the time the gun exploded. There was also evidence

tending to show that the defendant stated that he started to let down the hammer of the gun, and it slipped through his fingers, thus causing the gun to fire. There was a demurrer to this evidence, which was sustained by the court, and judgment thereon for the defendant; and the plaintiff has brought the case on error to this court.

Messrs. Brady & Willis, for plaintiff in error:

Negligence is not a question of law for the court except where the evidence is such that the court can conclude that twelve reasonable men could not differ in their conclusions from the evidence as to the existence of negligence, and the court can conclude as a matter of law that a verdict in favor of the plaintiff could not stand because reasonable men could not find that negligence existed.

29 Cyc. 630; Missouri, K. & T. R. Co. v. Shepherd, 20 Okla. 626, 95 Pac. 243; Harris v. Missouri, K. & T. R. Co. 24 Okla. 341, 24 L.R.A.(N.S.) 858, 103 Pac. 758; Lasky v. Canadian P. R. Co. 83 Me. 461, 22 Atl. 367; Clark v. St. Louis & S. F. R. Co. 24 Okla. 764, 108 Pac. 361.

The defense of contributory negligence in the state of Oklahoma is in all cases a question of fact, and is at all times to

season, to use care commensurate with the danger, not to shoot at an object seen suddenly, partly obscured by the undergrowth, without first awaiting for such a view as to enable him not to mistake a human being for a deer. Consequently, in this case, one was held negligent as a matter of law where he, while hunting for deer, upon seeing a "flash" through the underbrush, fired, wounding in the leg his guide, who had started out to scare up game, but had returned unexpectedly. The court considered objectionable the use of the term "highest degree of care and caution" in an instruction that a person handling firearms "is bound to use extraordinary care to prevent injury to others," and that defendant owed a duty to his guide to exercise the highest degree of care and caution before shooting in order to distinguish whether the object at which he shot was an animal or whether it was his guide. The court said that what would be ordinary care under some circumstances would not be under others. As the danger increases and the seriousness of injuries liable to occur from failure to avoid creating, or avoid meeting, such danger, increases, the quantum of care should increase, and, as matter of common knowledge, with the great mass of mankind, does increase. But while that is true, there is, in circumstances of great danger, the same as in those of little peril, the three well-known degrees of care. To say in either situation that one must exercise the very highest degree, in order to be free from failure to exercise L.R.A.1915E.

ordinary care, would be palpably wrong. Where very much, as where very little, care is required, there is the medium denominated ordinary care. When the trial judge said that appellant was required to "exercise the highest degree of care and caution," taking the language by itself and literally, he obviously left no room for a quantum of care greater than that of ordinary care. True, great care was required of appellant, but only because, ordinarily, such care is exercised, or must be presumed to be exercised, by the great mass of mankind under the same or similar circumstances. The use of the term "highest degree" is the crowning fault of the matter. It was also considered that the instruction was faulty in limiting defendant's duty to plaintiff's guide alone, as distinguished from any other person. The court, however, concluded that, in view of the facts of the case, the errors were not prejudicial.

In Harrison v. Allen, 179 Ill. App. 520, an action to recover damages for injury by the negligent discharge of a gun while hunting, it is held that the burden is on defendant to prove that there was no negligence on his part in discharging the gun, and that instructions are erroneous which place upon plaintiff throughout the whole case the burden of proving that he was without fault, and that the injury was caused by the negligence of the defendant. See to same effect Atchison v. Dullam, 16 Ill. App. 42.

J. D. C.

be submitted to, and passed upon by, the jury.

Chicago, R. I. & P. R. Co. v. Beaty, 27 Okla. 848, 116 Pac. 171; Independent Cotton Oil Co. v. Beacham, 31 Okla. 390, 120 Pac. 989.

Firearms are dangerous instruments, and the law requires one controlling them to exert a high degree of care to avoid injury to others.

Bahel v. Manning, 112 Mich. 24, 36 L.R.A. 523, 67 Am. St. Rep. 381, 70 N. W. 327, 1 Am. Neg. Rep. 458; Weaver v. Ward, Hobart, 134; Morgan v. Cox, 22 Mo. 373, 66 Am. Dec. 623; Tally v. Ayres, 3 Sneed, 677; Judd v. Ballard, 66 Vt. 668, 30 Atl. 96; Castle v. Duryee, 2 Keyes, 173; Glueck v. Scheld, 125 Cal. 288, 57 Pac. 1003, 6 Am. Neg. Rep. 249.

Messrs. McKeever & Church for defendant in error.

Devereux, C., filed the following opinion:

There is a large amount of testimony in the record, but it is not necessary to be stated, for, as decided by the supreme court of this state in *Scully v. Williamson*, 26 Okla. 19, 27 L.R.A.(N.S.) 1089, 108 Pac. 395, Ann. Cas. 1912A, 1265: "When a demurrer to the evidence is interposed, it must be taken that he who interposes it admits all the facts which the evidence in the slightest degree tends to prove, and all the inferences or conclusions which may be reasonably and logically drawn therefrom, and the court will not weigh conflicting evidence, but will treat as withdrawn all the evidence which is most favorable to the party demurring."

The question, therefore, presented, is whether there was any evidence to go to the jury under this rule.

At common law, where one was injured by the discharge of a gun or other firearms in the hands of another, the action was for trespass *vi et armis*, and the only defense available was that the defendant was utterly without fault. 1 *Thomp. Neg.* § 779; *Weaver v. Ward*, Hobart, 134. The modern doctrine, however, has modified this rule, and places the liability of one who injures another through the negligent discharge of firearms on the footing of negligence, and not on the footing of trespass. However, in 1 *Thompson on Negligence*, § 780, it is said that it may be doubted whether there is much substantial difference in the grounds of liability. In the same section it is said by Mr. Thompson, in speaking of the injury of one by the discharge of a gun in the hands of another: "Here, as in other cases, the test of the liability of the defendant is whether, in what he did, he failed to exercise reasonable or ordinary L.R.A.1915E.

care. And here, as in other cases, the reasonable care which persons using firearms are bound to take in order to avoid injury to others is a care proportionate to the probability of injury; and the principle is applicable that he who does what is more than ordinarily dangerous is bound to use more than ordinary care. Whether, in case of an injury proceeding from such cause, ordinary or reasonable care was used by the person inflicting it, will, in almost every case, present a question for a jury."

In *Morgan v. Cox*, 22 Mo. 373, 66 Am. Dec. 623, the suit was brought for the negligent shooting of the plaintiff's slave, and the only question was as to the fact of negligence. The defendant had been out with his gun, and was asked by plaintiff to aid him and his servant in driving an unruly cow across the Osage river; and while so doing he punched the cow with his loaded gun, and in replacing it across his horse the hammer struck the saddle, as he supposed, and caused it to fire, by which the plaintiff's servant was shot and killed. There was a verdict and judgment for the plaintiff, holding this to be negligence, which was affirmed by the court. In the opinion, it is said: "The defendant here had a dangerous instrument in his hands, and it was his duty to take proportionate care in handling it. The punching of the cow was a careless use of it, surrounded as he was by others; and, although the accident did not then occur, it was no doubt occasioned by accidentally striking the hammer against the saddle, upon returning the gun to the horizontal position [in] which the defendant had carried it, without elevating the muzzle. The accident, in all probability, would not have occurred had the defendant taken that care of the gun that it was his duty to have taken of it while it was loaded and he himself was surrounded by those whom it might injure if it accidentally fired."

This is strong authority in the case at bar. The defendant in this case is presumed, from the evidence, to have known the condition of the gun and the hammer, and that it was worn "click." He was looking toward the plaintiff at the time the gun fired. It is a reasonable deduction from this evidence that he saw the plaintiff and knew where he was, and knew that the gun was pointing directly towards him, and that he took no precaution to divert the weapon, and; knowing the condition of the hammer, he attempted to let it down while the gun was pointed directly at the plaintiff's feet. If it was evidence of negligence, as held by the court in *Morgan v. Cox*, *supra*, that the gun was discharged

while placing it on the saddle after punishing the cow, then certainly it is evidence of negligence that the defendant attempted to let the hammer down while the gun was pointing at the plaintiff.

In *McCleary v. Frantz*, 160 Pa. 536, 28 Atl. 929, a question very nearly the same as the case at bar was presented. In that case four persons were hunting together, and one separated from the others for some distance, and while attempting to join them, and just as he was coming over the hill, the defendant fired his gun at a rabbit, and some of the shot struck the plaintiff in the face, "putting out an eye. The court was asked to charge the jury in that case: "Even if the jury believe the defendant fired the shot which struck the plaintiff, yet if at the time the shot was fired the defendant, by reason of the growth of grass and weeds on the summit of the hill, could not see the plaintiff, their verdict must be for the defendant." This charge was refused, the trial court saying to the jury: "I leave it for you to say, under the circumstances of the case, whether or not the defendant exercised the care required by law."

The syllabus in this case clearly states the holding of the court, and is as follows: "Where the standard of duty is variable and shifts with the facts developed on the trial, it is a question of fact for the jury to determine, under the circumstances, whether a reasonable and proper degree of care was exercised. In an action to recover damages for personal injuries caused by the alleged negligent firing of a shotgun, it is proper to submit the case to the jury where there is evidence that plaintiff and defendant and two other persons went hunting; that they discussed the danger of four persons hunting together; that, after the discussion, three of the party, leaving the plaintiff behind, crossed a ridge over which plaintiff would have to go in order to rejoin them; and that defendant, having stirred up a rabbit, turned and shot his gun backward towards the crest of the hill, just as plaintiff was about to cross it, thereby wounding him."

The facts in the case just cited were stronger for the defendant than in the case at bar, because there was no evidence in that case that the defendant saw the plaintiff when he fired at the rabbit, while in the case at bar there is not only evidence that the defendant saw the plaintiff when he attempted to uncock the gun, but that the hammer was in such a condition that a reasonable inference may be drawn from it that the defendant knew it was likely, or at least possible, that it might be dis-

charged by slipping from his thumb while attempting to let it down.

In *Judd v. Ballard*, 68 Vt. 608, 30 Atl. 96, plaintiff and defendant were riding in a wagon, and while the defendant was closing the hammer preparatory to returning the revolver to his pocket, it was discharged, injuring the plaintiff. The court says: "Upon the facts presented the defendant is clearly answerable for the damages sustained by the plaintiff. The shooting of the plaintiff was an accident, but in no sense an unavoidable accident. It would not have occurred but for the defendant's carelessness. The test of liability is not whether the injury was accidentally inflicted, but whether the defendant was free from blame."

Numerous other authorities may be cited along this line, but the above are sufficient to show the general rule in cases of this kind.

The defendant in error has cited the case of *Sutton v. Bonnett*, 114 Ind. 243, 16 N. E. 180, but that case is clearly distinguishable, for the question was submitted to the jury, who found that the defendant did not see the plaintiff when the pistol was fired. That is not authority in the case at bar, where, for the purpose of this demurrer, it must be taken as true that the defendant did see the plaintiff, and that the gun was pointed at him, as shown beyond controversy by the fact that his foot was so injured that it had to be amputated.

The defendant in error has also cited the case of *Stefker v. Paysee*, 115 La. 954, 4 L.R.A. (N.S.) 119, 40 So. 366. This case is not an authority that the evidence under consideration in the case at bar was not sufficient to go to the jury. That case was submitted to the judge, without a jury, who found for the defendant. In the second paragraph of the syllabus it is said: "Where persons are gunning together, and an accident occurs, the negligence, to render one liable, must be in its nature gross. Fault must be shown."

If by this the court means that in cases of this kind the defendant is only liable in cases of gross negligence, it is opposed by the overwhelming weight of authority and reason, and we cannot follow it. It will also be noted that two of the judges dissented from the opinion of the majority in this case.

In conclusion we think there was evidence to go to the jury of negligence. The fact that the hammer of the gun was short; that it was worn so as to be smooth and "slick;" the fact that the defendant knew that the plaintiff had started off; that he attempted to let the hammer down on the loaded gun when it was pointed directly at the plain-

tiff, whom he saw,—was evidence sufficient to take this case to the jury on the question of negligence.

We therefore recommend that the judgment be reversed, and a new trial granted.

Per Curiam:

Adopted in whole.

KANSAS SUPREME COURT.

J. H. SPAETH, Appt.,

WESLEY KOUNS.

(95 Kan. 320, 148 Pac. 651.)

Evidence — merchantability of title in other state.

1. The testimony of a Missouri lawyer of fifteen years' experience and of a Missouri abstracter of titles of twenty years' experience, neither contradicted nor discredited, is sufficient to base a judgment

Headnotes by DAWSON, J.

Note. — Competency of witness to express his conclusion as to character, quality, or marketability of title to real property.

It is a general rule well established by a number of decisions that the opinion of a witness as to whether a title is good or marketable is incompetent. *Leahy v. Hair*, 33 Ill. App. 461 (testified that the title was not good); *Moses v. Cochrane*, 107 N. Y. 35, 13 N. E. 442 (see *infra*); *Murray v. Ellis*, 112 Pa. 485, 3 Atl. 845 (see *infra*); *Brackenridge v. Claridge*, 91 Tex. 527, 43 L.R.A. 593, 44 S. W. 819 (see *infra*).

A lawyer who examined a title for the purchaser under a contract calling for an indisputable and satisfactory title cannot give his opinion respecting the title in an action involving the contract. *Winter v. Stock*, 29 Cal. 408, 89 Am. Dec. 57.

In *Montgomery v. Pacific Coast Land Bureau*, 94 Cal. 284, 28 Am. St. Rep. 122, 29 Pac. 640, the admission in evidence of the opinion of attorneys who examined the title, that the title was unsafe, in an action by the owner of property against auctioneers who, after having sold the property and received a deposit on the purchase price, returned the deposit so received after the title had been pronounced imperfect by attorneys for the purchaser, was held error.

An obiter statement to the effect that attorneys may not give their opinions that the title to land in controversy is good is found in *Scott v. Hughes*, 66 W. Va. 573, 66 S. E. 737.

The written opinion of attorneys for the purchaser of lands, that the title to the land purchased was not good, was held incompetent to show an imperfect title in *Stiles v. Steele*, 37 Kan. 552, 15 Pac. 561. L.R.A. 1915E.

that the title to a tract of Missouri land is merchantable and is vested in the record owner free and clear of encumbrances.

Specific performance — defense — unmerchantable title.

2. One who makes a bargain to trade real estate properties with another cannot avoid his contract on the indefinite plea that the title of the other is "encumbered by liens and clouds, so that the title is unsatisfactory, unmerchantable, and defective," without pleading any specific defects, and without even adducing any evidence in support of such indefinite plea.

Evidence — of land title — right to disregard.

3. It is not proper for the district court to disregard the evidence of witnesses competent to testify as to the sufficiency of a title to land in another state, and, without either pleading or proof of the law of such other state, to pass judgment by an independent examination of the abstract.

Judgment — not within issues.

4. It is not proper for the district court to give judgment on an issue not fairly raised by the pleadings.

(May 8, 1915.)

This is usually based on the ground that whether the title is good or marketable, etc., is the very question at issue, and therefore to be passed upon by the court. *Winter v. Stock* and *Leahy v. Hair*, *supra*.

In an action by a purchaser to recover an advanced payment, the purchaser sought to introduce evidence of his inability to procure a loan upon the property because of objections to the title made by a lawyer to whom application for the loan was made; other evidence offered was to the effect that members of the legal profession familiar with such question regarded a title such as the one in question nonmarketable. This evidence was excluded; and the court of appeals, in approving the exclusion, states that if the facts proved justified the inquiry, the question was one for the court to answer; that the opinion of conveyancers upon it is quite immaterial. *Moser v. Cochrane*, 107 N. Y. 35, 13 N. E. 442.

In *Murray v. Ellis*, 112 Pa. 485, 3 Atl. 845, an action to recover under a contract for the sale of premises, the rejection of the opinion of an attorney as to marketable character of the title was held proper, as that was the question for the determination of the court on the papers and other facts submitted to it, and the opinion of a witness, however learned, could avail nothing.

In an action by real estate brokers to recover commission in which they explained the failure to complete the purchase by stating that the title was defective, the evidence of an attorney for the proposed purchaser, who testified that the title was not good, is stated to be an opinion of the attorney as to the law of the title, but this is not evidence, as the court must determine the law for itself. *Breckenridge v.*

A PPEAL by plaintiff from a judgment of the District Court for Saline County in defendant's favor in an action brought to compel specific performance of a contract for the exchange of real estate. Reversed.

The facts are stated in the opinion.

Messrs. C. W. Burch and B. I. Litowich, for appellant:

The determination of the sufficiency of the abstract to show a merchantable title could be made only by one possessing technical knowledge of the laws, customs, and usages of the state of Missouri, and it was a proper subject concerning which expert testimony might be offered.

Woods County Union Bank v. Shore, 87

Kan. 140, 123 Pac. 880; Brenner v. Luth, 28 Kan. 581; Bridges v. Vann, 88 Kan. 98, 127 Pac. 604; Eberhart v. Rath, 89 Kan. 329, 131 Pac. 604, Ann. Cas. 1915A, 268; Hutchings v. Missouri, K. & T. R. Co. (Sealy v. Missouri, K. & T. R. Co.) 84 Kan. 479, 41 L.R.A.(N.S.) 500, 114 Pac. 1077; Hite v. Keene, 149 Wis. 207, 134 N. W. 383, 135 N. W. 354, Ann. Cas. 1913D, 251; Morgan Lumber Co. v. Williams, 143 Ky. 115, 136 S. W. 131; Bollinger v. Gallagher, 163 Pa. 245, 43 Am. St. Rep. 791, 29 Atl. 751; Temple v. Pasquotank County, 111 N. C. 36, 15 S. E. 886; Venable v. Wabash Western R. Co. 112 Mo. 103, 18 L.R.A. 68, 20 S. W. 493; Barker v. Brown, 17 Ky.

Claridge, 91 Tex. 527, 43 L.R.A. 593, 44 S. W. 819.

An unsworn certificate or opinion of an attorney is not legal evidence as to the title of a party to an action. *Armstrong v. Maryland Coal Co.* 67 W. Va. 589, 69 S. E. 195.

In some cases where all the evidence from which the experts who expressed an opinion drew their conclusions is before the court, the expression of such an opinion has been held not reversible error. *Mead v. Altgeld*, 136 Ill. 298, 26 N. E. 386. In this case expert testimony was introduced to prove that the title as shown by the abstract was not a merchantable title. Objection was made to this evidence, and in passing upon the objection the supreme court states: "If it be admitted, as perhaps it should be, that the objection to this testimony was well taken, it does not follow that any prejudicial error was committed. All the evidence from which the legal conclusion arose was already before the court, and the expert testimony was merely a statement of that conclusion. It is impossible to say, therefore, that it had or could have had any influence upon the judgment afterwards pronounced by the court." In the opinion of the appellate court which was affirmed by this decision, it is stated that if the facts relating to the title had not been stated to the court, and the judge had nothing to rely on but the opinions of the lawyers, the judgment would have been reversed for the admission of such evidence.

In *Buswell v. O. W. Kerr Co.* 112 Minn. 388, 128 N. W. 459, 21 Ann. Cas. 837, a case involving the title to land in another state, the opinion of attorneys from that state was based upon an examination of the abstract without any examination of the record, and all of the facts upon which the opinion was based were before the court, and it was held not prejudicial error to receive the opinion in evidence under these conditions.

It is to be noted that in the cases thus far cited except *Buswell v. O. W. Kerr Co.* the question was in relation to the title to real property in the state where the action was being tried. In such a case no proof

is needed of the law of the state on the question. A somewhat different situation is presented when, as in *SPAETH v. Kouns*, the question relates to the title to land in another state; since in that case the law of the other state is a matter of proof, and the testimony of a competent witness is a proper method of proving such law. The real question seems to be as to the proper form of the testimony. It would seem that the particular form employed in the *SPAETH* CASE would have been objectionable if the point had been raised at the proper time. It will be noticed that the court did not approve of the form, but it having been introduced without objection, it was considered, and, in the absence of contradictory evidence, is held controlling.

In *Billick v. Davenport*, 164 Iowa, 105, 145 N. W. 470, attorneys, who had qualified as experts, testified over objection that in their opinion an abstract did not disclose a merchantable title to the property in dispute. The court states that the unwritten law of another state or foreign country may be proved by the testimony of attorneys, and the usage and practice under the written law of another state may also be shown by the evidence of those conversant therewith; but the ultimate conclusions of the witnesses based on the facts and the law, as to whether the abstract disclosed the kind of title exacted, were not competent as evidence; they were mere opinions or conclusions, and not testimony of facts, and cannot be considered in aid of the judgment by the court.

No question as to the competency of such an opinion as to title was raised in *Atkinson v. Taylor*, 34 Mo. App. 442. It appeared that the purchaser's attorney examined the abstract delivered by the vendor, and pronounced the title bad. It is stated that while in such cases the courts will look to the matter with closer scrutiny, an attorney's opinion will not *ipso facto* compel them to allow that the title is thereby doubtful; such an opinion is not considered as a substantive reason why the title should be declared to be doubtful.

As to oral proof of foreign laws, see note to *State v. Bearman*, 25 L.R.A. 449.

W. A. E.

L. Rep. 1172, 33 S. W. 833; Dimpfel v. Wilson, 107 Md. 329, 13 L.R.A.(N.S.) 1180, 68 Atl. 561, 15 Ann. Cas. 753; Genet v. Delaware & H. Canal Co. 13 Misc. 409, 35 N. Y. Supp. 147; Mowry v. Chase, 100 Mass. 79; Greason v. Davis, 9 Iowa, 219; State v. Behrman, 114 N. C. 797, 25 L.R.A. 449, 19 S. E. 220; Barrows v. Downs, 9 R. I. 453, 11 Am. Rep. 283; Re Robert, 8 Paige, 446; Consolidated Real Estate & F. Ins. Co. v. Cashow, 41 Md. 59.

The burden was upon the defendant to point out any defects and prove that the title was not merchantable.

Maupin, *Marketable Title*, 2d ed. § 296.

Defendant was estopped to raise additional questions concerning title, and especially was he estopped to refuse to complete the trade under a general statement to the plaintiff that his papers were imperfect.

Woodward v. McCollum, 16 N. D. 42, 111 N. W. 623; Wold v. Newgard, — Iowa, —, 94 N. W. 859; Easton v. Montgomery, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280.

Messrs. J. O. Wilson and J. H. Wilson for appellee.

Dawson, J., delivered the opinion of the court:

The plaintiff was the tenant of the defendant, and both resided in Salina. They made a bargain whereby the plaintiff traded to defendant a tract of Missouri land for the house he occupied in Salina. The conditions of the trade were that the parties should furnish to each other abstracts showing merchantable title to their respective properties. The plaintiff submitted his abstract to defendant's lawyer, as per defendant's instructions, and in time plaintiff's abstract and title were fixed up to meet this attorney's approval. Nevertheless the defendant repudiated the trade, and plaintiff brought suit for specific performance. The defendant answered that plaintiff had failed to furnish an abstract showing good title to the Missouri property; that it "was encumbered by liens and clouds, so that the title was unsatisfactory, unmerchantable, and defective." Other issues were raised, but are not for our consideration.

On the trial two Missouri experts, a lawyer of fifteen years' experience and an abstracter of twenty years' experience, testified for the plaintiff. The lawyer gave his opinion that the abstract "showed a good merchantable and marketable title in [plaintiff] free and clear from all liens and encumbrances." The abstracter testified that the title was vested in plaintiff free and clear of encumbrances. There was no objection to this testimony, not even to the L.R.A.1915E.

form of the questions, nor that the questions call for the conclusions of the witnesses. The only other evidence was the abstract itself, and the learned district court disregarded the evidence of the experts in Missouri law, and studied the abstract independently, and made certain findings of fact and conclusions of law in favor of defendant, and refused specific performance. From this judgment plaintiff appeals, and contends:

"First. That the court erred in disregarding the testimony of experts.

"Second. That the abstract shows a merchantable title in the plaintiff.

"Third. That the defendant was estopped to complain of the abstract of title, since it had been perfected to the complete satisfaction of his attorney, under his directions."

The first assignment of error is meritorious. The Missouri witnesses showed their competency to give expert testimony, and their testimony was undisputed. Their evidence was given by deposition, so their personal demeanor was not before the court. If they were ill-favored persons, the court could not discover it from the typewritten depositions. We see no reason why their evidence should be disregarded. Counsel for appellee do not help us in this dilemma. How is the sufficiency of the title to a tract of land in another state or country to be established? By introducing all the statutes, all the decisions, all the court proceedings which at one time and another may have affected the title as it passed from father to son, by conveyance, by descent, by will, or by forced sale? Such a mode of proof would sometimes be possible, but what an endless, bootless task it would be. On the other hand, how proper, precise, and expeditious is the proof where the evidence is the testimony of reputable experts whose long years of study of the law of titles in the state where the land lies have qualified them to speak on that subject.

On this general proposition Wigmore says: "Where a fact could be ascertained only by the inspection of a large number of documents made up of very numerous detailed statements, as the net balance resulting from a year's vouchers of a treasurer or a year's accounts in a bank ledger, it is obvious that it would often be practically out of the question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered in the shape of the testimony of a competent witness who has perused the entire mass and will state summarily the

net result. Such a practice is well established to be proper." 2 Wigmore, Ev. § 1230.

In *General Conference Asso. v. Michigan Sanitarium & Benev. Asso.* 166 Mich. 504, 132 N. W. 94, 95, is the following: "The plaintiff further offered in evidence the deposition of W. H. Lynch, who testified that he was an advocate, and resided in the village of Sweetsburg, district of Bedford, and province of Quebec, and that he had practised his profession continuously since October, 1899; that he was familiar with and knew the law and practice of the courts of the province of Quebec, Canada, in relation to the proof of wills, appointment of executors, and the settlement of estates under wills of deceased persons, . . . and that, under the practice and decisions of the courts of lower Canada, an executor has authority to indorse promissory notes belonging to the estate when said notes are payable to the order of the deceased person; and to transfer the title and ownership of said notes by such indorsement. . . . The testimony of the Canadian advocate and the articles of the Code were sufficient proof of the authority of Mrs. Ruiter to act as executrix of her husband's will, and of the fact that she became the absolute owner of the notes under the will, and could dispose of them as she saw fit." pp. 508-510.

The headnote in *Barker v. Brown*, 33 S. W. 833 (17 Ky. L. Rep. 1172) reads: "In garnishment proceedings it appeared that defendant had a life estate in land in Indiana on which tobacco, the proceeds of which were garnished, was raised. He leased the land for one third of the tobacco as rent. Claimants, his children, were the remaindermen, and had mortgaged their interest to secure a debt of their father, and he agreed that they should have his share of the crop to apply on the debt. When the tenant stated that he was going to ship the tobacco to Kentucky, claimants, fearing that in that state it might be subjected to plaintiff's debt, paid the father the value of his interest in the crop. Plaintiff, defendant, and claimants lived in Indiana. Held that, on an issue whether the transaction between defendant and claimants was fraudulent, it was error to refuse to permit one learned in the statute law of Indiana to testify that under the laws of that state neither the tobacco nor its proceeds could be made liable to the payment of plaintiff's debt." ¶ 1.

In *Consolidated Real Estate & F. Ins. Co. v. Cashow*, 41 Md. 59, which involved a question of ownership of an insurance policy, it was said: "We do not find any provision similar to those in our insolvent laws requiring such sales to be reported to, L.R.A.1915E.

and ratified by, the courts, and the purchaser's title is not made to depend upon such report and ratification. The receiver advertised on the 24th of July, and sold on the 7th of August. If we are to construe this statute as if it were an act of our own legislature, we should hold the receiver had complied with its requirement as to notice. If we are to determine whether his action would be so regarded by the courts of New York, we must have recourse to the testimony of witnesses competent to testify on that subject. The evidence of the witness Lee on this point, who swears that the sale was made 'after due public notice and advertisement, as required by the laws of the state of New York,' settles the question, provided he is shown to be sufficiently an expert to give such testimony. He states that he is thirty-four years of age, and resides in New York city, and is by occupation a lawyer. This we regard as sufficient to enable him to testify as he has done." p. 79.

To the same effect were *Greason v. Davis*, 9 Iowa, 219; *Pittsburg, C. C. & St. L. R. Co. v. Austin*, 141 Ky. 722, 133 S. W. 780; *Morgan Lumber Co. v. Williams*, 143 Ky. 115, 136 S. W. 131; *Dimpfel v. Wilson*, 107 Md. 329, 13 L.R.A.(N.S.) 1180, 68 Atl. 561, 15 Ann. Cas. 753; *Mowry v. Chase*, 100 Mass. 79; *Genet v. Delaware & H. Canal Co.* 13 Misc. 409, 35 N. Y. Supp. 147; *Temple v. Pasquotank County*, 111 N. C. 36, 15 S. E. 886; *Bollinger v. Gallagher*, 163 Pa. 245, 43 Am. St. Rep. 791, 29 Atl. 751; *Barrows v. Downs*, 9 R. I. 446, 453, 11 Am. Rep. 233.

We must hold that the evidence of the Missouri experts in this case was competent, and, as it was uncontradicted, and no reason shown for disregarding it, it should have been controlling. No specific defects in plaintiff's title were pleaded. This was not fair to the plaintiff. He could not reasonably have anticipated the quibbles which might be suggested by an oral criticism of his abstract of title in the course of an argument before the district court. Nor was it necessary for the court independently to raise issues by a scrutiny of the abstract which were not fairly raised by the pleadings. Litigants make their own issues. Courts may, and sometimes do, know of issues which might be projected into a lawsuit which would necessitate a different result from the one which is bound to flow from the issues which are raised or the procedure which is followed by the litigants.

If we might be permitted to put aside the issue and the proof tendered in this case, and examine the abstract for ourselves, as was done by the district court, we would

make no difficulty about plaintiff's title. The memorandum touching the registration of the patent is scant, but it is not proper to assume that it is defective. Moreover, the registration of the original homesteader's final receipt issued under § 2291 of the Revised Statutes of the United States, edition of 1875, 6 Fed. Stat. Ann. p. 292, Comp. Stat. 1913, § 4532, is itself sufficient. Civ. Code, § 380; *Backwalter v. School Dist.* 65 Kan. 603, 605, 70 Pac. 806. No consequence need be attached to the vagrant deed executed in 1866, covering part of this land. This deed was executed and recorded twenty years before the homesteader's final receipt was issued, and consequently fifteen years before the land was entered as a government homestead. This deed would be worthless also to convey an after-acquired title, because, as such, it would be a contract in violation of Federal law forbidding the homesteader to bargain away his homestead while the government held the title. United States Rev. Stat. 1875, §§ 2288, 2291, Comp. Stat. 1913, §§ 4532, 4535; *Melison v. Allen*, 30 Kan. 382, 383, 2 Pac. 97. The releases of the trust deeds to which the court objected would be valid if we were permitted to take judicial notice of what, as lawyers, we do know, that in Missouri there is a practice of presenting to the county recorder the instrument evidencing the indebtedness itself as authority for its assignee to enter satisfaction of the indebtedness. On this point, however, we would be compelled to rely on the testimony of the Missouri experts; but, since their testimony was neither contradicted nor discredited, we would hold these releases sufficient. Since the deed of 1866 could have conveyed nothing, the suit to quiet title against the heirs and assigns of the grantees under that title was unnecessary, and it can be of no consequence that the time has not yet elapsed to open up the judgment.

Where the court is short of evidence or information to determine the sufficiency of an act, fact, or condition, the presumption is that it is sufficient and regular, not that it is insufficient and irregular. *Omnia rite esse acta*. The burden is on him who challenges the sufficiency.

In *Maupin on Marketable Title to Real Estate*, 708, it is said: "The defect of title of which the purchaser complains must be of a substantial character; one from which he may suffer injury. Mere immaterial defects which do not diminish in quantity, quality, or value the property contracted for, constitute no ground upon which he may reject the title. Facts must be known at the time which fairly raise a reasonable doubt as to the title; a mere possibility or

conjecture that such a state of facts may be developed at some future time is not sufficient."

Again, it may be well said that the result below was unfair. Defendant directed plaintiff to submit his abstract to defendant's attorney. That attorney raised certain questions and made certain suggestions, to comply with all of which caused plaintiff expense and trouble. After compliance, and after defendant's attorney approved plaintiff's abstract of title, defendant, without reasonable excuse, refused to carry out his bargain. He should be compelled to do so; and the case is reversed and remanded, with instructions to the district court to render judgment for plaintiff.

Burch, J., not sitting.

NORTH CAROLINA SUPREME COURT.

W. T. BROWN, Appt.,
v.

ELM CITY LUMBER COMPANY et al.

(167 N. C. 9, 82 S. E. 961.)

Libel — statement of reason for buyer's claiming shortage.

1. A reply by a seller of hay to a claim of shortage by attorneys for the buyer, that it is a case where the buyer wishes to get an allowance on a car of hay, is not libelous.

Same — privilege — showing of malice.

2. A reply by a seller of hay to a claim for shortage made by the buyer's attorneys, that it is a case where the clients want an allowance on a car of hay, is quasi privileged, and will not sustain a libel suit unless malice is shown.

(September 30, 1914.)

APPEAL by plaintiff from a judgment of the Superior Court for Perquimans County in defendants' favor in an action to recover damages for an alleged libel. Affirmed.

Statement by Allen, J.:

This is an action to recover damages for

Note. — *Libel and slander: impugning claim or good faith of claimant.*

As to charging one with exacting excessive compensation for goods or services, see the note to *Astrac v. Star Co.* 40 L.R.A. (N.S.) 79.

It may be stated as a general proposition that the question whether language used in impugning a claim or the good faith of the claimant will support an action of libel or slander depends upon whether that language imputes crime, fraud, or other reprehensible conduct; and that, to be actionable, the language must be more than hypotheti-

an alleged libel. The plaintiff and plaintiff's witnesses testified substantially to the following facts: That in October, 1912, the plaintiff purchased from the Elm City Lumber Company, through correspondence with M. E. Mohn, a carload of hay; that the hay was shipped with bill of lading and draft attached, and plaintiff had to pay for same before inspecting or weighing it; that hay was purchased, "weight guaranteed." That upon inspecting same, plaintiff found a part of it to be of inferior quality, and also a shortage of 867 pounds in weight; that he thereupon sent a statement to the Elm City Lumber Company, containing various items, all of which were settled, except the plaintiff's claim for shortage, which he sent to Moore & Dunn, attorneys, of New Bern,

North Carolina, for collection. It is admitted in said company's answer that plaintiff's claim for shortage was presented to said company by Moore & Dunn. Whereupon the defendant company, through defendant N. E. Mohn, wrote to said Moore & Dunn the letter upon which this action is based, in words and figures as follows:

Messrs. Moore & Dunn, New Bern, N. C.

Dear Sirs:—

We have your favor of the 5th and note your remarks in regard to the claim against us sent you by W. T. Brown, of Hertford, North Carolina. This claim for which Mr. Brown contends is for a difference of weight on car of hay we shipped this party some time ago. He gave us the weights as he

cal, and must exclude the possibility that the claimant acted in good faith.

A good illustration of this is *Creelman v. Marks*, 7 Blackf. 281, holding that the statement of the defendant in an action upon a promissory note, that the plaintiff has sued him on a note which he, the defendant, never signed, is not slanderous; but that the further statement that the plaintiff signed the defendant's name to it without his permission is slanderous as imputing forgery.

A similar illustration is to be found in *Rice v. Simmons*, 2 Harr. (Del.) 417, 31 Am. Dec. 766, involving the publication of a paper, in these words: "The public are hereby cautioned against receiving from Washington Rice or John Agness, a black man, any papers relative to my business, as sundry papers have been purloined from my store and fell into the hands of said W. Rice, who hath endeavored to put some of them in claim against me, viz.: bills and receipts for grain I had bought and paid for, which was returned to me by the holders when their crop was delivered and I paid for it." It was held in an action by Rice that the statement as to the attempt to "put some of them in claim" was not libelous as imputing dishonesty, as it did not imply that Rice did not come into possession in good faith. But the caution to the public against the papers was held to imply dishonesty in that it suggested that, after trying to enforce them, Rice would, himself, or by his associates or agents, try to palm them off on the public, and that in this respect the publication was libelous.

So, the mere statement by the maker of a note that the payee raised it is not slanderous as imputing forgery, as it does not necessarily imply that it was raised wrongfully or without authority. *Holt v. Ashby*, 150 Ky. 612, 150 S. W. 810.

And the statement that if a person has letters authorizing him to draw on a certain firm, he forged them, cannot be made the basis of an action for slander upon the theory that it charges a criminal offense, without an allegation that he has such letters in his possession. *Mills v. Taylor*, 3 Bibb, 469. It was stated by the court that, L.R.A.1915E.

though not imputing a criminal offense, the words would be actionable if spoken of the plaintiff in relation to his trade.

A statement that a state's attorney has made a false report under oath of the number of convictions procured by him, in that he charged for twelve convictions against a certain accused, where he had secured convictions under two indictments containing six counts each, and was entitled to but two conviction fees, is not actionable *per se*, if it implies merely that the attorney made a mistake of law as to the proper basis of making his charges, and it is a question for the jury whether the communication is open to such construction. *Young v. Richardson*, 4 Ill. App. 364.

On the other hand, a charge of disreputable and corrupt, if not criminal, conduct, which is libelous *per se*, is made against a lawyer in a newspaper article relating to a bill presented by him for legal services to a municipality whose council was tied on the question as to its allowance, and whose mayor cast the deciding vote in favor of it, the article reading: "Does any citizen believe that he [the mayor] did not have a 'divy' in the notorious fraudulent Smedley bill? . . . The notorious Smedley bill, that the mayor has included as one of the items the people are asked by him to bond the city to pay, don't have to be paid. Judge Padgham has taken care of that. The people will not have to stand that fraud." *Smedley v. Soule*, 125 Mich. 192, 84 N. W. 63.

And a newspaper publication warning persons against trading for certain notes, and stating that the plaintiff obtained them without consideration from the maker while he was mentally incapacitated for business, is not libelous *per se* as imputing fraud or dishonesty, as the publication does not exclude the possibility that the plaintiff obtained them by gift, and without knowledge or suspicion of the maker's mental condition. *Trimble v. Anderson*, 79 Ala. 514.

And though not technically charging false pretenses, a publication sufficiently charges that offense to render it liable *as per se*,

states he received them from the car, whereas both the writer and the party who shipped this car of hay for us tallied the car when it was loaded at Shippensburg, Pennsylvania. We wrote Mr. Brown when he made this claim that he must be mistaken in his tally, from the fact that we know that the hay as invoiced to him was absolutely correct. This car was shipped to W. T. Brown last October, when the writer was in Pennsylvania, and personally looked after this shipment. Had this not been the case, we would have then entertained Mr. Brown's claim. It is just a case where we think Mr. Brown wanted to get \$10 allowance on a car of hay.

Yours very truly,

Elm City Lumber Co.

Upon receipt of this letter Moore & Dunn wrote the plaintiff, declining to further prosecute his claim. The jury found the issues submitted for the plaintiff and returned a verdict for \$200. This verdict his Honor set aside, not as a matter of discretion, but as a matter of law, and the plaintiff excepted and appealed.

Messrs. P. W. McMullen and Ward & Thompson, for appellant:

A libel, as applicable to individuals, has been well defined to be a malicious publication, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one dead, or the reputation of one alive, and expose him to public hatred, contempt, or ridicule.

where it warns the public against handling a note given by the defendant to the plaintiff (naming him), and states that it was obtained from the defendant under false pretenses. *Young v. Sheppard*, — Tex. Civ. App. —, 40 S. W. 62.

A newspaper article charging an undertaker with making an unjust charge for services in preparing a body for burial is libelous if not justified. *Holmes v. Jones*, 121 N. Y. 461, 24 N. E. 701.

No question seems to have been made in *Louisville Press Co. v. Tenuelly*, 105 Ky. 366, 49 S. W. 15, as to the actionability of a newspaper article saying of an undertaker that he refused to give up the body of a child without payment of embalming charges, and that, as the parent was financially unable to pay, the undertaker kept the body in his back room to advertise the superiority of his embalming fluid.

Even where the claimant is characterized by words which *ex vi termini* imply a crime, they are not actionable *per se* as charging such a crime, if they are used, and are understood by readers or hearers to be used, with reference to acts or conduct of which no such crime can be predicated.

Thus, to say that one stole a certain person's money is not slanderous as imputing larceny, when the statement refers, and is understood to refer, to the unlawful exaction of a fee from a prisoner by one who falsely professed to be a deputy prosecuting attorney. *Taylor v. Bond*, 43 Ind. App. 616, 88 N. E. 311.

And neither larceny nor robbery is charged so as to render slanderous *per se* a statement, "You have cheated and robbed orphan children out of \$1,400," when uttered with reference to a mortgage given the plaintiff by the children's father in consideration of the plaintiff's contract to support him during his life. *Filber v. Dauterman*, 28 Wis. 134.

Larceny is not predicable of an attorney's excessive charge for services, and therefore a letter reciting the services, and characterizing the charge as petit larceny, is not actionable as imputing that offense to the attorney; but the letter is actionable L.R.A.1915E.

per se as charging an attempt knowingly and corruptly to collect the charge in moral fraud of the defendant's rights, where it reads: "To bring this abstract down the abstracter had to insert three conveyances, and we distinctly will not pay \$5 for this service. In other states the charge would be 75 cents, and such a charge as Mr. Ivey makes is simply petit larceny. If you cannot get Mr. Ivey to do work for reasonable figure, do not have him do it at all. A charge of \$1 in this case is ample to cover the amount of labor, and we are certain that is no law authorizing any such charge as he has made. If you have paid this bill, we want you to collect \$4 from Mr. Ivey for overcharge, and do not ask him to do another cent's worth of work for us again in any connection. Get along without it some way, or pay somebody else to do it, unless he makes the matter right. Five dollars for three entries on an abstract is about the biggest charge we ever heard of. . . . You must make Mr. Ivey do the square thing in this matter." *Ivey v. Pioneer Sav. & L. Co.* 113 Ala. 349, 21 So. 531.

A charge of larceny cannot be predicated of a statement of an officer of an accident insurance company, that the plaintiff was a thief, when uttered, and understood by hearers, as referring to the plaintiff's claim under a policy which the officer asserted had been obtained by the plaintiff by fraud and false representations as to her physical condition. *Merrill v. Marshall*, 113 Ill. App. 447. It was further held that a further statement that the plaintiff and her husband have conspired to defraud the company was not actionable as charging conspiracy, since the husband and wife, being one person, cannot commit that offense.

Attention is also directed to *Kirksey v. Fike*, 29 Ala. 206, holding that the statements that "he is mighty smart after night;" "put him in the dark, and he would get it all," are not in themselves actionable as charging larceny; and that they are not rendered slanderous by the fact that they were spoken of one joint owner by another in a dispute between them relative to joint property, its position and disposition, since

Simmons v. Morse, 51 N. C. (6 Jones, L.) 7; *Wakefield v. Smithwick*, 49 N. C. (4 Jones, L.) 327.

The fact of publication of any alleged libelous matter is entirely dependent upon the facts and circumstances surrounding its communication, and cannot be made to depend upon the character of the action afterwards instituted thereupon.

Com. v. Pavitt, 2 Del. Co. Rep. 16.

The letter complained of was not absolutely privileged.

Ramsey v. Cheek, 109 N. C. 270, 13 S. E. 775; *Byrd v. Hudson*, 113 N. C. 212, 18 S. E. 209; *Gattis v. Kilgo*, 128 N. C. 402, 38 S. E. 931.

It is not contended by the plaintiff that in all cases the alleged libelous publication is sufficient to be submitted to the jury upon the question of malice. But where fraud is charged, such evidence is sufficient.

Gattis v. Kilgo, 128 N. C. 410, 38 S. E. 931; *Odgers, Libel & Slander*, 225.

Messrs. Charles Whedbee and Moore & Dunn, for appellees:

The communication was privileged, and there was no publication thereof upon which an action for libel would be based.

Dickinson v. Hathaway, 122 La. 644, 21 L.R.A. (N.S.) 34, 48 So. 136.

Where defamatory matter is published in the form of an answer made to inquiries by plaintiff, or his agents, the answer is privileged, if the answer does not go beyond plaintiff's inquiries.

25 Cyc. 392.

There is no evidence of any malice what-

ever toward the plaintiff, and no act upon defendant's part whereby malice would be inferred.

Nissen v. Cramer, 104 N. C. 575, 6 L.R.A. 780, 10 S. E. 676.

Where the facts are uncontroverted, it is a question for the court whether the publication is privileged.

Gattis v. Kilgo, 128 N. C. 402, 38 S. E. 931.

Allen, J., delivered the opinion of the court:

A libel, as applicable to individuals, is a malicious publication expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one dead, or the reputation of one alive, and to expose him to public hatred, contempt, or ridicule. It is any written slander, though merely tending to render the party liable to disgrace, ridicule, or contempt, and it need not impute any definite infamous crime. *Simmons v. Morse*, 51 N. C. (6 Jones, L.) 7.

Tested by this rule there is no libel in the letter written by the agent of the defendant, unless it is contained in the last sentence, as all the remaining part of the letter is a statement of facts, couched in respectful language. The letter was not written voluntarily, but in reply to a demand for payment of a claim, and more latitude is permissible in communications of this character, where a failure to answer may furnish some evidence of the justice of the claim.

the taking of joint property by one of the owners is not larceny.

Privilege.

The qualified privilege accorded persons in maintaining their own rights against impairment by others attaches to a letter to an attorney stating that his client "bought an unsound horse to cheat somebody with," and "he finds he cannot do it and wants me to take him back," when written in response to a letter of the attorney threatening suit in the premises if settlement is not made. *Com. v. Pavitt*, 2 Del. Co. Rep. 16.

A letter written by a railway superintendent in response to a letter regarded lost baggage from the owner's attorney is only qualifiedly privileged; and the railway company is liable for the statement that the claimant took the baggage away and fraudulently presented the claim, if it was made with malice and without belief in its truth, the latter being a question for the jury. *Alabama & V. R. Co. v. Brooks*, 69 Miss. 168, 30 Am. St. Rep. 528, 13 So. 847.

And the defendant in an action for the breach of a contract employing plaintiff as manager of a business is privileged to

state, at a conference of the parties with the plaintiff's attorney after the complaint is served, his defenses to the same, even if they involve a charge of misappropriation and embezzlement of funds,—provided the defendant obtains the conference for the purpose of effecting a compromise, and not merely for an opportunity to defame the plaintiff, and provided he makes the charges in good faith and without actual malice, and confines his remarks to subjects pertinent to the occasion; and the use of intemperate language is not evidence of malice if it was the result of honest indignation and a belief that it was justified. *Massee v. Williams*, 124 C. C. A. 492, 207 Fed. 222.

A qualified privilege attaches to the statement to a board of school trustees by one of its members, that a certain applicant for a position as teacher has not such a character as will give a proper influence over pupils, and that she had claimed wages not due her, and made statements which, in the speaker's opinion, she knew to be false, in order to obtain such wages. *Henry v. Moberly*, 6 Ind. App. 490, 33 N. E. 981, subsequent appeal 23 Ind. App. 305, 51 N. E. 497.

Lord Denman, speaking of a letter written in reply to one refusing payment of rent, said in *Tuson v. Evans*, 12 Ad. & El. 733: "Some remark from the defendant on the refusal to pay the rent was perfectly justifiable, because his entire silence might have been construed into an acquiescence in that refusal, and so might have prejudiced his case upon any future claim; and the defendant would therefore have been privileged in denying the truth of the plaintiff's statement. But, upon consideration, we are of opinion that the learned judge was quite right in considering the language actually used as not justified by the occasion. Any one, in the transaction of business with another, has a right to use language *bona fide*, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly, or by its consequences, be injurious or painful to another; and this is the principle on which privileged communication rests; but defamatory comments on the motives or conduct of the party with whom he is dealing do not fall within that rule. It was enough for the defendant's interest, in the present case, to deny the truth of the plaintiff's assertion; to characterize that assertion as an attempt to defraud, and as mean and dishonest, was wholly unnecessary. This case, therefore, was properly left to the jury; and there will be no rule."

In the construction of publications alleged to be libelous "the general rule of construction is that words are to be taken in the sense which is most obvious and

natural, and according to the ideas that they are calculated to convey to those to whom they are addressed. The principle of common sense which now governs in the construction of words requires that courts shall understand them as other people would. The question always is, How would ordinary men naturally understand the language? It is not the ingeniously possible construction, but the plainly normal construction, which determines the question of libel or no libel, and in ascertaining whether the words are actionable or not the court will not resort to any technical construction of the language, or consider its grammatical structure, but, instead of measuring the injury by the literal force of the words, will look solely to the meaning which the words were naturally calculated to convey. . . . In determining the actionable quality of words the entire conversation or writing must be considered. In ascertaining the meaning of a particular phrase or sentence it must be construed in connection with the remainder of the publication of which it forms a part. A single phrase, if standing alone or used in a different connection, may be capable of a meaning of which it is not susceptible in the connection in which it is actually used." 18 Am. & Eng. Enc. Law, 2d ed. 974 et seq.

"The fact that supersensitive persons, with morbid imaginations, may be able by reading between the lines of an article to discover some defamatory meaning therein, is not sufficient to make it libelous." Reid

A communication by a taxpayer impugning a claim by a state's attorney for fees for securing convictions in criminal cases is privileged, unless both false and malicious, when made to a board of supervisors to which the claim has been presented for allowance. *Young v. Richardson*, 4 Ill. App. 364.

And the statement of a taxpayer and voter that certain assessors had perjured themselves is qualifiedly privileged when uttered at a town meeting having under consideration a claim of the assessors for reimbursement for expenses of defending a suit which, the claimant stated, involved acts done in their official capacity, but which, in fact, was an action for damages for false answers to questions propounded to them in another suit against the collector for the noncollection of taxes. *Smith v. Higgins*, 16 Gray, 251.

A newspaper article concerning a village attorney's presentment of a bill to the village for services in mandamus proceedings instituted to compel village officers to pay an invalid claim of third persons is libelous *per se* if untrue as to any one of the statements that the attorney committed perjury in presenting the claim, that he endeavored

to obtain village money by fraudulent means, that he attempted to loot the village, that he used his position of village attorney for the purpose of exacting illegal fees from the village, that he was incompetent as an attorney, that he was a pettifogger, and that he misled the council by dishonest advice. *Smith v. Hubbell*, 142 Mich. 637, 106 N. W. 547.

An indorsement on a note to the effect that it was never signed, but is a fraud and forgery, made by a cashier of a collecting bank to show the reason for nonpayment, in accordance with a custom of bankers in that state, when returning it to the party who sent it for collection, is privileged. *Caldwell v. Story*, 107 Ky. 10, 45 L.R.A. 735, 52 S. W. 850.

Attention is also directed to *Ivey v. Pioneer Sav. & L. Co.* 118 Ala. 349, 21 So. 531, holding that special damages to the plaintiff in his business of abstractor of titles cannot be recovered where a letter complaining of exorbitant charges by the plaintiff, and characterizing them as petit larceny, was of a confidential nature, having been written to the defendant's agent who had employed the plaintiff. L. A. W.

v. Providence Journal Co. 20 R. I. 120, 37 Atl. 637.

If these rules of construction are applied to the letter in controversy, the language may be distorted into a charge of fraud, but considered naturally, the last sentence is nothing but another form of denying liability. The defendant had the right to say he had weighed the hay and there was no shortage, and that therefore he would not pay the claim, and this statement of fact implied dishonesty, if there is any such implication in the letter, as much as the statement in the last sentence, to the effect that the writer thought it was just a case where the plaintiff wanted an allowance on a car of hay. The sentence complained of is strictly true, as both the plaintiff and the defendant agree that the plaintiff did want an allowance upon the car of hay, and the evidence of the plaintiff, if we understand it correctly, tends strongly to prove that at least a part of the claim made against the defendant was unfounded.

The plaintiff testified: "The bill of lading and freight bill for the movement of the shipment showed the weight of the car to be 21,600 pounds, and it was invoiced and paid for by me as 21,495 pounds."

And again: "There is usually an allowance of 1 per cent for weights on hay. These weights are guaranteed to be within 1 per cent. I never made any reduction for this 1 per cent; they never asked me. I wrote them a letter in which I stated to them that I weighed the hay myself, and, after making an allowance of 1 per cent, charged them with the balance. As a matter of fact, I never made any such allowance of 1 per cent, and continued to send the statement for shortage of 867 pounds. I did not know of this 1 per cent until after the statement was sent."

If this evidence is true, and the plaintiff cannot complain that it should be acted on, as it is his own, he wrote the defendant that he had made a deduction of 1 per cent, or 216 pounds if calculated according to the bill of lading and freight bill, or 214 pounds if calculated on the invoice, when he had not done so, and he was making a claim for a shortage of 867 pounds when, upon his own showing, it ought to have been reduced by 214 or 216 pounds. In the light of these circumstances, and considering the occasion and the letter as a whole, we are of opinion that the plaintiff cannot maintain his action upon his showing. If, however, the publication was libelous, there is another fatal defect in the plaintiff's case.

It is admitted in the plaintiff's brief, and the authorities all sustain the position, that the occasion of writing the letter by

the agent of the defendant was one of qualified privilege, and, as was said in *Ramsey v. Cheek*, 109 N. C. 274, 13 S. E. 775: "In this class of cases, an action will lie only where the party is guilty of falsehood and express malice. 13 Am. & Eng. Enc. Law, 406. Express malice is malice in fact, as distinguished from implied malice, which is raised as a matter of law by the use of words libelous *per se*, when the occasion is not privileged. . . . Proof that the words are false is not sufficient evidence of malice unless there is evidence that the defendant knew, at the time of using them, that they were false. *Fountain v. Boodle*, 2 Gale & D. 455, 3 Q. B. 5; *Odgers, Libel & Slander*, 275. That the defendant was mistaken in the charges made by him on such confidential or privileged occasion is, taken alone, no evidence of malice. *Kent v. Bongartz*, 15 R. I. 72, 2 Am. St. Rep. 870, 22 Atl. 1023, and cases cited. We do not assent to the opposite doctrine which would seem to be laid down by *Pearson, J.*, in *Wakefield v. Smithwick*, 49 N. C. (4 Jones, L.) 327, which is not supported by the authority he cites, and doubtless intended to follow, for if the words are true a defendant does not need the protection of privilege. It is when they are false that he claims it. To strip him of such protection there must be falsehood and malice. To hold that falsehood is itself proof of malice in such cases reduces the protection to depend on a presumption of the truth of the charges."

There is in the plaintiff's evidence a total failure of proof of malice, and there is nothing in the record or in the letter which shows or has a tendency to prove that the defendant did not act in good faith and did not believe the statements he made to be true.

We are inclined to disagree with his Honor in the ruling that the sending of the letter to the attorneys of the plaintiff was not a publication.

The case of *Dickinson v. Hathaway*, 122 La. 644, 21 L.R.A.(N.S.) 33, 48 So. 136, seems to sustain the ruling, although it does not clearly appear from the statement of facts that the letter in that case was read by the attorneys, and the case of *Alabama & V. R. Co. v. Brooks*, 69 Miss. 168, 30 Am. St. Rep. 529, 13 So. 847, holds to the contrary.

Being of opinion, however, that the judgment is correct, it will not be disturbed because based upon a reason to which we do not give our assent. *Hughes v. McNider*, 90 N. C. 248; *Hughes v. Hodges*, 94 N. C. 56.

Affirmed.

TENNESSEE SUPREME COURT.

O. A. CROUT, JR., Plff. in Certiorari,
v.YAZOO & MISSISSIPPI VALLEY RAIL-
ROAD COMPANY.

(131 Tenn. 687, 176 S. W. 1027.)

Carrier — requiring passenger to accompany baggage.

1. A carrier may stipulate in a mileage ticket sold at reduced rates, that baggage will be transported under it only over such lines and between such stations as the purchaser of the ticket will travel on the day the baggage is presented for checking.

Same — loss — liability as carrier.

2. The holder of a reduced rate mileage ticket, providing for transportation of baggage only over such lines and between such stations as the holder will travel on the day the baggage is presented for checking, who, for his own convenience, checks baggage to a destination to which he does not intend to go until the following day, cannot hold the carrier liable as such for its

loss by fire in the terminal station before his arrival.

Same — custom — notice.

3. To bind a railroad company by a custom of holders of mileage tickets to violate a requirement that they travel with their baggage, it must be so open, notorious, and long continued as to charge the railroad company with notice of it.

Same — waiver of rule — notice to agent.

4. A passenger cannot establish a waiver by a railroad company of its requirement that he accompany his baggage, by stating in the presence of the agent who checked it, that he did not intend to do so.

Same — effect of statute.

5. The liability of a carrier as such for baggage at destination is not established where it was tendered by the owner in violation of a requirement that he accompany it, by a statute making it the duty of the carrier to keep safely any baggage at destination until the owner shall demand it, but allowing the collection of storage charges after four days.

(May 22, 1915.)

Note. — Liability of carrier for baggage not accompanied by a passenger.

This note is supplementary to notes in 55 L.R.A. 650, and 43 L.R.A. (N.S.) 806. Although the decision in *CROUT v. YAZOO & M. VALLEY R. Co.* involved a contract limiting the right of the passenger as to the particular train upon which baggage must be sent, the court thoroughly discussed the principles underlying the question considered in these notes.

The court in *CROUT v. YAZOO & M. VALLEY R. Co.* correctly states that "there is very respectable authority for the ancient doctrine of nonliability of a carrier of baggage when the passenger does not accompany his goods so that he may be able to see after them, even in modern times, and that there is also a strong line of authorities modifying this old rule, and holding that it is not necessary for a passenger to accompany his baggage upon the same train." It also correctly states that the annotator of the *Marshall Case* in the note in 55 L.R.A. 650, took the position that none of the reasons for the "ancient doctrine" exist under modern conditions. Some cases in which it appears that some courts yet favor the older doctrine, as well as some in which the decision is based upon the later doctrine, have been cited in the note to *Southern R. Co. v. Dinkins & D. Hardware Co.* 43 L.R.A. (N.S.) 806, the later note containing only cases decided after the earlier note. The present note is but a continuation of the two earlier ones.

The quotation by the court in *CROUT v. YAZOO & M. VALLEY R. Co.* from Elliott on Railroads appears to be only that author's statement of one particular holding, rather than his own judgment, as the sentence is: L.R.A.1915E.

"So, it has been held that where a carrier receives baggage," etc., and the reference is "*Wood v. Maine C. R. Co.* 98 Me. 98, 99 Am. St. Rep. 339, 56 Atl. 457, 15 Am. Neg. Rep. 306. But compare *McKibbin v. Wisconsin C. R. Co.* 100 Minn. 270, 8 L.R.A. (N.S.) 489, 117 Am. St. Rep. 689, 110 N. W. 964." Both of these cases are cited and discussed in note in 43 L.R.A. (N.S.) 806. The cases upon which Mr. Hutchinson bases his statements quoted by the court are also considered so far as they are in point in the notes to which reference is made, *supra*. The court's quotation from 6 Cyc. 670, is not decisive as to the conclusion of that authority, as the writer is there discussing the question, "Acceptance; when liability commences," and not the question here involved. That writer comes nearer to the question here under discussion in 6 Cyc. 662, where he says: "As to personal baggage of the passenger, delivered to and taken possession of by the carrier, the liability of the latter is that of a common carrier of goods. It is immaterial whether the baggage is carried on the same train with the passenger or not." But even at this point in the discussion, the writer does not appear to have had in mind the distinction between cases in which it appeared that the baggage was not carried on the same train with the passenger through no fault of his, and those cases that are in point in this discussion. So it would seem that the particular question here considered is not developed in Cyc., and that the work is not among the authorities holding to the "ancient doctrine."

With reference to *Collins v. Boston & M. R. Co.*, cited by the court in *CROUT v. YAZOO & M. VALLEY R. Co.*, the annotator in the

CERTIORARI to the Court of Civil Appeals to review a judgment reversing a judgment of the Circuit Court for Shelby County in plaintiff's favor in an action brought to recover the value of a trunk destroyed by fire, shipped by plaintiff as baggage over defendant's road. Affirmed.

The facts are stated in the opinion.

Messrs. McKellar & Kyser for plaintiff in certiorari.

Messrs. Charles N. Burch and H. D. Minor, with Mr. Clinton H. McKay, for defendant in certiorari:

Defendant was not a common carrier of the plaintiff's trunk, and the responsibility of an insurer did not attach.

Hutchinson, Carr. 3d ed. § 1274; 4 Elliott, Railroads, §§ 333, 1652a; 6 Cyc. 670; Marshall v. Pontiac, O. & N. R. Co. 126 Mich. 45, 55 L.R.A. 650, 85 N. W. 242; Wood v. Maine C. R. Co. 98 Me. 98, 99 Am. St. Rep. 340, 56 Atl. 457, 15 Am. Neg. Rep. 306; Collins v. Boston & M. R. Co. 10 Cush. 506; Southern R. Co. v. Dinkins & D. Hardware Co. 139 Ga. 332, 43 L.R.A. (N.S.) 806, 77 S. E. 147.

A custom or usage, to be available against a party, must first measure up to the standard of dignity prescribed by the supreme court.

Pennsylvania R. Co. v. Naive, 112 Tenn. 234, 64 L.R.A. 443, 79 S. W. 124; Blake v. Stump, 73 Md. 160, 10 L.R.A. 103, 20 Atl. 788; Second Nat. Bank v. Western

Nat. Bank, 51 Md. 128; 34 Am. Rep. 800; Citizens' Bank v. Graffin, 31 Md. 530, 1 Am. Rep. 66; Patterson v. Crowther, 70 Md. 125, 16 Atl. 531; American Lead Pencil Co. v. Nashville, C. & St. L. R. Co. 124 Tenn. 64, 32 L.R.A. (N.S.) 323, 134 S. W. 613; Louisville & N. R. Co. v. United States Fidelity & G. Co. 125 Tenn. 676, 148 S. W. 671; Southern R. Co. v. Dinkins & D. Hardware Co. 139 Ga. 332, 43 L.R.A. (N.S.) 806, 77 S. E. 147.

A custom cannot contradict or destroy the terms of an express contract.

Southern R. Co. v. Dinkins & D. Hardware Co. supra; 2 Elliott, contr. § 1713; Grace v. American Cent. Ins. Co. 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207; Barnard v. Kellogg, 10 Wall. 383, 19 L. ed. 987; The Reeside, 2 Sumn. 567, Fed. Cas. No. 11,657; New Roads Oilmill & Mfg. Co. v. Kline, 83 C. C. A. 1, 154 Fed. 296; Vardeman v. Penn. Mut. L. Ins. Co. 125 Ga. 117, 54 S. E. 66, 5 Ann. Cas. 221; Dixon v. Dunham, 14 Ill. 324; Dasher v. Beers, 32 Ill. 368, 83 Am. Dec. 274; Rennell v. Kimball, 6 Allen, 356; Postal Teleg.-Cable Co. v. Willis, 93 Miss. 540, 47 So. 380; Bedford v. Flowers, 11 Humph. 242; American Lead Pencil Co. v. Nashville, C. & St. L. R. Co. 124 Tenn. 64, 32 L.R.A. (N.S.) 323, 134 S. W. 613; Williams v. Luckett, 77 Miss. 394, 26 So. 967.

A common carrier ceases to be liable as a carrier *eo instanti* with the deposit of the

earlier note in 55 L.R.A. 650, said: "In Collins v. Boston & M. R. Co. 10 Cush. 506, where plaintiff delivered merchandise to a railroad company to be shipped as baggage, intending to take passage on the same train, and so stating in response to a question of an agent of the company as to whether the goods were to be accompanied by a passenger, but who failed, without fault of the company and without its knowledge, to take such train, and traveled by a later one, the carrier was held not to be liable for the loss of the goods, in the absence of gross negligence; but this was on the ground that the goods were not baggage, and that the responsibility of a carrier of baggage could not have attached to them; and it was held that this would have been the case had plaintiff accompanied them as he expected. However, the court said the omission of the plaintiff to accompany the goods, as he informed the defendant's agent he would do, contributed materially to the loss, since what might have been a very proper disposition of them when they reached their destination, under the belief that the owner was present to take charge of them, might have been one of hazard and exposure to loss in his absence. No opinion was expressed as to what would have been the effect upon defendant's liability of plaintiff's failure to travel on the same train with the goods, if they had been proper L.R.A.1915E.

articles of baggage. Neither does it appear that any check was given for the baggage."

In Denver & R. G. R. Co. v. Doyle, — Colo. —, L.R.A.1915D, 113, 145 Pac. 688, the question here considered does not seem to have been raised by the defendant in the first instance, its answer being that plaintiff's delay in removing the baggage after it had reached its destination reduced the defendant's liability to that of a warehouseman. Plaintiff attempted to show that defendant's negligence, causing her to delay her journey two days after her baggage was checked, excused her from a prompt removal thereof. The court held that plaintiff's own negligence was the cause of her not making the trip with her baggage, and refused to permit her to plead the fact that she had not accompanied her baggage to show that the delay was for a reasonable time only. The case is not directly in point on the facts, since under either theory the defendant would probably escape liability, for the plaintiff's offer was to prove that the failure to travel on the same train contributed to, if it was not the direct cause of, the injury. But the court approved the older theory, *arguendo*.

In St. Louis, I. M. & S. R. Co. v. De Witt, — Ark. —, 171 S. W. 906, the court said: "Becoming a passenger or purchasing a ticket entitles a passenger to have his baggage carried as well as himself, and it makes no

goods in the depot warehouse at destination. Thereafter its liability is that of warehouseman.

East Tennessee, V. & G. R. Co. v. Kelly, 91 Tenn. 699, 708, 17 L.R.A. 691, 30 Am. St. Rep. 902, 20 S. W. 312, 314; Pennsylvania R. Co. v. Naive, 112 Tenn. 239, 64 L.R.A. 443, 79 S. W. 124; Butler v. East Tennessee & V. R. Co. 8 Lea, 32; Southern Exp. Co. v. Kaufman, 12 Heisk. 161; Star Clothing Mfg. Co. v. Nordeman, 118 Tenn. 387, 100 S. W. 93.

The defendant was a warehouseman at the time of the destruction of the trunk by fire.

Hutchinson, Carr. 3d ed. § 1286; Roth v. Buffalo & State Line R. Co. 34 N. Y. 548, 90 Am. Dec. 736; Jones v. Norwich & N. Y. Transp. Co. 60 Barb. 193; Louisville, C. & L. R. Co. v. Mahan, 8 Bush, 184; Kansas City, Ft. S. & M. R. Co. v. McGahey, 63 Ark. 344, 36 L.R.A. 781, 58 Am. St. Rep. 111, 38 S. W. 659, 1 Am. Neg. Rep. 1; Charlotte Trouser Co. v. Seaboard Air Line R. Co. 139 N. C. 382, 51 S. E. 973; Jacobs v. Tutt, 33 Fed. 412; Nealand v. Boston & M. R. Co. 161 Mass. 67, 36 N. E. 592; Hoeger v. Chicago, M. & St. P. R. Co. 63 Wis. 100, 53 Am. Rep. 271, 23 N. W. 435; Wiegand v. Central R. Co. 75 Fed. 370, 25 C. C. A. 681, 39 U. S. App. 763, 79 Fed. 991; Vineburg v. Grand Trunk R. Co. 13 Ont. App. Rep. 93; Wald v. Louisville, E.

& St. L. R. Co. 92 Ky. 645; 18 S. W. 850; 3 Am. & Eng. Enc. Law, 567.

Fancher, J., delivered the opinion of the court:

This is a suit to recover the value of a trunk and its contents shipped as baggage by O. A. Crout, a traveling salesman, over the Yazoo & Mississippi Valley Railroad, and which was lost by fire in the burning of the depot of the Yazoo & Mississippi Valley Railroad at Cruger, Mississippi.

Mr. Crout was using a mileage book calling for 1,000 miles, for which he paid \$20. On January 1, 1913, he was at Thornton, Mississippi, and intended to be in Cruger, Mississippi, the next day, but, not intending to go there that night, he had his trunk taken to the depot of the company at Thornton, and there had it checked by the agent from Thornton to Cruger. It was his intention at the time to go south to Yazoo City, spend the night, and return to Cruger the next morning on another and different train from the one that carried his baggage from Thornton to Cruger. He did not tell the agent who checked his trunk that he was not going with it on the train to Cruger.

It is about 18 or 20 miles from Thornton to Cruger. Thornton is a place of 150 inhabitants, with three or four stores. Cruger is a town lying north, with some 300 or 400 inhabitants, and possessing several stores

difference in these modern times whether or not the baggage is transported upon the same train with the passenger, although he has the right to have it done. Kirby's Dig. § 6615; Conheim v. Chicago G. W. R. Co. 104 Minn. 312, 17 L.R.A.(N.S.) 1091, 124 Am. St. Rep. 623, 116 N. W. 581, 15 Ann. Cas. 389. Cyc. says: 'As to personal baggage of the passenger delivered to and taken possession of by the carrier, the liability of the latter is that of the common carrier of goods. It is immaterial whether the baggage is carried on the same train with the passenger or not.' 6 Cyc. 662; Warner v. Burlington & M. River R. Co. 22 Iowa, 166, 92 Am. Dec. 389. The passenger had bought a ticket for only part of his journey, but had stated to the carrier's agent that he would buy a ticket for the remaining part at the intermediate point and continue his journey over its line. A through ticket would not give him the advantage of a lower rate over part of the line. He did as he had agreed, but, changing his mind, stayed overnight at the intermediate point and continued his journey the next day. The baggage was checked through to his ultimate destination by the carrier's agent, and the check mailed to the passenger for the reason that the agent had not had time to check it for the train on which the passenger started his journey. It was burned with L.R.A.1915E.

the baggage room at its destination, and the carrier was held liable as a common carrier. The actual facts may not bring the case within the scope of this note, as the passenger was not at fault, but the case was apparently decided upon the general principle as quoted.

In Alabama G. S. R. Co. v. Knox, 184 Ala. 499, 49 L.R.A.(N.S.) 411, 63 So. 538, the court quoted and approved practically all of the argumentative matter contained in the note in 55 L.R.A. 650, and appended to the opinion a statement that after the preparation of the opinion, it had received and considered the case annotated in 43 L.R.A.(N.S.) 806, with the note thereto. It, however, adhered to the doctrine that the carrier does not stand in the position of a gratuitous bailee merely because the passenger does not travel upon the same train on which he sent his baggage. But it said: "It may be, from a technical standpoint, that the plaintiff must have at least intended to become a passenger in order to make the defendant a carrier of baggage, but it is unsound to hold that, when the carrier received full fare for the transportation of the plaintiff and her trunk, it was merely a gratuitous bailee simply because the plaintiff did not also make the trip on defendant's train."

J. W. M.

and a hotel. The train which carried the trunk from Thornton to Cruger was due to pass the former place between 6 and 7 o'clock P. M. A train went south from Thornton to Yazoo City, which is on the same road, between 6 and 7 o'clock P. M., and when this train reached Thornton, Crout, in company with another traveling man, boarded it, and went to Yazoo City, spent the night there, and the next morning got on one of defendant's passenger trains at that point and went through Thornton to Cruger, reaching that place between 9 and 10 o'clock A. M. The trunk had reached Cruger about 9 o'clock the night before, and was placed on the platform of the depot, and shortly afterward was put inside the building; no one calling for it. The depot was new, and had a slate roof. The agent of the company at Cruger was in his office in the depot, together with the porter, until about 10 o'clock that night, after the trunk was put in the building. The next morning between 5 and 6 o'clock, without the fault of the defendant railroad or any of its servants, the depot was destroyed by fire, and the trunk burned up.

The question is whether the railroad company is liable as a carrier for the loss of this baggage; it being conceded that there is no liability if it was merely a warehouseman.

The 1,000-mile ticket was sold at a reduced price under the ordinary fare, and, by stipulations of contract on its face, entitled the holder to transportation of baggage, limiting the size and weight, and providing that "baggage not exceeding 150 pounds in weight will be checked free. Baggage weighing in excess of said free allowance will be subject to regular excess baggage charge. Baggage may be shipped not exceeding \$100 in value. Baggage shall be offered for transportation and will be transported only over such lines and between such stations as purchaser of this ticket will travel on day the baggage is presented for checking."

It is insisted by the railroad company that under this contract it is not liable for the loss of the baggage, because plaintiff did not travel over the line and between the stations on the day the baggage was presented for checking, and as provided for in the contract.

Independent of contract on the subject, there is a conflict of authorities as to the liability of a carrier when a passenger does not accompany his baggage; some holding that in such case the carrier is a gratuitous bailee.

It is said in Hutchinson on Carriers, 3d ed. vol. 3, § 1274: "The owner of the property must, of course, stand in the relation L.R.A.1915E.

of passenger to the carrier in order to fix upon him liability as a carrier of baggage. The baggage is *ex vi termini* incidental to the carriage of the owner as a passenger. If, therefore, that which would have been properly baggage had it been accompanied by the owner as a passenger should, by accident or mistake, be accepted by the carrier for transportation without being accompanied by the owner, and when he is not, or does not, become a passenger, the carrier would not have it in his custody in the character of baggage, and would not be responsible for it as such."

It is said in Elliott on Railroads, vol. 4, § 1652a: "Where a carrier receives baggage with the understanding that it will go forward as the baggage of a passenger, but he does not intend to, and does not in fact, accompany it, the carrier is liable only as a gratuitous bailee, and if the carrier deposits it in an ordinarily well-constructed baggage room with doors and windows closed in the ordinary manner, the carrier is not liable for its loss by reason of its theft by one who feloniously effects an entrance by breaking a pane of glass in one of the windows."

In 6 Cyc. 670, it is said: "Delivery must be with the intention to become a passenger."

It is also said in Hutchinson on Carriers, vol. 3, 3d ed. § 1275: "Where . . . the owner of goods who has secured the right to be carried as a passenger tenders his goods as baggage, and the carrier, believing that they are to be accompanied by him, accepts them as such, he will thereby incur with respect to their safety the responsibility of a gratuitous bailee only, if through no fault of his, the owner does not become a passenger upon the journey upon which they are taken."

It is said by Hutchinson on Carriers, vol. 3, § 1275: "When the baggage is accompanied by the owner, as the carrier has the right to suppose will be the case, emergencies may arise in which his care and attention to it may preserve it from loss; and, when his journey has been safely made, the carrier may at once deliver to him his baggage, instead of being obliged to keep it for him, and thereby prolong his own responsibility."

In Marshall v. Pontiac, O. & N. R. Co. 126 Mich. 45, 85 N. W. 242, reported in 55 L.R.A. 650, the court said: "One who purchases a railroad ticket for the sole purpose of checking his baggage upon it; with the intention of going to his destination in his private conveyance, can hold the carrier liable only as a gratuitous bailee of the baggage, and cannot recover in case it is stolen

from the baggage room, unless the carrier is guilty of gross negligence."

The annotator of that case, in his notes in L.R.A., takes issue with the court upon the subject, and expresses surprise that a railroad company should not be held liable when baggage is regularly checked to point of destination on the request of one who has a valid ticket for that journey, though he does not choose to use the ticket by riding upon the cars, and cites a number of authorities sustaining his views. This writer sees no reason for requiring that a passenger accompany the baggage upon the same train with it so as to be able to identify it and claim it as soon as destination is reached, in view of the modern developments of baggage transportation in this country, where the baggage is checked when taken into the carrier's possession, and kept in the carrier's exclusive custody until it reaches its destination. This annotator holds that the decision in *Marshall v. Pontiac, O. & N. R. Co.* supra, is based on the theory of the relation of baggage to the passenger, which does not at all fit the modern practice of railroad transportation in this country, though it is consistent with the usages of carriers of earlier times.

The supreme court of New Jersey adheres to the views expressed by the annotator in the above Michigan case, and, while conceding that many of the older authorities hold that the plaintiff must accompany his baggage in order to charge the company as the carrier of the baggage, that the methods of railroad transportation of baggage have greatly changed of late years, even to the extent of running trains exclusively for baggage, especially at certain seasons, so that a passenger has no assurance whatever that his baggage will go on the same train as that which he takes himself, even when checked in due season for that purpose. To the same effect is *McKibbin v. Wisconsin C. R. Co.* 100 Minn. 270, 8 L.R.A. (N.S.) 489, 117 Am. St. Rep. 689, 110 N. W. 964, and *Alabama G. S. R. Co. v. Knox*, 184 Ala. 489, 49 L.R.A. (N.S.) 411, 63 So. 688.

The court in the latter case held that the old rule got its origin when travel was such that the owner usually accompanied his baggage to keep an eye on it and point it out along the journey, and perhaps at a time when the checking system was not in vogue, but that there is no reason for such a rule in modern times, when the owner can give no aid by riding upon the same train with his baggage.

The supreme court of Massachusetts, in *Collins v. Boston & M. R. Co.* reported in 10 Cush. 506, a case where the passenger did not go upon the same train with his goods, held that the railroad company was not

liable for their loss by theft after they had been checked by it, and the court said: "It is easy to perceive that the omission of the plaintiff to accompany them, as he informed the defendant's agent he should, contributed materially to the loss, and that what might have been a very proper and suitable disposition of them at the station at Lawrence, under the reasonable belief that the owner of them was present to take charge of them, might have been one of hazard and exposure to loss in his absence."

Without multiplying authorities upon the lines above indicated, it is readily seen that there is very respectable authority for the ancient doctrine of nonliability of a carrier of baggage when the passenger does not accompany his goods so that he may be able to see after them, even in modern times, and that there is also a strong line of authorities, modifying this old rule, and holding that it is not necessary for a passenger to accompany his baggage upon the same train. And some cases even go to the extent to hold that, if a passenger pays for his own transportation and checks his baggage, it is immaterial to the railroad whether he ever makes the trip as a passenger or not.

The above authorities are cited, not to indicate the views of this court as to the divergence of opinion, but rather to lead up to and shed light upon the discussion bearing more directly on the present case. The authorities hereinbefore quoted refer to cases where there is no contract upon the subject, and they reflect the views of courts treating of the question in the absence of any contractual obligation in that respect.

In the present case there is a contract which fixes the rights and liabilities of the parties. This 1,000-mile ticket was sold to Crout at a reduced price, and therefore may properly be the basis of a special contract setting forth any reasonable regulations or limitation of liability. Upon this special consideration it was proper for the parties to enter into a contract upon the subject.

The holding of the supreme court of Georgia in the case of *Southern R. Co. v. Dinkins & D. Hardware Co.* reported in 139 Ga. 332, 43 L.R.A. (N.S.) 806, 77 S. E. 147, was based on facts very similar to this case; the mileage ticket seems to have been identical. That court made the following statement of its views upon a special contract such as the one here involved: "From a careful examination of the authorities and the underlying principles we deduce the rule to be that the transportation of baggage is incidental to the relation of passenger; that, whether the baggage is checked on a trip ticket or mileage ticket, in the absence of a contrary contractual stipulation, the passenger is not bound to travel on

the same train which carries his baggage; if he uses the mileage or ticket over the same line of the carrier's road within such space of time after the checking of his baggage as to indicate that the checking of the baggage and the travel relate to the same journey. But, where the carrier and the purchaser of a ticket contract with relation to the purchase of a mileage ticket, that baggage will be transported 'only over such lines and between such stations as purchaser of this ticket will travel on date baggage is presented for checking,' the contract controls; and if, in violation of the contract, the purchaser of the ticket intentionally fails to travel on the same day with his baggage, and the baggage is lost, the liability of the carrier is that of a gratuitous bailee."

We are of opinion that the Georgia court lays down the correct rule that the transportation of baggage is incidental to the relation of passenger. Shipment of baggage is not like the shipment of ordinary freight. When ordinary freight is shipped a charge is made for that transportation alone; whereas, in the carriage of baggage, the consideration for the transportation of a passenger is likewise a consideration for a certain amount of free baggage transportation. Baggage is carried incidental to the carriage of a passenger. In granting this free carriage of baggage a public carrier has the right to make reasonable rules and regulations so long as the same are not contrary to the duties of the carrier as established governing the carriage of baggage.

It has become a part of the fixed duty of carriers of passengers, by a long-continued custom to that effect, to also carry a limited amount of baggage free of charge. A carrier would have no right by contract to release itself of that duty, so long established by custom that it has become a law.

We think, furthermore, that if by accident a passenger should not accompany his baggage, or if he and the baggage should become separated by the ordinary incidents of travel, a contract such as is here presented could not release the carrier of its liability in case of loss during carriage. And in cases where there are regular baggage trains, or where the carrier itself of its own choosing does not ship the baggage on the same train with the passenger, we think there should be no release of liability.

But in a case like the present one, where the purchaser of a ticket by intention refused to comply with the contract, and to travel on the same train with his baggage, and the same was lost, there could be no liability as a carrier. The liability in such case is that of a gratuitous bailee. The railroad had a right to stipulate that the

passenger should travel upon the same day and make the same trip, so that, in point of fact, the carriage of the baggage would be incidental to the carriage of the passenger. A carrier has the right to anticipate the probability that a passenger will remove his baggage when it reaches its destination, and thereby terminate all liability, and in view of that probability a contract may be made, as in the case here, providing that the passenger shall travel on the same day of the checking of his baggage.

From this case it appears that drummers frequently remove their baggage from the depot upon arriving at Cruger on the night train. There were trucks on hand which were used for carrying trunks to store-houses, and in some cases baggage was taken to the hotel. Crout states that if he had gone from Thornton to Cruger that night that he would not have taken his trunk out of the depot, and it is insisted that the baggage would have been lost anyway, so that there was no materiality in his going upon the same train. This statement was made after the loss, and was probably only his view at that time as to what he would have done, looking back on the transaction. However that may be, the railroad had the right to contract upon the chance of his removing his baggage, and, having done so, the wilful failure of Crout to accompany it rendered the railroad only liable as a gratuitous bailee, and not as an insurer of the value.

It is next insisted by the plaintiff in this case that there was a custom among traveling men to violate the stipulations of this contract, and that in many instances persons did not travel with their baggage upon the same day; that they would check their baggage to the next town where they were going to work, and, if the hotel accommodations were poor or lacking, that they would go to a nearby town having a good hotel and remain overnight, and then double back over the same line the next day; and also that there was a custom among traveling men over defendant's road to leave their sample trunks in the depot overnight when they arrived in a town after dark and after business hours.

The proof does not show the extent of this alleged custom. The fact that some traveling men did leave their trunks in the depot overnight would not render invalid the express stipulation in the contract requiring that the passenger should travel between the same points and on the same day of the checking of his baggage, because the railroad had the right to rely upon the probability of the baggage being taken from the depot. It is not shown that there was such open, notorious, and long-continued custom

of violation of this contract as to presume a knowledge and waiver of it by the railroad. It is not shown that the railroad or its agents knew of any such custom. The fact that the printed contract was placed upon the face of the mileage book shows that the railroad relied upon the stipulations there contained. This contract was accepted by the passenger, and, if he did not read its contents, notice was nevertheless given him, and it was his duty to know the provisions contained in his ticket procured at reduced fare. Therefore the alleged custom has nothing to do with the contract.

It was also stated by the plaintiff that he remarked to another gentleman his intention not to accompany the baggage at the time he was having it checked, and of his intention to spend the night at Yazoo City, and going on to Cruger the next day, and that this statement was made near and within the hearing of the railroad agent. The agent says that he heard no such statement, and that, if he had, he would not have checked the baggage. Whether that be correct or not, the passenger could not rely upon a waiver of the written contract in his ticket merely by a statement to that effect in the presence of the agent. *Louisville & N. R. Co. v. United States Fidelity & G. Co.* 125 Tenn. 676, 148 S. W. 671; *Pennsylvania R. Co. v. Naive*, 112 Tenn. 239, 64 L.R.A. 443, 79 S. W. 124; *American Lead Pencil Co. v. Nashville, C. & St. L. R. Co.* 124 Tenn. 65, 32 L.R.A.(N.S.) 323, 134 S. W. 613.

It is further insisted that, under § 4068 of the Mississippi Code of 1906, the railroad was liable for this trunk as a carrier after it was stored as baggage. This statute provides that it shall be the duty of every railroad company to receive any trunk or baggage which the regulations of the company allow to be transported with every passenger offered in person upon his exhibiting a ticket over the road of the company, immediately upon receiving the trunk or baggage, to issue to the owner a check for the same, and upon arrival of the train to which the trunk or baggage is checked, to put it off at a reasonably convenient place to be provided for the deposit of baggage; and it is the duty of the railroad company to safely keep the trunk or baggage at the station until the owner thereof or his agent shall demand the same, provided that after four days the company should have the right to charge and collect a reasonable storage for the same.

This statute does not in any way conflict with the express contract involved in this suit. It is made the duty of the carrier to safely keep the baggage upon its arrival at destination, and it cannot charge storage.

L.R.A.1915E.

until the expiration of four days. This statute does not make the railroad responsible as a carrier after the act of carriage has ceased, but only requires the safe-keeping of the baggage, and that no storage shall be collected until the expiration of four days.

The trial court gave judgment in favor of the plaintiff, Crout. The court of civil appeals held that peremptory instructions should have been sustained on the trial of this case in favor of the railroad company, and reversed the circuit court, and dismissed the suit.

In the foregoing opinion we have not undertaken to follow each assignment of error in its regular order, for the reason that it was more orderly to treat of the questions raised in the manner pursued by us.

It results therefore that there is no error in the judgment of the Court of Civil Appeals, and the same is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

CADILLAC MOTOR CAR COMPANY,
Plff. in Err.,

v.
E. WELLS JOHNSON.

(221 Fed. 801.)

Negligence — collapse of automobile wheel — liability of manufacturer.

1. That a manufacturer of automobiles ought to have discovered that a wheel purchased from another manufacturer was defective before placing it in a car does not render him liable to one who purchases the car from a dealer, for injury through collapse of the wheel, although his prospectus expressly states that the wheels used are the best obtainable.

Evidence — custom of trade.

2. Upon the question of the liability of an automobile manufacturer for injury to

Note. — Liability of manufacturer or dealer for personal injuries caused by defects in automobile.

The present note supplements the note accompanying *Olds Motor Works v. Shaffer*, 37 L.R.A.(N.S.) 560.

Generally, as to liability of manufacturer, packer, or vendor to persons not in privity of contract, for injuries from defects in article sold, see notes to *Tomlinson v. Armour & Co.* 19 L.R.A.(N.S.) 923, and *Mazetti v. Armour & Co.* 48 L.R.A.(N.S.) 213.

The court in *CADILLAC MOTOR CAR CO. v. JOHNSON* holds that the fact that a manufacturer of automobiles ought to have discovered that a wheel purchased from another manufacturer was defective before placing it on the car does not render it liable to one

a purchaser through collapse of a wheel, evidence is admissible as to the practice of manufacturers of such vehicles, and of the trade, with respect to the examination of wheels to be used on them.

Same — reputation of manufacturer.

3. Upon the question of the liability of the manufacturer of an automobile for injury to the purchaser through collapse of a wheel which he obtains from another manufacturer, evidence is admissible of the inquiries made and the information received by him before contracting for the wheel, what reputation the manufacturer of the wheel had, and the price and reputation of his wheels.

(Coxe, Circuit Judge, dissents.)

(March 9, 1915.)

who purchases the car from a dealer for an injury occurring through the collapse of the wheel, although its prospectus expressly states that the wheels used in its cars are the best obtainable. The court recognizes the rule that a manufacturer of articles inherently dangerous, such as poisons, dynamite, gunpowder, torpedoes, bottles of water under gas pressure, etc., is liable in tort to a third person injured by reason of a defect in these articles, unless he can prove that he has exercised reasonable care in their manufacture; but the court classes automobiles with such articles as tables, chairs, pictures, etc., and states that the manufacturers of these are liable in tort to third persons for injuries caused by such articles only in case of wilful injury or fraud. A manufacturer of automobiles is clearly chargeable with knowledge that they will be driven along roads good, bad, and indifferent, sometimes at a high rate of speed, and must necessarily understand that if such a machine is constructed of defective parts, sooner or later damage will result to the user of the car by reason of those parts being insufficient to withstand the strain to which they are subjected.

An automobile so constructed would appear to be a machine of a dangerous nature to those attempting to use it for the very purpose for which it was manufactured, and it would appear that the manufacturers of these machines should be chargeable at least with the exercise of due care in the selection of materials used in them and in the workmanship employed, and it would seem that this rule should apply both to those parts which the manufacturer himself produces, and to those purchased by him from another, and that as to the latter he should be held to the exercise of due care and diligence to discover defects. This view has been taken by the other cases which have had occasion to consider the question.

On the first appeal of *Johnson v. Cadillac Motor Car Co.* 194 Fed. 497, the rule was laid down that to manufacture an automobile, or to purchase and assemble one from parts furnished by different makers, and to put on the market for sale by deal-
L.R.A.1915E.

ERROR to the District Court of the United States for the Northern District of New York, Ray, District Judge, to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Argued before Lacombe, Coxe, and Ward, Circuit Judges.

Mr. William Van Dyke, for plaintiff in error:

To exclude the degree of care exercised by others was error, either because it showed or tended to show the care which should have been exercised.

Kilbride v. Carbon Dioxide & Magnesia Co. 201 Pa. 552, 88 Am. St. Rep. 829, 51

ers to third persons, a machine, any essential part of which is known to be defective, or in the exercise of ordinary care ought to be known to be defective, and so defective as to make the car dangerous to those using it for the purpose for which designed and intended by the maker, is a wrongful act, and that the manufacturer so assembling the car and placing it on the market is liable in damages to a third person who purchases it from a dealer in ignorance of such defect and is injured while properly using it.

And it was held that to create liability in such a case it is not necessary that the instrument or machine should have been one of an inherently dangerous nature. *Ibid.* The court relative to this question said: "If perfectly safe to users as ordinarily made and used, still if so defectively constructed by reason of poor workmanship or the use of poor material that it was dangerous to the life or limb of the user when he put it to the uses for which intended by the maker, the maker is liable, for he knew, or in the exercise of ordinary care ought to have known, of the defects. A gun is not an article inherently dangerous to human life. If let alone it is perfectly harmless and can do no injury to anyone. It is only when used that it becomes a dangerous instrumentality. It is intended to be loaded with powder and ball or some other explosive material, and used either for the destruction of life or in some innocent amusement. The manufacturer of guns knows this, and should he make and put upon the market for sale to others for use by them a gun with a barrel made of ordinary tin metal or lead so colored as not to be distinguished from gun metal, he would be liable to a third person who should purchase such gun, and in using same be seriously injured. The gun so made would not be inherently dangerous to human life, if hung upon the wall and unused, but it would be inherently and imminently dangerous to human life the moment it was put to use for the purposes intended by the maker thereof and the purchaser thereof. The liability in such cases is not confined to the negligent construction and putting upon the

Atl. 347; Northern C. R. Co. v. Husson, 101 Pa. 1, 47 Am. Rep. 699; Richmond & D. R. Co. v. Elliott, 149 U. S. 266, 371, 272, 37 L. ed. 728, 732; 13 Sup. Ct. Rep. 837, 940; Westinghouse Electric & Mfg. Co. v. Heimlich, 62 C. C. A. 92, 127 Fed. 92; Carlson v. Phoenix Bridge Co., 132 N. Y. 273, 30 N. E. 750; Texas & P. C. A. Co. v. Barrett, 116 U. S. 618, 41 L. ed. 1138, 17 Sup. Ct. Rep. 707, 1 Am. Neg. Rep. 745; Canadian Northern R. Co. v. Senake, 120 C. C. A. 65, 201 Fed. 639; Shandrew v. Chicago, St. P. M. & O. R. Co. 73 G. C. A. 430, 142 Fed. 325; Bush v. Cincinnati Traction Co. 112 C. C. A. 499, 192 Fed. 244; Wabash R. Co. v. Kitchart, 79 C. C. A. 150, 149 Fed. 109, 9 Ann. Cas. 497; Southern P. Co. v. Gloyd, 70 C. C. A. 528, 138 Fed.

388; Chicago G. W. R. Co. v. McDonough, 88 C. C. A. 517, 161 Fed. 657; Marquardt v. Ball Engine Co. 58 C. C. A. 462, 122 Fed. 375; Washington & G. R. Co. v. McDade, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; Chicago G. W. R. Co. v. Egan, 86 C. C. A. 230, 159 Fed. 41; Southern P. Co. v. Hetzer, 1 L.R.A.(N.S.) 288, 68 C. C. A. 26, 135 Fed. 272; C. W. Raymond Co. v. Ball, 127 C. C. A. 35, 210 Fed. 217; Pennsylvania R. Co. v. Buckley, 127 C. C. A. 86, 210 Fed. 268; Probst v. Delamater, 100 N. Y. 266, 3 N. E. 184.

Evidence of the previous experience of defendant and of the trade with wheels produced under like circumstances was material, as tending to establish the degree

market of articles of an inherently dangerous nature, but extends to and includes all articles intended for use by others which are so defectively constructed that, by reason of such defective construction, they are articles of an inherently dangerous nature when put to the use for which intended. Gunpowder, dynamite, preparations of arsenic, and other poisons, and many other things, are articles of an inherently dangerous nature whether put to the use for which intended or not. A steam engine without water and fire is no more dangerous than an ordinary wagon, but it becomes an article of an inherently dangerous nature the moment water and fire are placed therein and steam is generated. An automobile is not an article or a machine of an inherently dangerous nature. Alone and of itself it will not move, explode, or do injury to anyone. Put gasoline in the tank and set it in motion upon the highway, and it becomes at once an article of an inherently dangerous nature if defectively constructed. Such defect may reside in the steering apparatus, so that the driver is powerless to control it, or, as in this case, in the defective spokes of the wheel, which made it liable to break down, overturn, and destroy the lives of those using it the moment it was put to the use for which intended. Injury to the user of an automobile from the breaking of a wheel is incident to its use, but not necessarily incident to its use if properly constructed of suitable material. Injury to the user of an automobile and to all riding therein naturally follows from a defective construction thereof, although such injury does not always follow its use."

In this case, where the jury found that the manufacturer of the automobile which caused the plaintiff's injury through the collapse of a defective wheel furnished to the manufacturer by another company had no knowledge of the defect, or of the fact that the maker of the wheel used weak wood in the construction of wheels, and could not have discovered the defect in the exercise of ordinary care by any approved and known test, and the only theory upon which a finding of negligence by him could

be based was a failure to scrape off paint from the spokes of the wheels furnished, and this test was unknown, and would be a most extraordinary one, it was held that a verdict finding the manufacturer liable could not be sustained. Ibid.

In *McPherson v. Buick Motor Co.* 163 App. Div. 474, 138 N. Y. Supp. 224, an action was brought against the manufacturer of an automobile by one to whom it had been sold by the manufacturer's vendee, to recover for an injury sustained through the collapse of a defective wheel while the machine was being run at a moderate rate of speed on an ordinary road, and where there was evidence from which the jury might have found that the spokes of the wheel were of inferior stock, and that by practical tests this could have been discovered prior to its use in the wheels, and also evidence that the running of the automobile at an ordinary speed would be dangerous to those riding in it, it was held that the case should have been submitted to the jury, although the manufacturer alleged that the wheels are not manufactured by him, but were purchased from a reputable manufacturer. Quoting from 29 Cyc. 484, the court said: "One who supplies a thing for such use by others that it is obvious that any defect will be likely to result in injuries to those so using it is liable to any person who, using it properly for the purpose for which it is supplied, is injured by its defective condition. The doctrine of invitation has been invoked as a ground of liability in such cases, proceeding upon the theory that he who furnishes a thing for a certain use by others invites others to use it, and is therefore bound to make it safe for such purpose."

And upon a subsequent appeal of this case in 160 App. Div. 55, 146 N. Y. Supp. 462, it was held that an automobile manufacturer is chargeable with knowledge that an automobile equipped with weak and defective wheels is a dangerous machine, and that where such manufacturer purchased ironed and painted wheels from a reputable dealer, and exercised no care to determine whether they were defective, except to run the car

of care incumbent upon defendant, and its exclusion was error.

Paul v. Consolidated Fireworks Co. 212 N. Y. 117, 105 N. E. 795; *MacPherson v. Buick Motor Co.* 153 App. Div. 474, 138 N. Y. Supp. 224; *Bruekel v. Milhau's Son*, 116 App. Div. 835, 102 N. Y. Supp. 395; *Kilbride v. Carbon Dioxide & Magnesia Co.* 201 Pa. 552, 88 Am. St. Rep. 829, 51 Atl. 347; *Northern C. R. Co. v. Husson*, 101 Pa. 1, 47 Am. Rep. 690; *Gerkin v. Brown & S. Co.* 177 Mich. 45, 48 L.R.A.(N.S.) 224, 143 N. W. 48, 4 N. C. C. A. 254; *Gould v. Slater Woolen Co.* 147 Mass. 315, 17 N. E. 531; *Conyes v. Oceanic Amusement Co.* 202 N. Y. 408, 95 N. E. 801; *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; *Chicago & A. R. Co. v. Kerr*, 148 Ill. 605, 35 N. E. 1117; *American Locomotive Co. v. White*, 123 C. C. A. 464, 205 Fed. 260.

The standard of testing or inspecting is that known and used by others in the trade, and not that which experts say would disclose the defect, or plaintiff might suggest as practical.

Canadian Northern R. Co. v. Senske, 120 C. C. A. 65, 201 Fed. 639; *Westinghouse Electric & Mfg. Co. v. Heimlich*, 62 C. C. A. 92, 127 Fed. 82; *Richmond & D. R. Co. v. Elliott*, 149 U. S. 266, 37 L. ed. 728, 13 Sup. Ct. Rep. 837; *Carlson v. Phoenix Bridge Co.* 132 N. Y. 273, 30 N. E. 750;

Texas & P. R. Co. v. Barrett, 116 U. S. 618, 41 L. ed. 1138, 17 Sup. Ct. Rep. 707, 1 Am. Neg. Rep. 745; *Johnson v. Cadillac Motor Car Co.* 194 Fed. 497; *Kirbride v. Carbon Dioxide & Magnesia Co.* 201 Pa. 552, 88 Am. St. Rep. 829, 51 Atl. 347; *Bruekel v. Milhau's Son*, 116 App. Div. 836, 102 N. Y. Supp. 395; *Titus v. Bradford, B. & K. R. Co.* 136 Pa. 618, 20 Am. St. Rep. 944, 20 Atl. 517.

Defendant was not liable for simple negligence.

Slater v. Advance Thresher Co. 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133; *Danforth v. Fisher*, 75 N. H. 111, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 535; *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057; *Vincent v. Crandall & G. Co.* 131 App. Div. 200, 115 N. Y. Supp. 600; *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338; *Huddy, Automobiles*, p. 15; *Steffen v. McNaughton*, 142 Wis. 49, 26 L.R.A.(N.S.) 382, 124 N. W. 1016, 19 Ann. Cas. 1227; *Jones v. Hoge*, 47 Wash. 663, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915, 92 Pac. 433; *Johnson v. Cadillac Motor Car Co.* 194 Fed. 497; *Engel v. Eureka Club*, 137 N. Y. 100, 33 Am. St. Rep. 692, 32 N. E. 1052; *McCafferty v. Spuyten Duyvil & P. M. R. Co.* 61 N. Y. 178, 19 Am. Rep. 267; *Salisbury v. Howe*, 87 N. Y. 132; *Gordon v. Ellenville & K. R. Co.* 195 N. Y. 137, 47 L.R.A.(N.S.) 462, 88 N. E. 14;

several miles for a test, it was liable for an injury to one who purchased the car from the manufacturer's vendee and was injured by reason of the collapse of a wheel because of a defect which might have been discovered by proper inspection. The court said: "We hold that under the circumstances the defendant owed a duty to all purchasers of its automobiles to make a reasonable inspection and test to ascertain whether the wheels purchased and put in use by it were reasonably fit for the purposes for which it used them, and, if it fails to exercise care in that respect, it is responsible for any defect which would have been discovered by such reasonable inspection and test."

In *Quackenbush v. Ford Motor Co.* 153 N. Y. Supp. 131, it was held that an automobile manufacturer is liable to one who purchases a car from the company's agent, to whom it had been sold, for damages resulting to the car by reason of inability to control it because of the manufacturer's negligence in equipping it with defective brakes and in assembling the car.

The defendant, in stating the question for determination, attempted to draw a distinction between the manufacturer's duties in cases of injury to the automobile and in cases of personal injury, but the court denied the existence of any ground for such distinction, and said: "We think there is no well-founded ground for such a distinction. A modern automobile, properly L.R.A.1915E.

equipped with brakes, and assembled in harmony with the plans underlying the construction, is not inherently a dangerous machine. In the hands of a reasonably intelligent and careful operator, it involves no greater hazards to the public than a team of horses attached to a wagon. But this theoretically safe machine becomes inherently unsafe when it is improperly assembled, or when the brakes are constructed of materials which will not stand the necessary strain upon them; such an automobile, designed for the use upon the highways (and this court may take judicial notice of the use to which such vehicles are commonly put), is a menace to the safety of the public, and it devolves the duty upon the manufacturer to use proper materials and to use due care in the assembling of such materials in the completed machine, and the character of the injuries resulting from defective materials and construction has nothing to do with the question of the manufacturer's duty. The appellant does not question that if the plaintiff's assignor had been personally injured in this accident, he would have been entitled to succeed in this action, but because the injury resulted to Mr. Demarest's property it seems to be contended that a different rule is involved. In other words, we are asked to hold that the manufacturer's duty is made to depend, not upon the question of the inherent danger of the enginery which he

Southwick v. First Nat. Bank, 84 N. Y. 429; Trussdell v. Bourke, 145 N. Y. 612, 40 N. E. 83; Laudeman v. Russell, 46 Ind. App. 32, 91 N. E. 822; Pennsylvania Steel Co. v. Elmore & H. Contracting Co. 175 Fed. 176; Kuelling v. Roderick Lean Mfg. Co. 183 N. Y. 78, 2 L.R.A.(N.S.) 303, 111 Am. St. Rep. 691, 75 N. E. 1098, 5 Ann. Cas. 124, 19 Am. Neg. Rep. 407.

Ward, Circuit Judge, delivered the opinion of the court:

In March, 1909, Johnson, the plaintiff below, bought of a dealer an automobile known as the Cadillac motor model 30, manufactured by the defendant. In July of the same year, while driving at from 12 to 15 miles an hour, the front right wheel broke, the car turned over, and Johnson sustained most serious injuries. He brought this suit to recover damages therefor, charging the defendant with simple negligence in respect to the wheel. There can be no question that the wheel was made of dead and "dozy" wood, quite insufficient for its purposes.

There was no contractual relation between the plaintiff and the defendant. The defendant bought the wheels it used of the Schwarz Company, and in its prospectus stated: "The Cadillac Company manufactures Cadillac cars almost in their entirety. It operates its own foundries, both

iron and brass, its pattern shops, sheet metal shops, machine shops, gear cutting plant, painting, finishing, and upholstering departments. It makes its own motors, its own transmissions, its own radiators, hoods, and fenders. It makes even the small parts, cap screws, bolts, and nuts. There is not one of the millions of pieces manufactured annually which does not pass the scrutiny of trained inspectors,—trained in accordance with the high ideals of the Cadillac organization.

"Wheels. The wheels are the best obtainable and equal to those used on the highest priced cars. They are of the artillery type, made from well-seasoned second growth hickory, with steel hubs. The spokes are of ample dimensions to insure great strength."

The plaintiff said of this prospectus that he had "looked it over" before he bought the car.

The trial judge proceeded throughout the case on the theory that, though an automobile is not inherently a dangerous thing, it becomes so if fitted with a weak and insufficient wheel, and if the defendant knew, or ought to have discovered, that the front right wheel was such, then, especially in view of its prospectus, it was liable in damages to the plaintiff, although it had no contractual relations with him.

places in the public highways, but upon the result of the accident which grows out of his faults in construction; the machine may go over embankments because of defects in construction, but if the operator jumps out, and is uninjured, the fault of the manufacturer may not be looked into in reference to the injuries which his property sustains. We think this is not the rule; that the manufacturer's duty depends, not upon the results of the accident, but upon the fact that his failure to properly construct the car resulted in the accident. In such cases the negligence is based upon the failure to perform a duty owed to all persons in whose presence the machine is to be used, not upon a duty to the purchasers only (Statler v. George A. Ray Mfg. Co. 125 App. Div. 69, 109 N. Y. Supp. 172, approved in 195 N. Y. 481, 88 N. E. 1063, though reversed for errors), and the particular class of injury which may result has no bearing upon the question of liability. The manufacturer had no more right to send out a car with a brake which was not properly tested than he had to send out a car with a wheel which was not up to the standard, as in the case of MacPherson v. Buick Motor Co. 153 App. Div. 474, 138 N. Y. Supp. 224, Id., 160 App. Div. 55, 145 N. Y. Supp. 462. Having disregarded this duty to the public in general, including the purchaser, the manufacturer is liable for the injury growing out of such negligence, whether such injury be to the L.R.A.1915E.

person or the property of the purchaser, although the vehicle was not purchased directly from the manufacturer, but from an agent to whom it was sold."

And in denying the contention that the doctrine adopted enlarged the liability of the manufacturer beyond what he assumed in warranting the machine, the court said: "The contract of warranty simply provides for the quality of workmanship and materials; the plaintiff in the present case (or her predecessor in interest) would have been entitled to have the defective brake materials replaced with proper ones, we may assume, if she had merely discovered the defect and no accident had resulted. That might have satisfied the implied warranty; but there was a relationship created by reason of the inherent danger to the public in sending out a defective machine without taking proper precautions to determine its safety, and the plaintiff is entitled to recover because of the damages sustained under this new relation, entirely independent of the contractual relation between the purchaser and seller. The two are not inconsistent rights; the one provides for securing what was contemplated in the transaction of purchase and sale; the other takes care of the damages sustained because of the failure of the manufacturer to perform a duty which he owed to the plaintiff's assignor in common with the public generally." J. T. W.

We do not understand this to be the law. So far as third parties are concerned, the liability of manufacturers is as follows: One who manufactures articles inherently dangerous, *e. g.*, poisons, dynamite, gunpowder, torpedoes, bottles of water under gas pressure, is liable in tort to third parties which they injure, unless he prove that he has exercised reasonable care with reference to the article manufactured. *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Torgesen v. Schultz*, 192 N. Y. 156, 18 L.R.A.(N.S.) 726, 127 Am. St. Rep. 894, 84 N. E. 956; *Wilson v. Faxon*, 208 N. Y. 108, 47 L.R.A.(N.S.) 693, 101 N. E. 799, Ann. Cas. 1914D, 49. In the *Torgesen Case*, *Willard Bartlett, J.*, said: "It is manifest that there was no contract relation between the plaintiff and the defendant, but the defendant is sought to be held liable under the doctrine of *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, and similar cases, based upon the duty of the vendor of an article dangerous in its nature, or likely to become so in the course of the ordinary usage to be contemplated by the vendor, either to exercise due care to warn users of the danger, or to take reasonable care to prevent the article sold from proving dangerous when subjected only to customary usage. The principle of law invoked is that which was well stated by Lord Justice Cotton in *Heaven v. Pender*, L. R. 11 Q. B. Div. 503, 19 Eng. Rul. Cas. 81, as follows: 'Anyone who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act.'"

On the other hand, one who manufactures articles dangerous only if defectively made or installed, *e. g.*, tables, chairs, pictures, or mirrors hung on the walls, carriages, automobiles, and so on, is not liable to third parties for injuries caused by them, except in case of wilful injury or fraud. *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543; *Loose v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Kuelling v. Roderick Lean Mfg. Co.* 183 N. Y. 78, 2 L.R.A.(N.S.) 303, 111 Am. St. Rep. 691, 75 N. E. 1098, 5 Ann. Cas. 124, 19 Am. Neg. Rep. 407. In the latter case *Vann, J.*, said: "A land roller is an implement not ordinarily dangerous, but one with a defective tongue, when the defect is thoroughly concealed for the purpose of making a better sale, may turn out to be as dangerous as a cartridge loaded with dynamite, instead of gunpowder. L.R.A.1915E.

Liability in this case rests on the simple extension of the well-established principle that the maker of an article inherently dangerous, but apparently safe, who puts it on the market without notice, is liable to one injured while using it, to the maker of an article not inherently dangerous, who made it dangerous by his own act, but so concealed the danger that it could not be discovered, and put it on the market to be sold and used as safe. The extension is logical and consistent with the authorities, for, if the implement is not inherently dangerous, but the use thereof is made dangerous by a defect wrongfully concealed, the result is the same and the motive worse."

These distinctions are recognized in *National Sav. Bank v. Ward*, 100 U. S. 195, 204, 25 L. ed. 621, 624; *Huset v. J. I. Case Threshing Mach. Co.* 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865; *Pennsylvania R. Co. v. Hummel*, 92 C. C. A. 541, 167 Fed. 89. In the first of these cases Mr. Justice Clifford says: "Pharmacists or apothecaries, who compound or sell medicines, if they carelessly label a poison as a harmless medicine, and send it so labeled into the market, are liable to all persons who, without fault on their part, are injured by using it as such medicine, in consequence of the false label; the rule being that the liability in such a case arises, not out of any contract or direct privity between the wrongdoer and the person injured, but out of the duty which the law imposes on him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with the label may have passed through many intermediate sales before it reached the hands of the person injured. *Thomas v. Winchester*, 6 N. Y. 397, 410, 57 Am. Dec. 455. Such an act of negligence being imminently dangerous to the lives of others, the wrongdoer is liable to the injured party, whether there be any contract between them or not. Where the wrongful act is not immediately dangerous to the lives of others, the negligent party, unless he be a public agent in the performance of some duty, is in general liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract. *Collis v. Selden*, L. R. 3 C. P. 496, 37 L. J. C. P. N. S. 233, 16 Week. Rep. 1170. Builders of a public work are answerable only to their employers for any want of reasonable care and skill in executing their contract, and they are not liable to third persons for accidents or injuries which may happen to them from imperfections of the structure after the same is completed and has been accepted by the employers. *Albany v. Cun-*

liff, 2 N. Y. 165, 174. Misfortune to third persons not parties to the contract would not be a natural and necessary consequence of the builder's negligence, and such negligence is not an act imminently dangerous to human life. *Loop v. Litchfield*, 42 N. Y. 351-358, 1 Am. Rep. 513. So, where the manufacturer of a steam boiler sold it to a paper company, it was held that the seller was only liable to the purchaser for defective materials, or for want of care and skill in its construction, and if after delivery to and acceptance by the purchaser, and while in use by him, an explosion occurs in consequence of such defective construction, to the injury of third persons, the latter will have no cause of action against the manufacturer. *Losee v. Clute*, 51 N. Y. 494-496, 10 Am. Rep. 638."

We are not persuaded to the contrary by the decision in *MacPherson v. Buick Motor Co.* 160 App. Div. 55, 145 N. Y. Supp. 462.

We do not regard the statements in the defendant's prospectus as a representation that it actually manufactured the wheels, but only that it bought the best wheels it could get. There was no evidence whatever that the plaintiff either read or relied on this representation before buying his car. However, in the absence of wilful injury or fraud, of which there was no claim, this representation could not be availed of by third parties in no contractual relation with the defendant. *Kuelling v. Roderick Lean Mfg. Co.* 183 N. Y. 78, 2 L.R.A. (N.S.) 303, 111 Am. St. Rep. 691, 75 N. E. 1098, 5 Ann. Cas. 124, 19 Am. Neg. Rep. 407.

Even on the theory on which the case was tried, we think much evidence bearing upon the question of the exercise by the defendant of ordinary care was erroneously excluded, to its prejudice. The practice of the manufacturers of automobiles and of the trade, as to the examination of wheels, while not controlling, was certainly relevant. In *Shannahan v. Empire Engineering Co.* 204 N. Y. 543, at page 550; 44 L.R.A. (N.S.) 1185, 98 N. E. 9, Vann, J., said: "Aside from the alleged violation of the labor law [Consol. Laws, chap. 31], the plaintiff claimed that the defendant was guilty of negligence at common law. When such a question of negligence is involved, general usage and practice is competent to show ordinary care, just as one may show the purchase of a standard article from a reputable dealer. The common usage of the business is a test of negligence, but not a conclusive or controlling test. *Bennett v. Long Island R. Co.* 163 N. Y. 1, 4, 57 N. E. 79, 7 Am. Neg. Rep. 478; *Burke v. Witherbee*, 98 N. Y. 562, 566; *Thomp. Neg.* § 3770; 29 Cyc. 609. While it is not L.R.A.1915E.

always true that what everybody does anybody may do without the imputation of negligence, still it is competent to show the general habit of mankind in the same kind of business as tending to establish a standard by which ordinary care may be judged. We have said that 'ordinarily what everybody does is all that anybody need do.' *Boyce v. Manhattan R. Co.* 118 N. Y. 314, 319, 23 N. E. 304, 5 Am. Neg. Cas. 304. Such evidence is received for what it is worth, in view of all the circumstances of the particular case, and, under proper instruction from the court as to its inconclusive nature, the jury has a right to give it such consideration as they think it should receive in connection with all the other facts."

So the defendant should have been allowed to show what inquiries it had made as to the Schwarz Company before contracting with it for wheels, what answers it received, what reputation that company had as manufacturers, that their wheels were as high priced, if not higher priced, than any in the market, and that no accident connected with the wood in the wheels had ever been heard of.

The judgment is reversed.

Coxe, Circuit Judge, dissenting:

I am unable to concur in the opinion of the court reversing the judgment herein. The plaintiff sustained serious and permanent injuries of the most aggravated character by reason of the collapsing of the front wheel of an automobile manufactured by defendant, and purchased by the plaintiff about four months prior to the accident. The principal defense is that the defendant purchased all its wheels from the Schwarz Company, of Philadelphia, a reputable manufacturer, who agreed to use for the spokes the best obtainable second growth hickory. This he did not do. On the contrary, it is undisputed that the spokes of the wheel in question were made of dead, "dozy," and rotten timber, which went to pieces when the car was moving at the rate of 10 or 12 miles an hour.

The defendant had no representative in the Schwarz factory to inspect the wood put into the wheels purchased by it, and it never made any inspection itself of the wheels, which were painted with lead-colored paint before leaving the Schwarz factory. The only test applied by defendant was to drive the car for a few miles at different speeds, making frequent turns. If the wheels had been subjected to any test, even though slight and perfunctory, it would undoubtedly have discovered the decayed spokes.

If the law, as stated in the prevailing

opinion, is sustained, the owner of an automobile entirely free from fault may be injured for life by the collapse of a decayed wheel occurring a few months after its purchase, and be absolutely without redress.

It is, I think, doubtful whether, in the circumstances disclosed, an action can be brought to a successful termination against the Pennsylvania company, where the wheel was manufactured. If this be so, it follows that an injury may be occasioned by the grossest negligence and no one be legally responsible. Such a situation would, it seems to me, be a reproach to our jurisprudence.

The principles of law invoked by the defendant had their origin many years ago, when such a delicately organized machine as the modern automobile was unknown. Rules applicable to stage coaches and farm implements become archaic when applied to a machine which is capable of running with safety at the rate of 50 miles an hour. I think the law as it exists to-day makes the manufacturer liable if he sells such a machine under a direct or implied warranty that he has made, or thoroughly inspected, every part of the machine, and it goes to pieces because of rotten material in one of its most vital parts, which the manufacturer never examined or tested in any way. If, however, the law be insufficient to provide a remedy for such negligence, it is time that the law should be changed. "New occasions teach new duties:" situations never dreamed of twenty years ago are now of almost daily occurrence.

The law should be construed to cover the conditions produced by a new and dangerous industry, and should provide redress for such injuries as the plaintiff has sustained. My own judgment is, considering the dangers to be encountered from passenger automobiles, that the manufacturer is under an implied obligation to build such cars of materials capable of doing the work required of them. He may purchase the parts of makers of high reputation, but this does not absolve him from the obligation of a personal inspection, which at least will discover obvious defects, such as decayed and "dozy" spokes. If it be impossible for the manufacturer to inspect the wheels at his own place of business, he should have a representative skilled in the business at the wheel factory to make such inspection. In other words, where the lives and limbs of human beings are at stake it is not enough for the manufacturer to assert that he bought the wheel, which collapsed four months after it was sold, from a reputable maker and thought it was made of sound material. Such an excuse might be sufficient in the case of a farm wagon L.R.A.1915E.

or a horse-drawn vehicle of any kind, but in my opinion it is wholly insufficient in the case of a wagon propelled by gasoline, which is capable of making 50 miles an hour. What would be regarded as sufficient care in the former case might be gross negligence in the latter.

The ultimate question is—Can a manufacturer of motor cars escape liability for an injury occasioned by a grossly defective wheel by proving that he purchased the wheel from a reputable manufacturer? I think this question must be answered in the negative. The law imposes the duty of constructing a safe machine upon the manufacturer. He cannot avoid that duty by buying his materials from others. He is responsible for the car sold as having been manufactured by him. In the present case the defendant's representative sold the car to the plaintiff under an implied warranty that the wheels were made of reasonably sound material. Instead of being sound and staunch, one wheel was rotten and wholly incapable of withstanding the strain put upon it. This condition could have been discovered by subjecting the wheel to the simplest tests.

If the rule contended for by the defendant be the law, a manufacturer can sell a machine which menaces the lives and limbs of those who use it, and escape all liability by asserting that he bought the materials from dealers whom he supposed to be careful and prudent.

I think the judgment should be affirmed.

MICHIGAN SUPREME COURT.

THOMAS TAYLOR

v.

INDIANA & MICHIGAN ELECTRIC COMPANY, Plff. in Err.

(— Mich. —, 151 N. W. 739.)

Water — flooding riparian property — liability of public service corporation.

1. The liability of a public service corporation organized to generate electricity to supply consumers with power and light,

Note — Duty to serve public as affecting liability of public utility for temporary interference with water rights.

There appears to be but little authority on the question whether a corporation may be relieved from liability for a temporary injury on the ground that the damage inflicted was necessary to enable it to meet its obligations to the public. The cases in which the rights of public service corporations in streams have been discussed have generally been cases where the corporation was seeking a permanent diversion

for negligently discharging the water from its pond to the injury of lower riparian property, is not different from that of private mill owners, and it cannot escape liability for emptying its pond for the purpose of making repairs on its wheels, so rapidly that lower riparian property is inundated, on the theory that it was necessary to do so to meet its obligations to the public.

Appeal — failure to instruct — absence of request.

2. One dissatisfied with the instructions given by the court upon a particular question must present a request for instructions in accordance with his views.

Same — incorrect definition — correction.

3. An incorrect definition of negligence in an instruction to the jury is not reversible error if it is corrected in a requested

instruction, so that the two, taken together, constitute a correct definition.

Same — assessment of damages — method.

4. In an action by one whose property is injured by the negligent increase of the flow of a stream, to recover for injury to his own property and to that of others whose claims are assigned to him, it is not reversible error to assess the damages to each separately, and render a verdict for the aggregate amount.

Same — refusal to submit special interrogatories.

5. Refusal to submit special interrogatories to the jury is not error if they are not specific enough to be controlling in the case.

(March 18, 1915.)

of water, or a permanent injunction against pollution or diversion thereof by other parties. On this point, as to the rights of corporations supplying water to cities, it is said in 40 Cyc. 764: "Neither a municipality nor a public service corporation has the right to appropriate and divert the waters of a non-navigable stream, for the purpose of securing an adequate supply of water for the use of the inhabitants of the municipality, to the injury of the rights and privileges appertaining to riparian owners on the stream, in virtue of such ownership, except upon the condition of making full and just compensation to such riparian owners for all the injury which they sustain. Even though the municipality owns lands bordering on the stream, it has only the rights of a riparian proprietor, which must be exercised with due regard to the similar rights of other owners." The decision in *TAYLOR v. INDIANA & M. ELECTRIC CO.*, that a corporation organized to generate electricity to supply consumers with power and light cannot escape liability for emptying its pond, for the purpose of making repairs on its wheels, so rapidly that lower riparian property is inundated, on the theory that it was necessary to do so to meet its obligations to the public, appears to be sound in principle, and is supported by what authority has been found on the question.

In *Chorman v. Queen Anne's R. Co.* 3 Penn. (Del.) 407, 54 Atl. 687, it was held that a railroad company had no greater right than a private landowner to cut an embankment and discharge upon adjoining land, to the injury of growing crops thereon, an accumulation of surface water resulting, as it was alleged, from an extraordinary storm; and that it could not escape liability for damages for so doing on the theory that it had a right to cut the ditches and discharge the water to protect its roadbed and assured the safety of passengers and freight. The court said: "For the purposes of this case, the plaintiff and the defendant company are private parties, and the rules of law governing the rights and duties of private owners of adjoining lands, L.R.A.1915E.

in respect to surface water, are applicable. We know no public right or privilege belonging to the company to use or dispose of its surface water different from that of a private owner. Whatever may be its rights and duties to see to the safety and protection of its passengers and freight as a common carrier, they do not enter into its relation to the plaintiff as owner or possessor of adjoining lands. As to these adjoining lands, they are on an exact equality."

Attention is called to several cases not strictly within the title of the note, the injury being of a permanent nature, in which the point has been considered whether corporations serving the public have any greater right to divert water from a stream than private owners generally. Thus, in *Saunders v. Bluefield Waterworks & Improv. Co.* 58 Fed. 133, the fact that a water company had contracted, for its own profit, to supply water to the inhabitants of a municipality for domestic purposes, and to a railroad company for its trains and shops, was held not to confer upon it any greater right to divert the water of a non-navigable stream to the injury of a lower riparian proprietor than any other private riparian proprietor would have. The court considered that the water company was not the agent of the railroad company or of the city to claim the right to divert the water; but even if it were otherwise, it was said, if the company came as the agent of the city and the railroad company, it could make no difference in this case, because if the water was needed for public uses it could be taken without the consent of the lower riparian owners, if at all, only by instituting condemnation proceedings. The decree was reversed for want of jurisdiction in 11 C. C. A. 232, 25 U. S. App. 70, 68 Fed. 333.

And in *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 33 L.R.A. 376, 53 Am. St. Rep. 262, 20 So. 780, the rule was laid down that the fact that a corporation is chartered for the purpose of supplying a certain city and its inhabitants with water, and is under a contract with the city to supply it and the

ERROR to the Circuit Court for Berrien County to review a judgment in plaintiff's favor in an action brought to recover damages for alleged negligent flooding of certain lands, and for injury and destruction of growing crops thereon. Affirmed.

The facts are stated in the opinion.

Mr. O. W. Coolidge, with Mr. M. L. Howell, for plaintiff in error:

Defendant had the right, in the management and operation of its plant, to utilize the entire flow of the St. Joseph river, and to discharge it in larger volume than its natural flow, and to discharge the overflow plus the water it needed for its wheels, provided that it did not overload the stream, and in the exercise of those rights it was not liable for any injuries to the lands of lower owners so occasioned, and the rights of the plaintiff are qualified by such rights of the defendant.

2 Farnham, Waters, §§ 462-467; Baker v. Boston, 12 Pick. 184, 22 Am. Dec. 421; Atty. Gen. ex rel. Muskegon Booming Co. v. Ewart Booming Co. 34 Mich. 475; Borchardt v. Wausan Boom Co. 54 Wis. 107, 41 Am. Rep. 12, 11 N. W. 440; 3 Farnham, Waters, § 982, p. 2802; Brooks v. Cedar Brook & S. C. River Improv. Co. 82 Me. 17, 7 L.R.A. 460, 17 Am. St. Rep. 459, 19 Atl. 87; Scranton v. Wheeler, 6 C. C. A. 585, 16 U. S. App. 152, 57 Fed. 814, 113 Mich. 565, 87 Am. St. Rep. 484, 71 N. W. 1091; Valentine ex rel. Dudley v. Berrien Springs Water Power Co. 128 Mich. 291, 87 N. W. 370; Wood v. Rice, 24 Mich. 423; Salliotte v. King Bridge, 65 L.R.A. 620, 58 C. C. A. 466, 122 Fed. 378; High Bridge Lumber Co. v. United States, 16 C. C. A. 460, 37 U. S. App. 234, 69 Fed. 320; Holyoke Water-Power Co. v. Connecticut River Co. 52 Conn. 570, 22 Blatchf. 131, 20 Fed. 71; Smith v. Agawam Canal Co. 2 Allen, 355; Alexander v. Milwaukee, 16 Wis. 248; Hollister v. Union Co. 9 Conn. 436, 25 Am. Dec. 36; Hoagland v. State, — Cal. —, 22 Pac. 142; Gibson v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; Henry v. Vermont C. R. Co. 30 Vt. 638, 73 Am. Dec. 329; Gregory v. Bush, 64 Mich. 37, 8 Am. St. Rep. 797, 31 N. W. 90;

people therein with water, does not give the corporation any additional right to use or appropriate the water in a well-defined stream flowing over or through lands of different landowners.

In an action to recover damages from the owner of a creamery for the pollution of the waters of a creek flowing through the plaintiff's farm, by the throwing of washings and refuse from the creamery into the stream, it was held in Bowman v. Humphrey, 124 Iowa, 744, 100 N. W. 854, that evidence was

National Copper Co. v. Minnesota Min. Co. 57 Mich. 83, 58 Am. Rep. 333, 23 N. W. 781, 17 Mor. Min. Rep. 44; Macomber v. Nichols, 34 Mich. 212, 22 Am. Rep. 522; Barry v. Peterson, 48 Mich. 263, 12 N. W. 181; Underwood v. Waldron, 33 Mich. 232; Gould v. Boston Duck Co. 13 Gray, 443; Lawrence v. American Writing Paper Co. 144 Wis. 556, 128 N. W. 440; Carter v. Thurston, 58 N. H. 104, 42 Am. Rep. 584; Merritt v. Brinkerhoff, 17 Johns. 306, 8 Am. Dec. 404; Coldwell v. Sanderson, 69 Wis. 52, 28 N. W. 232, 33 N. W. 591; Timm v. Bear, 29 Wis. 254; McKee v. Delaware & H. Canal Co. 125 N. Y. 353, 21 Am. St. Rep. 740, 26 N. E. 305; Clinton v. Myers, 46 N. Y. 511, 7 Am. Rep. 373; Pool v. Lewis, 41 Ga. 162, 5 Am. Rep. 526, 5 Mor. Min. Rep. 523; Hetrich v. Deachler, 6 Pa. 32; Bullard v. Saratoga Victory Mfg. Co. 77 N. Y. 525; Lapham v. Curtis, 5 Vt. 371, 26 Am. Dec. 310; Keeney & W. Mfg. Co. v. Union Mfg. Co. 39 Conn. 576; Hoy v. Sterrett, 2 Watts, 327, 27 Am. Dec. 313; Whaler v. Ahl, 29 Pa. 98; Whitney v. Wheeler Cotton Mills, 151 Mass. 396, 7 L.R.A. 613, 24 N. E. 774; Red River Roller Mills v. Wright, 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167; Snow v. Parsons, 28 Vt. 459, 67 Am. Dec. 723; Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102; Andrews v. Weekerman, 144 Mich. 199, 107 N. W. 870; Hoxsle v. Hoxsle, 38 Mich. 77; Buchanan v. Grand River & G. Log Running Co. 48 Mich. 367, 12 N. W. 490; White River Log & Boom Co. v. Nelson, 45 Mich. 578, 8 N. W. 587, 909; People v. Hulbert, 131 Mich. 156, 64 L.R.A. 265, 100 Am. St. Rep. 568, 91 N. W. 211; Witherel v. Muskegon Boom Co. 68 Mich. 48, 13 Am. St. Rep. 325, 35 N. W. 758; Bauman v. Pere Marquette Boom Co. 66 Mich. 544, 33 N. W. 538; 1 Thomp. Neg. 49, 72-74; Kansas City, M. & B. R. Co. v. Smith, 72 Miss. 877, 27 L.R.A. 762, 48 Am. St. Rep. 579, 17 So. 78; Ilfrey v. Sabine & E. T. R. Co. 76 Tex. 63, 13 S. W. 165; Darling v. Thompson, 106 Mich. 216, 65 N. W. 754; Hunter v. Pelham Mills, 52 S. C. 279, 68 Am. St. Rep. 904, 29 S. E. 727.

inadmissible that the business in which the defendant was engaged was one of great benefit and profit to the general public.

Generally, as to correlative rights of upper and lower proprietors as to use and flow of water in streams, see note to Barnard v. Shirley, 41 L.R.A. 737.

And as to the right of a municipality to pollute streams with sewage, see notes in 48 L.R.A. 691; 61 L.R.A. 694; 20 L.R.A. (N.S.) 1050; 25 L.R.A. (N.S.) 589; and 47 L.R.A. (N.S.) 137.

R. E. H.

Messrs. Cady & Andrews, for defendant in error:

It is not error to refuse to submit a question concerning which there was no testimony.

Darrah v. Gow, 77 Mich. 16, 43 N. W. 851; Daniels v. Aldrich, 42 Mich. 68, 3 N. W. 253; Fowler v. Hoffman, 31 Mich. 215.

The authority to build the dam and to operate the same conferred no right upon the defendant company to take property without compensation. There was no intention on the part of the war department to that effect, and if there was, it was contrary to the Constitution of the United States, in that it took property without due process of law.

Grand Rapids Boom Co. v. Jarvis, 30 Mich. 309; Grand Rapids & I. R. Co. v. Morley, 166 Mich. 66, 131 N. W. 136; Stone v. Roscommon Lumber Co. 59 Mich. 24, 26 N. W. 216; White River Log & Boom Co. v. Nelson, 45 Mich. 578, 8 N. W. 587, 909; Anderson v. Thunder Bay River Boom Co. 61 Mich. 489, 28 N. W. 518; Thunder Bay River Boom Co. v. Speechly, 51 Mich. 336, 18 Am. Rep. 184; Bauman v. Pere Marquette Boom Co. 66 Mich. 544, 33 N. W. 538; Koopman v. Blodgett, 70 Mich. 610, 14 Am. St. Rep. 527, 38 N. W. 649; McKee v. Delaware & H. Canal Co. 125 N. Y. 353, 21 Am. St. Rep. 740, 26 N. E. 305; Brewster v. J. & J. Rogers Co. 169 N. Y. 73, 58 L.R.A. 495, 62 N. E. 164; Boyington v. Squires, 71 Wis. 276, 37 N. W. 227.

The upper owner of rights on a stream cannot use its property to the detriment of the property owner below.

Day v. Louisville Coal & Coke Co. 60 W. Va. 27, 10 L.R.A.(N.S.) 167, 58 S. E. 776.

McAlvay, J., delivered the opinion of the court:

Plaintiff, for himself and as assignee of twenty-three others, recovered judgment against defendant in an action of trespass on the case for damages for negligently overflowing their lands and injuring and destroying crops growing thereon. Defendant has removed the case to this court by writ of error for review, and asks for a reversal on account of errors committed upon the trial of the case.

Defendant company owns and operates four or more dams on the St. Joseph river in this state, thereby controlling the water power of said stream for many miles above Berrien Springs. This water power, to the amount of 8,000 horse power, is utilized to generate electricity, which is sold and furnished by defendant to customers in Michigan and Indiana to be used for varied L.R.A.1915E.

purposes. The power houses located at these dams are connected by trunk lines, so that the power from all of them is united and is available to all customers. The dam of defendant with which this suit is concerned, being the farthest downstream, is located at Berrien Springs. It has a head of 21 feet and a pondage or reservoir of 900 acres. It is constructed with the power house located part way out in the dam, which has on each side of it provision made for two units, each operated by eight 48-inch turbine wheels. Between the power house and the west bank of the river only one unit is installed. On the east side two units are installed. The discharge of water from the units on the east side is about 50 feet in width. It is flanked on the west side by the power house, and on the east side by a cement wall which divides the discharge of the wheels from the discharge of the spillway. The water discharged from the wheels flows partly into the small channel and partly into the main channel of the river. These channels are formed by an island about 200 feet below the power house. The main channel of the river is on the east side of the spillway, and over it are constructed six Tainter gates, each 20 feet wide, which are raised and lowered by machinery. Small gates are constructed to control the water flowing into the wheel pits. These small gates were out of repair, and on May 12, 1909, work was commenced repairing the gates leading into the unit on the west side of the power house. This was completed May 27th. Work was commenced on the east side May 28th. As soon as this work was begun on the east side, the gates into the units where there were sixteen wheels were closed, leaving the only water taken out of the pond for power purposes that which ran through the west eight wheels. The lands of plaintiff and his assignors are located along the river below this dam. The banks of the river at plaintiff's farm were from 4 to 6 feet high above the surface of the normal flow of the water. It was the claim on the part of plaintiff, and the theory upon which his case was tried, that the overflow of these lands which occasioned the damages complained of was caused by the careless and negligent operation by the servants and agents of defendant, of the gates to this dam during the time they were repairing the small gates which controlled the water flowing into the wheel pits of the sixteen wheels on the east side of the power house; that after the repair began on the east side, in order to allow the workmen to work in the wheel pits, the water was shut off from the east two units. From May 27th to June 5th, with

the exception of that which was discharged through the west unit, which had been repaired, and was operating continuously, practically all of the water coming downstream was held back and had gradually accumulated in the 900-acre pond above the dam, so that at 4 A. M. June 5th the water was running over the crest of the dam 3.12 feet, when two of the Tainter gates, which had been raised 2 feet, were opened to 5 feet, and at 7 o'clock four of these gates, including the two just mentioned, were opened to 7 feet, and remained open for six hours, which lowered the water in the pond 2 feet in five hours, and caused the tailrace to rise 7 feet higher than the normal flow of the river. Plaintiff's land was dry at 7 A. M. of this day, and three hours later this sudden discharge of water into this channel caused the water to overflow the banks of the river and cover this farm. Plaintiff contends that this flooding continued during the next day, June 6th, causing the water on plaintiff's farm to rise 5 feet in fifty-five minutes, and that it was done by defendant for the purpose of lowering the water which had accumulated in the pond and then closing the gates to allow the water to again accumulate, while the water in the tailrace which filled the pits would quickly subside, so that the men could continue repairs. The contention of defendant is that this high water was caused by excessive rains, and that it operated this dam with due care, without negligence, and only as was necessary under the circumstances. The foregoing statement, although very brief and omitting all reference to the exhibits and technical testimony which the record contains, we think, gives the essential facts necessary to an understanding of the case. All of this evidence of all kinds in the case was submitted to and passed upon by the jury, which returned a verdict in favor of plaintiff, upon which a judgment was duly entered.

The defendant and appellant, in presenting this case before this court, both on the original hearing and on the rehearing, has confined his argument to errors which were assigned upon certain portions of the charge of the court as given, upon the refusal of the court to give certain requests, and the refusal of the court to submit special requests to the jury.

We will first consider the errors defendant has assigned upon the charge of the court as given, and in doing so will give the entire charge of the court material to the issue, indicating the portions claimed to be erroneous in the order as marked alphabetically in the record, and bracketed by defendant.

L.R.A.1915E.

"Charge of the Court."

"The defendant had a right to build its dam and impound the water in the St. Joseph river, and hold back such water in an artificial lake or pond (A). [but, by the building of that dam in question, the plaintiff and his assignors were deprived of no rights that previously had belonged to them, except perhaps certain inconveniences that are not important to be considered in this case].

"(B) [The plaintiff and his assignors had the right to cultivate their lands and plant whatever crops they pleased along the so-called river bottoms, subject to the risk of overflow and damage from the waters of the river flowing in a natural way, and no matter how much damage plaintiff and his assignors may have suffered by reason of the overflow of water from the St. Joseph river from and after the 4th day of June, 1909, he and neither of them can recover in this action if the water for any reason so flowing upon and over their lands was not more than would naturally and necessarily have been cast upon their lands if there had been no dam at the place shown by the evidence, located near Berrien Springs.]

"By permission obtained from Congress and the Secretary of War and the supervisors of Berrien county the defendant was permitted to build the dam in question. Under this permission the defendant had the right to pond and discharge the waters of the river in a reasonable way; (C) [that is, the defendant has a right to the reasonable use of the dam and impounded water in the prosecution of its business, and in such varying quantities as the volume of the stream and its own interests made reasonably necessary, keeping in view the rights of lower riparian owners, that is, those who own lands below the dam; but such permission does not give the defendant company the right to wilfully and negligently operate the dam in such a manner that the lower property owners below the dam and along the river will be injured].

"[In this case the plaintiff claims that on the 5th day of June, and for ten days or two weeks thereafter, the water in the St. Joseph river rose and flowed over its banks, and the water injured and destroyed his crops and the crops of the various persons who have assigned their claims to him. Those assignments were proper enough, and, having been made, the claims of the various parties [if they have any] can all be adjusted in this one suit.

"(D) [The plaintiff and his assignors were what are known as riparian owners; that is, they owned and occupied lands

along the St. Joseph river below the dam in question.] The simple fact that by an overflow of water from the river their crops were injured or destroyed would not render the defendant liable. And in this connection, I will charge you, as requested by defendant, that the defendant cannot be found guilty of negligence and held liable therefor without proof other than proof of the fact that the plaintiff's lands were overflowed. [Twenty-first. Given with following modification.] That means, the plaintiff or his assignors—that means that the fact that the plaintiff or his assignors received an injury does not entitle him or them to recover on that fact alone; in addition he must show, not only that he received an injury [he or they received an injury], but that the defendant, through some wilful and negligent act which a prudent man would not have done, caused the injury to the plaintiff and his assignors, or either of them.

“(E) Now [negligence consists in the doing or omitting to do something which persons of ordinary prudence and care would not have done, or would not have omitted to do, under like or similar circumstances].

“(F) [The plaintiff claims that at the time in question the defendant, by the dam before mentioned, had pooled or impounded the water in the St. Joseph river, preventing the natural flow of the river, until the fore bay or pond became full of water and was flowing over the crest of the dam; that the defendant then, without considering the rights of the landowners along the river below the dam, but wilfully and negligently, to serve some purpose of its own other than the reasonable use of such water, caused the gates of the dam to be opened so that a large volume and quantity of water was thereby suddenly discharged from said pond, and so greatly increased what would have been the natural flow of the river, thereby flooding the lands of the plaintiff and his assignors, and that the lands of the plaintiff and his assignors would not have been so flooded and their crops injured and destroyed had the water been permitted to flow down the river uninterrupted and not interfered with by defendant, and increased by the wilful and negligent operation of its dam before mentioned.]

“(G) [If you find that the defendant did wilfully and negligently operate its dam as claimed, and the crops of the plaintiff and his assignors, or either of them, were injured as claimed, the defendant is liable to the plaintiff for all of the injury caused thereby to the crops of plaintiff, and either or all of his assignors.]

“If, on the other hand, the jury find, as L.R.A.1915E.

claimed by defendant, that the time complained of there was an unusual flood of water, and that by no act of the defendant was the natural flow of the water increased in the river, as claimed by plaintiff, and that said defendant was in no wise negligent in the management of its dam at the time in question, the plaintiff cannot recover.

“I now instruct you as prayed by the defendant:

“‘If the volume of water naturally flowing in the river without increase thereof by reason of any act of the defendant overflowed the banks and inundated the property of the plaintiff and his assignors, then the defendant is not responsible in this suit.’ [Twenty-third. Given.]

“‘The case is founded upon a charge that the defendant was guilty of negligence in discharging water from its pond into the river and thereby flooding the lands of the plaintiff and his assignors, and there can be no verdict rendered against the defendant unless it was so negligent.’ [Twenty-fifth. Given.]

“‘Negligence is a disregard of duty. The plaintiff's claim is that it was defendant's duty to discharge the water from the pond in such a manner as not to greatly increase the volume flowing in the river.’ [Twenty-sixth. Given.] ‘The defendant had a right to discharge water from its pond faster than it flowed in, so as to reduce the elevation of the pond and facilitate the business of the defendant, and it would not be liable therefor.’ [Twentieth. Given, with the following modification]: unless such water was negligently discharged, and at a time and in a manner that a man of ordinary judgment and discretion would not have caused such water to be discharged, having in mind the rights of owners of land below such dam.

“‘The defendant had a right to discharge water so that its wheels could be repaired or any other necessary repairs made to its dam, if the discharge of water was necessary to enable the repairs of wheels or other necessary repairs to be made’ [Eighth. Given, with the following modification]: but this right should be exercised by defendant with due regard to the rights of owners of lands below the dam.

“‘If the jury find that the defendant is liable for injuries to the plaintiff and his assignors, or either of them, on account of the negligence of the defendant as explained, then you will proceed to determine the amount of damages sustained by the plaintiff and his assignors, or either of them.

“(H) [The measure of damages, if you find that the plaintiff or any of his assignors are entitled to damages in this

case, will be the reasonable value of the crops injured or destroyed at the time the injury occurred. In determining the amount of damages so sustained, you will take into consideration all the facts and evidence of every kind produced before you by the plaintiff and by the defendant bearing upon the question of the amount of such damages that may have been sustained by the plaintiff and his assignors, or either of them, and as reasonable men determine the amount of damages so sustained by the plaintiff and his assignors, or either of them.]

"(I) [If you find that the plaintiff is entitled to damages, you will determine the amount of damages sustained by the plaintiff individually, and each of the assignors who are entitled to damages, and report the separate damages sustained by each to the court, as well as the total amount of damages which you may find.]

"If the jury find that the defendant is not liable for any damages sustained by plaintiff or his assignors, or either of them, under the evidence and instructions of the court, your verdict will be not guilty."

From defendant's brief it appears that its principal objection to the charge of the court is that the court omitted to instruct the jury what acts and omissions on the part of the defendant would amount to negligence. In the thirty-two requests to charge which the defendant presented (six of which were given), we do not find any which specifically cover the proposition, although there are several which indicate the views of defendant as to what acts on its part would not amount to negligence. These were requests which were not given by the court, and read as follows:

"First. It was the duty of the defendant to keep its water wheels in repair and in condition to fulfil its contracts, regardless of the state of the water, and if the wheels became out of order so as to threaten their efficiency, and in order to put them in repair it was necessary to lower the water in the pond, then defendant had the right to discharge sufficient water to so lower it.

"Second. If defendant, in operating its plant in the customary manner, found it necessary to lower the water in the pond, and to do so discharge a large volume of water into its tailrace, and in so doing had no intent to injure any person, then it is not liable in this case."

"Ninth. Defendant was under no obligation whatever to hold the water at a point at or above the crest of its dam; on the contrary, it had an absolute right to discharge sufficient water so as to maintain L.R.A.1915E.

such constant head as was demanded by its operation, and it cannot be charged with negligence in so doing.

"Tenth. If an unusually large volume of water was coming into defendant's pond, either because of a freshet, or because of a discharge from other ponds above, then the defendant had a right to allow such water to escape through its gates or wheels, and to discharge sufficient of such water so as to maintain the head which it desired."

"Fourteenth. The defendant had a right to operate its wheels during the high water, as well as during low water, and it had a right to discharge all such water through its waste gates as interfered with its operation, without incurring any liability thereby."

From these requests to charge, and also from the briefs of its counsel and the oral argument upon rehearing, it appears that defendant's case is planted largely upon the theory that the defendant is in fact a public utility, subject to control by public authorities in certain respects, and has thereby acquired, in the use and operation of its dams, other and different rights and privileges from those acquired by ordinary persons or corporations in the use and exercise of rights granted to them to maintain and operate dams upon the rivers of the state of Michigan; for example, if, in the operation of its business of furnishing light and power to its customers, it becomes necessary at any time to use to its entire capacity, it had the right to do so, notwithstanding such operations released water impounded in its dams upon said stream in such large quantities that the riparian owners below were flooded and damaged; that such conduct could not be charged against it as negligence, and that all such damages were consequential; further, that, notwithstanding freshets or discharge of ponds above, defendant had a right to discharge sufficient water at any time from the dam in question to maintain a head demanded by its operations or for the purposes of necessary repairs, and could not be charged with negligence if in so doing such large quantities of water were discharged by it that lower owners were damaged. This is not the law in the state of Michigan and never has been. The fact that a public utility, so-called, is operating dams on a stream in this state, gives it no rights superior to an ordinary dam owner and no other or different liabilities. It is and always has been the law in this state that a dam owner cannot raise the water in his pond so as to flood and damage the lands of riparian owners upstream, or so manipulate the discharge of waters from

his dam that they will flood and damage the lands of such owners downstream. All persons or corporations who own and maintain dams upon the streams of this state acquire only rights to a reasonable use of the water in such streams, subject to the rights of owners above and below them, and are held responsible for damages accruing to upper or lower riparian owners caused by the negligent operation of such dams.

It was the duty of defendant, if not satisfied with the charge of the court in regard to what would constitute negligence on the part of defendant, to present a request in accordance with its views.

In our opinion the requests of defendant above quoted were properly refused by the court.

The exceptions taken by defendant to portions of the charge of the court as shown above, except as we have already stated, have not been separately presented and relied upon, so that it is necessary only for the court to consider such exceptions as are not covered by what has been said already.

Defendant's assignment (E) refers to the definition of the word "negligence" given by the court which, taken by itself, would not be considered as correct, but when taken in connection with such definition included in defendant's request No. 26, which was given by the court, the mistake is corrected, and whatever of error may appear must be considered as error without prejudice.

Another portion of the charge, assignment I, requires some attention. It refers to the instruction of the court as to how the jury should arrive at the amount of damages if plaintiff was entitled to recover. Plaintiff brought suit for himself and as assignee of twenty-three others whose lands were flooded. The testimony in the case tended to show individual losses of the assignors, as well as of plaintiff, and the total amount which he was entitled to recover, if anything, was made up of these separate items. We can see no possible prejudice arising from this. No claim is made that either the separate items or the gross amount was excessive. If any error can be said to have been committed, it was error without prejudice.

Defendant also assigns error upon the refusal of the court to submit to the jury certain special questions requested in writing by defendant, as follows:

"(1) Was the defendant negligent in permitting the water to raise in its pond at any time prior to June 7th?

"(2) Was it negligent in discharging water from its pond prior to June 7th?

"(3) Was it negligent in permitting the

water to accumulate in its pond prior to June 15th?

"(4) Was the volume of water flowing in the river from June 5th to June 12th sufficient, at all times, to overflow the banks of the river upon the lands in question?"

The court properly refused to submit any of these questions to the jury. The first three questions were not sufficiently specific, not being limited to any length of time prior to the dates named in each of them, or any particular days; therefore there could be nothing conclusive in the answers to them. It follows that the defendant was not entitled of right to have them put. The fourth question was properly refused because there was nothing in the question to indicate what volume of water was referred to. If it was the natural flow of the stream, it required the consideration of facts which were not in evidence. There was no evidence of the natural flow of the water along the premises in question, nor of the elevation of the different parcels of land involved in the case, except as to plaintiff's own premises.

By statute special questions to the jury are required to be specific, in single, short sentences. Comp. Laws 1897, § 10237.

"Special questions to the jury are intended for the purpose of a finding upon some particular question of fact in dispute on the trial." *Van Auker v. Chicago & W. M. R. Co.* 96 Mich. 307-314, 22 L.R.A. 33, 55 N. W. 971, and cases cited.

"The answers to special questions must be controlling in the case." *Fowler v. Hoffman*, 31 Mich. 215-219; *Cousins v. Lake Shore & M. S. R. Co.* 98 Mich. 386, 56 N. W. 14, 4 Am. Neg. Cas. 152, and cases cited.

From an examination of the entire charge of the court as given, we are satisfied that the learned trial judge fairly and correctly submitted the case without prejudice to defendant. The record shows that plaintiff claimed that the flooding of his lands and those of his assignors was not caused by the sudden rising of the waters in the river, but by the negligent operation of this dam by defendant in negligently impounding and releasing large quantities of water while undertaking repairs to certain of the wheels; defendant's claim and theory being that the high state of water was caused by heavy rains, and that in impounding and releasing water in large quantities while conducting repairs, it was acting within its rights, and if damages were caused to plaintiff and his assignors no liability attached. This was the principal dispute of fact in the case. Nearly all of the testimony on both sides bears upon the question. The court submitted

all questions of fact to the jury in a charge which we have already said contained no prejudicial error.

The errors assigned relative to the sufficiency of the declaration, the bill of particulars, and the assignments of claims made to plaintiff, and also to the refusal of the court to strike out all testimony on the part of the plaintiff as to the value of growing crops of corn on the premises flooded, have been examined, and we find that no error was committed in overruling the objections of defendant as to these matters.

No prejudicial error appearing in the record, the judgment of the Circuit Court is affirmed.

MINNESOTA SUPREME COURT.

THOMPSON-MCDONALD LUMBER COMPANY Reapt.,

v.

EDGAR J. MORAWETZ, Impleaded, etc.,
Appt.

(127 Minn. 277, 149 N. W. 300.)

Mechanics' Lien — necessity for delivery.

1. An actual delivery upon the premises, of material sold and furnished a contract-

Headnotes by BROWN, Ch. J.

Note. — Mechanics' lien; delivery upon the premises of material sold to contractor.

The question under annotation necessarily presupposes that the actual use of the material upon the premises is not essential to the lien,—a question upon which there is great conflict of authority, real or apparent. See note to Pittsburgh Plate Glass Co. v. Leary, 31 L.R.A.(N.S.) 746, on that question.

Under the rule adopted by the court in THOMPSON-MCDONALD LUMBER Co. v. MORAWETZ, the owner is not safe, unless he is protected by a bond, in settling with his contractor after ninety days (or other period for filing liens) has expired since the last delivery of material upon the premises, even if the record is free from liens at the time. A lien may be filed later for material that he never saw and never heard of, and the lien may include the price of other material for which no lien could be filed on account of expiration of the lien period, but for the fact that it was furnished by the same materialmen who furnished the unheard of material. So, the owner takes the risk in settling without a bond, and a search of the mechanics' lien record is no protection to him. But if the interpretation is sound, the practical business world, L.R.A.1915E.

or for use in the construction of a building thereon, is not necessary, as against the owner, to vest in the materialman a right of lien under our mechanics' lien statutes. Same — delivery to contractor.

2. In the absence of fraud and collusion between the materialman and the contractor, a good faith delivery of such material to the contractor for use in the building is all that is necessary to protect the rights of the materialman.

Same — protection of owner.

3. The owner may protect himself from fraudulent conduct on the part of the contractor by requiring a bond or other security for the payment of material purchased by him on the credit of the building and premises.

(November 6, 1914.)

APPEAL by defendant Morawetz from a judgment of the District Court for Dakota County in plaintiff's favor in an action to foreclose a mechanics' lien. Affirmed.

The facts are stated in the opinion.

Mr. Arthur M. Higgins, for appellant:

Materials are "furnished," within the meaning of the lien law, when they are placed on the premises to be charged with the lien.

Wentworth v. Tubbs, 53 Minn. 388, 55 N. W. 543; Berger v. Turnblad, 98 Minn. 163, 116 Am. St. Rep. 353, 107 N. W. 543; Howes v. Reliance Wire-Works Co. 46 Minn. 44, 48 N. W. 448; John Paul Lumber Co. v. Hormel, 61 Minn. 303, 63 N. W. 718.

except bonding and surety companies, may have recourse to the legislature for relief.

This proposition must be clearly distinguished from the one approved in those cases in which the owner of the building orders the material or prevents the delivery thereof. For example, in Trammell v. Mount, 68 Tex. 210, 2 Am. St. Rep. 479, 4 S. W. 377, the owner had contracted with plaintiff to furnish the material and build the walls of a stone house; after plaintiff had prepared all the stone, at a great distance from the premises, had hauled part of it and partly built the wall, the owner notified him that he, the owner, would be unable to comply with his part of the contract. It was held that the value of the undelivered stone and the cost of the work thereon was lienable against the property. The court, after stating the two views as to necessity of use of material, said: "We are inclined to adopt the latter view in cases where the delivery at the building is prevented by the act or direction of the owner. If he directs, for his own convenience, that the material be delivered at some other place; or, after it is prepared and nothing is left to be done by the materialman but to take it to the building spot, the owner violates his contract and refuses to receive it, it seems that justice

Mr. Josiah E. Brill, for respondent:

Actual incorporation of the material into the building is not essential to the right of lien.

Burns v. Sewell, 49 Minn. 425, 51 N. W. 224; Combination Steel & I. Co. v. St. Paul City R. Co. 52 Minn. 203, 53 N. W. 1144.

Brown, Ch. J., delivered the opinion of the court:

Defendant Morawetz entered into a contract with defendant Offrell for the construction of a building upon premises owned by him; Offrell agreeing to furnish all labor and material. On February 27, 1912, Offrell, the contractor, purchased from plaintiff certain material to be used in the construction of the building, of the value of \$288.24, and the same was used for that purpose. On March 30, 1912, the contractor purchased other and additional material for the same use and purpose of the value of \$9.71. The material so furnished was not paid for, and within ninety days from the date of the second item just mentioned, but not within ninety days from the date of the first item, plaintiff duly perfected a lien against the premises, and thereafter brought this action to foreclose the same. Plaintiff had judgment, and defendant Morawetz appealed.

The cause comes to this court upon the findings, the evidence not being returned, and the question presented is whether the findings of fact support the conclusions of law. Whether the conclusions of law are

dictates that, through his own conduct, the owner should not defeat the lien. The language of the statute does not require such a delivery, nor does it require that the material should actually enter into the construction of the improvement. To furnish material for the construction of a house, and to furnish materials which enter into its construction, are very different things. To give our statute the latter construction is to strain its words beyond their usual meaning, and this should not be done for the purpose of depriving mechanics and others of the protection which the statute was evidently intended to give them. We rather incline to a liberal construction in their favor. We have heretofore held that a delivery to the owner, no matter at what distance from the building, transfers the title to the material (Fagan v. Boyle Ice Mach. Co. 65 Tex. 324). It gives the owner of the building complete ownership and control over it; and it would be unjust to place it in the power of the person to whom it was delivered or furnished, to defeat a lien upon his property through his own wrong in appropriating it to other purposes than those for which it had been furnished. The law did not certainly intend to leave it to the owner to say whether the materialman should have his lien or not, but to compel the lien when

so supported depends upon the question, with reference to which the facts are not in dispute, whether the second item of material above mentioned was lienable under the statutes. If it was not, the lien statement was not filed in time, and the lien fails. If it was, the judgment must be affirmed. The facts are in brief as follows:

The building under construction was located in Liberty Heights, in Dakota county, and plaintiff's place of business, dealer in lumber and building material, was at Minneapolis. In substance and effect, the trial court found, in respect to the item of material in question, that on March 30, 1912, the contractor purchased of plaintiff, and plaintiff sold and delivered to him for use in the construction of the building, certain material of the value of \$9.71; that the contractor ordered the material shipped to him from Minneapolis, and that, in pursuance thereof, plaintiff delivered the same to a common carrier consigned and to be shipped to the contractor at the place where the building was under construction; that no part of the material was delivered upon the premises or taken there by the contractor or any other person, and no part thereof was ever used in the construction of the building. What became of the material does not appear.

The contention of defendant is that, as no part of the material was used in the building, or ever delivered upon the premises where the same was being constructed, the

latter had done all that was required of him, though the owner should attempt to defeat it. The present is a strong case in favor of the mechanic. He made a contract to construct the stone work of a house for a given sum. The parties with whom he contracted failed to perform their part of the contract, and forced him to quit work. Had he completed the work, he would have been entitled to the full sum agreed on, and to enforce a lien to collect it. Under the law, when compelled to desist from the work he was entitled to a *pro rata* recovery. Why should he not enforce his lien to the same extent? The law gave him a lien as an incident to the contract. Everything that he did in the performance of that contract was necessarily done towards the construction of the building, and as necessarily carried with it a right to the lien. In the nature of things much of the work had to be done away from the building. If the contractor had been permitted to go on with his contract, it would have entered into the improvement he had agreed to make. If forced by the owners to stop before he could place the work in the building, it would not change its character. It was still work done under a contract for constructing the walls, and as such should carry with it a lien upon the building. The owner was not thereby relieved from the

value thereof was not a lienable item; and, further, since the lien was not perfected within ninety days from the date of the first item of material, that the court was in error in ordering judgment for plaintiff.

Our statute (§ 7020, Gen. Stat. 1913) provides that whoever contributes to the improvement of any real estate by furnishing labor or material for the construction of a building thereon, whether under contract with the owner, contractor, or subcontractor, shall have a lien upon the premises for the value of the labor or material so furnished. The statute, being remedial in character, has always received a liberal construction and application. *Johnson v. Starret*, 127 Minn. 138, L.R.A.1915B, 708, 149 N. W. 6; 2 Dunnell's Minn. Dig. 6033. Similar stat-

liability to pay for the work done, and his liability under the contract carried with it the mechanics' lien."

It will be seen that in cases like that just discussed there is no question about the owner's liability for the debt. The only question is as to the lien; while in cases like *THOMPSON-MCDONALD LUMBER Co. v. MORAWETZ* the owner could not possibly, in the absence of the statute, be held liable personally for the debt. Cases like the Texas case are not included herein.

In *Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co.* 34 L.R.A. 625, 15 C. C. A. 289, 31 U. S. App. 704, 68 Fed. 105, it was held that no lien could be acquired under the mechanics' lien statute giving the right to such lien to persons who have "furnished material," by persons who made railroad ties for use in constructing a railroad, where the construction company breached its contract with plaintiff and refused to take the ties after they were made under its specifications, and they became a total loss to plaintiff. The ground of the decision is the fact that the ties were not "delivered to the railroad company or on its premises." At least in practice, there would be no difference between this situation and the one where the contractor breached his contract by appropriating the material to his own use without the knowledge of the owner of the building, and without the material being upon the owner's premises. This case differs from the Texas case, *supra*, in the fact that it was the contractor and not the owner, who ordered the material and breached his contract.

A distinction such as is pointed out, *supra*, would seem to be justified upon the ground that in cases like the Texas case there is privity of contract between the parties as a basis upon which the statute can operate, while in the Federal case there was neither privity of contract nor privity of estate. There is a line of cases cited in the note in 31 L.R.A. (N.S.) 746, in which it is held that there can be no lien unless the material is actually used in the construction of the building. These cases are based upon the theory that there must be

utes in other states have been construed strictly, and the rule announced that there can be no lien for material furnished unless it be actually incorporated in the building so as to form a part of the structure. Some of the authorities so holding are referred to by Mr. Justice Brown in the *Johnson Case*, *supra*, and others, including those holding to the contrary, will be found in a note to *Pittsburgh Plate Glass Co. v. Leary*, 21 L.R.A. (N.S.) 746. But that rule of strict construction has never been applied in this state. On the contrary, we have held that actual incorporation of the material into the building is not essential to the right of lien. *Burns v. Sewell*, 48 Minn. 425, 51 N. W. 224; *Hickey v. Collom*, 47 Minn. 565, 60 N. W. 918; *Combination Steel*

privy of estate to support the lien. It goes without saying that under these decisions there must be a delivery, and it is unnecessary to cite cases here based upon that theory. There is also a line of cases there cited in which it is held that, because of the peculiar wording of the statute, actual use of the material in the building is not necessary to support the lien. This position might be justified upon the theory that the legislature intended to provide a lien in every case in which the owner would be personally liable for the bill, and perhaps create such liability for the purpose of the lien in all cases in which the owner might be estopped to deny direct assent to the contractor's order on the credit of the building. It might be questioned whether a statute creating the relation of principal and general agent between the two men, who never contracted to that effect and who are thereby deprived of the right to make an ordinary building contract, would be constitutional. And the same may be said of a statute purporting to create liability where there is neither privity of contract nor privity of estate. It would therefore seem, in view of the further fact that the decision in *THOMPSON-MCDONALD LUMBER Co. v. MORAWETZ*, is opposed by many decisions and fully supported by none, that the court may have gone a little further in sustaining the lien than other courts will be willing to go. It would seem that there ought to be some sort of notice to the owner that would be sufficient to place him in the position of at least tacitly assenting to the transaction. As the court pointed out, a delivery upon the premises might not in every case be adequate, but that would seem to be an argument against holding him liable in every case in which there was such a delivery without use of the material, rather than for holding that the lien attaches in the absence of a delivery. The better rule would seem to be that the lien cannot attach unless the owner is in the position of having at least tacitly consented to the transaction, and delivery upon the premises may or it may not place him in that posi-

& I. Co. v. St. Paul City R. Co. 62 Minn. 203, 53 N. W. 1144. We have consistently followed this rule, and it is supported by the courts of other states having similar statutes. Whether a delivery of material upon the premises where the building is being constructed is essential to the right of lien has not heretofore been presented in a case between the owner of the property and the lien claimant. While such a delivery has been said in some of the opinions to be necessary, the question was not involved in the particular case, and the question is an open one in this state. The case of *Wentworth v. Tubbs*, 53 Minn. 388, 55 N. W. 543, presented a controversy between a lien claimant and a mortgagee, and involved the question whether the lien there before

the court was prior to a mortgage upon the premises, which was executed and recorded before the improvements thereon were commenced. It was held that, as against the mortgagee, the material must be delivered upon the premises, or the improvement be actually under way, in order that the lien may take priority over a mortgage executed before the commencement of the work. The case is not here in point. We have also held that a delivery of material upon the premises is not necessary to give life to the lien in those cases where a delivery is prevented by the owner. This includes instances where the material is specially prepared in conformity with special orders. *John Paul Lumber Co. v. Hormel*, 61 Minn. 303, 63 N. W. 718; *Berger v. Turnblad*, 98

tion, considering all the surrounding circumstances. It will be observed that even the Pennsylvania cases, construing a peculiarly worded statute, can be reconciled on the facts with this theory.

In *Foster v. Dohle*, 17 Neb. 631, 24 N. W. 208, it was held that "the lien of a materialman for materials furnished for the erection of a building under an agreement with the contractor extends only to such materials as were used in or delivered at the building for use therein." The court said: "But it will not be seriously contended that the mere fact that the owner enters into a contract with the builder to erect or repair a building authorizes the builder to go to every lumber yard in the city and every hardware store and purchase from each a sufficient quantity of material for the erection or repair of the building in question, and make the owner of the building liable therefore. If all this material was delivered by the materialmen at the building, and they acted in entire good faith, it is possible the owner might be liable, because the delivery of the material would be notice to him of the unusual quantity which was being furnished for which he might be liable. But that question is not before the court. The contractor, however, unless expressly constituted such, is not the agent of the owner, and cannot bind him by contracts for materials not put into the building or delivered at the same for use therein."

In *Badger Lumber Co. v. Mayes*, 38 Neb. 822, 57 N. W. 519, it was held that a lien could be filed where the lumber was delivered to the contractor at his planing mill, not on the premises, under an agreement between him and the vendor that the lumber was to be used in defendant's building, provided that it was actually so used. The court approved what is said in *Foster v. Dohle*, supra, and clearly indicated that the lien could not have been filed if the contractor had not actually delivered the lumber to the defendant's building.

Ashford v. Iowa & M. Lumber Co. 81 Neb. 561, 116 N. W. 272, is as to facts on all fours with *Thompson-McDonald Lumber Co. v. Morawetz*, 1915E.

Berger Co. v. Morawetz, but the holding is directly opposite. A plate rail was shipped to the village where the building was situated by the materialman to the contractor for use in the building, and the amount charged in the account of material previously furnished and used in the building; plaintiff depended upon this item to bring the whole account within the lien period. The court said: "The plate rail charged November 18 was never delivered on the premises or used in the construction of plaintiff's building, but entered into the construction of a dwelling built in Homer by Wiseman for a Mr. Ryan. The evidence does not bring the defendant within any of the exceptions suggested by Mr. Justice Maxwell in *Foster v. Dohle*, 17 Neb. 634, 24 N. W. 209, . . . and therefore, as to the item of the plate rail charged November 18, 1904, the defendant is not entitled to a lien. *Pomeroy v. White Lake Lumber Co.* 33 Neb. 243, 49 N. W. 1131; *Weir v. Barnes*, 38 Neb. 876, 57 N. W. 750; *North v. Globe Fence Co.* 144 Mich. 557, 108 N. W. 285; *John A. Roebeling Sons Co. v. Bear Valley Irrig. Co.* 99 Cal. 490, 34 Pac. 80; *Stimson Mill Co. v. Los Angeles Traction Co.* 141 Cal. 30, 74 Pac. 357; *McGarry v. Averill*, 50 Kan. 362, 34 Am. St. Rep. 121, 31 Pac. 1082."

In order to furnish material for a building there must be an actual or constructive delivery of the material at or near the building." *Foster Lumber Co. v. Sigma Chi Chapter House*, 49 Ind. App. 528, 97 N. E. 801. But the court also says that there can be no lien unless the material is actually used in the building. This case must therefore be considered merely as representative of that class of cases referred to supra, but not cited in this note.

The decision of the Pennsylvania courts comes nearer to supporting *Thompson-McDonald Lumber Co. v. Morawetz*, than any others on the question. The peculiar wording of the statute, however, and the facts of each particular case, serve to distinguish these cases, and it will be observed that, on the facts, each case here cited

Minn. 163, 116 Am. St. Rep. 353, 107 N. W. 543. And notwithstanding expressions found in the opinions that delivery upon the premises is usually necessary, the logical result of our decisions leads to the conclusion that, as against the owner, material sold and in good faith delivered to the contractor for use in the building entitles the materialman to a lien whether the material be, in fact, delivered upon the premises or not. If it be delivered to the contractor for use in the construction work, it would seem a strain to hold, and clearly a departure from the logic of prior decisions, that the materialman is bound to follow the contractor to the premises and see to it that the material is taken to and deposited thereon. Our decisions are to the effect that, if the material be, in fact, delivered upon the premises, the subsequent act of the contractor, even though fraudulent, in removing the same and converting it to his own personal use does not defeat the lien. If

such removal does not defeat the lien, it is a little difficult to understand why the failure of the contractor, to whom possession has been given, to take the material to the premises at all, should defeat the lien. If, in fact, delivered upon the premises, the contractor could, under the decisions referred to, within an hour thereafter, cart it away without prejudicing the rights of the lien claimant. In view of this situation no benefit can accrue to the owner by an actual delivery upon the premises, and his position would in no legal respect be protected thereby. If the material in a given case be delivered into the physical possession of the owner, it seems clear that no court would hold that his failure to deliver the same upon the premises would affect the rights of the materialman. We can conceive of no valid reason for applying a different rule where the delivery is to the contractor, the agent and representative of the owner, and for whose acts the owner is responsible, to

could be reconciled with the theory stated, *supra*.

Under a special act which applied only to the city and county of Philadelphia (March 17, 1806, 4 Sm. Laws, 300), and which created liens and provided that liens for material or labor furnished "for or in erecting and constructing, etc." should have precedence over any other lien originating after the commencement of the building, it was held in *Hinchman v. Graham*, 2 Serg. & R. 170, that material delivered to the carpenter shop, at a distance from the building for which it was furnished, was lienable, although it was never used in the building. But it is to be observed that the contest was among lien creditors, the owner of the building having become insolvent, and thereby prevented final delivery on the premises, and it is pointed out that the carpenter had sold the material after the insolvency, crediting the amount on his lien against the building, so that the creditors had in effect received the value of the material, as it had gone to lessen the amount of liens.

In *White v. Miller*, 18 Pa. 52, decided apparently under act of 1836, which repealed and supplied the act of 1806, *supra*, it was held that material furnished "on the credit of the building" was lienable thereon, even though it had been sold on execution against the contractor, and not used in the building. The rough lumber had been delivered on the premises, but the sash had been delivered to the contractor at his shop off the premises, for the purpose of painting it prior to using it in the building. The court held that title to the material passed to the owner of the building as soon as it was delivered to the contractor, and that the owner should have protected his property from sale for contractor's debts. Hence, the value of the whole was lienable because it had been furnished "on the cred-

it of the building," within the meaning of the act.

In *Dick v. Stevenson*, 9 W. N. C. 411, affirming 13 Phila. 132, it was held that, under the act of 1836, the lumber furnished on the credit of the building, but delivered to the contractor at his shop, and not on the premises, was lienable against the building, although delivered before the commencement of the building. But presumably the owner got the benefit of the material.

And it has been held that under these acts work done on lumber furnished by the contractor, by the owner of a sawmill at his mill, is lienable against the building in which the contractor intended to and did use the lumber, the work having been done on the credit of the building. *Singerly v. Doerr*, 62 Pa. 9. It will be observed that the building actually benefited by the labor.

And a later act, 1901, § 3, provides: "Any labor or materials furnished in completely fitting up or equipping the structure or other improvement for the purpose for which it was intended, whether on the property subject to the lien or elsewhere, if actually done, or used for the purpose, shall be treated as part of the erection or construction thereof."

On the whole, it would seem that when the legislature abandons the theory that a lien may be filed only for material used in the building or for the benefit of the owner, it should in justice to all parties provide some basis for the lien, and that, in the absence of such a provision, the courts should assume that it did not intend to provide for a lien for material not actually employed upon the premises, in the absence of a delivery of the material upon the premises, or other act equivalent thereto, as notice to or an implied assent by the owner.

J. W. M.

the extent at least that the premises are liable under the statutes for the value of the material so furnished. A rule requiring the materialman to follow the material to the premises would impose upon him an unnecessary burden and result in no benefit to the owner. In many instances material for the construction of buildings is shipped to the contractor at some distant point. A delivery to the carrier in such case, the material being consigned to the contractor, is a delivery to the contractor, and no useful purpose would be served by requiring the materialman to despatch a messenger with the material to see that it finally reaches the premises. Of course, fraud and collusion between the materialman and the contractor, resulting in a wrongful diversion of material, would destroy the right of lien. But in the absence of fraud we think, and so hold, that a good faith delivery of material to the contractor is sufficient to vest the right of lien.

It may at first thought seem that the owner is at a disadvantage and inadequately protected from fraud or collusion, but the matter of his protection is wholly within his own hands. He may require of the contractor a bond as security for the payment for all material purchased for the improvement.

In the case at bar the material was delivered to a carrier, consigned to the contractor at a place where the building was under construction. The delivery to the carrier was a delivery to the contractor, and plaintiff was not required, in order to protect his lien rights, to accompany the shipment and see that the material was actually delivered upon the premises.

Judgment affirmed.

KENTUCKY COURT OF APPEALS.

ROSCOE VINCENT, Appt.,

v.

S. R. HAYCRAFT.

(158 Ky. 845, 106 S. W. 613.)

Timber — reservation of title — right to annual product of trees.

A reservation by a grantor of real estate, of the timber growing thereon, with the right to remove it within a specified time, does not include title to the annual product of the trees after it has ripened and fallen to the ground.

(May 13, 1914.)

A PPEAL by defendant from a judgment of the Circuit Court for Edmonson County in plaintiff's favor in a suit to en-
L.R.A.1915E.

join defendant from appropriating a crop of beech mast. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. M. M. Logan and Ora E. Hazellip, for appellant:

Defendant was the owner of the trees growing upon the land to which plaintiff had the use and possession.

Buckwalter v. Hutcherson, 23 Ky. L. Rep. 2074, 66 S. W. 602; Byassee v. Reese, 4 Met. (Ky.) 372, 83 Am. Dec. 481; Moss v. Meshew, 8 Bush, 187; Hays v. McLin, 115 Ky. 39, 72 S. W. 339; Lenz v. South Covington & C. Street R. Co. 24 Ky. L. Rep. 1827, 72 S. W. 1132; Dils v. Hatcher, 24 Ky. L. Rep. 826, 69 S. W. 1092; McRae v. Stillwell, 111 Ga. 65, 35 L.R.A. 513, 36 S. E. 604; Wait v. Baldwin, 60 Mich. 622, 1 Am. St. Rep. 551, 27 N. W. 697; Russell v. Myers, 32 Mich. 522; Harrell v. Miller, 35 Miss. 700, 72 Am. Dec. 154.

Plaintiff had no right to prevent defendant from going upon the land and using the beech mast in any manner that he saw fit.

Irvine v. McCreary, 108 Ky. 495, 49 L.R.A. 417, 50 S. W. 966; Rowan v. Portland, 8 B. Mon. 232; Brown v. Burkenmeyer, 9 Dana, 159, 33 Am. Dec. 541; Thomas v. Bertram, 4 Bush, 317; Hall v. McLeod, 2 Met. (Ky.) 98, 74 Am. Dec. 400; Bedford-Bowling Green Stone Co. v. Oman, 115 Ky. 369, 73 S. W. 1038; Craddock v. Riddlesberger, 2 Dana, 205; Simmons v. Williford, 60 Fla. 359, 53 So. 452, Ann. Cas. 1912C, 735; Brittain v. McKay, 28 N. C. (1 Ired. L.) 265, 35 Am. Dec. 738; Beckenstoss v. Stahler, 33 Pa. 251; Flynt v. Conrad, 61 N. C. (Phill. L.) 190, 93 Am. Dec. 588;

Note. — Right as between owner of land and owner of timber thereon to annual product of the trees.

The case of Red Cypress Lumber Co. v. Beall, 5 Ga. App. 202, 62 S. E. 1056, holding that turpentine and the right to take it from the trees are appurtenances of the timber, and not of the land, where the land and timber are owned by different persons, is quite consistent with VINCENT v. HAYCRAFT, inasmuch as the latter holds that not until the mast had ripened and fallen to the ground did the right to it reside in the owner of the land.

No other authorities have been found on the present question. The distinctiveness of cases relating to fruit trees, as emphasized in VINCENT v. HAYCRAFT, requires their exclusion. Equally valueless in the present connection are cases, if any, dealing with the right, as between landlord and tenant, to the annual product of forests.

For annotation on various timber questions, see the title "Timber" in Index to L.R.A. Notes. L. A. W.

Skinner v. Wilder, 38 Vt. 115, 88 Am. Dec. 646; *Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 728; *Hoffman v. Armstrong*, 48 N. Y. 201, 8 Am. Rep. 537; *Hickey v. Michigan C. R. Co.* 96 Mich. 498, 21 L.R.A. 729, 35 Am. St. Rep. 621, 55 N. W. 989.

Messrs. Grider & Logan also for appellant.

Mr. John J. Johnson for appellee.

Clay, C., filed the following opinion:

On March 31, 1908, Gillis Vincent conveyed to S. R. Haycraft a tract of land containing about 35 acres. The deed contained the following reservation: "The party of the first part reserves all timber upon the land herein conveyed with the free and unobstructed right to cut and remove same for the final period of seven years from this date." On July 20, 1911, Gillis Vincent sold and conveyed to Roscoe Vincent the timber growing upon the land which he had previously sold to Haycraft. On April 29, 1912, Haycraft sold and conveyed the land to Roscoe Vincent; the deed containing a provision to the effect that Haycraft was to have the use and possession of the land until January 1, 1913. The timber on the land consisted principally of beech trees. In the year 1912 there grew upon these trees a very large amount of mast, which is chiefly valuable as a food for hogs. The beech mast ripened and fell on the ground in the months of October and November.

The question is: Who is the owner of the beech mast,—Roscoe Vincent, who had acquired title to both the timber and the land, or Haycraft, who had retained the use and possession of the land until January 1, 1913? The court below held that the mast belonged to Haycraft. Roscoe Vincent appeals.

The argument for Vincent is, in brief, as follows: The reservation of the timber was a reservation of an interest in the land. Haycraft never acquired any title whatever to the timber. Therefore, when he reserved the use and possession of the land, he reserved only the title which he then had. The reservation of the timber carried with it the reservation of the fruit of the timber. Having no title to the timber Haycraft could in no way acquire title to the fruit of the timber. In this connection it is insisted that the case is not unlike that of a fruit tree overhanging the premises of another, in which event it is generally held that the fruit belongs to the owner of the soil on which the tree is growing, and not to him on whose soil the fruit happens to fall. *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 646; *Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 728; *Hoffman v. Armstrong*, 48 N. Y. 201, 8 Am. Rep. 537; L.R.A.1915E.

Hickey v. Michigan C. R. Co. 96 Mich. 498, 21 L.R.A. 729, 35 Am. St. Rep. 621, 55 N. W. 989.

It may be conceded that it was the purpose of Haycraft to reserve until the following January 1st whatever estate he had in the land by virtue of his original deed, and that the case is precisely the same as if the question were between him and his grantor, Gillis Vincent. It may also be conceded that mast is as much the fruit of the beech tree as the acorn is of the oak, the chestnut of the chestnut tree, or the walnut of the walnut tree. *Bullen v. Denning*, 5 Barn. & C. 842, 8 Dowl. & R. 657, 4 L. J. K. B. 314, 29 Revised Rep. 431; *United States v. Nordlinger*, 58 C. C. A. 438, 121 Fed. 690. The case, however, is not similar to that of fruit growing on the land of one landowner and falling on the land of another. In the latter case the landowner on whose soil the fruit falls has no interest in the adjoining land, of which the tree is a part. Nor do we think the case is exactly like that of the reservation of an orchard or of certain fruit trees. The sole purpose of reserving an orchard or certain fruit trees would be to reserve the fruit, for fruit trees are valuable for the fruit alone. After all, we think the case turns on the intention of the parties in reserving the timber. Manifestly, the main purpose of the reservation was the timber itself, and not the incidental fruits of the timber.

It is the general rule that a sale or reservation of timber, to be cut and removed within a specified time, is a sale or reservation of only so much as may be cut and removed within that time. *Adkins v. Huff*, 58 W. Va. 645, 3 L.R.A.(N.S.) 649, 52 S. E. 773, 6 Ann. Cas. 246; 25 Cyc. 1551, 1552; *Jackson v. Hardin*, 27 Ky. L. Rep. 1110, 87 S. W. 1119; *Chestnut v. Green*, 120 Ky. 385, 86 S. W. 1122. Therefore the removal of the timber within the time specified is an element necessary to the completion of the title. Here the original grantor, Gillis Vincent, during the time that the title to the timber was in him, and thereafter the grantee of the timber, Roscoe Vincent, had the right at any time before the expiration of seven years to cut and remove the timber in question. Therefore, while the use and possession of the land were reserved by Haycraft, Roscoe Vincent had a right to go upon the land and cut and remove the timber. In doing this he had the right to take away anything that was a constituent part of the timber. This carried with it the right to take the mast so long as it was on the trees. When, however, the mast became ripe and fell on the ground, it was no longer a part of the timber; and the right to cut and remove the timber did not carry with it the

independent right to go on the premises and carry away the fallen mast. That being true, we conclude that the retention of the use and possession of the land until the following January 1st gave to Haycraft the right to appropriate to his own use the ripened mast which had fallen on the ground during the months of October and November.

Judgment affirmed.

NEW HAMPSHIRE SUPREME COURT.

HORACE J. HOLDEN, Admr., etc., of
David H. Cook, Deceased,
v.

FARMERS' & TRADERS NATIONAL
BANK.

(— N. H. —, 93 Atl. 1040.)

Executor — withdrawal of deposit made without authority — liability of bank.

1. A bank is not liable to account to an administrator of a decedent's estate for money deposited by persons assuming without authority to act as executors of such estate, and paid out on their checks without notice of their lack of authority, even though the payment is in satisfaction of a debt of one of the acting executors.

Bank — payment to unauthorized executor — liability.

2. A bank which pays a deposit made by a person since deceased, upon the order of one acting as executor without authority, is bound to account therefor to a legal representative of the estate.

(April 6, 1915.)

TRANSFER by the Superior Court for Coos County for the opinion of the Supreme Court, upon exceptions by plaintiff to the order of nonsuit of an action brought to charge defendant for certain funds as the property of the estate represented by him. Sustained.

Decedent, David H. Cook, died in 1907, and left a will in which Edward A. and Benjamin F., his sons, were named as executors. The will was admitted to probate,

but the sons failed to qualify. At the time of decedent's death he had on deposit with the defendant bank the sum of \$17.57. The sons assumed to act as executors and collected \$3,235.23 of the money of said estate. An account was opened by them with the defendant as "E. A. & B. F. Cook, executors," and the money collected by them deposited, and it, together with the \$17.57, was paid out upon checks drawn by them. Among these checks was one for \$300 given to take up a mortgage. Defendant dealt with decedent's sons in good faith and in the usual way, and had no knowledge that they were not executors.

Further facts appear in the opinion.

Mr. Horace J. Holden for plaintiff.

Messrs. Drew, Shurtleff, Morris, & Oakes and Thomas F. Johnson, for defendant:

The deposits made by E. A. & B. F. Cook, executors, with which we are dealing, were general deposits.

Alston v. State, 92 Ala. 124, 13 L.R.A. 659, 9 So. 732; New York County Nat. Bank v. Massey, 192 U. S. 138, 145, 48 L. ed. 380, 383, 24 Sup. Ct. Rep. 199; Leapheart v. Commercial Bank, 45 S. C. 563, 33 L.R.A. 700, 55 Am. St. Rep. 800, 23 S. E. 939; 3 R. C. L. 519.

The defendant bank, by custom or law, statutory or otherwise, was under no obligation to know, nor could be considered at fault for not knowing, when E. A. Cook made his first deposit, April 1, 1907, that he was not a qualified executor of the will of David H. Cook.

In the absence of notice or knowledge of an adverse claimant, a bank cannot question the right of a customer to withdraw moneys which he has deposited, nor refuse the demands of the depositor by check. If money is deposited by one as executor, the depositor as executor has the right to withdraw it, and the bank has a right to presume that he will appropriate the money, when drawn, to a proper use.

Brookhouse v. Union Pub. Co. 73 N. H. 373, 2 L.R.A. (N.S.) 993, 111 Am. St. Rep. 623, 62 Atl. 219, 6 Ann. Cas. 675; Duckett v. National Mechanics' Bank, 86 Md. 400, 39 L.R.A. 84, 63 Am. St. Rep. 513, 38 Atl. 983;

Note. — *Liability to estate of bank which receives deposit from one assuming without authority to act as executor or administrator.*

A careful search has disclosed no case other than HOLDEN v. FARMERS' & T. NAT. BANK, passing upon this question. The law, however, as stated in that case, seems right upon reason and principle, and will doubtlessly be considered worthy authority when the question next arises. Bailees and depositaries, it seems, are not liable to the L.R.A. 1915E.

true owner of the property bailed or deposited in the event of its return to the bailor or depositor or his order before notice of the claim of the true owner. 5 Cyc. 212; 13 Cyc. 809. *A fortiori*, it would seem that, the relation between a bank and its depositor being that of debtor and creditor, the bank should not be liable to the true owner of the deposit in the event of its payment to the depositor or his order before notice of the claim of the true owner. See 5 Cyc. 517.

W. W. A.

Essex County v. Newark City Nat. Bank, 48 N. J. Eq. 51, 21 Atl. 185; 2 Michie, Banks & Bkg. p. 947; 1 Morse, Banks & Bkg. 3d ed. § 317; Munnerlyn v. Augusta Sav. Bank, 88 Ga. 333, 30 Am. St. Rep. 159, 14 S. E. 554; Safe Deposit & T. Co. v. Diamond Nat. Bank, 194 Pa. 334, 44 Atl. 1064; Walker v. Manhattan Bank, 25 Fed. 255; Goodwin v. American Nat. Bank, 48 Conn. 551; Keane v. Roberts, 4 Madd. Ch. 332, 20 Revised Rep. 306.

No demand was ever made upon the bank for any part of these funds prior to bringing this suit. The failure to make such a demand is fatal to the maintenance of this action.

1 Morse, Banks & Bkg. 4th ed. §§ 290, 322; 2 Michie, Banks & Bkg. p. 1321; Payne v. Gardiner, 29 N. Y. 146; Bank of British N. A. v. Merchants' Nat. Bank, 91 N. Y. 106; Watson v. Phoenix Bank, 8 Met. 217, 41 Am. Dec. 500; Branch v. Dawson, 33 Minn. 399, 23 N. W. 552; Tobias v. Morris, 126 Ala. 535, 28 So. 517; Johnson v. Farmers' Bank, 1 Harr. (Del.) 117; Girard Bank v. Bank of Penn Twp. 39 Pa. 92, 80 Am. Dec. 507; Downes v. Phoenix Bank, 6 Hill, 297; Brahm v. Adkins, 77 Ill. 263; Thurston v. Wolfborough Bank, 18 N. H. 391, 45 Am. Dec. 382.

Peaslee, J., delivered the opinion of the court:

The plaintiff seeks to charge the defendant for certain funds as the property of the estate which he represents. With the exception of one item of \$17.57, the money was all received by the defendant from E. A. and B. F. Cook, who represented themselves as the executors of the will of David H. Cook; and it was all paid out upon their order and in the usual course of business. The defendant had no knowledge or notice of the fact that the depositors had not qualified as executors.

The plaintiff's claim seems to be that the defendant is liable because it has intermeddled with the estate, and cases wherein parties have been treated as executors *de son tort* are cited and relied upon. But the fact that these funds belonged to an estate rather than to an individual does not give them peculiar attributes, nor make one liable to the true owner thereof, for intermeddling therewith when he would not be liable if the owner were an individual. "It is the wrongful or tortious intermeddler, without claim or the color of a title, upon whom sound authorities in law fasten, in effect, the liabilities of executor *de son tort*." Schouler, Extra. § 188. In one case, as in the other, the plaintiff must show an invasion of his property right. As the plaintiff states in his brief, his action

sounds in tort, rather than contract. It is, in substance, a suit in trover.

The case presented is this: One who has converted the property of another delivers the same to a third party to hold subject to the depositor's order. The depositary, in good faith and with no knowledge or notice of the depositor's wrongdoing, parts with possession of the property as ordered by the depositor. The law is well settled that such acts do not amount to a conversion by the depositary. "Merely receiving property from the wrongful possessor, and returning it before notice of his want of title, is no conversion." 2 Cooley, Torts, 3d. ed. 867; Loring v. Mulcahy, 3 Allen, 575; Spooner v. Holmes, 102 Mass. 503, 3 Am. Rep. 491; Hill v. Hayes, 38 Conn. 532.

The defendant was not chargeable with knowledge that the deposit was the property of the estate, except in so far as it had notice of the fact. The notice consists in the act of E. A. and B. F. Cook in making the deposit as executors. It is essential for the plaintiff to rely upon this act; otherwise he has no shadow of a claim. It is the evidence by which he must charge the defendant with notice of whose property the funds were. But, while this act is sufficient to support this branch of the plaintiff's claim, it is equally potent to destroy another essential part of his case. Having thus fixed the defendant's knowledge, the next step is to show that it paid out the funds without proper authority. To prove this the plaintiff offers to show that in fact the Cooks were not executors. But the plaintiff had already shown, as he must, that in this transaction they acted as executors, and the defendant dealt with them as such. The bank's knowledge and its possession of the fund rested alike upon the proposition that they were executors. The plaintiff cannot take inconsistent positions as parts of one proposition. The bank's only knowledge that the funds were the property of the estate being the representation of the Cooks that they were executors, it was entitled to rely upon that representation throughout its dealing with the fund, until it received notice to the contrary. The source of the bank's possession was the act of the Cooks as executors. In this respect the case differs radically from one where the connection between the source of possession and the authority for paying out involves some intervening facts. If A makes a deposit, the bank may lawfully pay to A without further inquiry. Brookhouse v. Union Pub. Co. 73 N. H. 368, 373, 2 L.R.A. (N.S.) 993, 111 Am. St. Rep. 623, 62 Atl. 219, 6 Ann. Cas. 675. But if B comes to the bank with an order for the

payment to him of A's deposit, the bank is bound to ascertain the truth as to the intervening facts. It must know whether A gave B the order. And so, if A dies leaving a deposit, the bank must ascertain that one claiming to receive the estate has the legal right to do so.

The bank's contract is to pay to the depositor or his order. In this case it agreed to pay to E. A. and B. F. Cook, executors, or their order. Except as to one item, it was not bound to inquire into their right to the estate, because it did not pay to them any part of the estate not received from them. The same parties who made the deposit drew it out, or ordered it paid out. There were no intervening facts which the bank was bound to know at its peril. It was the ordinary transaction of a deposit both made and paid out upon a single representation whose falsity was unknown to the depository.

The claim that the bank is liable for \$323.22 paid to it by the alleged executors for the release of a mortgage upon E. A. Cook's horses stands no better than the other items. For all that the defendant knew, this was a legitimate payment by the executors. The defendant was not bound to oversee the execution of the trust by its depositor. *Ibid.*

As to the item of \$17.57, the case stands differently. This sum the bank held as a part of the estate, and before it was paid out the bank was bound to know that the claimant was legally entitled to it. Payment to one not authorized to receive the estate did not discharge the bank from this liability. It is still indebted to the estate in the sum of \$17.57, which it is liable to pay upon demand. Ordinarily, suit for such a deposit cannot be maintained without a demand. But, when by word or conduct the bank has denied the plaintiff's right, no demand is necessary. "We have pointed out that, as a general rule, demand must be made. The reason for the rule is that, when banks are ready and willing to pay on demand, they shall not be annoyed by suit. The implied contract is that the banks shall keep a deposit until called for, and until the bank refuses to pay on demand, they are not in default. . . . But where the bank has disclaimed liability, or where for any other reason the demand would manifestly be futile, none need be made." *Pratt v. Union Nat. Bank*, 79 N. J. L. 117, 120, 75 Atl. 313, 314. The bank paid this item out upon the order of E. A. and B. F. Cook, and it still claims it is protected in so doing. Under these circumstances no demand was necessary.

As to the substantial part of this contract. L.R.A.1915E.

controversy, the ruling granting a nonsuit was right; but as to the item last considered it must be set aside.

Exception sustained. All concur.

ARKANSAS SUPREME COURT.

CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY, Appt.,

J. L. WATKINS.

(— Ark. —, 175 S. W. 1157.)

Carrier — ejection of passenger — right upon purchase of ticket.

A passenger ejected for nonpayment of fare is not entitled to acceptance as a passenger on the same train, upon purchasing a ticket merely from the point where ejected to destination.

(April 12, 1915.)

Note. — Carriers: sufficiency of tender of fare to prevent ejection.

This note is supplementary to the note to *Kirk v. Seattle Electric Co.* 31 L.R.A. (N.S.) 991, and adheres to the scope there outlined. See the earlier note for references to annotation on collateral questions.

As to the duty of a passenger to pay a fare wrongfully demanded, to avoid expulsion, see *Sprenger v. Tacoma Traction Co.* 43 L.R.A. 708, and *Light v. Detroit & M. R. Co.* 34 L.R.A. (N.S.) 282, and notes.

As to the efforts that must be made to collect fares before ejecting passengers for nonpayment of same, see *Chesapeake & O. R. Co. v. Friend*, L.R.A.1915C, 148, and note.

For the right of a carrier to refuse to accept non-ticket holders as passengers see *St. Louis & S. F. R. Co. v. Blythe*, 29 L.R.A. (N.S.) 299, and note.

Tender after steps toward ejection.

Supplementing 31 L.R.A. (N.S.) 992.

Where a conductor acted upon the assumption that a ticket presented by a passenger was invalid, he should accept the fare if offered before expulsion, but is under no legal obligation to do so afterward. *Norman v. East Carolina R. Co.* 161 N. C. 330, 77 S. E. 345, Ann. Cas. 1914D, 917. It was accordingly held in this case that the trial court properly refused an instruction to the effect that if the plaintiff was wrongfully ejected because his ticket had not been properly stamped by the ticket agent, it was his duty to decrease his damages by tendering the fare after the ejection, since it erroneously assumed without evidence that the conductor would have accepted the fare if tendered, he having acted upon the assumption that the ticket was invalid.

The fact that the ejection of a passenger

APPPEAL by defendant from a judgment of the Circuit Court for Prairie County in plaintiff's favor in an action brought to recover damages for alleged wrongful ejection from defendant's train. Reversed.

The facts are stated in the opinion.

Messrs. Thomas S. Buzbee and George B. Pugh, for appellant:

Plaintiff was not entitled to acceptance as a passenger.

Stone v. Chicago & N. W. R. Co. 47 Iowa,

82, 29 Am. Rep. 458; Manning v. Louisville & N. R. Co. 95 Ala. 392, 18 L.R.A. 55, 36 Am. St. Rep. 225, 11 So. 8, 8 Am. Neg. Cas. 26; Swan v. Manchester & L. R. Co. 132 Mass. 116, 42 Am. Rep. 432.

Hart, J., delivered the opinion of the court:

Appellee sued appellant for damages for alleged wrongful ejection from its train. Appellee, J. L. Watkins, lived in Little

from a train for refusal to pay fare is at a regular station does not entitle him to re-enter the train and become a passenger upon tender of the full fare from the point where he first entered the train to his destination. Phillips v. Atlantic Coast Line R. Co. 90 S. C. 187, 38 L.R.A. (N.S.) 1151, 73 S. E. 75, Ann. Cas. 1913C, 1244.

But in Choctaw, O. & G. R. Co. v. Hill, 110 Tenn. 396, 75 S. W. 963, it was held that the reason for the rule that where a passenger is ejected because of his refusal to pay fare, or his ejection commenced, he cannot thereafter become entitled to the rights of a passenger upon the train by tender of the proper fare, does not exist, and hence the rule itself will not obtain, when plaintiff is ejected while the train is stopped at a regular station; so, where a train newsboy was put off because of a violation of the rules of the carrier while the train was standing at a station, so that his discharge terminated his right to free transportation, it was held that the conductor should have given him an opportunity to pay his fare and become a regular passenger before ejecting him, and where he failed to do so and again ejected plaintiff, when he boarded the train and tendered fare as it was about to start, both ejections were unlawful.

In Southern Kansas R. Co. v. Wallace, — Tex. Civ. App. —, 152 S. W. 873, where plaintiff's husband secured tickets and baggage checks for her and their children, but in the confusion of the departure of the train he gave her the baggage checks only, forgetting to give her the tickets, and the conductor, upon her explaining the matter to him, said: "You can't ride on baggage checks on my train; it takes tickets to ride," at the same time pulling the bell rope for the train to stop, and when she asked if she could not pay her fare to the next station and pay for sending a telegram back concerning the tickets, he said that all he knew was for her to get off, which she did when the train stopped, the court sustained a verdict in favor of the husband, saying "A formal tender was not necessary, and an expression of a desire to pay the fare, and the conductor's reply that all that was left for her to do was to get off the train, was certainly sufficient evidence for the court to submit to the jury whether she offered to pay the fare, and whether the conductor refused it." L.R.A.1915E.

An instruction that the tender of cash fare by a passenger or someone in his behalf in good faith, after steps had been taken to eject him because of his failure to produce a proper ticket or to pay fare when called upon to do so, was erroneous. Loy v. Northern P. R. Co. 68 Wash. 33, 122 Pac. 372.

In Powell v. St. Louis & S. F. R. Co. 229 Mo. 246, 129 S. W. 963, the court apparently takes the view that if the passenger, after having a dispute with the conductor as to the amount of fare due, and after it became apparent that the conductor intended to eject him, tendered the amount demanded before the train was stopped, and before the defendant's employee attempted to eject him, it was a sufficient tender to make his ejection unlawful.

In Boster v. Chesapeake & O. R. Co. 36 W. Va. 318, 15 S. E. 158, the court took into consideration the fact that plaintiff offered to pay the second fare wrongfully demanded of him to avoid expulsion, after the conductor had pulled the bell cord to stop the train, but that the conductor refused to accept it, and put him off the train, in sustaining the verdict for an amount which otherwise it would have regarded as being excessive.

And in Georgia R. & Electric Co. v. Davis, 6 Ga. App. 645, 65 S. E. 785, the court, while recognizing the rule that where a passenger has refused a rightful demand for fare, he cannot avoid expulsion by tendering the fare after the train has been stopped, says that the case is different where the demand for fare was wrongful, and in such a case the fact that the conductor refused to permit the passenger to re-enter the car after being ejected, although he was willing to pay his fare a second time, could be taken into consideration in aggravation of damages.

Tender of fare from point of ejection.

Supplementing 31 L.R.A.(N.S.) 995.

In Whittemore v. Boston & M. R. Co. 76 N. H. 383, 83 Atl. 125, where plaintiff, whose ticket had expired, having been ejected at a station, purchased a ticket from there to his destination and again boarded the train, and the conductor refused to accept the new ticket unless he paid his fare from the place where he first boarded the train, it is held that, it plaintiff thought his ticket

Rock, and in July, 1914, got a pass over appellant's line of railroad to Brinkley to become a brakeman between that point and Memphis. After he had made a few trips on the local freight train the conductor told him that he did not need him any longer. This occurred at Brinkley. Appellee wired to Little Rock for a pass home. While he was waiting for an answer to his message a passenger train came along on its way to Little Rock, and appellee board-

ed the train. When the auditor came around to collect his fare he told him the circumstances detailed above. The auditor wired to Little Rock to see if he could obtain a pass for him, and the despatcher wired back that appellee should have waited at Brinkley to get a pass, and instructed the auditor to eject him from the train if he did not pay his fare. Appellee refused to pay his fare, and when the train arrived at Hazen the conductor told him to get off

entitled him to ride and refused to pay his fare for that reason, he was entitled to ride on the second ticket without paying the back fare, and defendant would be liable for ejecting him the second time; but if he either knew, or ought to have known, that his ticket was worthless, or if he refused to pay his fare because he thought he would not be put off until the intermediate station was reached, and in that way he could ride the whole distance for less than the regular fare, the company was justified in refusing to accept him on a second ticket, and he could not recover for his second ejection.

Tender of fare by custodian.

Supplementing 31 L.R.A.(N.S.) 995.

While the failure of a father who has custody of his child, to pay the fare legally demanded for the child, will entitle the carrier to eject both, although the parent has a valid ticket, such right does not arise until the company or its agent has returned or offered to return the unearned portion of their fare, or given some written acknowledgment which will enable the parent to proceed on his trip. *Lankford v. Southern R. Co.* 165 N. C. 653, 81 S. E. 998, 6 N. C. C. A. 1060.

Tender of a worn or peculiar coin.

Supplementing 31 L.R.A.(N.S.) 997.

For other cases involving the character or condition of a coin or of currency that may be tendered in payment of fare, see *Cincinnati Northern Traction Co. v. Rosnagle*, 35 L.R.A.(N.S.) 1030, and note.

In *Konkle v. St. Paul City R. Co.* 119 Minn. 177, 137 N. W. 738, a judgment for a passenger for his wrongful ejection from a street car was sustained where it appeared that he tendered a Canadian quarter which was at first received by the conductor, but later, refused, and the change given for it demanded back, and plaintiff, having no other money, was ejected, where the conductor's refusal to receive the coin was not on the ground that it was Canadian money, but that it was a coin of the province of New Brunswick, in which he was mistaken, and there was no evidence that the car company had given its conductors any directions to refuse such money in L.R.A.1915E.

payment of fares, and it further appeared that the identical quarter was received by plaintiff from defendant through another conductor for the preceding day as part of the change given to him at that time.

Miscellaneous.

In *Illinois C. R. Co. v. Holman*, — Miss. —, 64 So. 7, where plaintiff, who had a mileage book which he had received in consideration of advertising, which, while valid for transportation entirely within the state, was by its terms and by the terms of the interstate commerce act, invalid for transportation in interstate commerce, attempted to ride thereon on an interstate trip, and, upon being informed that it could not be so used, requested the conductor to pull mileage to a point near the state line, which was done, at which place he got off and purchased a ticket from there to his destination in the other state, and upon reboarding the train and presenting the ticket the conductor refused to accept it unless plaintiff would pay cash fare from the beginning of his journey to the point where he purchased the ticket, which he refused to do, it was held that the conductor was justified in ejecting him.

Where the contract on a mileage book provided that the mileage should not be accepted upon trains except where the passenger boarded the train at a nonagency station, and that at agency stations the mileage should be exchanged for regular tickets, tender by a passenger who boarded the train at an agency station, of cash fare to a nonagency station and mileage from there to his destination, was insufficient, and a nonsuit was properly granted in an action for his ejection. *Morgan v. Southern R. Co.* 139 Ga. 465, 77 S. E. 632.

In *Hallman v. Southern R. Co.* — N. C. —, 85 S. E. 298, where plaintiff purchased a mileage book and exchanged mileage for a ticket over a short route to his destination, upon the assurance of the agent that connections would be made, and that if connections were not made the same ticket would be good over a longer route, but upon failure of connections over the short route the conductor demanded an extra cash fare for the longer route, which plaintiff refused to pay, but tendered sufficient mileage to make up the difference, it was held that his ejection was wrongful. R. L. S.

the train. Appellee then offered to pay his fare from Hazen to Little Rock, but the conductor and auditor of the train refused to receive it, unless he would pay the fare from Brinkley to Little Rock, and ejected him from the train. Appellee then went to the ticket agent at Hazen and bought a ticket from that place to Little Rock, and again attempted to enter the train, but was not permitted to do so. Appellee did not offer to pay his fare from Brinkley to Hazen, but, on the contrary, refused to do so. Under the rules of the company the conductor or auditor were not allowed to permit appellee to ride unless he paid the full fare from the point where he got on the train to the point of destination. The jury returned a verdict in favor of appellee in the sum of \$50, and to reverse the judgment rendered appellant has prosecuted this appeal.

Section 6591 of Kirby's Digest provides that if any passenger shall refuse to pay his fare it shall be lawful for the conductor of the train to put him out of the car at any usual stopping place the conductor may elect. According to the undisputed testimony the appellee got on the train at Brinkley to go to Little Rock. He had no ticket or pass, and refused to pay his fare. Under the statute above referred to, the conductor had a right to eject him from the train at Hazen, which was a usual stopping place. The appellee then bought a ticket from Hazen to Little Rock, and attempted to board the same train to be carried to Little Rock, but the conductor and train auditor refused to permit him to ride on the train, because, under the rules and regulations of the company, he was required to pay fare from the point where he entered the train to the point of destination, and, having refused to pay fare from Brinkley to Little Rock, they would not permit him to again embark on the train at Hazen.

The regulation by which railroads, when passengers are found on their trains who have no tickets or passes, require such passenger to pay fare not only for that part of the route to be traveled, but also for that part already passed over, is a reasonable one. *Manning v. Louisville & N. R. Co.* 95 Ala. 392, 16 L.R.A. 55, 36 Am. St. Rep. 225, 11 So. 8, 8 Am. Neg. Cas. 26.

Where a passenger has been lawfully ejected from a railway train for nonpayment of fare, he cannot demand to be carried forward on the same train without paying the disputed fare, and his purchase of a ticket at the point of ejection will not entitle him to readmission to the train. *Stone v. Chicago & N. W. R. Co.* 47 Iowa, 82, 29 Am. Rep. 458. L.R.A.1915E.

When the train auditor demanded of appellee the fare from Brinkley to Little Rock, appellee refused to pay him and told him that he would pay him from Hazen to Little Rock. It is apparent that appellee, having got on the train at Brinkley, would not be entitled to ride to Little Rock by tendering the fare from Hazen to Little Rock, and his purchase of a ticket from Hazen gave him no greater rights than his tender of the fare from Hazen to Little Rock.

In the case last cited the court, in discussing a precisely similar situation, said: "The purchase of a ticket from the ticket agent would give him no greater rights. For under such ticket he would be claiming the same rights under the same state of facts" upon which "he would not be entitled to" them "had he dealt alone with the conductor. The fact that he made use of an agent of the company other than the conductor cannot enlarge his rights, or change the legal aspect of the case. It must be that the transaction with the agent was a mere continuation of the transaction with the conductor."

To the same effect, see *Swan v. Manchester & L. R. Co.* 132 Mass. 116, 42 Am. Rep. 432; *Phillips v. Atlantic Coast Line R. Co.* 90 S. C. 187, 38 L.R.A.(N.S.) 1151, 73 S. E. 75, Ann. Cas. 1913C, 1244; *Pickens v. Richmond & D. R. Co.* 104 N. C. 312, 10 S. E. 556, 8 Am. Neg. Cas. 556; *Pennington v. Philadelphia, W. & B. R. Co.* 62 Md. 95; *Gulf, C. & S. F. R. Co. v. Riney*, 41 Tex. Civ. App. 398, 92 S. W. 54.

It follows that the court should have directed a verdict for the appellant, and for its refusal to do so the judgment must be reversed; and, inasmuch as the facts have been fully developed, the cause of action will be dismissed.

MICHIGAN SUPREME COURT.

PEOPLE OF THE STATE OF MICHIGAN
v.

JACOB GRUNLAND, Plff. in Certiorari.

(— Mich. —, 153 N. W. 4.)

Bastardy — death of child — effect on proceedings.

1. The death of a bastard, pending a

Note. — The question as to abatement of bastardy proceedings by death is considered in a note to *People v. Kemppainen*, 30 L.R.A.(N.S.) 1167. A careful search has disclosed no later cases on the subject, other than *PEOPLE v. GRUNLAND*, which is in accord with the law as stated in the earlier note.

prosecution under the bastardy act, does not entitle defendant to a dismissal of the proceedings.

Same — order without evidence — validity.

2. No order for the payment of money can be entered against defendant in bastardy proceedings in the absence of evidence showing expenditures incident to the care and support of the child.

(June 14, 1915.)

CERTIORARI to the Circuit Court for Houghton County to review an order requiring defendant to pay a certain sum for the use and benefit of the complainant in a bastardy proceeding. Affirmed in part.

The facts are stated in the opinion.

Messrs. Burritt & Burritt, for plaintiff in certiorari:

At the death of the child the object of the bastardy statute is ended, as it is not necessary that the public should have any further protection.

Waite v. Washington, 44 Mich. 388, 6 N. W. 874; People v. Phalen, 49 Mich. 402, 13 N. W. 830; Sutfin v. People, 43 Mich. 37, 4 N. W. 509; Cross v. People, 8 Mich. 113; People v. Cole, 113 Mich. 84, 71 N. W. 455.

The order made by the court that Jacob Grunland stand charged with the payment of \$150 for the use and benefit of Alvera Stone, the mother of said bastard child, was unauthorized by the statute and void.

Sutfin v. People, 49 Mich. 37, 4 N. W. 509; Cross v. People, 8 Mich. 113; People v. Brannen, 173 Mich. 411, 138 N. W. 1050; Speiger v. State, 32 Wis. 400.

Mr. William J. Galbraith, for the People:

The statute is to be construed as it stands, namely: The respondent "shall stand chargeable with the maintenance of the child in such manner as the court shall order."

Bird, J., delivered the opinion of the court:

The principal question for solution in this case is whether bastardy proceedings abate upon the death of the child. The complainant, Alvera Stone, made a complaint on the 16th day of July, 1914, under §§ 5901 et seq., charging respondent with being the father of her child. The child was born on April 19, 1914. The respondent was arrested and held for trial in the circuit court. After that, but before the trial, the child died. After the testimony was taken at the trial, which took place in September, 1914, it appearing that the death of the child occurred on August 31, 1914, respondent moved the court for an L.R.A.1915E.

order dismissing the case. The court denied this motion, and the question of the paternity of the child was left to the jury, and they returned a verdict of guilty. The trial court thereupon made an order requiring respondent to pay \$150 for the use and benefit of complainant.

1. While this precise question has never been passed upon by this court, other state courts whose filiation statutes, like our own, were passed for the purpose of protecting the public against the necessity of supporting illegitimate children, have held that the proceedings thereunder were not abated by the death of the child. *Hauskins v. People*, 82 Ill. 193, 2 Am. Crim. Rep. 178; *Smith v. Lint*, 37 Me. 546; *Meredith v. Wall*, 14 Allen, 155; *Hanisky v. Kennedy*, 37 Neb. 618, 56 N. W. 208.

The reasons for this holding are well expressed in *Smith v. Lint*, supra, where it is said: "The expenses for the maintenance of an illegitimate child commence at its birth. They include what may be necessary for its support and comfort. The liability of the father is coextensive with that of the mother, and relates to the past as well as the future. The order of court charging him with maintenance embraces expenses which have been, as well as those which may be, incurred. The death of the child relieves the father from future support, but furnishes no discharge as to the past."

In the instant case the child lived four months and eleven days. More or less expense must have been necessarily incurred by someone during that period. Had the child lived, the liability of the respondent covering this period would not have been questioned. If this be so, we can see no valid reason why he should not be held liable if the child died at the end of that period.

But it is contended that, if this be the proper construction, the court had no basis for fixing the amount of the order at the sum of \$150, as there was no proof as to any expenses having been incurred by anyone. In his return to the writ of certiorari the circuit court returns that "I further certify that no proofs were taken by me to ascertain the amount of money said Alvera Stone, the mother of said child, had expended, if any, for the maintenance of said child, although I did make some informal inquiries as to the expenses."

In a case of this kind the authority of the trial court to make an order for any sum must rest upon the fact that there have been expenditures incident to the care and support of the child. What the expenditures may have been in any given case is not only a proper, but a necessary,

subject of inquiry on the trial, to enable the court to properly fix the amount of the order. As the return of the court shows that this was not done, the order will be vacated. The verdict adjudging respondent to be the father of the child will stand. Leave is granted to take further testimony bearing upon the question of expenditures as a basis for a new order therein.

TENNESSEE SUPREME COURT.

MRS. IDA SAULMAN, Admr., etc., of
Haddon Saulman, Deceased, Plff. in Cer-
tiorari,

v.

MAYOR AND CITY COUNCIL OF NASH-
VILLE.

(131 Tenn. 427, 175 S. W. 532.)

Municipal corporation — injury by
light plant — liability.

A municipal corporation is liable for the
death of a telephone lineman because of

*Note. — Liability of municipality for
torts in connection with its lighting
plant.*

For full discussion of the principles of
law involved in the question here raised,
and citation of cases thereto, see note to
Brantman v. Canby, 43 L.R.A.(N.S.) 862,
to which this note is supplementary.

On the general principles of distinction
between governmental functions and pri-
vate or proprietary rights, discussed in
SAULMAN v. NASHVILLE, see notes to Bar-
ron v. Detroit, 19 L.R.A. 452, and Dickin-
son v. Boston, 1 L.R.A.(N.S.) 665. Var-
ious concrete phases of the subject are
treated in notes that may be found by con-
sulting Index to L.R.A. Notes, "Municipal
Corporations," §§ 72-80.

It will appear by reference to cases cited
in note in 43 L.R.A.(N.S.) 867, that the
court in SAULMAN v. NASHVILLE, in holding
that a municipality is engaged in a pro-
prietary or private enterprise when main-
taining a plant for street lighting only,
followed the weight of authority, but that
different reasons are given as the basis for
the holding, and that some courts are op-
posed.

The following are later cases holding the
municipality liable for torts in connection
with its lighting plant; Athens v. Miller,
— Ala. —, 66 So. 702; Dublin v. Ogburn,
142 Ga. 840, 83 S. E. 939 (but reversing
judgment for plaintiff and remanding for a
new trial for errors in allowing remote dam-
ages); Goetzke v. Chicago, 174 Ill. App.
446 (see same case, infra, for ground of
decision); Sykes v. Portland, 177 Mich.
290, 143 N. W. 326; Riley v. Independence,
258 Mo. 671, 167 S. W. 1022; Asher v. In-
dependence, 177 Mo. App. 1, 163 S. W. 574.
L.R.A.1915E.

the negligent maintenance by its employ-
ees of a heavily charged wire carrying the
current of a plant operated by the munici-
pality to light its streets and public build-
ings, which charged a guy wire of the tele-
phone company with a deadly current,
since, in performing such service, it is en-
gaged in a private enterprise.

(March 19, 1915.)

CERTIORARI to the Court of Civil Ap-
peals to review a judgment reversing a
judgment of the Circuit Court for David-
son County in plaintiff's favor in an action
brought to recover damages for the death of
her intestate, alleged to have been caused
by defendants' negligence. Reversed.

The facts are stated in the opinion.

Messrs. Pendleton & De Witt for plain-
tiff in certiorari.

Messrs. A. G. Ewing, Jr., and F. M.
Garard, for defendant in certiorari:

An employee of a telephone company can-
not recover where he is killed by causes that
would necessarily come under his observa-
tion, and that he must have known, or that

In holding that the municipality was lia-
ble for a death caused by negligence in con-
nection with its electric wires used for fur-
nishing electric light to the inhabitants, the
court in Athens v. Miller, supra, said:
"When a municipality engages in the busi-
ness of furnishing electricity, lights, water,
etc., to the public, it is not then discharging
or exercising governmental functions or
powers, but is, *quoad hoc*, exercising pro-
prietary or business powers, and as to such
business it is governed by the same rules
of law which are applicable to ordinary
business corporations engaged in like busi-
nesses." The same principle is the basis of
the holding in Dublin v. Ogburn, supra;
Sykes v. Portland, 177 Mich. 290, 143 N. W.
326; Riley v. Independence, 258 Mo. 671,
167 S. W. 1022; Asher v. Independence, 177
Mo. App. 1, 163 S. W. 574.

In Goetzke v. Chicago, 174 Ill. App. 446,
where the city owned the electric light plant
for lighting the streets, and plaintiff was
injured by coming into contact with a live
wire that, through the city's negligence, had
fallen, while passing along the street, it
was held that the city was liable even if
maintaining the plant was a governmental
function, for the reason that the city owes
a duty to the public to keep its streets free
from dangerous conditions. This is a ground
of liability entirely independent of the ques-
tion of liability for torts in connection with
the municipality's own plant, and, as ex-
plained in the note in 43 L.R.A.(N.S.) 862,
is therefore not within the scope of the
note. In the former note the doctrine of
this case is set out by quotation from
Palestine v. Siler, 225 Ill. 630, 8 L.R.A.
(N.S.) 205, 80 N. E. 345, which case was
cited and followed in the Goetzke Case.

J. W. M.

he should have known by the exercise of ordinary care, or that he could have known of its existence and location by the exercise of ordinary care; and his own failure to observe the same is his own negligence, and was the proximate cause of his injury, which deprived him of his right to recover damages sustained.

Moore v. Chattanooga Electric R. Co. 119 Tenn. 710, 16 L.R.A.(N.S.) 978, 109 S. W. 497; *East Tennessee & W. N. C. R. Co. v. Lindamood*, 111 Tenn. 463, 78 S. W. 99; *Nashville, C. & St. L. R. Co. v. Hayes*, 117 Tenn. 680, 99 S. W. 362; *Ferguson v. Phoenix Cotton Mills*, 106 Tenn. 239, 61 S. W. 53; *Grigsby & Co. v. Bratton*, 128 Tenn. 597, 163 S. W. 804; *Knoxville v. Cain*, 123 Tenn. 250, 48 L.R.A.(N.S.) 628, 159 S. W. 1084, Ann. Cas. 1915B, 762; *Elliott, Roads & Streets*, 3d ed. § 1073.

No presumption of negligence could arise from the city's failure to inspect during so short a period. The inspection given was shown to be all that was required by the rules of experience.

Griffin v. Parker, 129 Tenn. 446, L.R.A.—, 164 S. W. 1142; *Acme Box Co. v. Gregory*, 119 Tenn. 537, 105 S. W. 350.

The city is not liable for injuries caused by its municipal lighting plant, which is operated and used exclusively to furnish electric light for its streets, public places, and buildings, and assists in its police duties, in the preservation of order, in the prevention of crime, and does not derive a profit therefrom or furnish light to private consumers.

McQuillin, Mun. Corp. § 2645; *Hodgins v. Bay City*, 156 Mich. 687, 132 Am. St. Rep. 546, 121 N. W. 274; *Palestine v. Siler*, 225 Ill. 630, 8 L.R.A.(N.S.) 205, 80 N. E. 345.

Buchanan, J., delivered the opinion of the court:

The question on which this case turns is whether, under its facts, the city was, at the time of the acts on which its liability is predicated, engaged in the performance of a governmental function or a private one. The case is before us on certiorari. The court of civil appeals held that the city was engaged in the discharge of a governmental function.

The liability of the city is predicated upon the negligent construction and maintenance of a heavily charged electric light wire, which, on account of such negligence, came into contact with a guy wire attached to one of the poles of a telephone company, and charged the guy wire with a deadly current of electricity, which was communicated to the body of the intestate of the administratrix, and caused his death, when he at-

tempted, in the exercise of due care, to ascend the telephone pole in the discharge of his duties as a lineman in the employ of the telephone company. No question is made by the city against the judgment of the court of civil appeals; the case being before us solely on the petition and assignments of error filed by the administratrix.

The following facts appear without dispute: The municipal defendant, prior to and at the time of the injury to plaintiff's intestate, was authorized by its charter to build or purchase, own, and operate electric light works, for the purpose of lighting public buildings or streets or other public places in the city, and for the sale of electric current to all persons desiring to purchase the same, either for lighting, heating, or power, or for any purpose whatsoever. This authority was vested in the defendant under chapter 207, Acts 1891, and chapter 11, Acts 1901, and pursuant to this authority the city, at the time of the injury, owned, controlled, and was operating an electric light works, plant, or system, and the wire, which was so constructed and maintained that it was the cause of the injury to plaintiff's intestate, was a part of the system, plant, or works so owned and operated by the city. But at the time of the injury the city was not and had not been engaged in the sale of electric current or the furnishing of electric lights to private consumers, and the current generated by the city was used exclusively for the purpose of lighting the streets, fire halls, and public buildings of the city. That the injury was caused by the negligence of the municipal defendant in the original suspension and subsequent maintenance of the wire owned by the city which came into contact with the guy wire of the telephone company is a fact undisputed and settled by the verdict of the jury. It is manifest that the communication of the deadly current from the wire of the city to the guy wire was the result of friction which destroyed the insulation of the city's wire. It is also clear that at the time of the fatal injury plaintiff's intestate was rightfully upon the pole owned by his employer in the discharge of his duties, and in no sense a bare licensee or trespasser, and the verdict of the jury settled the fact that he was free from contributory negligence at the time of his injury.

Originally plaintiff's suit in this cause was brought against the telephone company and the municipal defendant as joint tortfeasors, but subsequent to the origin of the suit the telephone company, by payment of a sum certain to plaintiff and taking from her a covenant not to further prosecute her suit against it, in the form approved in our recent case (*Smith v. Dixie Park & Amuse-*

ment Co. 128 Tenn. 112, 157 S. W. 900); discharged its liability, and that branch of the case is not before us now.

Passing, now, to the single issue of law arising upon the facts, we observe in the outset that, since the decision in *Russell v. Devon County*, 2 T. R. 667, 1 Revised Rep. 585, 12 Eng. Rul. Cas. 694, it has been settled at common law that liability does not exist against a political subdivision of the state, based upon the misconduct or non-feasance of public officers, in favor of an individual, and in the cases which undertook to give a reason for the rule it was held to be better that the individual should suffer than that he should be allowed to inflict on the public the inconvenience of affording him redress. Other reasons were given by later cases.

But in *Moodalay v. Morton*, 1 Bro. Ch. 469, the master of the rolls, while admitting the rule, denied that the defendants fell within it. "They have rights," said he, "as a sovereign power; they have also duties as individuals. If they enter into bonds in India, the sums secured may be recovered here. So, in this case, as a private company, they have entered into a private contract, to which they must be liable."

From this slight relaxation of the original rule, exceptions to it have grown up, until, on examination of the reported cases, they appear to be quite as numerous as applications of the rule. An instructive note reviewing the earlier cases accompanies *Barren v. Detroit*, 19 L.R.A. 452. In fact, so large has been the ingrafting of exceptions upon the original rule by our American courts that in his excellent work on *Municipal Corporations* (vol. 6, § 2622) Mr. McQuillin says: "Yet in every state except South Carolina it is the settled rule that a municipality is liable at common law for its torts in the performance or nonperformance of municipal or corporate duties, as distinguished from governmental duties."

And to sustain the quoted text the author cites *Irvine v. Greenwood*, 89 S. O. 511, 36 L.R.A.(N.S.) 363, 72 S. E. 228. And this learned author in the same section adds: "In other words, where its officers or servants are in the exercise of power conferred upon the municipality for its private benefit or pecuniary profit, and damage results from their negligence or misfeasance, the municipality is liable to the same extent as in the case of private corporations or individuals."

To sustain the text just above set out, the author cites cases from twenty-nine courts of last resort in the United States and one from the Supreme Court of the United States, and in the same section it is said: "That while acting in its private capacity a L.R.A.1915E.

municipality is liable . . . to the same extent as a private corporation or individual [citing *Provine v. Seattle*, 59 Wash. 681, 110 Pac. 619; *Toledo v. Cone*, 41 Ohio St. 149]. . . . Furthermore, for torts committed by its agents and servants in the performance of corporate or private duties, the municipality is liable, whether the tortious act was done negligently or intentionally," citing *Johnson v. Somerville*, 195 Mass. 370, 10 L.R.A.(N.S.) 715, 81 N. E. 268.

In substantial accord with the views above stated are those announced in *Dillon on Municipal Corporations* (last ed.) §§ 1665, 1666, 1670, 1671. Coming nearer to the exact question in the present case is what is said by the author last named at § 1670 of his work, as follows: "Thus, in the case of municipal electric light works, the city is under obligation to exercise reasonable care in constructing and maintaining its poles and wires in the public streets and on private property, and if any person is injured through neglect of the city or its officers, agents, or employees in that respect, the city is liable in damages."

And, says Mr. McQuillin, in his work on *Municipal Corporations* (§ 2680): "It is settled beyond dispute that a municipality which operates its own water, electric light, or gas plant acts in a private, and not a governmental, capacity, and is liable for its negligence in connection therewith."

See also the following authorities: *Abbott, Mun. Corp.* § 955; *Davoust v. Alameda*, 5 L.R.A.(N.S.) 536, and note, (149 Cal. 69, 84 Pac. 760, 9 Ann. Cas. 847, 20 Am. Neg. Rep. 7); *Bullmaster v. St. Joseph*, 70 Mo. App. 60; *Boothe v. Fulton*, 85 Mo. App. 19; *Rhobidas v. Concord*, 51 L.R.A. 381, and note, (70 N. H. 90, 85 Am. St. Rep. 604, 47 Atl. 82); *Brown v. Salt Lake City*, 33 Utah, 222, 93 Pac. 570, 14 L.R.A.(N.S.) 619, 126 Am. St. Rep. 828, 14 Ann. Cas. 1004, and note.

The court of civil appeals in the present case denied the liability of the city upon the ground that, at the time of the injury and prior thereto, the city was using its electric light plant only for the purpose of lighting its streets and municipal buildings, and had not sold any of its electric light current to private consumers. We think it is error to suppose that the sale of part of the electric current which it manufactured was the only way in which the city could derive a corporate emolument from the possession, ownership, and operation of such a plant. Of course, the taking of money from private consumers of its current might be the most unequivocal proof that the city was deriving corporate emolument as the result of such operation; but this is the utmost sig-

nificance which such a fact should have in determining the ultimate question. At most, it is but a conclusive badge indicating a private, as contradistinguished from a public, use. But the absence of such a badge clearly does not convert the user into a public one, nor amount to conclusive proof that such was the character of the user.

The city is a corporate entity, located within the physical boundaries of the state, and existing by virtue of the sovereign will of the state. *Imperium in imperio*. The city holds an easement in the streets in trust for the convenience of the citizens. "The corporation has the power to grade, macadamize, or do anything else for the improvement of the streets, whereby they may be made to answer the end for which they were designated." *Humes v. Knoxville*, 1 Humph. 402, 408, 34 Am. Dec. 657. Springing out of this right and power of the corporation is a liability against it for a wanton or negligent failure to use reasonable diligence and care, so to exercise the power as not unnecessarily to injure the property of abutting owners. *Ibid.*; *Knoxville v. Harth*, 105 Tenn. 436, 80 Am. St. Rep. 901, 58 S. W. 650.

From the same easement and power over its streets there flows another corporate liability, to wit, for "the wrongful acts and neglects of their servants and agents" which unreasonably expose persons who use the streets for purposes of travel to injury, and where injury results while the traveler was in the exercise of reasonable and ordinary care, or free from contributory negligence. *Memphis v. Lasser*, 9 Humph. 757; *Nashville v. Brown*, 9 Heisk. 1, 24 Am. Rep. 289; *Knoxville v. Bell*, 12 Lea, 157; *Oliver v. Nashville*, 106 Tenn. 273, 61 S. W. 89; *Doyle v. Chattanooga*, 128 Tenn. 433, 161 S. W. 996, 4 N. C. C. A. 167.

In the leading case of the line just named (*Memphis v. Lasser*, supra), the city sought to avoid liability upon the ground that at the time it performed the act resulting in plaintiff's injury it was engaged in the discharge of a public function or duty, to which the doctrine of *respondet superior* did not apply; but the court said, "No," and further: "All the powers conferred upon a corporation for the local government of a town or city are, in judgment of law, for the private benefit of such corporation, although the public at large may also derive benefit therefrom. And whether the object of a given improvement be to confer a direct benefit or convenience upon the inhabitants of the corporation, as to furnish water facilities or the like, or whether it be to swell the revenues of the corporation, is wholly immaterial. The principle governing the liability of the corporation is precisely the same in both cases."

principles governing the liability of the corporation is precisely the same in both cases. And it is the province of the court to construe and interpret the charter of a corporation, to determine the nature and extent of the powers conferred, and to judge what acts do or do not fall within the legitimate scope of the authority bestowed and the purposes for which it may have been created. The court in this case did not err, therefore, in tacitly assuming as a matter of law that the construction of the work in question was within the scope of the powers conferred and for the private benefit of the corporation."

Further in the opinion, and quoting from *Lord Ellenborough in Yarborough v. Bank of England*, 16 East, 6, it was said: "Whenever a corporation is competent to do, or order to be done, any act on its behalf, it is liable for the consequences of such act, if it be of a tortious nature, and to the prejudice of another."

We think the opinion above quoted from is full negation of every reason advanced in the present case to free the city from liability. To be sure, in *Memphis v. Lasser*, the manifest purpose of the city in digging the cistern into which Lasser fell was to furnish water for the extinguishment of fires, while in the present case the purpose for which it maintained the electric wire was to furnish light for its streets and public buildings. If there is any material distinction between the two purposes, which would make for liability in the one and avoid it in the other, we are unable to perceive it.

The reason on which the court of civil appeals bases its holding freeing the city from liability because it did not sell any of its current to private consumers is in conflict with the opinion in the *Lasser* Case, where it is said: "And whether the object of a given improvement be to confer a direct benefit or convenience upon the inhabitants of the corporation, as to furnish water facilities or the like, or whether it be to swell the revenues of the corporation, is wholly immaterial. The principle governing the liability of the corporation is precisely the same in both cases."

Our case (*Memphis v. Kimbrough*, 12 Heisk. 138) presents a case of municipal ownership. There the property owned by the city was a steamboat wharf on which an iron cylinder was negligently allowed to remain, concealed by the water of the river, which had overflowed it. A collision between a steamboat and the cylinder resulted in the sinking of the boat, and the owner sued the city for damages and recovered a judgment, which this court affirmed. It appears that one of the officers of the city

provided for by its charter, and to be elected, was a wharfmaster; also that the ordinances of the city required him to keep the wharf free from obstructions. The city received money from steamboats for the use of the wharf, but this fact was clearly not regarded as controlling on the ultimate question of liability. The court said the duty imposed on the city by its charter was a corporate one, and not a public one; in respect of the whole public, its duty was absolute and perfect, and not discretionary or judicial, in character, and plaintiff had an interest in the discharge of the duty of the city to keep the wharf in repair. The wharfmaster was not acting as a public officer, but as the agent or servant of the corporation, for its benefit and that of the individuals using the wharf. It is clear that the collection of tolls for use of the wharf was only a matter of evidence tending to shed light on the character of the act on which liability was predicated. That its absence would not have avoided the liability of the city is manifest from the long line of cases, beginning with *Memphis v. Lasser*, 9 Humph. 757, where no such fact appears. That our view of the question is supported by the clear weight of authoritative English and American decisions we have no doubt. There are some opposing views in other jurisdictions, but they are not supported by reason nor by weight of authority.

We have another line of cases where, on the facts in each, liability of the municipal defendant was denied on the ground that, at the time of the injury complained of, the city was engaged in the discharge of a public function. Some of these cases are *Foster v. Lookout Water Co.* 3 Lea, 42; *Davis v. Knoxville*, 90 Tenn. 600, 18 S. W. 254; *Irvine v. Chattanooga*, 101 Tenn. 291, 47 S. W. 419; *Chattanooga v. Reid*, 103 Tenn. 616, 53 S. W. 937.

The principles governing in those cases do not apply to the facts of this one. Here we have a municipal corporation authorized by its charter to own and operate for its private emolument and electric light plant, and we find it in the exercise of that power, enjoying the franchise conferred upon it by the sovereign state for the private emolument of it as a corporation, and of its citizens residing within its local boundaries. We find it and its citizens deriving from the use of the property a private benefit not enjoyed by the general public composing the sovereign state, resident outside the boundaries of the corporate defendant,—the same kind of private benefit which the same corporate defendant and its citizens realize from the use of improved streets and other local comforts. Under such conditions as L.R.A.1915E.

these, the municipal corporation may no more be relieved of liability where, by the misfeasance of its servant, it places a death trap on a telephone pole than if such a trap had been placed on the street. Its servant was bound to know that, in the discharge of their duties, the lineman of the telephone company would be under necessity of ascending the pole, just as its servant in charge of its streets is bound to know that travelers are under necessity of using its streets. No material distinction can be drawn, and in either case the violation of implied duty is tortious in its character, and the doctrine of *respondent superior* applies.

The judgment of the Court of Civil Appeals was erroneous, and will be reversed. The judgment of the Circuit Court is affirmed.

ARKANSAS SUPREME COURT.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Appt.,

J. B. TUKEY.

(— Ark. —, 175 S. W. 403.)

Carrier — duty to protect passenger from arrest.

1. A railroad company is liable for the wrongful arrest by a peace officer, at the instance of a brakeman, of a passenger who in entering the car had a controversy with the brakeman in regard to showing his ticket, the rule with respect to which the brakeman was attempting to enforce, even though the brakeman had no authority to secure the arrest, since the duty rested on the railroad company to protect the passenger from ill treatment.

Damages — false arrest — humiliation.

2. Five hundred dollars is not excessive to award to a railroad passenger not given to drinking, for arrest, and removal from the car, and detention for some minutes, on the charge of drunkenness, which charge was without foundation in fact.

(March 15, 1915.)

Note. — Liability of carrier for wrongful arrest of passenger caused by servant.

For the earlier cases on this question, see notes to *Schmidt v. New Orleans R. Co.* 7 L.R.A.(N.S.) 162, and *Moore v. Louisiana & A. R. Co.* 34 L.R.A.(N.S.) 299.

For cases involving the liability of a carrier for acts of special police officers appointed by public authority, see notes to *McKain v. Baltimore & O. R. Co.* 23 L.R.A.(N.S.) 289; *Pennsylvania R. Co. v. Kelly*, 30 L.R.A.(N.S.) 481; *Taylor v. New York*

APPEAL by defendant from a judgment of the Circuit Court for White County in plaintiff's favor; in an action brought to recover damages for alleged wrongful arrest of plaintiff at the instance of defendant's servant while a passenger on its train. Affirmed.

Statement by Kirby, J.:

J. B. Tukey, a traveling salesman, bought a ticket from Batesville to New Augusta, Arkansas, on the 31st of July, 1913, and changed cars at Newport. When he attempted to board appellant's train, there was a woman passenger in front of him,

& L. B. R. Co. 39 L.R.A.(N.S.) 122; New York, C. & St. L. R. Co. v. Fieback, 43 L.R.A.(N.S.) 1164; Moss v. Campbells Creek R. Co. L.R.A.1915C, 1183.

For cases involving the liability of a carrier for the arrest or false imprisonment by a servant employed as a detective, policeman, or watchman not a public officer, see notes to Milton v. Missouri P. R. Co. 4 L.R.A.(N.S.) 282, and Conchin v. El Paso & S. W. R. Co. 28 L.R.A.(N.S.) 83.

As to the duty of a carrier to protect a passenger from arrest, see Mayfield v. St. Louis, I. M. & S. R. Co. 32 L.R.A.(N.S.) 525, and Thompkins v. Missouri, K. & T. R. Co. 52 L.R.A.(N.S.) 791.

In Carver v. Carolina, C. & O. R. Co. — N. C. —, 85 S. E. 293, which was an action against a carrier by a passenger for damages because the carrier's agent caused public officers to arrest him while on the train, the court, because of certain errors, granted a new trial, and said that if upon the second trial it should be shown that the conduct of the plaintiff on the train was such as to justify the conductor in calling upon the policemen and asking them to take the plaintiff in custody then the defendant would not be liable for any damages, but if the jury should find that the conduct of the plaintiff was not such as to warrant the conductor in ordering him into the custody of the officers of the law, but that the conductor acted in good faith although mistaken, the defendant would then be liable for such actual or compensatory damages as the plaintiff may have sustained; and if the jury should find that the conductor wrongfully and unjustifiably ordered the arrest of plaintiff without necessity, and that his act was wanton, malicious, reckless, or done through gross negligence in disregard of the plaintiff's rights as a passenger, then punitive damages might be awarded in the sound discretion of the jury.

A railroad company is liable for false imprisonment where its conductor, when directing officers to arrest a disorderly passenger, also caused them to lock up plaintiff, another passenger, who merely witnessed the disorder, and detain him as a witness against the guilty party; and it is not necessary to show express authority of the conductor to cause the arrest and detention L.R.A.1915E.

and he and the other passengers, who were all impatient, were detained while the brakeman waited for the lady to search in her bag for a ticket, which she feared was lost. Tukey, with his personal baggage and sample grips, two in one hand and one in the other, started to board the train. The brakeman asked him where he was going, and he replied to New Augusta, and was requested to show his ticket, which Tukey produced after setting his grips down. The brakeman then told him to move on, but Tukey insisted on his reading the ticket and seeing the destination. This caused an argument and contention, and the brakeman

of a witness to disorderly conduct on the train. New York, P. & N. R. Co. v. Waldron, 116 Md. 441, 39 L.R.A.(N.S.) 502, 82 Atl. 709.

In Turk v. Norfolk & W. R. Co., — W. Va. —, 84 S. E. 569, where plaintiff was given permission by defendant's conductor, to remain in its car which was detained at a station because of a wreck, the court found that he was still a passenger, and that defendant was liable, both in compensatory and punitive damages, for the acts of other servants in procuring plaintiff's arrest and mistreatment by an officer.

Where the conductor of a Pullman car directed the arrest of a passenger, alleging that he had not paid his fare, and the officer imprisoned the passenger without first taking him to a magistrate, the imprisonment was unlawful and the Pullman company was liable. Polonsky v. Pennsylvania R. Co. 106 C.C.A. 541, 184 Fed. 561.

One who enters a passenger train, claiming the right to transportation on a non-transferable ticket issued to another, cannot lawfully be arrested for refusal to pay cash fare upon the auditor taking up the void ticket; and where the officer causes the passenger's arrest under such circumstances, the arrest is unlawful and the company is liable in damages for the injuries sustained. Chicago, R. I. & P. R. Co. v. Radford, 36 Okla. 657, 129 Pac. 834.

But in Wright v. Georgia Southern & F. R. Co. 66 Fla. 510, L.R.A.—, —, 63 So. 909, where it appeared that plaintiff entered defendant's train, relying upon the statement of its agent that the conductor would be authorized to issue her a reduced fare ticket, which in fact he had no authority to do, and she was ejected from the train at a subsequent station, the court denied recovery for her wrongful arrest by the local officer at the instigation of defendant's servant, on the ground that plaintiff, being without a ticket on the train and refusing to pay the regular fare, became a trespasser, so that the stringent rule of liability of a carrier for the tortious acts of its servants toward a passenger did not prevail, and the servants in causing her arrest were acting outside of their authority, so that the carrier would not be liable to a nonpassenger.

R. L. S.

finally told him if he did not get on in he would have him arrested, and Tukey went on into the car and sat down. The brakeman turned to another employee of the company and told him to get a policeman, who appeared in a few minutes, and the brakeman went to the door of the car with the officer and pointed out Tukey to him. The officer then arrested him, and upon his inquiry for the cause of his arrest was told "it was for drunkenness; that there were nine saloons in Newport and 9,000,000 gallons of whisky to come on, and he could get all he wanted to drink." He protested that he was not drunk, but the officer took him out on the platform, and after detaining him five or ten minutes decided he was not too drunk to proceed with the journey, and released him. He stated: That he was never intoxicated in his life, did not drink at all, and that he had used no profane or boisterous language in talking to the brakeman, but had only insisted, after he was requested to produce his ticket, that the brakeman read the station of his destination therefrom. That he was never arrested in his life before, was greatly chagrined and humiliated by being arrested under the circumstances, and suffered much anguish of mind on account thereof. Others testified that the drummer, when the lady was searching for her ticket, elbowed his way to the front of the crowd and said, "I hope to God you have lost it and will never find it." This he denied. They also said he was excited, and talking loud to the brakeman, and appeared to be drunk. A judgment for \$500 damages for the wrongful arrest of appellee was rendered against the railroad company, from which it appealed.

Messrs. E. K. Kinsworthy, P. R. Andrews, and T. D. Crawford, for appellant:

The court should not have left the jury to base their finding of damages upon conjecture or speculation.

St. Louis, I. M. & S. R. Co. v. Steed, 105 Ark. 205, 151 S. W. 257.

In the absence of any evidence tending to show authority on the part of the brakeman to cause plaintiff's arrest, the defendant is not liable.

Chicago, R. I. & P. R. Co. v. Nelson, 87 Ark. 524, 113 S. W. 44.

Mr. S. Brandidge, for appellee:

If the brakeman caused or procured the wrongful and illegal arrest and imprisonment of the plaintiff, who was at the time a passenger on the train, the company would be liable even though it might later appear that the brakeman was at the time acting without the scope of his authority L.R.A.1915E.

and had departed from the line of his duty.

St. Louis, I. M. & S. R. Co. v. Dowgiallo, 82 Ark. 292, 101 S. W. 412; Mayfield v. St. Louis, I. M. & S. R. Co. 97 Ark. 28, 32 L.R.A.(N.S.) 525, 133 S. W. 168; Moore v. Louisiana & A. R. Co. 99 Ark. 235, 34 L.R.A.(N.S.) 299, 137 S. W. 826; Hull v. Boston & M. R. Co. 210 Mass. 159, 36 L.R.A.(N.S.) 406, 96 N. E. 58, Ann. Cas. 1912C, 1147; 2 Hutchinsan, Carr. § 1100.

Kirby, J., delivered the opinion of the court:

It is insisted for reversal that there is no liability against the railroad company for the arrest of appellee, the brakeman being without authority to cause the arrest, and that the testimony shows the arrest was in fact made by the peace officer.

Chicago, R. I. & P. R. Co. v. Nelson, 87 Ark. 524, 113 S. W. 44, is relied on in support of appellant's contention. There the arrest was caused by the gateman at the depot, who refused to allow the persons to pass through the gate and take the train, because the tickets presented by them had already been punched, and the court held (quoting syllabus):

"A railroad company is not liable for the wrongful arrest by a policeman of a passenger, though the arrest was made under the directions of the company's station master, if the latter had no authority to direct the arrest to be made."

In Mayfield v. St. Louis, I. M. & S. R. Co. 97 Ark. 28, 32 L.R.A.(N.S.) 525, 133 S. W. 168, the court held that a railway company was liable for any wrongful arrest of a passenger made or procured by its servants in charge of the train, being under obligation to protect the passengers against any negligent or wilful misconduct of its servants while performing its contract of carriage.

The brakeman was enforcing the rule, as was his duty to do, requiring the passengers to show their tickets before boarding the train, and the controversy arose between him and the passenger while performing this service. After the incident was closed, and the passenger had desisted from further contention and argument, and moved on by the direction of the brakeman and taken his seat in the coach, the officer who had been sent for by the brakeman made the arrest. There is no question but that Tukey was a passenger at the time of his arrest, nor of the fact that he was arrested and taken from the train after having been pointed out to the officer by the brakeman, who had threatened to have him arrested if he did not move on, and sent for an officer for that purpose. The col-

loquy between the passenger and the brakeman had already been finished before the arrival of the officer; and since it did not amount to an offense or violation of the law for which he could be arrested, and the necessity for the proper protection and handling of the passengers in their embarkation had already passed, the causing of the passenger's arrest was a violation of the railway's duty to him, for which it is liable in damages.

The railroad is an insurer of the safety of the passengers against intentional ill treatment from its servants and agents, whose duties relate to the comfort and safety of its passengers, and require them to come in contact with the passengers. *Moore v. Louisiana & A. R. Co.* 99 Ark. 235, 34 L.R.A.(N.S.) 299, 137 S. W. 82d.

Instruction numbered 2, relative to the measure of damages, means only that the jury were authorized to find for the matters set out therein, as shown by the evidence, and did not leave the jury free to find damages against the company without regard to such matters, as shown by the testimony.

The passenger, who was not given to drinking, and who was arrested and taken from the train and detained on the outside of the coach for ten minutes, remonstrated against his arrest, and insisted that he be allowed to proceed with his journey, was necessarily humiliated and chagrined, and suffered such anguish from the condition produced and the situation developed as entitled him to substantial compensation, and the award of the jury is not excessive. The passenger's persistent demand of the brakeman to read his ticket after that official had rightfully requested him to produce it doubtless provoked him to go to the unwarranted extent of having the officer to arrest the passenger, but that did not excuse the company for the violation of its duty to him.

There is no prejudicial error in the record, and the judgment is affirmed.

ARKANSAS SUPREME COURT.

SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY, Appt.,

v.

V. S. SHARP et al.

(— Ark. —, 177 S. W. 25.)

Telephone — making subscribers responsible for long-distance messages — reasonableness.

1. A rule of a telephone company requiring a subscriber to pay for all long-distance messages originating from his telephone, L.R.A.1915E.

whether O. K'd by him or not, is reasonable.

Same — discrimination in enforcement.

2. Failure in two instances to enforce a rule requiring telephone subscribers to pay for messages originating from their telephones is not such discrimination as to nullify the rule.

Same — request for O. K. — abrogation of rule.

3. Request by operators to subscribers to O. K. long-distance messages originating on their telephones in some instances does not abrogate a rule making subscribers liable for such messages whether O. K'd or not.

Same — effect of reversal of charges.

4. That a telephone company on request reverses charges for long-distance messages does not abrogate a rule requiring subscribers to pay for such messages originating on their telephones.

(May 17, 1915.)

A PPEAL by defendant from a judgment of the Circuit Court for Craighead County in plaintiff's favor in an action brought to recover penalties provided by statute for alleged discrimination against them by defendant in the furnishing of telephone service. Reversed.

Statement by Hart, J.:

V. S. Sharp and H. D. White, partners as Sharp & White, instituted this action in the circuit court against the Southwestern Telegraph & Telephone Company to recover penalties under our statute for alleged discrimination against them by the defendant in furnishing telephone service. The testimony taken at the trial was voluminous, but we think the issues raised by the appeal are simple and may be briefly stated as follows: The defendant telephone company owns, maintains, and operates a telephone exchange in the city of Jonesboro,

Note. — Reasonableness of rule of telephone company requiring subscriber to pay for all long-distance messages originating from his telephone.

As to use of subscriber's telephone by nonsubscriber, see note to *Cumberland Teleph. & Teleg. Co. v. Southern R. Co.* 45 L.R.A.(N.S.) 990.

As to right to withdraw telephone service because of abuse of service, see note to *Huffman v. Marcy Mnt. Teleph. Co.* 23 L.R.A.(N.S.) 1010.

As to right of public service corporation to exact security of consumer or require payment of rentals in advance, see notes to *Buffalo County Teleph. Co. v. Turner*, 19 L.R.A.(N.S.) 693, and *Phelan v. Boone Gas Co.* 31 L.R.A.(N.S.) 319.

As to discrimination by public service corporation by requiring payment of rental in advance, see note to *Vaught v. East Tennessee Teleph. Co.* 31 L.R.A.(N.S.) 315.

Arkansas, and also operates a long-distance line from the city of Jonesboro to various towns in the state of Arkansas and elsewhere. The plaintiffs are court stenographers and maintain an office in the city of Jonesboro. For several years they have been subscribers to the defendant's telephone service. Telephone subscribers pay a stated rental for service in the city of Jonesboro and extra compensation for long-distance service. Under the rules and regulations of the company in regard to long-distance messages, each subscriber was charged and required to pay for all long-distance messages originating from his telephone. The plaintiffs declined to pay for such messages originating in their office unless the messages were O. K'd by them. The telephone company refused to credit them for service over the long-distance telephone unless they would agree to pay for all such messages originating in their office, regardless of whether they were O. K'd by plaintiffs. Hence this suit. Other facts will be stated in the opinion. The jury returned a verdict for the plaintiffs for \$175, and the defendant has appealed.

Mr. A. P. Wozencraft, with **Mr. Walter J. Terry**, for appellant:

A creditor telephone company, like any other business creditor, must surely be permitted the privilege of waiving differences and compromising matters with its customers, particularly where it is the first mis-

understanding and the relations have been satisfactory and such patrons have been reasonable.

Vaught v. East Tennessee Teleph. Co. 123 Tenn. 318, 31 L.R.A.(N.S.) 315, 130 S. W. 1050, Ann. Cas. 1912C, 132; *Magruder v. Cumberland Teleph. & Teleg. Co.* 92 Miss. 716, 16 L.R.A.(N.S.) 560, 46 So. 404; *Yancey v. Batesville Teleph. Co.* 81 Ark. 486, 99 S. W. 679, 11 Ann. Cas. 135; *Rushville Coop. Teleph. Co. v. Irvin*, 27 Ind. App. 62, 59 N. E. 327.

A company cannot be penalized for refusing to do anything on credit, regardless of the terms of credit, or the solvency or temperament of the party making the demand.

Yancey v. Batesville Teleph. Co. 81 Ark. 486, 99 S. W. 679, 11 Ann. Cas. 135; *Little Rock & M. R. Co. v. St. Louis Southwestern R. Co.* 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 777; *Montgomery v. Southwestern Arkansas Teleph. Co.* 110 Ark. 486, 161 S. W. 1660; *Younts v. Southwestern Teleg. & Teleph. Co.* 192 Fed. 200; *Illinois C. R. Co. v. Dunnigan*, 96 Miss. 749, 24 L.R.A.(N.S.) 503, 50 So. 4; *Southwestern Teleg. & Teleph. Co. v. Murphy*, 100 Ark. 546, 140 S. W. 720; *Southwestern Teleg. & Teleph. Co. v. Garrigan*, 107 Ark. 611, 156 S. W. 447.

At common law, innkeepers, common carriers, and all others engaged in similar enterprises have the right to demand pre-

As to right to refuse telephone service to coerce payment of bill, see note to *Danaher v. Southwestern Teleg. & Teleph. Co.* 30 L.R.A.(N.S.) 1027.

As to right of telephone company to discriminate as to rates, see note to *New York Teleph. Co. v. Sigel-Cooper Co.* 36 L.R.A.(N.S.) 561.

As shown by the following cases, it is well settled that a telephone company may make reasonable regulations concerning the conduct of its business, and that these rules must be complied with by its subscribers: *Southwestern Teleg. & Teleph. Co. v. Danaher*, 102 Ark. 547, 144 S. W. 925; *Smith v. Southwestern Teleg. & Teleph. Co.* 109 Ark. 35, 158 S. W. 975; *Huffman v. Marcy Mut. Teleph. Co.* 143 Iowa, 590, 23 L.R.A.(N.S.) 1010, 121 N. W. 1033; *McDaniel v. Faubush Teleph. Co.* 32 Ky. L. Rep. 672, 106 S. W. 825; *People ex rel. Postal Teleg. Cable Co. v. Hudson River Teleph. Co.* 19 Abb. N. C. 466; *Pugh v. City & Suburban Teleph. Asso.* 8 Ohio Dec. Reprint, 644.

While the decision in *SOUTHWESTERN TELEG. & TELEPH. CO. v. SHARP* appears to be the first which has passed upon the reasonableness of a rule of a telephone company requiring a subscriber to pay for all long-distance messages originating from his telephone, there would seem to be little L.R.A.1915E.

doubt of the correctness of the conclusion reached in that case, holding such a rule to be reasonable. As stated in the opinion the subscriber can easily control the use of his telephone by third persons; while it is manifestly impossible for telephone operators to know and recognize the voices of all persons using a telephone for long-distance purposes, and to know to whom these calls should be charged in the absence of such a regulation. It has been recognized that a telephone company, when long-distance service is sought at a private station by a nonsubscriber with whom it has no contract relation, may require the applicant to go to one of its regular pay stations (*Jones v. Cumberland Teleph. & Teleg. Co.* 140 Ky. 165, 130 S. W. 994), but, as already stated, it is impossible for the telephone company's servants to definitely determine from a person's voice whether he is one of its subscribers or not, or to determine the authority of the person speaking to use the telephone, and it would seem that the only safe method for the company to pursue in such cases would be to adopt such a rule as was in question in *SOUTHWESTERN TELEG. & TELEPH. CO. v. SHARP*, under which a uniformity of policy is established for the guidance of both the subscriber and the company.

J. T. W.

payment by all customers, or some of them, as the innkeeper or carrier may think best.

2 Hutchinson, 3d ed. § 567; Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 249, 51 Fed. 472, affirmed in 4 Inters. Com. Rep. 718, 9 C. C. A. 409, 15 U. S. App. 479, 61 Fed. 158; Southern Indiana Exp. Co. v. United States Exp. Co. 88 Fed. 659; Gulf, C. & S. F. R. Co. v. Miami S. S. Co. 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407; Vaught v. East Tennessee Teleph. Co. 123 Tenn. 318, 31 L.R.A. (N.S.) 315, 130 S. W. 1050, Ann. Cas. 1912C, 132.

The right to recover a penalty must be dependent upon the right to demand the service; and only he who has paid or tendered the proper charges has a right to make such demand.

Western U. Teleg. Co. v. Messler, 95 Ind. 29; Langley v. Western U. Teleg. Co., 88 Ga. 777, 15 S. E. 291; Moran v. Western U. Teleg. Co., 186 Mo. App. 633, 172 S. W. 433.

Messrs. Baker & Sloan, for appellees:

The rule of the defendant as to payment of long-distance messages is unreasonable. Shepard v. Milwaukee Gaslight Co., 6 Wis. 539, 70 Am. Dec. 479; Western U. Teleg. Co. v. Chamblee, 122 Ala. 428, 82 Am. St. Rep. 89, 25 So. 232; Western U. Teleg. Co. v. Griawold, 37 Ohio St. 301, 41 Am. Rep. 500; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624; Taylor v. Little Rock, M. R. & T. R. Co. 39 Ark. 148; Little Rock, M. R. & T. R. Co. v. Talbot, 47 Ark. 97, 14 S. W. 471; St. Louis Southwestern R. Co. v. Wallace, 90 Ark. 138, 22 L.R.A. (N.S.) 379, 118 S. W. 412, 21 Am. Neg. Rep. 484; Southern R. Co. v. Cumberland Teleph. & Teleg. Co. 127 Tenn. 566, 45 L.R.A. (N.S.) 990, 156 S. W. 853, Ann. Cas. 1914B, 1187.

Under the well settled rule of construction applicable to a proviso in a statute, the burden throughout of showing that compliance or offer to comply with reasonable rules and regulations was not made by the plaintiffs rested upon the defendant.

McRae v. Holcomb, 46 Ark. 306; Stanley v. Walkerson, 63 Ark. 556, 39 S. W. 1043; Towson v. Demson, 74 Ark. 302, 86 S. W. 661; Vaughan v. State, 84 Ark. 332, 103 S. W. 576; McDonald v. State, 83 Ark. 26, 102 S. W. 703.

Where parties are indisputably solvent, and are entitled to receive credit as much as the other patrons or subscribers of a public service company, that may be a discrimination as to credit.

Phelan v. Boone Gas Co. 147 Iowa, 626, 31 L.R.A. (N.S.) 319, 125 N. W. 208; Owens-L.R.A. 1915E

boro. Gaslight Co. v. Hildebrand, 19 Ky. L. Rep. 983, 42 S. W. 351.

Hart, J., delivered the opinion of the court:

This suit was brought under an act approved February 25, 1913. See Acts 1913, p. 346.

Section 1 of that act is as follows:

"Section 1. That § 7948, Kirby's Digest be amended so as to read as follows: Section 7948. Every telephone company doing business in this state and engaged in a general telephone business shall supply all applicants for telephone connection and facilities without discrimination or partiality, within ten days after written demand therefor; provided, such applicants comply or offer to comply with the reasonable regulations of the company, and no such company shall impose any condition or restriction upon any such applicant that are not imposed impartially upon all persons or companies in like situations; nor shall such company discriminate against any individual or company engaged in lawful business, by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise, under a penalty of \$100, and \$5 per day for each day from the expiration of said notice until said demand is complied with or suit is instituted for penalty for failure to comply with said demand, for such discrimination, after compliance or offer to comply with the reasonable regulations of such company and the time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused. And any person denied such telephone facilities shall also have the right to proceed by mandamus or other proper remedy to enforce the furnishing of same and the courts shall hear such applications either in vacation or in term time and make such temporary orders relative to the furnishing of such facilities as the facts may justify, and may enforce compliance therewith, until such orders are vacated by order of the court or the judge at chambers, or such suit is finally determined."

In the case of the Southwestern Teleg. & Teleph. Co. v. Danaher, 102 Ark. 547, 144 S. W. 925, we held that telephone companies have the right to make and enforce reasonable rules and regulations for the guidance of their subscribers, and, in case the subscriber refuses to obey such regulations, may refuse to furnish telephone service without being guilty of discrimination. The statute under consideration there was practically the same as that in this case,

except in regard to the penalty prescribed for its violation.

Being public service corporations, telephone companies take and hold their charters subject to the obligation of rendering service at uniform and reasonable rates and without discrimination. In recognition of the right of the telephone company to prescribe and enforce reasonable rules and regulations for the guidance of its subscribers, this court has held that a telephone company may require its charges to be paid in advance, and may extend credit for such charges to such persons as it may deem desirable, without rendering itself liable to a charge of discrimination. *Yancey v. Batesville Teleph. Co.* 81 Ark. 486, 99 S. W. 679, 11 Ann. Cas. 135.

It is the general rule that telegraph and telephone companies may make rules and regulations which require that charges shall be paid for a reasonable time in advance by their subscribers, and may enforce such regulations by the refusal of service to persons who do not comply therewith. See case note in Ann. Cas. 1914D, at page 119.

In the case before us there was no refusal of credit to plaintiffs, but under the rules and regulations adopted by the telephone company subscribers were required to pay for all long-distance messages which originated from the subscribers' telephone. The plaintiffs refused to pay for long-distance messages originating from their office telephone unless these messages were from themselves or were O. K.'d by them.

We think the regulation adopted by the telephone company was a reasonable one, and that it had a right to enforce it. The undisputed evidence shows that Jonesboro was a growing city; that there were 1,033 subscribers to the Jonesboro exchange and about 200 service stations in the country; that they were also connected with the Nettleton exchange, which had about 200 telephones in town and country; that on account of the number of subscribers it was difficult for the operators to recognize the voices of the persons making long-distance calls, and in order to keep the telephone company from being imposed upon, it was necessary that long-distance calls be charged to the telephone from which they originated. It was also shown that it was an easy matter for the subscriber to control the use of his phone. Of course, when the plaintiffs were in their office they could personally control it, and when they were out the telephone could be locked in the desk so that no one else could use it. Hence, we are of the opinion that the rule adopted by the telephone company was a reasonable one and that it had a right to enforce it.

L.R.A.1915E.

It is contended by counsel for the plaintiffs that, however just and proper the rules were in themselves, they were so enforced as to constitute an unjust discrimination against them. We do not think the evidence in the record shows that the rule sought to be enforced against the plaintiffs was ignored in regard to others in like situation. In order to sustain this issue plaintiffs introduced two witnesses, each of whom stated that at one time the company had charged his office with a message which had not been authorized by him and that he refused to pay it. The evidence on the part of the telephone company tends to show that they uniformly attempted to enforce this rule, and the mere fact that they did not enforce it on the two occasions in question does not amount to a discrimination against the plaintiffs.

It was also shown by the plaintiffs by several other witnesses that frequently the long-distance operators asked them to O. K. messages which came from their phones. The mere fact, however, that in some instances the long-distance operators requested subscribers to O. K. messages was not sufficient to show that the rule under consideration had been abrogated or was not being enforced. The operators, at the times mentioned, may have had a suspicion that the subscriber was being imposed upon, and did this for the purpose of protecting the subscriber. At any rate, we do not think the fact that the long-distance operators would sometimes request that messages be O. K.'d by subscribers is sufficient to show either an abrogation of the rule or its nonenforcement.

It was also shown by plaintiffs that the company frequently received calls which were "reversed." For instance, a person would be in Jonesboro and would desire to talk to his home or office in Paragould, Arkansas, and would request the long-distance operator to call his office or home and charge the message to that end of the line. This testimony did not tend in any way to show that the rule in question had been abrogated or was not being enforced. The reversing of calls had nothing whatever to do with the rule in question. It was an entirely different rule and adopted for an entirely different purpose. The testimony on the part of the telephone company, which was not disputed, tended to show that this practice was permitted for the benefit of its subscribers; that, when the operator became satisfied that the person talking was a subscriber to a phone in another town, he was permitted to have his message charged to his home phone; that the company so far had not lost anything by adopting this rule; and that, if,

as the exchange grew larger, it should be found that this rule operated injuriously to the best interest of the company, or should not be beneficial to the subscriber, it would be abrogated.

The record shows that the agents of the defendant tried in every way to induce the plaintiffs to accept service in accordance with its rules and regulations, and never at any time refused to serve them until they had refused to comply with its rules and regulations in regard to the use of the long-distance telephone. We think the undisputed testimony shows that the telephone company sought to enforce the rule under consideration against its subscribers alike, and that it only restricted the use of the long-distance telephone when requested to do so by its subscribers, or when they refused to obey the regulations in regard thereto.

It follows that the court erred in not directing a verdict for the defendant, and for that error the judgment will be reversed; and, inasmuch as the case appears to have been fully developed, the cause of action of plaintiffs will be here dismissed.

KANSAS SUPREME COURT.

CARRIE JOHNSON

v.

ERICK OLSON et al.

ANNA K. JACOBSON et al., Appts.

(92 Kan. 819, 142 Pac. 256.)

Alien — inheritance — constitutional changes.

1. In the absence of a governing treaty, the repeal of the constitutional provision

Headnotes by JOHNSTON, Ch. J.

Note. — Effect of treaties upon alien's right to inherit.

This note is supplemental to the note to Rixner's Succession, 32 L.R.A. 177, where the earlier cases are collected.

For effect of state statutes and Constitutions upon inheritance through an alien, see the note to De Wolf v. Middleton, 31 L.R.A. 146.

For tracing descent through an alien, see the note to Cramer v. McCann, 37 L.R.A. (N.S.) 109.

For effect of state Constitutions and statutes upon the question of inheritance by or from an alien, see the note to Beavan v. Went, 31 L.R.A. 85.

For validity of discrimination against aliens by inheritance tax law as affected by treaty with foreign government, see the note to Re Stixrud, 33 L.R.A. (N.S.) 632. L.R.A. 1915E.

that no distinction shall be made between citizens and aliens in the inheritance, enjoyment, and descent of property, and the adoption in its place of the provision that the rights of aliens in reference to the inheritance, enjoyment, and descent of property shall be regulated by law, without enacting a statute regulating the inheritance of property by aliens, revives and reinstates the common-law rule that an alien cannot inherit from a deceased citizen.

Treaty — Sweden — descent.

2. Article 6 of the treaty between the United States and Sweden, originally negotiated in 1783, and revived in article 17 of the treaty of 1827, relating to the disposition of "goods and effects," does not refer to or embrace real estate.

Descent — through alien.

3. The intestate, who was the owner of land in Kansas, died without wife or issue; his father and mother having previously died. Among his surviving brothers and sisters some were aliens and some citizens of the United States. One of his sisters, who was an alien and alive when he died, had two children who were citizens of the United States. Held, that the sister, being an alien, could not inherit a share of the estate, and that after her death her children, although citizens, were incapable of inheriting through her.

(July 7, 1914.)

APPEAL by defendants Jacobson et al. from a judgment against them in the District Court for Clay County in an action brought to partition certain real estate. **Affirmed.**

The facts are stated in the opinion.

Mr. George L. Davis, for appellants:

At the death of Olaf Olson, Anna Anderson, his sister, inherited an undivided one sixth of all his property, both real and personal, and at her death it descended to her children, and the same should be divided among them share and share alike.

For question whether real estate will pass under the word "effects" in a written instrument, see the note to Andrews v. Applegate, 12 L.R.A. (N.S.) 661.

General doctrines.

A state law contrary to the provisions of a treaty permitting the inheritance of aliens is inoperative. *Bahaud v. Bize*, 105 Fed. 485; *Opel v. Shoup*, 100 Iowa, 407, 37 L.R.A. 583, 69 N. W. 560; *Doehrel v. Hillmer*, 102 Iowa, 169, 71 N. W. 204; *Wilcke v. Wilcke*, 102 Iowa, 173, 71 N. W. 201; *Ehrlich v. Weber*, 114 Tenn. 711, 88 S. W. 188 (the point probably not necessary to the decision).

In the absence of treaty, a state may permit an alien to inherit; and a state statute placing citizens or aliens substantially on the same terms in this respect is

Adams v. Akerlund, 168 Ill. 632, 48 N. E. 454; Re Stixrud, 58 Wash. 339, 33 L.R.A. (N.S.) 632, 109 N. W. 343, Ann. Cas. 1912A, 850.

Messrs. F. B. Dawes, R. C. Miller, F. D. Williams, and J. L. Hogan, for appellees:

In the absence of any statute upon the subject, and in the absence of any positive provision of the Constitution clearly granting the right to inherit to aliens, the common law prevails.

Hewey v. Nourse, 54 Me. 256; 8 Am. & Eng. Enc. Law, 931; Stemple v. Herminghouser, 3 G. Greene, 408; 8 Cyc. 377; Com. v. Churchill; 2 Met. 118; Com. v. Marshall, 11 Pick. 350, 22 Am. Dec. 377; State v. Rollins, 8 N. H. 530; Nickels v. Kane, 82

Va. 309; Moseley v. Brown, 76 Va. 419; Booth v. Com. 16 Gratt. 519; Insurance Co. of Valley of Va. v. Barley, 16 Gratt. 363.

Where the words "goods and effects" are connected together, as they are in this treaty, such words do not embrace real estate.

5 Cyc. 686; McCaffrey v. Woodin, 65 N. Y. 459, 22 Am. Rep. 644; 1 Co. Litt. § 177, subdiv. 118b; Vandergrift's Appeal, 83 Pa. 126, 9 Mor. Min. Rep. 397; Hunter v. Case, 20 Vt. 195; McKleroy v. Cantey, 95 Ala. 295, 11 So. 258; First Nat. Bank v. Consolidated Electric Light Co. 97 Ala. 465, 12 So. 71; De Cordova v. Knowles, 37 Tex. 19; Doe ex dem. Haw v. Earles, 15 Mees. & W. 450; Keyes v. Milwaukee & St.

not contrary to the provision of the United States Constitution that "no state shall, without the consent of Congress

enter into any agreement or compact with another state or with a foreign power." Blythe v. Hinckley, 180 U. S. 333; 45 L. ed. 557, 21 Sup. Ct. Rep. 390, affirming 127 Cal. 431, 89 Pac. 787. In the state court it was pointed out (January, 1900) that the treaties between the United States and the country of the alien (Great Britain) were silent on this subject.

A statute eliminating objections to the inheritance of aliens who are residents is a disqualifying statute as to an alien non-resident, within the terms of a treaty permitting aliens who would take if not "disqualified" by the laws of a country, to sell the inheritance. Doe ex dem. Dockstader v. Roe, 4 Penn. (Del.) 398, 55 Atl. 341, infra, under "Great Britain."

As to what is a "reasonable time" under a treaty for an alien heir to dispose of his inheritance, see Ahrens v. Ahrens, 144 Iowa, 486, 123 N. W. 164, Ann. Cas. 1912A, 1098, infra, under "Hanover;" see also in this connection Scharpf v. Schmidt, 172 Ill. 255, 50 N. E. 182, infra, under "Württemberg."

The decision in JOHNSON v. OLSON, that the expression "goods and effects" in a treaty referring to disposition by will or in case of intestacy does not include real property, is in accord with a similar decision in Meier v. Lee, 106 Iowa, 303, 76 N. W. 712, cited in the JOHNSON Case. On the other hand, the contrary was held under the same treaty in Adams v. Akerlund, 168 Ill. 640, 48 N. E. 454 (infra, under "Sweden"), and in Erickson v. Carlson, 95 Neb. 182, 145 N. W. 352 (infra, under "Sweden"); see also Re Stixrud, 58 Wash. 339, 33 L.R.A. (N.S.) 632, 109 Pac. 343, Ann. Cas. 1912A, 850, sufficiently referred to in the principal case.

The court in JOHNSON v. OLSON, does not refer to Den ex dem. University v. Miller, 14 N. C. (3 Dev. L.) 188, referred to in the earlier note, and more fully in the note in 12 L.R.A. (N.S.) 664, where it was held that under the treaty of 1782 between the United

States and the Netherlands, the word "effects" therein included real property.

It may be noted that the inheritance of an alien brother under treaty is not conditioned that the deceased parents should have been capable of inheriting, as the brother does not inherit through deceased parents, but directly (Wilcke v. Wilcke, 102 Iowa, 173, 71 N. W. 201, infra, under "Prussia"); but that in Meier v. Lee, 106 Iowa, 303, 76 N. W. 712, infra, under "Sweden," it was held that alien cousins could not inherit, as they took immediately through their mother, who died before the intestate and who was a nonresident alien.

Great Britain.

Supplementing note in 32 L.R.A. 179.

It is not an enabling, but a disqualifying, statute of Delaware, which eliminates objections to the inheritance of an alien if he is a resident of the United States at the death of the ancestor, but provides that aliens "not residing within the limits of the United States at the time of the intestate's death shall be passed by, and the effect shall be the same as if they were dead," and, consequently, it is controlled by the treaty of 1900 between the United States and Great Britain, which provides: "Article 1. Where, on the death of any person holding real property (or property not personal) within the territories of one of the contracting parties, such real property would, by the laws of the land, pass to a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of three years, in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and to withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the citizens or subjects of the country from which such proceeds may be drawn." Doe ex dem. Dockstader v. Roe, 4 Penn. (Del.)

P. R. Co. 25 Wis. 691; Planters' Bank v. Sharp, 6 How. 301, 320, 12 L. ed. 447, 456.

A niece, a citizen of the United States, cannot inherit from an intestate uncle, a citizen of the United States, where the mother of said niece, a sister of the intestate, is alive at the time of the intestate's death, and a citizen and resident of Sweden.

State v. Ellis, 72 Kan. 288, 83 Pac. 1045; Lash v. Lash, 57 Iowa, 88, 10 N. W. 302; Smith v. Lynch, 61 Kan. 612, 60 Pac. 329; Beavan v. Went, 155 Ill. 592, 31 L.R.A. 85, 41 N. E. 91; Wilcke v. Wilcke, 102 Iowa, 178, 71 N. W. 201; McGregor v. Comstock, 3 N. Y. 408; Levy v. M'Cartee, 6 Pet. 102, 8 L. ed. 334; People v. Irvin, 21 Wend. 128; M'Creery v. Somerville, 9 Wheat. 354, 6 L. ed. 109; McLean v. Swanton, 13 N. Y. 535;

398, 55 Atl. 341, where the plaintiff claimed under nonresident English heirs, and the defendant was an Englishman resident in the United States, and where the court, in overruling the defendant's contention that the language of said § 1 of the treaty was too obscure, ambiguous, and contradictory to be capable of sensible interpretation, said: "It is almost inconceivable that the language of a paper of such grave importance as this treaty between two great nations should be clothed in language at once so loose and careless. It reflects but little credit upon the persons charged with the duty of framing this treaty, and suggests that some degree of competency should hereafter be required in such cases. Still, however, in applying the ordinary rules of interpretation to the plain purposes and scope of the treaty, it seems to us that § 1 of the treaty contemplates the elimination of the disqualification of alienage in the next of kin, so far as it relates to the subject-matter of this suit, and puts the next of kin on the same footing as if they were all residents of this state at the time of the death of the intestate."

In State v. Ellis, 72 Kan. 285, 83 Pac. 1045, in holding that a citizen might inherit from her citizen half-brother through nonresident parents, who predeceased the intestate, it was said (*obiter*) that the treaty of 1900 between Great Britain and the United States did not apply to a case where the heirs were citizens of the United States.

See also Blythe v. Hinckley, 127 Cal. 431, 59 Pac. 787, *supra*, under "General doctrines."

France.

Supplementing note in 32 L.R.A. 183.

It was held in *Bahaud v. Bize*, 105 Fed. 485 (Neb.), that under article 7th of the treaty of 1853 between the United States and France (summarized in the previous note) a nonresident citizen of France might inherit property in a state, where the Constitution of such state (Neb.) provided that "no distinction shall ever be made by law L.R.A.1915E.

Renner v. Muller, 12 Jones & S. 551; Descottes v. Talvandé, 2 McMull. L. 300.

Johnston, Ch. J., delivered the opinion of the court:

The purpose of this action is the partition of a tract of land in Clay county which had been owned by Olaf Olson, who died intestate, unmarried, and without children on January 3, 1911. His parents, who died prior to the time of his death, were citizens of Sweden, and never had been citizens of the United States. They had seven children besides Olaf, and their names were Lizzie Person, Anna Anderson, Brita Olson, and Carrie Johnson, sisters of Olaf; and Erick Olson, Zackarias Olson, and Lars Olson, his brothers. Only three of

between resident aliens and citizens in reference to the possession or descent of property," and the statute provided that nonresident aliens were prohibited from acquiring title to or holding any lands by descent, devise, purchase, or otherwise, except (1) that the widow and heirs of aliens who had heretofore acquired lands in the state under its laws might hold the same by devise or descent for ten years, within which time they might sell or become resident; (2) that a nonresident alien owning land at the time of the act might dispose of it during his life; (3) that he might take liens, etc., and hold thereunder for ten years after enforcement; (4) that he might purchase so much real estate as should be necessary for the purpose of erecting and maintaining manufacturing establishments; such statute further providing that its provisions should not apply to any real estate lying within the corporate limits of cities and towns. The court considered that the treaty, as construed by the court in *Geofroy v. Riggs*, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295 (referred to in the earlier note), applied "to all states by whose laws an alien, whether designated as resident or nonresident, is permitted to hold real estate. In such states, where a resident alien is permitted to hold real estate, the prohibition as to nonresidents holding title to real estate by inheritance or otherwise is inoperative, by virtue of the treaty, as to citizens of the Republic of France."

Germany.

Supplementing note in 32 L.R.A. 185.

The treaty between the United States and the German Empire made soon after the formation of the latter does not abrogate the treaties between the German states and this country. *Ehrlich v. Weber*, 114 Tenn. 711, 88 S. W. 188, *infra*, under "Saxony" (probably *obiter*).

The same was inferentially held in *Opel v. Shoup*, *infra*, under "Bavaria;" *Doehrel v. Hillmer*, *infra*, under "Prussia;" *Wilcke v. Wilcke*, *infra*, under "Prussia."

these were citizens of the United States, Carrie Johnson, Erick Olson, and Zackarias Olson, but Erick died without wife or children prior to the death of Olaf. The brother Lars Olson, deceased, was a citizen of Sweden, and his only children and heirs were citizens of Sweden, and never were citizens of the United States. The sister Lizzie Person was a citizen and resident of Sweden at the death of Olaf, and had never been a citizen of the United States. Before the death of Olaf his sister Brita Olson died a citizen of Sweden, and she never had been a citizen of the United States, but she left four children, two of whom were, and always had been, citizens of Sweden, and two of them, Betty Jerner and Olaf Olson, were residents and citizens of the United States

when their uncle Olaf died. Another sister, Anna Anderson, was living at the time Olaf died, and had always been a citizen of Sweden. She died in 1912, some time after this action was commenced, leaving four children, two of whom were citizens of Sweden, and never citizens of the United States, and two of them, Anna K. Jacobson and Mary Burge, were citizens of the United States at the time that Olaf died. The trial court held that those who were aliens when Olaf died were not entitled to inherit any share in the land; that his sister Carrie Johnson and his brother Zackarias Olson, citizens of the United States, were each entitled to an undivided one third of the land; that Betty Jerner and Olaf Olson, citizens of the United

Bavaria.

A statute of a state prohibiting the inheritance by nonresident aliens is rendered inoperative by the treaty of 1845 between the United States and Bavaria, providing that "every kind of *droit d'aubaine* is hereby, and shall remain, abolished between the two contracting parties, their states, citizens, and subjects respectively.

Where, on the death of any person holding real property within the territories of one party, such real property would, by the laws of the land descend on a citizen or subject of the other were he not disqualified by alienage, such citizen or subject shall be allowed a term of two years to sell the same, which term may be reasonably prolonged according to circumstances, and to withdraw the proceeds thereof, without molestation, and exempt from all duties of detraction." *Opel v. Shoup*, 100 Iowa, 407, 37 L.R.A. 583, 69 N. W. 560.

Hanover.

Supplementing note in 32 L.R.A. 186.

In *Ahrens v. Ahrens*, 144 Iowa, 486, 123 N. W. 164, Ann. Cas. 1912A, 1098, it was held that aliens who brought an action of partition (fifty years after the death of the intestate), claiming that a statute of the state passed some seven or eight years after the death of the intestate removed the disqualification of aliens to inherit, and further that their disqualification was removed by their removal to the United States eight or nine years after such death, had not acted within a "reasonable time" under the treaty between the United States and Hanover, which provided that "where, on the decease of any person holding real estate within the territories of one party, such real estate would by the laws of the land descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same and to withdraw the proceeds without molestation, and exempt from all duties of detraction on the L.R.A.1915E.

part of the government of the respective states."

See also *Doehrel v. Hillmer*, *infra*, next paragraph.

Prussia.

Supplementing note in 32 L.R.A. 187.

Under art. 14 of the treaty of 1828 between the United States and the King of Prussia, quoted in the earlier note, it was held that where a citizen of Iowa devised real property therein to a resident of Hanover, Germany, who died some twenty months later intestate as to such real property, the same devolved upon her sons, who were also residents of Hanover. *Doehrel v. Hillmer*, 102 Iowa, 169, 71 N. W. 204. The court held that the mother took the property by purchase under the Iowa statute, and "was owner of real property," within the meaning of the treaty. Such statute (chap. 85, Acts 22d Gen. Assembly of Iowa) provided that "any nonresident alien may acquire and hold real property to the extent of three hundred and twenty (320) acres, or city property to the amount of \$10,000 in value, providing that within five years from the date of purchase of said property, the same is placed in the actual possession of a relative of such purchaser, the occupant being related to such owner within the third degree of kindred, or the husband or wife of such relative, and further provided that such occupant become a naturalized citizen within ten years from the purchase of such property as aforesaid."

It was held in *Wilcke v. Wilcke*, 102 Iowa, 173, 71 N. W. 201, that aliens who were citizens of Waldeck were entitled to inherit under the treaty between the United States and the King of Prussia.

Saxony.

In *Ehrlich v. Weber*, 114 Tenn. 711, 88 S. W. 188, where one heir was alien and one a citizen, it was held that the act of Tennessee of 1883 (chap. 250) should be construed as applying only to a case where all the heirs were aliens, and it was said that in any case such act was contrary to

States and children of an alien mother who was not living when Olaf died, were each entitled to one sixth of the land; but that Anna K. Jacobson and Mary Burge, although citizens of the United States, did not inherit any share, as their alien mother was living when Olaf died. Anna K. Jacobson and Mary Burge are the only relatives of the deceased who claimed a part of his estate other than those to whom it was awarded, and they are appealing from the decision holding that they were not entitled to inherit.

Whether they can inherit from their deceased uncle depends upon the interpretation of the treaty between the governments of Sweden and the United States and of our statutes of descent and distribution. If the

and could not in any event regulate the rights of parties falling within the terms of the treaty between the United States and Saxony of 1845-1846, providing that "where, on the death of any person holding real property within the territories of one party, such real property would by the laws of the land descend on a citizen or subject of the other, were he not disqualified by alienage, or where such real property has been devised by last will and testament to such citizen or subject, he shall be allowed a term of two years from the death of such person—which term may be reasonably prolonged according to circumstances—to sell the same and to withdraw the proceeds thereof without molestation, and exempt from all duties of detraction on the part of the government of the respective states." A prior statute placed aliens in all respects as to the succession of property in the same situation as citizens.

Sweden.

Supplementing note in 32 L.R.A. 187.

Meier v. Lee, 106 Iowa, 303, 76 N. W. 712, is referred to in the principal case, and holds the same doctrine as that case.

JOHNSON v. OLSON is contrary to Adams v. Akerlund, 168 Ill. 635, 48 N. E. 454, where, in addition to the statements summarized in JOHNSON v. OLSON, the court said: "Bouvier, in his Law Dictionary, defines the French word, *biens* to mean: 'Property of every description, except estates of freehold and inheritance.' But this is evidently the strict meaning which it has, as it is defined by the common-law writers, because, immediately after this definition, he adds these words: 'In the French law this term includes all kinds of property, real and personal. *Biens* are divided into *biens meubles*, movable property, and *biens immeubles*, immovable property.' It would thus appear, that the word, as used in the original treaty in the French language, has a meaning in the civil law which includes both real and personal property. In a note to § 13, of Story on Con-

appellants can inherit, it must be through their mother, who was a citizen of Sweden when Olaf Olson died, and had never been a citizen of the United States.

Originally aliens and citizens were upon an equality in Kansas so far as the inheritance of property was concerned. The Constitution provided that "no distinction shall ever be made between citizens and aliens in reference to the purchase, enjoyment or descent of property." Bill of Rights, § 17; Comp. Laws, 1885, § 99.

At the general election in 1888 this provision was stricken from the Constitution, and in its place a provision was inserted providing, among other things, that "the rights of aliens in reference to the purchase, enjoyment or descent of property may be

dict of Laws, 8th ed., it is said: "The term *biens* in the sense of civilians and continental jurists comprehends not merely goods and chattels, as in the common law, but real estate." It is also said in a note to § 146 of the same work: "Foreign jurists commonly in the term *biens* include all sorts of property, movable and immovable, in their discussions on this subject."

Erickson v. Carlson, 95 Neb. 182, 145 N. W. 352, referred to in the principal case, follows Adams v. Akerlund in construction of the same words in the same treaty.

Re Stixrud, 58 Wash. 339, 33 L.R.A. (N.S.) 632, 109 Pac. 343, Ann. Cas. 1912A, 850, is sufficiently referred to in the principal case.

Switzerland.

Supplementing note in 32 L.R.A. 87.

The provisions of art. 5 of the treaty between the United States and Switzerland, dated November 25th, 1850, and ratified November 8th, 1855 (referred to in the earlier note as the treaty of 1850), provide for two classes of laws: (1) Where the laws of the state permit aliens to hold or inherit, and (2) where they are not permitted to hold; and under the statute of Indiana providing that they may "take and hold land by devise and descent only, and may convey the same at any time within five years thereafter, and no longer, and all land so left unconveyed at the end of five years shall escheat to the state of Indiana," the court adjudged that land not conveyed by alien heirs within some nine or ten years belonged to the state. Lehman v. State, 45 Ind. App. 330, 88 N. E. 365. The treaty provided: "Art. 5. The citizens of each one of the contracting parties shall have power to dispose of their personal property within the jurisdiction of the other, by sale, testament, donation, or in any other manner, and their heirs whether by testament, or *ab intestato*, or their successors, being citizens of the other party, shall succeed to the said property, or inherit it, and they may take possession thereof, either of

regulated by law." Bill of Rights, § 17; Gen. Stat. 1909, § 99.

Since that time there has been no legislation on the subject, except chapter 3 of the Laws of 1891, which provided for the early disposition of real estate then owned by nonresident aliens, and therefore we have no constitutional or statutory provisions regulating the inheritance of property by aliens. In the absence of any regulation or provision on the subject, the rule of the common law will control. In 8 Cyc. 377, it is said: "When a statute abrogating a rule or principle of the common law is repealed, the common-law principle or rule is *ipso facto* revived, unless there is something to show a contrary intent on the part of the legislature."

The common law was in force when the original provision of the Constitution permitting aliens to inherit was adopted, and when it was abrogated without the substitution of a regulation or statute on the subject of inheritance the common law was revived. It is a settled principle of the common law that there can be no inheritance by, through, or from an alien, and this principle has been applied in Kansas, where it was declared that "it is also the well-recognized rule of the common law that an alien cannot inherit the lands of a deceased citizen." *State v. Ellis*, 72 Kan. 285, 288, 83 Pac. 1045.

The supreme court of Iowa held that the

themselves, or by others acting for them; they may dispose of the same as they may think proper, paying no other charges than those to which the inhabitants of the country wherein the said property is situated shall be liable to pay in a similar case.

The foregoing provisions shall be applicable to real estate situated within the states of the American Union, or within cantons of the Swiss Confederation in which foreigners shall be entitled to hold or inherit real estate. But in case real estate situated within the territories of one of the contracting parties shall fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the state or in the canton in which it may be situated, there shall be accorded to the said heir, or other successor, such term as the laws of the state or canton will permit to sell such property; he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty and without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which the real estate may be situated."

Waldeck.

See *Wilcke v. Wilcke*, supra, under "Prussia." L.R.A.1915E.

common law controlled in the absence of legislation in regard to the rights of an alien to inherit, upon the theory that statutes, as well as constitutional provisions, are to be construed in reference to the principles of the common law, and that, where they are silent upon the subject, the principles of the common law will govern. It was said that "the statute regulating the descent of property in Iowa, at the adoption of the Constitution, was that of February 13, 1843, and provides that the lands of any person dying intestate shall descend in equal shares to his children. This evidently means such children as have inheritable blood; for, it being an inflexible rule at common law that aliens, resident or non-resident, are not heirs, cannot take by descent, nothing less than a plain and express provision in relation to them will change this rule." *Stemple v. Herminghouser*, 2 G. Greene, 408, 410; *State v. Rollins*, 8 N. H. 550; *Nickels v. Kane*, 82 Va. 309; *Insurance Co. of Valley of Va. v. Barley*, 16 Gratt. 363; 6 Am. & Eng. Enc. Law, 931.

This would be the controlling rule, in the absence of a treaty regulation, but it is contended that, under the terms of a treaty between the United States and Sweden, the appellants take a share in the real estate owned by their uncle at the time of his death. A treaty between these governments was made on April 3, 1783, and in article 6 there was a stipulation regulating the

Württemberg.

Supplementing note in 32 L.R.A. 189.

Art. 2 of the treaty of 1844 between the United States and Württemberg, referred to in the earlier note, giving the alien heir two years to sell the land, "which term may be reasonably prolonged according to circumstances," means that in cases where the circumstances are such as to make it reasonable that such aliens, in order to preserve their rights, should have further time, such further time as may be reasonable under the circumstances may be allowed. Therefore, it was held that it could not be claimed that alien heirs had lost their interest where they filed a bill for partition within two years and six months after the death of the decedent, considering that they were unable to make sale of their interest during the statutory period of two years after granting letter of administration, for filing claims, which had not expired till two years and twenty days after such death; that the names of some of the heirs were unknown to them until proof of heirship was made in the probate court nearly two years after such death; that some of the heirs still remained unknown, and one heir was a minor, and that the aliens could not find a purchaser for their fractional interests. *Scharpf v. Schmidt*, 172 Ill. 235, 50 N. E. 182.

B. B. B.

property rights of the citizens of the contracting parties. The article was revived and inserted without change in the treaty of 1827. 8 Stat. at L. 60, 346, 354. In the article it was agreed that "the subjects of the contracting parties in the respective states, may freely dispose of their goods and effects either by testament, donation or otherwise, in favor of such persons as they think proper; and their heirs in whatever place they shall reside, shall receive the succession even *ab intestato*, either in person or by their attorney, without having occasion to take out letters of naturalization. These inheritances, as well as the capitals and effects, which the subjects of the two parties, in changing their dwelling, shall be desirous of removing from the place of their abode, shall be exempted from all duty called *droit de detraction*, on the part of the government of two states respectively." 8 Stat. at L. 64.

The original treaty is published in the English and French languages as if both were originals, and the dispute is as to the meaning of the clause "goods and effects," which is given in the French copy as *fonds et biens*. Do these words refer to personal property only, or do they embrace real estate? It is contended that the French word *biens* means real as well as personal property, and a note to § 13 of Story on Conflict of Laws, 8th ed. is quoted as follows: "The term *biens*, in the sense of the civilians and continental jurists, comprehends not merely goods and chattels, as in the common law, but real estate."

Bouvier, however, defines the word to mean: "Property of every description, except estates of freehold and inheritance."

The same definition is given by Black in his Dictionary of Law. It is sometimes said that Lord Coke has defined the word as meaning real property, but it appears that he referred to real chattels, rather than to real estate itself. He said: "Goods, *biens*, *bona*, includes all chattels, as well real as personal." 1 Co. Litt. 1st Am. ed. § 177, subdv. 118b.

Burrill's Law Dictionary gives the same definition. In 5 Cyc. 686, the word *biens* is defined as "property of every description, except estates of freehold and inheritance; goods."

The court of appeals of New York gave the following definition: "The corresponding Norman-French term *biens* is said to include property of every description, except estates of freehold." McCaffrey v. Woodin, 65 N. Y. 459, 468, 22 Am. Rep. 644.

Most of the authorities appear to hold that the word does not mean real estate, but, assuming that there is a real difference of opinion in the authorities as to the L.R.A.1915E.

meaning of the term, we should then examine the treaty as drawn in the English language. The intention of the makers of a treaty is to be construed in the same way and under the same general rules as are used in interpreting contracts between individuals. 38 Cyc. 969. The treaty must not only be construed as a whole, but where it is executed in two languages both are originals and must be construed together. *United States v. Percheman*, 7 Pct. 51, 8 L. ed. 604. The terms used were intended to be identical, and if the word *biens* is used in more than one sense, and there is doubt as to the meaning in which it was used in the French copy, we can look at the corresponding words used in the English version, and we find these to be words about the meaning of which there can be little, if any, doubt. The corresponding expression of *fonds et biens* is "goods and effects," and that expression, in its natural and ordinary sense, means movable personal property, and not real estate. Even if the treaty had been only in French language, and the makers of it had translated it into English, using the words "goods and effects," it must have been inferred, in view of the different meanings given to the French expression, that the makers of the treaty intended to use it in the sense imported by the phrase "goods and effects." That phrase is in frequent use, and includes only personal property, unless the context in which it is employed shows clearly that it was intended to have a peculiar and more extended meaning. "Goods" is defined as "wares, commodities, and chattels," and "effect" has a more extending meaning, but, when it is used in connection with "goods," as here, it clearly means personal property, and not real estate. So it has been held under a statute providing for the attachment of "goods and effects," that the expression did not include an estate in lands. The supreme court of Pennsylvania in deciding the question said: "Their meaning is free from all ambiguity or doubt, whether used in a popular, a lexicographical, or a legal sense. The word 'goods' is always used to designate wares, commodities, and personal chattels. The word 'effects' is the equivalent of the word movables." *Vandergriff's Appeal*, 83 Pa. 126, 129, 9 Mor. Min. Rep. 397.

In Vermont the words "goods, effects, and credits" were used in a trustee statute, and the supreme court of that state held that real estate was not embraced within the term "effects," the court saying: "That word, as ordinarily used, is understood to mean goods, movables, personal estate; and I am not aware that the word 'effects' has ever been defined by any legal writer as in-

cluding real estate." *Hunter v. Case*, 20 Vt. 195, 197.

An Alabama statute provided for a landlord's lien on "goods, furniture, and effects," and in a controversy it was held that "effects," as there used in connection with "goods," meant property of the same kind as "goods" and "furniture," and did not mean real estate. *McKleroy v. Cantey*, 95 Ala. 295, 11 So. 258; *First Nat. Bank v. Consolidated Electric Light Co.* 97 Ala. 465, 12 So. 71.

A power of attorney was executed authorizing a party to sell "claims and effects," and it was held that the word "effects," coupled, as it was, with "claims," did not embrace real estate. *De Cordova v. Knowles*, 37 Tex. 19. In *Keyes v. Milwaukee & St. P. R. Co.* 25 Wis. 691, it was held, under a garnishment statute providing for the attachment of "property and effects" in the hands of another, that the word "effects" meant personal property capable of being seized and sold under execution. In *Planters' Bank v. Sharp*, 6 How. 301, 321, 12 L. ed. 447, 456, the court, in defining the word "effects," remarked: "So, in respect to effects, it has been held, when the word is used alone, or *simpliciter*, it means all kinds of personal estate. . . . But if there be some word used with it, restraining its meaning, then it is governed by that, or means something *ejusdem generis*."

In *Doe ex dem. Haw v. Earles*, 15 Mees. & W. 460, the court held that "the meaning of the word 'effects' is, in common parlance, confined to personal things; and it has been judicially decided to bear that meaning, unless the context shows that the testator used it in a more comprehensive sense. This was held by all the court of King's bench in the cases of *Carnfield v. Gilbert*, 3 East, 516, and of *Doe ex dem. Wall v. Langlands*, 14 East. 870." Page 456.

It is true that, in interpreting wills, the courts, to prevent intestacy, have sometimes expanded the meaning of the term "effects" so as to include real property, but, as the word is ordinarily used in contracts and statutes, the courts uniformly hold that the term is not sufficiently comprehensive to include real estate, and, when coupled with "goods" or other like terms, descriptive of personal property, it includes nothing except movable personal property. This is illustrated in a case note in 12 L.R.A. (N.S.) 661.

In *Meier v. Lee*, 106 Iowa, 303, 308, 76 N. W. 712, 715, the supreme court, in interpreting the treaty under consideration, gave a definition of the words "goods and effects" used in the treaty, and held that it did not include real estate. In defining the

words the court said: "'Goods: A valuable possession or piece of property; especially, and almost universally, in the plural, goods, wares, commodities, chattels.' 'Effects: Goods, movables, personal estate.' . . . 'Goods and effects' have never been held to include real estate."

The supreme court of Illinois interpreted the same provision of the treaty between the United States and Sweden, and made a contrary decision. *Adams v. Akerlund*, 168 Ill. 632, 48 N. E. 454, 457. The court proceeded on the theory that the words *fonds et biens* had the same meaning as the expression "goods and effects," and, while it was conceded that the word "effects," when used in connection with the word "goods," as a general thing, means personal, and not real, property, it nevertheless held that the context of the article in which the expression occurs indicated an intention to include real estate. It was said that the words "heirs," "succession," and "inheritances," as there used, "are very significant words in determining the meaning to be given to the word 'effects.'" After defining these terms and showing that they apply to real property, the court came to the conclusion that "the terms of the treaty were intended to include real estate as well as personalty, and that the word 'effects' was intended to have the broader meaning, which includes both land and personalty." p. 640.

In holding that the words "heirs," "succession," and "inheritances" gave the term "effects" an unusual meaning, that court apparently overlooked the fact that those words are stereotyped ones which are commonly employed in articles or provisions of treaties which deal expressly and unquestionably with personal property alone. For instance, in the treaty of 1845 with Bavaria there is a provision stipulating as to the disposition of personal property by donation or otherwise, which provides that citizens, "their heirs, legatees, and donees" shall "succeed to their said personal property," using terms which it is said are appropriate only to real property. Likewise in the treaty of 1829 with Austria-Hungary, an article stipulating as to "personal goods" only, the terms "succeed" and "representatives" are used; it being agreed that citizens of either nation "shall succeed to their personal goods, whether by testament or *ab intestato*." In the treaty with Russia of 1832 a provision of the treaty referring to personal property only used the expression of succeeding to personal property by testament or *ab intestato*. In a treaty of 1826 with Denmark it was provided that no unequal duties, charges, or taxes of any kind should be levied on "personal property,

money, or effects" of the respective citizens or subjects, or upon the removal of the same from either "upon the inheritance of such property, money, or effects, or otherwise; than are or shall be payable in each state, upon the same, when removed by a citizen or subject of such state." There they used the word "inheritance" of personal property, a term which, it is said, gives character and a peculiar meaning to the word "effects" in the treaty in question. In the treaty of 1902 with Spain, in stipulating as to the power to dispose of personal property, the terms "heirs, legatees, and donees" are used, and it is provided that the citizens of either shall "succeed" to personal property. In a treaty with Great Britain made in 1899 a provision dealing with personal property applies all these terms which have been mentioned to personal property. The same is true in treaties with Bolivia, Brazil, Italy, Prussia, Switzerland, Württemberg, Brunswick and Lüneburg, Columbia, Hesse, Mecklenberg-Schwerin, and Saxony. In fact, it appears that in most, if not all, the treaties negotiated between this government and other nations, these so-called real estate terms are used in provisions which expressly relate to personal property, and personal property only, and this without regard to whether the treaty is with a civil-law nation or a common-law nation. The treaties we have examined are found in "Compilation of Treaties in Force" (37 Senate Documents, 5th Congress, second session), which has been prepared from time to time under the authority of Congress. The fact that these terms, which, it is argued, are only applicable to real estate, have been generally applied to personal property, hardly justifies the court in the inference that in the use of the terms "goods and effects" the contracting parties intended to include real estate. The common use of the terms, "heirs," "succession," and "inheritance," in treaty provisions which expressly and without doubt refer to personal property, neutralizes the argument that the use of the same in connection with the words "goods and effects" changes an expression which means personal property into one which means real estate. The supreme court of Illinois was led to the view that an expression which, by itself, means personal property, was intended to embrace real estate because of the use of terms which it appears are generally applied in provisions for the disposition of personal property only. The supreme court of Nebraska in *Erickson v. Carlson*, 95 Neb. 182, 145 N. W. 352, with little discussion, adopts the view taken by the Illinois court, and the supreme court of Washington, in an inheritance case, appears to take the same

view. *Re Stixrud*, 58 Wash. 339, 33 L.R.A. (N.S.) 632, 109 Pac. 343, Ann. Cas. 1912A, 850.

We are inclined to agree with the supreme court of Iowa and hold that the words "goods and effects," as used in the article in question, do not mean or embrace real estate. It appears to us that the context in which the words "heirs," "succession," and "inheritance" were used strongly tends to support that view, and to show that the makers of the treaty did not intend to expand the meaning of "goods and effects," but were referring to movable property only. In the sentence following the one containing the words "heirs" and "succession" and which, it is said, expanded the meaning of "goods and effects" so as to make the words cover real property, it is provided: "These inheritances, as well as the capitals and effects, which the subjects of the two parties, in changing their dwelling, shall be desirous of removing from the place of their abode, shall be exempted from all duty called *droit de détraction*, on the part of the government of the two states respectively." 8 Stat. at L. 64.

The expression "these inheritances" refers to "goods and effects," the property which the parties are to receive by inheritance or succession, and is such property as can be removed from the place of their abode when they change their dwelling. It thus appears that the "goods and effects" which they are to inherit and to receive by succession are movable property, and not real estate.

As the treaty does not apply to real estate, and as an alien is not allowed to inherit real property under the law as it exists in Kansas, it follows that Anna Anderson, who was still alive and an alien when her brother died, was not entitled to inherit a share of the land owned by her brother. Can her children, the appellants, inherit? The rule of descent is fixed by the statute. As Olaf Olson left no wife or issue, his estate would descend to his father and mother if they were alive and capable of taking by descent. Gen. Stat. 1909, § 2953. The rule of the statute, in effect, is that, if one of the parents be dead, the estate goes to the surviving parent, and, if both be dead, it descends as if they had outlived the intestate and died in the ownership and possession of the property. Gen. Stat. 1909, § 2954. Neither of the parents of Olaf Olson were living at the time of his death, and so the property descended the same as it would have done if his parents had outlived him and had been resident owners of the property at the time of their death. Upon the death of the intestate the descent is cast at once, and the title to the

property would have passed to their sons and daughters, the brothers and sisters of the intestate, who were capable of inheriting, but, as we have seen, only those of them that have the inheritable blood or quality can inherit a share of the estate. At the moment of Olaf's death the title to the land owned by him passed at once to those capable of taking. Anna Anderson, who was living, would have taken a share but for alienage, and the appellants, her children, can only claim through her, and she being incapable of inheriting, the inheritance was obstructed and the estate diverted to those who could take. This was, in fact, determined in *Smith v. Lynch*, 61 Kan. 609, 60 Pac. 329. See also *Cramer v. McCann*, 83 Kan. 719, 37 L.R.A. (N.S.) 108, 112 Pac. 882. In *Walker v. Potomac Ferry Co.* 3 MacArth. 440, 442, it was said that "it is impossible for the children of a parent still alive to derive an inheritance, when the mother was herself incapable of acquiring that inheritance on account of alienage." p. 442.

See also *Meier v. Lee*, 106 Iowa, 303, 76 N. W. 712; *People v. Irvin*, 21 Wend. 128; *Benner v. Muller*, 12 Jones & S. 535; note in 31 L.R.A. 177.

The court therefore ruled correctly in holding that the appellants were not entitled to a share in the land of the intestate, and they are the only ones who complain of the ruling of the court.

The judgment will be affirmed.

KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appt.,

v.

ISABELLE D. COOPER.

(164 Ky. 489, 175 S. W. 1034.)

Railroad — blocking crossing — private action.

1. One injured by the blocking of a street crossing by a railroad company contrary to the provisions of a statute may recover damages therefor although no penalty is provided for violation of the statute.

Note. — *Damages recoverable for delaying person by blocking railroad crossing.*

This is a continuation of a note on the same question appended to *Terry v. New Orleans* G. N. R. Co. 44 L.R.A. (N.S.) 1069.

The only case beside *LOUISVILLE & N. R. Co. v. COOPER*, decided since the preparation of the earlier note appears to be *Southern R. Co. v. Jarvis*, 11 Ala. App. 635, 66 So. 936, in which it was held that the mere fact that the plaintiff was detained by a L.R.A.1915E

Same — duty to request moving of train.

2. One obstructed, in crossing a railroad track at a highway crossing, by a train standing on the crossing contrary to statute, is not bound to seek a railroad employee and request the moving of the train, to hold the railroad company liable for injuries thereby caused.

Same — chill from delay — duty to seek shelter.

3. A pedestrian cannot hold a railroad company liable for the results of a chill caused by delay at a highway crossing on a cold night on account of a train standing on the crossing in violation of the terms of a statute, if stores open and warm adjoin the highway at the crossing in which he might have secured shelter until the train was moved.

(May 5, 1915.)

A PPEAL by defendant from a judgment of the Circuit Court for Whitley County overruling a motion for a new trial in an action brought to recover damages for injuries alleged to have been caused by defendant's violation of the statute against blocking street crossings. Reversed.

The facts are stated in the opinion.

Messrs. Hiram H. Tye and Benjamin D. Warfield, for appellant:

There is no provision in § 768, Kentucky Statutes, giving a cause of action to any person who is detained at a railroad crossing by reason of a train standing across it for more than five minutes.

Shields v. Louisville & N. R. Co. 97 Ky. 103, 27 L.R.A. 680, 29 S. W. 978; *Sublett v. Mobile & O. R. Co.* 145 Ky. 707, 38 L.R.A. (N.S.) 1153, 141 S. W. 50; *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; *Osborne v. Cincinnati, N. O. & T. P. R. Co.* 158 Ky. 176, 164 S. W. 818; *Hummer v. Louisville & N. R. Co.* 128 Ky. 486, 108 S. W. 886; *Cincinnati, N. O. & T. P. R. Co. v. Rose*, — Ky. —, 21 L.R.A. (N.S.) 681, 115 S. W. 830; *Sandifer v. Louisville & N. R. Co.* 28 Ky. L. Rep. 464, 89 S. W. 528.

It was plaintiff's duty to seek and procure shelter instead of remaining in the cold, and if she failed to do so she cannot recover for any trouble, ailment, disease,

freight train at a public road crossing for one hour and six minutes, the engineer and conductor having detached the engine and taken it to near-by coal mines, would not support a recovery of punitive damages. The court said: "It was not shown that either the conductor or the engineer had any knowledge of the fact that the plaintiff was being detained by the cars on the crossing, or that either of them knew that he was suffering an injury, or was in a place where he could or was likely to be injured. In fact, it is not shown that

pain, or suffering caused by such failure on her part.

Louisville & N. R. Co. v. King, 131 Ky. 347, 115 S. W. 196; West Kentucky Coal Co. v. Davis, 138 Ky. 667, 128 S. W. 1074; Illinois C. R. Co. v. Dallas, 150 Ky. 445, 150 S. W. 536.

It is for the jury to say, under all the facts of the particular case, whether or not an injured plaintiff exercised ordinary care in seeking medical or surgical aid, or whether the failure to do so amounted to contributory negligence.

1 Thomp. Neg. § 202; Glasgow v. Metropolitan Street R. Co. 191 Mo. 847, 89 S. W. 915; Louisville & N. R. Co. v. Reaume, 128 Ky. 90, 107 S. W. 290.

Mr. J. M. Robeson for appellee.

Hurt, J., delivered the opinion of the court:

The main street of the town of Corbin is Center street, which runs from west to east, and is crossed by the Louisville & Nashville Railroad, which runs north and south. On the night of December 18, 1912, which was a cold night with snow on the ground, the appellee, Mrs. Isabelle D. Cooper, who resided on Poplar street, on the west side of the Louisville & Nashville Railroad, went from her home to the postoffice in Corbin, which is on the east side of the railroad, and on Center street. The postoffice is less than a block from the railroad crossing over Center street. The appellee was a stout, robust woman, weighing about 175 pounds at that time, and comfortably and warmly dressed, and accompanied by her daughter, who was about twenty-one years of age. After going to the postoffice, she started to return to her home by way of Center street, and when she arrived at the railroad crossing she found the street blockaded by a freight train of considerable length, which was standing upon the track. There was no other very convenient or accessible way for a lady going from the postoffice to reach the home of Mrs. Cooper, except by the way of Center street, and over the railroad crossing over the street. On the east side of the railroad crossing, and about 10 steps

from the crossing, was Blair's store, and about 15 steps from the crossing was Candler's restaurant, and between that and the postoffice was the Wilbur Hotel, and in the same building with the postoffice was Green's store. The evidence does not certainly show whether Blair's store and Green's store were open or not at the time appellee came to the railroad crossing; but it is undisputed that Candler's restaurant, the Wilbur Hotel, and the postoffice were all open and comfortably warm, and were respectable places. On the other side of Center street from these buildings was another store, and also a dwelling house.

The evidence introduced by the appellee shows that when she arrived near to the railroad crossing, and 5 or 6 steps from the restaurant, she discovered the train across the street, and remained standing there for about ten minutes, as she states, expecting that it would be moved out of the way. Becoming cold, she and her daughter walked back past the restaurant and the storehouses, and the hotel, down to the corner about a block away from the crossing, and returned, as she says, to keep from growing cold. When she returned to the crossing the train was still across the street, and did not move for from ten to fifteen minutes, when it backed back towards the depot, and she went from there to her husband's store, and from there to her home. She proved by her own testimony that she was chilled by standing waiting for the train to move, and the next morning had a pain in her back, and headache, and a cold, which confined her to her bed for three or four days. In this she is corroborated by her daughter, and husband's father, and another relative. After that she claims to have suffered from this cold and was affected with catarrh, and was at times confined to her bed; but she did not call a physician, nor seek the services of one, until in the following November or December, nearly one year thereafter, when her husband visited a physician, and got him to prescribe a remedy for scanty menstruation, from which she claims to have been suffering. This suit was filed on De-

either of them knew even remotely where the plaintiff was during the entire time he was being detained. . . . For aught appearing, the conductor and engineer intended to return and clear the crossing in a much shorter time, and were detained at the mines and prevented from moving the cars from the crossing at an earlier time by an unavoidable accident to the engine or some other cause not due to their fault, and over which they had no control. . . . It is not only not averred that the injury was consciously or intentionally inflicted upon the plaintiff, but it is not even averred in L.R.A.1915E.

this count that the highway or public road was one much or little used, or that the blocking occurred at a time when persons would likely or probably be traveling along it, or what knowledge the defendant's servants or agents whose acts are complained of had of these matters, or other like circumstances and conditions existing at the time of the transaction complained of."

As to criminal or penal responsibility for blocking street or highway railroad crossing, see note to State v. Norfolk Southern R. Co. L.R.A.1915B, 329.

R. E. H.

cember 13, 1913, and was tried on the 12th day of March, 1914; but the appellee did not have the services of a physician at any time until the night before the trial, when a physician was sent for, though she claims that she used patent medicines and other medicines as remedies for the troubles from which she suffered, and that she had not been during this time able to do her household work, as she had before December 18, 1912, and had suffered a great deal from the effects of it, but had not been confined to her bed at any time for three months before the trial. The physician who was called to see her testified that she was in a run-down state of health, somewhat nervous, and had some symptoms of la grippe. He also testified that la grippe and a cold were both infectious diseases, and that a person could have one without the other; but a person having the bacilli which produces la grippe, by reason of having a cold and the physical strength impaired, would give the la grippe the opportunity to develop itself, and that exposure on a cold night possibly and probably did produce a cold, which would superinduce la grippe.

The appellee, in her petition, alleged that she was returning from the postoffice in the direction of her home, that she found the street crossing blockaded by the freight train, which remained there for about thirty minutes without moving, and that she was compelled to await its removal, and that she became chilled, and contracted a cold from so doing, which resulted in the suffering and impairment of health above mentioned. All of this was alleged to have resulted from the negligence of the employees operating the railroad train in permitting the same to remain across the street for the time mentioned, and that they, by the exercise of ordinary care, could have known that she was so detained in the street, and that she did not know, and could not have known by the exercise of ordinary care and prudence, that she was exposing herself to the peril of a cold, and asked to recover a judgment in damages of \$5,000 against the appellant. The appellant, by its answer, traversed all of the affirmative allegations of her petition, and in addition thereto alleged that if she did become cold from waiting in the street, as she alleged, that resulted from her own negligence in not seeking a shelter from the cold in one of the near-by houses, which were then and there open and comfortably warm. The affirmative allegations were, by agreement of parties, considered as controverted of record. Upon these issues the case went to trial before the court and a jury, and at the conclusion of the evidence for the appellee the appellant moved the court to instruct the jury to return a di-

rect verdict for it, which motion was overruled.

The evidence also showed that the appellee saw no employee of the railroad company about the crossing while she was standing there. Evidence was introduced by the appellant of a young man and a young lady, who came to the crossing while appellee was there, but on account of the weather immediately went into the restaurant, which was about 10 steps away, and remained ten or fifteen minutes, when they came out, and the train had moved. The appellant also proved by three near neighbor women of the appellee that they had known nothing of her sickness, nor had observed any impairment of her health, or her failure to perform her work, as she had done before the occurrence complained of as her ground for damages. The appellant at the close of all of the evidence again moved the court to direct the jury to return a direct verdict for it, which motion was overruled, and it took exceptions thereto. The jury returned a verdict for the appellee in the sum of \$2,000. The appellant filed grounds and moved the court to set aside the verdict, and to grant it a new trial on account of alleged errors of the court in overruling its motions for a peremptory verdict in its favor, and also on account of the admission of incompetent evidence against it, and the rejection of competent evidence offered by it, and because the court had misinstructed the jury over the objection of the appellant, and had refused to instruct the jury as requested by the appellant in writing. The court overruled the motion for a new trial, and the appellant now appeals to this court.

It is insisted for the appellee that, inasmuch as the train was permitted to remain across the crossing of the street for more than five minutes, that was negligence in itself on the part of appellant, and rendered it liable for any damages which appellee sustained thereby. The appellant contends that inasmuch as there is no penalty prescribed for a violation of the statute, which makes it unlawful for the railroad company to obstruct a crossing with a train for a longer time than five minutes, and that it can only be punished for such conduct under an indictment charging it with guilt of a public nuisance by obstructing a street by permitting a train to remain across the street for an unreasonable length of time, that no action for damages can arise to an individual from such obstruction.

It is true there is no penalty prescribed for a violation by a railroad company of the statute making it unlawful to obstruct a street for more than five minutes, which is provided for by § 763, subsec. 5, of Kentucky Statutes, and for such reason no

prosecution for a violation of this statute can be maintained. This court, in discussing said statute in the case of *Harvey v. Illinois C. R. Co.* 159 Ky. 492, 167 S. W. 875, said: "It is provided in § 768 of the Kentucky Statutes that a railroad company 'shall not obstruct any public highway or street, by cars or trains, for more than five minutes at any one time.' This statute, which is merely supplementary of the common law forbidding the unreasonable obstruction of highways, is, we think, sufficient to impose upon a railroad company the duty of leaving unobstructed highway crossings for a longer time than five minutes by any one train. In other words, a train may block a crossing for a period of not longer than five minutes at any one time, but when the five minutes have expired, if the train is not ready to move, the crossing must be cleared by cutting the train in two or by some other method."

Section 406, Ky. Statutes, provides:

"A person injured by the violation of any statute may recover from the offender such damage as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed."

If a person injured by a violation of a statute, where a penalty for its violation is imposed, can recover damages from the offender, there is no sound reason why one suffering injuries from the violation of a statute, where no penalty is imposed for its violation, cannot also recover damages from the offender. In the case of *Shields v. Louisville & N. R. Co.* 97 Ky. 103, 27 L.R.A. 680, 29 S. W. 978, relied upon by appellant, this question did not arise. In that case the court held, as has always been the law in this state, that an individual cannot maintain an action against one who has created or maintained a public nuisance, on account of an injury or inconvenience which is common to all the people of the community alike. An individual may maintain an action for an injury suffered from the creation or maintenance of a public nuisance, where he has suffered some special injury thereby, but he cannot recover for an injury which was common to all the people of the community. *Barr v. Stevens*, 1 Bibb, 293; *Seifried v. Hays*, 81 Ky. 380, 50 Am. Rep. 167. While one injured by the violation of a statute may recover from the offender such damages as he has sustained by reason of the violation, the violation of the statute must be the direct and proximate cause of the injury complained of. One cannot recover damages of another merely because such other has violated a statute.

Another principle which underlies a right of recovery of damages, either for an injury sustained by reason of the violation of a

statute or for an injury sustained in another way, is that the one seeking the recovery must have exercised such care as an ordinarily prudent person would have exercised under like or similar circumstances to have avoided receiving the injury. If, by his failure to exercise such ordinary care, he incurs the injury, and but for his failure to exercise such care he would not have received the injury, he has no right of recovery. If his own negligence is the cause of his injury, he has no right to attribute it to another; or if his own negligence so contributes to his injury that although the other is guilty of negligence also, but for his own negligence the negligence of the other would have been harmless, he is barred from recovery. Another duty that is imposed upon everyone is that, when he has suffered an infraction of his rights, he is to act in such a way as to minimize his loss and make his damages as light as possible. These principles are elementary. *Paducah & M. R. Co. v. Hoehl*, 12 Bush, 43; *Sullivan v. Louisville Bridge Co.* 9 Bush, 90, 15 Am. Neg. Cas. 147; *Illinois C. R. Co. v. Dick*, 91 Ky. 434, 15 S. W. 666; *Louisville & N. R. Co. v. Cox*, 8 Ky. L. Rep. 961; *Cincinnati, N. O. & T. P. R. Co. v. Palmer*, 13 Ky. L. Rep. 783; *Louisville & N. R. Co. v. McCoy*, 81 Ky. 403; *Henderson v. Burke*, 19 Ky. L. Rep. 1781, 44 S. W. 422; *Louisville & N. R. Co. v. Sights*, 121 Ky. 203, 89 S. W. 132; *Sinclair v. Illinois C. R. Co.* 30 Ky. L. Rep. 1040, 100 S. W. 236.

Applying them to the uncontradicted evidence in the case at bar, it is evident that the appellant failed to perform its duty to appellee, by clearing the crossing at the expiration of five minutes from the time the train was placed across the crossing, or else to have cut the train in two and thereby cleared the crossing. It was not her duty to have hunted up the ones operating the train, as urged by appellant, and requested them to move it from the crossing, because it must be assumed that they knew that it was their duty to do so, and besides, in all probability, she could not have found them in the night without difficulty. Passing over the fact of the great difficulty of proving satisfactorily that the cold, of which appellee complains as the basis of her damages, was caused by the appellant obstructing the street crossing with its train, or that she incurred it by standing for ten or fifteen minutes in the street, we will assume that her standing in the street was the cause of the cold, as the evidence tends to uphold that contention. The uncontradicted evidence further shows that the appellant owed appellee no contractual obligation of any kind; that she was not in a hurry, nor was any duty upon

her to pass over the crossing at once, or that she suffered any damages, either general or special, by the loss of the twenty-five or thirty minutes of time during which the train obstructed the crossing, as she went from there, when the crossing was cleared, to her husband's store, and from there, after a time, to her home. It is undisputed that at the time she reached the crossing from the postoffice, and found the street obstructed, she was then about 10 steps from Candler's restaurant, which was open and lighted and warm and from the door of which the movements of the train could be observed. Within less than a block, and on the street along which she had come from the postoffice, were the hotel and postoffice, both of which were open, lighted, and warm. Instead of seeking the warmth of the restaurant, as Miss McKeehan and her escort did, who approached the crossing about the same time, she chose to stand in the street for ten minutes, and, feeling cold, she walked back down the street, past the hotel and postoffice, and to the corner at Harris's store, and then returned to the crossing, and stood from ten to fifteen minutes longer, when the train was moved. She claims to have incurred a cold from standing in the street, and when asked why she did not enter one of these buildings, which were so near at hand, the only reason she offered for not so doing was that she had no business in either of the places. She did not exercise the care to prevent taking a cold which a prudent person would have ordinarily exercised under similar circumstances; in fact, exercised no care at all, and made no effort to avoid any injury which she might sustain from exposure to the weather. If she had exercised the least care, by going into one of the houses mentioned, and remaining all or a part of the time until the train moved, the obstruction of the street by the train would have caused her no harm. It seems that her own want of care was the direct and proximate cause of her incurring the cold, if it was caused by her standing in the street at all.

In the case of Cincinnati, N. O. & T. P. R. Co. v. Rose, — Ky. —, 21 L.R.A. (N.S.) 681, 115 S. W. 830, the appellee, Rose, had a contract with the railroad company to provide her a berth in a sleeper on a certain train. She met the train at Danville, at the middle of the night, when she was informed that she could not be furnished with a berth in the sleeper, and instead of going to a hotel, or to the house of her relatives, from which she came to the station, she drove 5 miles to her home, in the night, and from the exposure incurred a severe cold, and the consequences attending it. This court held that she could not recover L.R.A.1915E.

on account of the cold and its consequences. In Sandifer v. Louisville & N. R. Co. 28 Ky. L. Rep. 464, 89 S. W. 528, the decedent of plaintiff was a child seventeen months old, and was carried by its mother, grandmother, grandfather, and an uncle, at 4 o'clock A. M., to a railroad flag station, for the purpose of all of them taking passage upon the train. They found the door of the waiting room closed, and, while waiting, a rain fell and drenched them all. The child incurred pneumonia and died. This court held that its administrator could not recover damages for its death, because, among other reasons, there was a storehouse about 10 steps away, and a mill, where there was a fire, within 25 or 30 steps, in which they could have been sheltered. The negligence of the parents was imputed to the child.

The question of negligence is a mixed question of law and fact; but, where the facts are such that no other conclusion than that of negligence can be drawn, it should be taken from the jury. Exchange Bank v. Trimble, 108 Ky. 230, 58 S. W. 156. Negligence is a question for the court, where the facts are admitted or established by undisputed testimony. Henderson Trust Co. v. Stuart, 108 Ky. 167, 48 L.R.A. 49, 55 S. W. 1082; Exchange Bank v. Trimble, 108 Ky. 230, 58 S. W. 156; Bush v. Grant, 22 Ky. L. Rep. 1766, 61 S. W. 363; Maysville v. Guilfoyle, 110 Ky. 670, 62 S. W. 493.

For the reasons given, the court below was in error when it overruled appellant's motion to direct the jury peremptorily to find a verdict for it, both at the conclusion of appellee's evidence, and at the conclusion of all the evidence. Having arrived at the conclusion above stated, it is unnecessary to discuss the other questions raised upon the appeal.

The judgment appealed from is reversed, and the cause is remanded to the court below, with directions to proceed in conformity to this opinion.

WASHINGTON SUPREME COURT. (Department No. 1.)

STATE OF WASHINGTON EX REL. HARRY SYVERSON

T. C. FOSTER, Sheriff of Lewis County.

(— Wash. —, 146 Pac. 169.)

Bail — pending appeal — body execution.

1. One appealing from an order refusing

Note. — Right to bail pending attempt to avoid body execution.

That the defendant's right to his liberty pending an appeal from a judgment upon

to vacate a body execution, upon the ground that it violates the constitutional provision against imprisonment for debt, is entitled to be admitted to bail pending the appeal.

Habeas corpus.—questioning judgment of court of competent jurisdiction.

2. The supreme court may issue a writ of habeas corpus to inquire into the legality of a denial of bail pending appeal from an order refusing to vacate a commitment under a body execution, where the right to such execution is disputed because of constitutional provisions, although the denial was by a court of competent jurisdiction.

(February 5, 1915.)

PETITION for a writ of habeas corpus to procure petitioner's release on bail pending an appeal from an order of the court denying his motion to vacate an order of arrest. Writ issued.

The facts are stated in the opinion.

Messrs. Hayden, Langhorne, & Metzger and Thacker & Hancock, for petitioner:

Petitioner is entitled to avail himself of habeas corpus for the purpose of admission to bail.

Packenham v. Reed, 37 Wash. 260, 79 Pac. 786; State v. Jackschitz, 76 Wash. 256, 136 Pac. 132; State v. Johnson, 69 Wash. 616, 126 Pac. 56; United States v. Wong Lee Foo, 13 Ariz. 252, 31 L.R.A. (N.S.) 1088, 108 Pac. 488; Re Cazin, 56 Vt. 297; 5 Cyc. 10.

Mr. G. E. Hamaker for respondent.

Chadwick, J., delivered the opinion of the court:

On the 24th day of October, 1913, a judge

which a body execution had been issued should be at least as sacred as his right to his liberty pending an appeal from a conviction on a criminal charge seems axiomatic. It is usually held to be within the sound discretion of the court to refuse or to admit the defendant to bail after conviction and pending appeal, unless the discretion is taken from the court by statute. See note to Re Schriber, 37 L.R.A. (N.S.) 693. Tested by this rule alone, the decision in **STATE EX REL. SYVERSON v. FOSTER** could be upheld by the fact that the trial court had refused to exercise its discretion, i. e., it had dismissed the plaintiff's writ of habeas corpus under the belief that it had no discretion in the matter.

Bail in civil cases before trial of the cause was known to the common law (2 Pollock & M. History of English Law p. 592); likewise the writ of habeas corpus (p. 593). So, it would appear that the court in **STATE EX REL. SYVERSON v. FOSTER** was correct in holding that where "the statute is silent" the court has inherent power to issue the writ of habeas corpus and determine the right to bail.
L.R.A.1915E.

ment was rendered in the superior court for Lewis county in favor of one Amy D. Bronson and against Harry Syverson. The action had been brought to recover damages for an injury to the person of the plaintiff. The judgment remaining unsatisfied, plaintiff filed a petition *ex parte*, and obtained from the judge presiding an order directing that an execution issue against the person of the defendant, the present petitioner, commanding the sheriff of Lewis county, or the sheriff of any other county in the state of Washington where the relator might be found, to arrest him and hold him until the judgment was paid or satisfied, or until he should be discharged according to law. Syverson appeared in the superior court and in the original action by motion to vacate the order of arrest for the following reasons:

"That the court has no jurisdiction, in the matter, to issue such order.

That the showing made on behalf of the plaintiff was insufficient to warrant it being granted. That said order is contrary to the laws of the state of Washington, and to article 1, § 17, of the Constitution of the state of Washington.

That the warrant herein issued in this cause be vacated and quashed; and the defendant discharged from the custody of the sheriff of Lewis county, Washington, for the following reasons: That the order does not state or fix the amount of any bond, as provided by the statute, to be given on behalf of plaintiff suing out the warrant, . . . and that said order does not fix the amount of bail in which the defendant shall be held, as provided by law."

On the other hand, a man's right to his liberty is a different question from his right to maintain a particular proceeding to gain his liberty. For example, in the civil court the defendant on an appeal might be entitled to a supersedeas or a stay of execution on application and offer of surety, etc. If such proceedings are provided and specially adapted to secure the object of the statute under which the debt is being collected, while not unduly depriving the debtor of his liberty, has the debtor the right to his liberty if he ignores them? Some such question as this seems to have been in the mind of the court in *Ex parte Wilson*, 6 Cranch, 52, 3 L. ed. 149, where it was held that habeas corpus is not the proper remedy in a case of arrest under a civil process. The application was for a writ of habeas corpus and a certiorari to bring up the record of a civil cause in which judgment had been rendered against the defendant, "upon which a ca. sa. had issued, by which he was taken and was now in confinement within the prison bounds," etc.

J. W. M.

The motion was brought on regularly for hearing, and was overruled by the court. An order reaffirming the former order of arrest was entered. Petitioner was thereupon recommitted to the custody of the sheriff and is now held by him. A subsequent motion for bail was made and denied by the court. Whereupon the defendant filed a petition praying for a writ of habeas corpus. This petition was also denied. Petitioner then filed a petition for a like writ in this court. It is recited in the brief of the petitioner, and is not denied by respondent, although it does not appear in the transcript, that an appeal was taken from the order of the court denying the motion of the petitioner to vacate the order of arrest. The prayer of the petition in this court is for an order fixing bail pending a hearing and determination of the appeal.

It is contended by the respondent that inasmuch as the relator is held for an injury to the person of the party plaintiff (Rem. & Bal. Code, § 749), and which judgment is subject to execution under Rem. & Bal. Code, § 516, petitioner is held "under a warrant or judgment of a court of competent jurisdiction," and that the cause of his detention will not be inquired into; that he has no remedy and cannot release himself from the penalties imposed by law in the execution of the judgment pending an appeal unless he gives a supersedeas bond as in a civil action. From the argument of counsel we understand this to have been the opinion of the trial judge also. Without going into the merits of the case or inquiring into the right of a party to invoke the aid of the sections of the statute just referred to, we think that, so long as the right of the plaintiff in the original action to execute a judgment by process against the person of the petitioner by imprisonment pending the payment of her judgment is questioned under § 17, art. 1, of the Constitution of the state, it follows as a matter of course that bail should be taken. The Constitution is sweeping in its terms. It says: "There shall be no imprisonment for debt except in cases of absconding debtors." It will be admitted that a very serious question of law has been raised by the petitioner.

The statute is silent as to the right of bail pending an appeal where the person of the debtor is held in satisfaction of an execution, and no cases are cited by counsel on either side. They say none can be found, and a hurried search by the writer of this opinion confirms the assurance of counsel; but it does not follow that there is no law to cover the case. A more frequent reference to fundamental principles would make for better law and save much time and energy L.R.A.1915E.

wasted in reading, approving, discussing, distinguishing, or rejecting cases from the great mass of judicial opinions to be found in the published reports.

"Case law is fast becoming the great bane of the bench and bar. Our old-time great thinkers and profound reasoners, who conspicuously honored and distinguished our jurisprudence, have been succeeded very largely by an industrious, painstaking, far-searching army of sleuths, of the type of Sherlock Holmes, hunting some precedent in some case, confidently assured that if the search be long enough and far enough some apparently parallel case may be found to justify even the most absurd and ridiculous contention." *State v. Rose*, 89 Ohio St. 383, L.R.A. 1915A, 256, 106 N. E. 50.

The right of personal liberty "is a right strictly natural," of which the right to have a writ of habeas corpus to bring the body of one detained before a court of competent jurisdiction to inquire into the cause and nature of the commitment or detention is a guaranteed remedy.

"Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article, that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and that, in this Kingdom, it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the Great Charter (i) is, that no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes (j) expressly direct that no man shall be taken or imprisoned by suggestion or petition to the King or his council, unless it be by legal indictment, or the process of the common law. By the petition of right, 3 Car. I, it is enacted that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law. By 16 Car. I. chap. 10, if any person be restrained of his liberty by order or decree of any illegal court, or by command of the King's Majesty in person, or by warrant of the council board, or of any of the privy council, he shall, upon demand of his counsel, have a writ of habeas corpus, to bring his body before the court of King's bench or common pleas, who shall determine whether the cause of his commitment be

just, and thereupon do as to justice shall appertain." 1 Bl. Com. 134, 135.

This principle has been carried into our Constitutions.

"The privilege of the writ of habeas corpus shall not be suspended unless, in cases of rebellion or invasion, the public safety requires it." United States Const. art. 1, § 9; Washington Const., art. 1, § 13.

The writ of habeas corpus is an appropriate and proper remedy in aid of bail. But it is contended that petitioner is held under a final judgment and process of a court of competent jurisdiction, and that this court will not inquire into the legality of such judgment and process by resort to an extraordinary writ. Rem. & Bal. Code, § 1075; *Re Newcomb*, 56 Wash. 395, 105 Pac. 1042. But it does not follow that courts will deny a resort to the writ where it is invoked in aid of bail pending a hearing upon a disputed right affecting the personal liberty of the petitioner. While the Constitution (art. 1, § 20) refers in terms to parties charged with crime, we think, nevertheless, that there is an inherent power in the courts, sustained by reference to the doctrines of the common law and the guaranties of the Bill of Rights (art. 1 of our Constitution), to grant bail in all proceedings pending a final hearing and determination of the merit of the controversy. The Constitution (art. 1, § 22) guarantees the right of appeal. That guaranty includes every incident and every privilege attending the right. While there seem to be no cases in point having established the principle, it is not difficult to follow it into the adjudged cases. We will not pursue it further than to refer to the case of *Packenham v. Reed*, 37 Wash. 258, 79 Pac. 786. In that case there was an original application for a writ of habeas corpus to admit to bail. The petitioner had been committed to the reform school of the state of Washington until he should attain the age of eighteen years, or until he should otherwise be regularly discharged therefrom. Thereafter, he gave notice of appeal. Bail was denied pending the hearing on appeal. The principal contention of the respondent, the superintendent of the reform school, was that there was no law or statute authorizing bail pending an appeal in such cases. After noting the fact that this court had always given a liberal construction to statutes granting a stay of proceedings on judgments pending appeals, the court said that it had no doubt that an infant has a right of appeal when committed to the reform school, and incidentally a right to be admitted to bail pending such appeal.

"The writ may be had for the purpose of admitting a prisoner to bail in civil and L.R.A.1915E.

criminal actions." Rem. & Bal. Code, § 1077.

The court found this section to be declaratory of the common law, and that habeas corpus is an appropriate remedy under it. In answering the contention that there was no statute authorizing bail, the court said: "So far as our investigations have led us, we have found no case where jurisdiction to admit to bail by habeas corpus has been denied, in the absence of a statute limiting the power of the court in that regard."

If it be said that an infant committed to the state training school is held under criminal process and has a right to be admitted to bail without reference to the statute, under article 1, § 20, of the Constitution, the answer is that the law under which infants are detained and confined in reform schools and houses of correction are not criminal statutes. *Re Powell*, 6 Okla. Crim. Rep. 495, 120 Pac. 1022; *Re Watson*, 157 N. C. 340, 72 S. E. 1049; *Ex parte Ah Peen*, 51 Cal. 280; *Reynolds v. Howe*, 51 Conn. 472; *Re Sharp*, 15 Idaho, 120, 18 L.R.A.(N.S.) 886, 96 Pac. 563; *State ex rel. Caillouet v. Marmouget*, 111 La. 225, 35 So. 529; *Mill v. Brown*, 31 Utah, 473, 120 Am. St. Rep. 935, 88 Pac. 609; *Lindsay v. Lindsay*, 257 Ill. 328, 45 L.R.A.(N.S.) 908, 100 N. E. 892, Ann. Cas. 1914A, 1222. In principle the case of *Packenham v. Reed*, above referred to, is broad enough to cover and sustain the right of the relator to demand and have bail fixed in this case.

It was suggested at the time of oral argument that, in the event this court issued the writ, bail should be fixed in a sum greater than that fixed at the time the order to show cause was issued, to wit, \$3,000. That sum seems ample, in the absence of a positive showing that it is probably insufficient to insure the presence of the defendant when his case is finally disposed of on appeal.

The writ will issue.

Morris, Ch. J., and Parker, Mount, and Holcomb, JJ., concur.

KANSAS SUPREME COURT.

NORA JINKIAWAY et al., Appts.,
v.
BERTHA ARDELLA FORD et al.

(93 Kan. 797, 145 Pac. 885.)

Life tenant — duty to pay taxes.

1. It is the duty of a tenant for life in possession and enjoying the rents and profits of land, to pay the taxes thereon.

Headnotes by BENSON, J.

Same — right of remainderman to secure tax title.

2. A remainderman not in possession, and having no right to the occupancy or use of the land, may purchase and hold a tax title thereon under a sale for delinquent taxes which the life tenant ought to have paid.

Same — merger of tax title and life estate.

3. Where a remainderman purchases a tax title in the circumstances above stated, and enters into possession under it, and afterwards takes a quitclaim deed from the life tenant, the tax title is not necessarily merged in the conveyance of the life estate.

Joint tenants — tax title — right to secure.

4. One of several remaindermen who does not have the possession, or right of possession, or right to rents and profits, who purchases the property at a sale for taxes which the life tenant ought to have paid, to whom a tax deed valid on its face is issued, may hold the tax title for his own use and benefit as against other remaindermen.

(January 9, 1915.)

Note. — Effect of purchase of tax title by remainderman in expectancy.

- I. Rights acquired against life tenant, 344.
- II. Rights acquired against coremainderman, 345.

Scope.

The present note does not deal with the rights acquired by a remainderman who has voluntarily paid taxes on the estate without allowing a sale to take place, although a few cases on that point are included in subdivision I. for illustrative purpose merely.

Cases which are decided on the theory that the tax sale in question was void have been excluded from this note.

As to the duty of a life tenant to pay taxes, see note to *Defreese v. Lake*, 32 L.R.A. 744.

As to the effect of tax sale on land held by life tenant, see note to *Estabrook v. Royon*, 32 L.R.A. 805.

As to the effect on estates in reversion or remainder, of a tax sale during the existence of a life estate, see note to *Ferguson v. Quinn*, 33 L.R.A. 688.

I. Rights acquired against life tenant.

A remainderman may acquire the life estate at a tax sale. *Fox v. Coon*, 64 Miss. 465, 1 So. 629.

In *Sage v. Gloversville*, 43 App. Div. 245, 60 N. Y. Supp. 791, it is held to be the right of a remainderman to have a receiver appointed and the rents and profits of real estate applied to the discharge of taxes in arrear, unless the life tenant, within a time to be fixed by the court, pay and discharge them. It is stated that as such L.R.A.1915E

A PPEAL by plaintiffs from a judgment of the District Court for Clay County in favor of defendants in an action brought to set aside a tax deed and a quitclaim deed under which a remainderman claimed title to real estate. Affirmed.

The facts are stated in the opinion.

Messrs. C. Vincent Jones, F. L. Williams, and James L. Hogin, for appellants:

If a remainderman redeems from a tax sale, he redeems for all who are similarly situated.

There is a relation of trust and confidence existing between a life tenant and a remainderman.

Perry, Tr. 3d ed. § 539; 16 Cyc. 616, 617; *Dassler*, Taxation in Kansas, §§ 447-7; *Delashmutt v. Parrent*, 39 Kan. 548, 18 Pac. 712; *Keith v. Keith*, 26 Kan. 26; *Gibson v. Gilman*, 71 Kan. 320, 80 Pac. 587; *Wiswell v. Simmons*, 77 Kan. 622, 95 Pac. 407; *Nagle v. Tieperman*, 74 Kan. 32, 9 L.R.A.(N.S.) 674, 85 Pac. 941, 88 Pac. 969, 10 Ann. Cas. 977; *Peck v. Ayres*, 79

receiver can be authorized to collect the rents and pay them on the taxes, there seems to be no objection to the remainderman, as she professes a willingness to do, advancing the receiver the money for that purpose in order to prevent the sale, and the receiver afterward reimbursing her from the rents and income. That a receiver may be appointed under such circumstances is the theory of *Goodman v. Malcolm*, 6 Kan. App. 233, 48 Pac. 439.

A receiver was appointed and the remaindermen allowed to recover amounts paid by them for taxes in *Abernethy v. Orton*, 42 Or. 437, 95 Am. St. Rep. 774, 71 Pac. 327.

In *Ferguson v. Quinn*, 97 Tenn. 46, 33 L.R.A. 688, 36 S. W. 576, a remainderman who officiously paid taxes assessed to a life tenant, for which the remainder was not liable, was held not entitled to be substituted to the state's lien on the life estate for the amount so paid.

In *Downey v. Strouse*, 101 Va. 226, 43 S. E. 348, a remainderman who occupied the premises during the entire period of the life estate as renter from the life tenant, paying therefor a sum that would have been more than sufficient to pay the taxes accruing each year on the entire property, was held not entitled to be subrogated to the tax lien of the city, and to have satisfaction for his claim from the real estate for taxes paid by him during his tenancy. It is stated that, conceding the coremaindermen knew that the remainderman so renting the land was paying the taxes, they had the right to presume that he was paying them for the benefit of the life tenant, and that he was looking to her for reimbursement out of the rents and profits which were passing through his hands to an amount more than sufficient to satisfy the taxes.

Kan. 457, 100 Pac. 283; *Comes v. Gibson*, 77 Kan. 425, 16 L.R.A. (N.S.) 121, 94 Pac. 998; *Johns v. Johns*, 93 Ala. 239, 9 So. 419; *Fox v. Coon*, 64 Miss. 465, 1 So. 629; *Harrison v. Harrison*, 56 Miss. 174; *Clark v. Lindsey*, 47 Ohio St. 437, 9 L.R.A. 740, 25 N. E. 422; *Christy v. Fisher*, 58 Cal. 256; *Middleton Sav. Bank v. Bacharach*, 46 Conn. 513; *Davis v. King*, 87 Pa. 261; *Shrigley v. Black*, 66 Kan. 213, 71 Pac. 301; *Bangs v. Farmers' State Bank*, 67 Kan. 831, 72 Pac. 1098; *Defreese v. Lake*, 109 Mich. 415, 32 L.R.A. 744, 63 Am. St. Rep. 584, 67 N. W. 505; *Tisdale v. Tisdale*, 2 Sneed, 599, 64 Am. Dec. 775; *Lee v. Fox*, 6 Dana, 172; *Rothwell v. Dewea*, 2 Black, 613, 17 L. ed. 309.

The moment Bertha Ardella Ford became the owner of the life estate, the effect was merely to pay the taxes upon the land and to restore all the parties to the position they occupied before the land was sold.

Jeffers v. Sydnam, 129 Mich. 440, 89 N. W. 42; *First Cong. Church v. Terry*, 130 Iowa, 513, 114 Am. St. Rep. 443, 107 N. W.

II. Rights acquired against coremainderman.

It is a well-established rule that joint tenants or tenants in common cannot, where the land is assessed as a whole, purchase the common estate at a tax sale and acquire title thereby to the exclusion of their cotenants. 37 Cyc. 1348; *Freeman, Cotenancy*, § 158.

This doctrine has been applied by holding that a remainderman in expectancy cannot acquire a tax title to lands good as against other remaindermen therein. *Johns v. Johns*, 93 Ala. 239, 9 So. 419; *Wilson v. Linder*, 21 Idaho, 576, 42 L.R.A. (N.S.) 242, 123 Pac. 487; *Ann. Cas. 1913E, 148 (obiter)*; *Harrison v. Harrison*, 56 Miss. 174; *Fox v. Coon*, 64 Miss. 465, 1 So. 629.

The theory of these cases is that it is the duty of the remaindermen to prevent a loss of the freehold by tax sale, and that, a remainderman being only a tenant in common with the other remaindermen, the duty is as mandatory and binding upon him as on his cotenants in remainder. Upon a purchase at tax sale he is treated as a trustee of the title for the equal benefit of all the remaindermen.

The amounts so paid may be charged upon the estate (*Harrison v. Harrison*, 56 Miss. 174), or the purchaser may compel contribution from his cotenants (*Clark v. Lindsey*, *infra*).

The court in *Wilson v. Linder*, 21 Idaho, 576, 42 L.R.A. (N.S.) 242, 123 Pac. 487, *Ann. Cas. 1913E*, 148, was of the opinion that the rule that it is the duty of a cotenant to protect the common title was applicable to the case of contingent remaindermen, but it was held that such a contingent remainderman, who purchased at a tax sale, was entitled to be reimbursed by his coremain-

305; *People ex rel. Gibson v. Board of Assessors*, 101 N. Y. Supp. 176; *Sage v. Gloversville*, 43 App. Div. 245, 60 N. Y. Supp. 791; *Trimmier v. Darden*, 61 S. C. 220, 39 S. E. 373; *Downey v. Strouse*, 101 Va. 226, 43 S. E. 348; *Goodman v. Malcolm*, 5 Kan. App. 285, 48 Pac. 439; *Crawford v. Meis*, 123 Iowa, 610, 66 L.R.A. 154, 101 Am. St. Rep. 337, 99 N. W. 186; *Shrigley v. Black*, 66 Kan. 213, 71 Pac. 301; *Downing v. Hartshorn*, 69 Neb. 364, 111 Am. St. Rep. 550, 95 N. W. 801.

A life tenant can acquire a title neither by adverse possession nor under a sale for taxes which accrued during the continuance of his life estate as against the remaindermen.

Menger v. Carruthers, 57 Kan. 425, 46 Pac. 712, 3 Kan. App. 75, 44 Pac. 1096; *Shrigley v. Black*, 66 Kan. 213, 71 Pac. 301; *Crawford v. Meis*, 123 Iowa, 610, 66 L.R.A. 154, 101 Am. St. Rep. 337, 99 N. W. 186; *Bangs v. Farmers' State Bank*, 67 Kan. 831, 72 Pac. 1098.

Under the quitclaim deed the defendant,

dermen the amount so paid within a reasonable time, and in case of their failure to so reimburse him he acquired title. The tax titles here were purchased in the name of a husband of the contingent remainderman, but the case is treated as one of a purchase by the remainderman herself.

In *Clark v. Lindsey*, 47 Ohio St. 437, 9 L.R.A. 740, 25 N. E. 422, under a statutory provision that if any person seized of land as tenant in dower shall neglect to pay the taxes thereon, so that a tax sale be held, and the tenant does not within one year after the sale redeem the same according to law, such tenant shall forfeit to the person or persons next in title to such land, in remainder or reversion, all the estate he or she held, and the remainderman or reversioner may redeem such lands in the same manner that other lands may be redeemed after having been sold for taxes, a tenant in remainder after a dower estate, who purchased lands upon a tax sale thereof, was held to be a trustee for his coremaindermen, although such latter failed to redeem their separate interest within the required time.

See *Downey v. Strouse*, *supra*, I.

Another line of decisions is to the effect that where the remaindermen are not in possession, and have no right of possession, they are not chargeable with the duty of making payment of taxes. Consequently, one such remainderman may acquire a tax title to the exclusion of his coremaindermen. *Crawford v. Meis*, 123 Iowa, 610, 66 L.R.A. 154, 101 Am. St. Rep. 337, 99 N. W. 186 (title acquired by remainderman through a stranger who purchased at tax sale). See *JINKIAWAY v. FORD*.

Nothing is said as to possession in the cases adhering to the opposite doctrine.

W. A. E.

Bertha Ardella Ford, became a trustee *ex maleficio*.

Ahrens v. Jones, 169 N. Y. 555, 88 Am. St. Rep. 620, 82 N. E. 666; Goodwin v. McMinn, 193 Pa. 646, 74 Am. St. Rep. 703, 44 Atl. 1094; Larmon v. Knight, 140 Ill. 232, 33 Am. St. Rep. 229, 29 N. E. 1116, 30 N. E. 318; Lauricella v. Lauricella, 161 Cal. 61, 118 Pac. 430; Kahm v. Klaus, 64 Kan. 24, 67 Pac. 542; Newell v. Newell, 14 Kan. 202; Gemmel v. Fletcher, 76 Kan. 577, 92 Pac. 713, 93 Pac. 339; Gray v. Ulrich, 8 Kan. 112.

Messrs. F. B. Dawes and R. C. Miller, for appellees:

A remainderman who is without possession and without right of possession can obtain a title to the land by purchasing at a tax sale, taking out a deed, going into possession, and remaining in possession for more than five years.

Bowman v. Cockrill, 6 Kan. 311; Broquet v. Warner, 43 Kan. 48, 19 Am. St. Rep. 124, 22 Pac. 1004; Nagle v. Tieperman, 74 Kan. 32, 9 L.R.A.(N.S.) 674, 85 Pac. 941, 88 Pac. 969, 10 Ann. Cas. 977; Spratt v. Price, 18 Fla. 289; Waterson v. Devoe, 18 Kan. 223; Carson v. Fulbright, 80 Kan. 624, 103 Pac. 139.

Bertha A. Ford did not procure the life estate by the quitclaim deed until after she was in possession under her tax deed. How, then, could she be said to be in privity with Nora Jinkiaway, whose duty it was to pay the taxes, at the time she bid off the property, or at the time she went into possession under tax deed?

Patton v. Pitts, 80 Ala. 373; Bailey v. Sundberg, 1 C. C. A. 387, 1 U. S. App. 101, 49 Fed. 593; Shew v. Call, 119 N. C. 450, 56 Am. St. Rep. 678, 26 S. E. 33; Seymour v. Wallace, 121 Mich. 402, 80 N. W. 242; Sherin v. Brackett, 38 Minn. 152, 30 N. W. 551; Boughton v. Harder, 46 App. Div. 352, 61 N. Y. Supp. 576.

Life tenants and remainderman are not tenants in common.

Blessing v. House, 3 Gill & J. 290; Thompson v. Mawhinney, 17 Ala. 362, 52 Am. Dec. 176; Martin v. Castle, 193 Mo. 183, 91 S. W. 930; Downey v. Strouse, 101 Va. 226, 43 S. E. 348.

Remaindermen are not tenants in common with each other.

Pulse v. Osborn, — Ind. App. —, 60 N. E. 374; Crawford v. Bartman, 123 Iowa, 610, 66 L.R.A. 154, 101 Am. St. Rep. 337, 99 N. W. 186; Jones, Mortg. 5th ed. § 680; MacEwen v. Beard, 58 Minn. 176, 59 N. W. 942.

After such remainderman has gone into possession under a tax deed good on its face, the taking of a quitclaim deed from the life tenant will not destroy the tax deed. L.R.A.1915E.

Carson v. Fulbright, 80 Kan. 624, 103 Pac. 139.

Benson, J., delivered the opinion of the court:

This is an action to set aside a tax deed, and also to set aside a quitclaim deed made by the plaintiff Nora Jinkiaway to the defendant Bertha Ardella Ford. John Ertz, owner of the land in controversy, died February 1, 1897, leaving a will by which he devised to his wife, Nora, for the use of herself and her children, an estate for life in this land. He left five children by a former wife, and seven children by his wife Nora. His will provided that after the death of his wife the home farm in Clay county, now the subject of this action, should be sold and the proceeds divided equally among eleven of his sons and daughters. Five of the children are joined with the widow (now Mrs. Jinkiaway) as plaintiffs, and seven are defendants. Mrs. Ertz lived on the home farm for about one year after her husband's death, when she leased it for a term of eight years for a grain rent, and moved to Clay Center. From Clay Center she moved to Oklahoma and thence to Wichita, where she has lived since November, 1899. The taxes on the land for the year 1897 were not paid, and it was accordingly sold in September, 1898, to Bertha Ertz, who is a defendant in this action by the name of Bertha Ardella Ford. The taxes for the years 1898, 1899, and 1900 were paid by the purchaser, and a tax deed valid in form was issued to her on September 7, 1901. On September 9th Mrs. Ford presented her tax deed to the subtenant, Mr. Dicks, who was in possession of the farm holding under the tenant to whom Mrs. Ertz had leased it, and demanded the rents; Dicks agreed to account to her for rents, and purchased the landowner's share of the oats that had been raised that year on the farm, and agreed to lease the premises from Mrs. Ford for the next year. Afterwards Dicks repudiated this arrangement and threatened to hold possession under the old lease. Mrs. Ford then commenced an action to obtain possession under the statute relating to forcible entry and detainer. An appeal to the district court was taken from the judgment rendered in that action. Pending the trial of that appeal the case was settled, and Mr. Dicks took a lease from Mrs. Ford for one year. Mrs. Ford has been in possession herself ever since the expiration of that lease. On September 23, 1901, Mrs. Jinkiaway made and delivered to A. T. Ford, husband of the defendant Bertha Ardella, a deed purporting to remise, release, and quitclaim the land to Mrs. Ford for a consideration of \$1. It appears that

\$5 was the amount paid, but there was evidence tending to prove that \$50 was promised, although the evidence on this matter is conflicting. The action in forcible entry and detainer was commenced in November, 1901, after the quitclaim deed had been obtained, and in her affidavit in that action Mrs. Ford stated "that on or about the 23d day of September, 1901, said plaintiff became the owner" of this land. It will be observed that the date thus given in the affidavit is the date of the quitclaim deed. In the original petition it was expressly alleged that Mrs. Ford took possession under her tax deed, but concealed the fact, and these allegations were repeated in different parts of the petition, making concealment one of the grounds for setting aside the tax deed. These allegations were repeated in effect, although not so directly and emphatically, in the amended petition upon which the case was tried. In this amended petition it was alleged in connection with the charge of concealment, and a promise of the Fords to pay the taxes, that Mrs. Ford and her husband "were at that time actually in possession of said land, having long before ousted plaintiff's tenant, and were claiming to own the same under the tax deed." Two of the plaintiffs were minors, and an offer was made in their behalf to redeem from the tax sales by paying the necessary amounts, which the court was asked to ascertain for that purpose. No special findings were requested. The court found for the defendant Bertha Ardelia Ford on her counterclaim to quiet title, and against all the other parties plaintiff and defendant, except the two minors, and dismissed the cause as to them without prejudice. Judgment was rendered in favor of Mrs. Ford, quieting her title as prayed for.

The principal legal questions to be considered are: First, can one of several remaindermen who has no right of possession lawfully purchase and hold a tax title while the owner of the life estate is in possession enjoying the rents and profits; second, where a remainderman has purchased the land at a tax sale and obtained a tax deed valid upon its face and taken possession of the land, will a quitclaim deed taken from the owner of the life estate impair or affect her rights under the tax deed? third, does the remainderman hold the property under the tax deed for the benefit of all the remaindermen, subject to their contribution of an equitable proportion of the expense?

Proceeding in the order of the questions as stated above it should be remembered that the title acquired under a tax deed is an independent one, vesting in the grantee an estate in fee simple which extinguishes

all former rights and titles of individuals. *Kansas State Agri. College v. Linscott*, 30 Kan. 240, 265, 1 Pac. 81; *Belz v. Bird*, 31 Kan. 130, 1 Pac. 246. A person who is under an obligation to pay the tax upon land cannot legally acquire and hold a valid tax title upon it. *Keith v. Keith*, 26 Kan. 26; *Phipps v. Phipps*, 39 Kan. 495, 501, 18 Pac. 707; *Delashmutt v. Parrent*, 39 Kan. 548, 556, 18 Pac. 712.

The correlative rule that ordinarily one who is under no such obligation may do so is just as firmly established. *Waterson v. Devoe*, 18 Kan. 223; *Nagel v. Tieperman*, 74 Kan. 32, 9 L.R.A. (N.S.) 674, 85 Pac. 941, 88 Pac. 969, 10 Ann. Cas. 977; *Baldwin v. Gibson*, 85 Kan. 267, 116 Pac. 827; note in 75 Am. St. Rep. 229, 230. In the *Nagel Case* it was held that a wife, not being in possession or receiving rents, and under no other obligation to pay taxes, might acquire a tax title upon her husband's lands. It is also well settled that, as between a remainderman and a life tenant, the latter should pay the taxes, and that the remainderman, in the absence of some agreement or controlling equity, is under no obligation to do so. 16 Cyc. 632; *Menger v. Caruthers*, 57 Kan. 425, 428, 46 Pac. 712.

Applying these principles, it seems clear that as between the life tenant, Mrs. Jinkaway, whose duty it was to pay the taxes, and Mrs. Ford, holding only as a remainderman, chargeable with no such duty, the tax title is valid so far as the ability of the grantee to acquire it at the time it was purchased is concerned.

Proceeding further in the order suggested above, the next proposition to be considered is the effect of the quitclaim deed upon the tax title. The contention of the parties claiming adversely to the tax title is that the immediate effect of taking the conveyance of the life estate was the payment of the taxes covered by the tax deed. This effect is claimed on the ground that the life tenant could not acquire and hold a tax title in the circumstances, and that by accepting the conveyance from her, Mrs. Ford took upon herself the same burden. That is, that if Mrs. Jinkaway had purchased the land and taken the tax deed, the transaction would have been treated as a payment of the taxes, and that one holding under her is subject to the same disability. It has been held, however, that a person rightfully holding a tax deed valid upon its face, who buys an outstanding title, does not thereby necessarily as a matter of law relinquish his tax deed as a muniment of title. It was decided in *Carson v. Fulbright*, 80 Kan. 624, 103 Pac. 139: "One who is not under any obligation to pay taxes upon land, nor in privity with one so liable, may obtain a

tax title thereto, and when in possession and claiming title under such a tax deed, apparently valid, may accept a conveyance from the former owner without incurring thereby the risk of losing his land for failure to pay a mortgage given by such former owner and outstanding when the taxes became delinquent, although the mortgagor had covenanted in the mortgage to pay the taxes." Syl.

It was said in the opinion: "When the taxes upon which the deed was issued became delinquent, and at the time the deed was issued the defendant was under no obligation to pay the taxes, and by accepting a conveyance afterward from the former owner he did not divest himself of his previously acquired title, although such former owner was bound to pay the taxes. Such an effect cannot be claimed under the operation of the rule of merger, for merger is very largely a question of intention, and will not be presumed when it would operate to the disadvantage of the party. . . . It will be presumed that the conveyance was obtained for some benefit, and not for a burden." p. 825.

These principles apply, perhaps, with greater force here where the outstanding interest was a life estate only. Taking the quitclaim deed cannot be construed to merge the tax title without doing violence to the Carson decision, with which the court remains content. The appellants, however, distinguish that case by referring to the fact that the tax deed there under consideration had been of record for over five years, and therefore was not assailable for defects not apparent upon its face, while here the tax deed is vulnerable to such an attack. In this situation it is argued that it was the duty of Mrs. Jinkiaway to bring a suit to set it aside, and that this duty passed to Mrs. Ford by her acceptance of the quitclaim deed. The proposition is that in buying an interest presumably for her benefit, she imposed upon herself the duty to destroy the title which she already possessed. This presents again the question of merger. Starting with the premise that Mrs. Ford having at the time she purchased the tax title capacity to do so, and having acquired a certain interest in the land, the question is whether that interest was merged in the life estate by taking the quitclaim deed. Merger would not depend on the extent of the interest, whether a fee simple, or one that would ripen into a fee by efflux of time. Being, as stated in the Carson Case and others cited in that opinion, largely a question of intention, we are constrained to hold that it cannot be presumed, in the absence of an agreement, express or implied, to do so, that in taking the conveyance of the life

estate it was the intention to destroy the tax title, the latter upon its face appearing to create an estate in fee simple. Gen. Stat. 1909, § 9479.

The appellants construe the effect of the quitclaim deed as creating a trust *ex maleficio* in the grantee for their benefit. This effect is claimed because of alleged fraudulent representations and concealment in procuring it. The claim was made in the petition, and some evidence was offered supporting it, that the deed was obtained upon the representations that the land was about to be sold for taxes and would be lost to all parties if they were not paid; that Mrs. Ford would pay the taxes if the deed were made, and hold the land for the benefit of the parties in interest. The evidence, however, only presented a question of fact, which, in view of the general finding against the appellants and in favor of Mrs. Ford, must be construed as finding that the contention was not true. The weight of the evidence and credence to be given to it were for the trial court. If a special finding had been desired on that particular issue, a request for it should have been made. Any consideration here of the legal effect of such representations would be unwarranted in view of the findings. In this connection it may be said that the refusal of the court to allow Mrs. Jinkiaway to testify whether she would have made the conveyance had she known that Mrs. Ford was then claiming the property under a tax deed is regarded as immaterial, although an answer might well have been allowed. For the purpose of this ruling a negative answer will be presumed. The finding of the court sufficiently indicates that such an answer would not have affected the decision. Errors not prejudicial must, under the mandate of the Code and in pursuance of good practice, be disregarded.

We come now to the third question, whether Mrs. Ford, in the attitude of a remainderman rightfully holding a tax title, holds it for the common benefit of all the remaindermen; that is, whether that is the legal effect of her purchase. This question is important to all the parties except Mrs. Jinkiaway and one of the appellants who has conveyed his interest to Mrs. Ford. It should be observed that her coremaindermen, or, as they have sometimes been called, cotenants in remainder, are not tenants in common as that term is ordinarily applied, possession, or a common right of possession, being essential to tenancy in common. The remaindermen hold from the same common source, that is, under the will, but independently of each other. One tenant in common may not hold a tax title against his cotenants, for, by virtue of the common posses-

sion, he is equally bound with his cotenants to pay the taxes (*Muthersbaugh v. Burke*, 33 Kan. 260, 6 Pac. 252), and for the same reason redemption by one is effectual for all. Not so with coremaindermen. They have no common possession or possession of any sort from which such consequences may flow.

The rights and obligations of life tenants and remaindermen as holders of tax titles were considered in a highly instructive opinion of the supreme court of Iowa. The principles decided, so far as they relate to this controversy, may be stated without reciting the facts of that case. It was held that remaindermen who are not in possession and have no right of possession at the time of the sale may purchase and hold an outstanding tax title for their exclusive benefit against other remaindermen, but that the purchase of a tax title by a tenant for life in possession does not vest the title in him as against remaindermen, but operates as a redemption from the tax sale. It will be noticed that the first point decided answers the question now under consideration. The court said on that proposition: "Here, however, the cotenants in remainder were not in possession, nor did they have any right of possession, and they were not chargeable with the duty and responsibility of making payment of taxes. As between themselves, it cannot be said that there were any reciprocal rights or duties. The duty of paying taxes rested upon the life tenants, and, should one of the remaindermen have seen fit to pay taxes allowed to become delinquent for the protection of the estate, he could not recover any portion of the amount so paid from his coremaindermen. There being no duty to pay, there could be no such thing as an enforced contribution." *Crawford v. Meis*, 123 Iowa, 610, 66 L.R.A. 154, 101 Am. St. Rep. 337, 99 N. W. 186.

Brief reference will now be made to a few of the cases relied upon by the appellants as supporting a contrary view. It was held in *Clark v. Lindsey*, 47 Ohio St. 437, 9 L.R.A. 740, 25 N. E. 422, 425, that where a tenant in dower neglects to pay taxes and one of several tenants in common in remainder purchases the land at a tax sale, the purchase will inure to the benefit of his cotenants in remainder. The opinion, however, refers to an Ohio statute, providing that when a tenant in dower shall neglect to pay taxes so long that the lands are sold for their payment, and there is no redemption in one year, the tenant in dower shall forfeit that estate to the remainderman or reversioner, who may thereupon redeem as other lands are redeemed. A L.R.A.1915E.

dowress having failed to pay taxes as this statute provided, two of the remaindermen purchased at tax sale. On the question whether another remainderman was divested of his estate by the tax title, the court said: "In our view, the relations existing between tenants in common—whether in possession of the property or entitled to an estate in remainder—is of a nature to preclude such a result. Just dealing and the confidence necessarily reposed in each other would suggest that owners in common of real estate should consult for the mutual benefit. While one should do no act intentionally to the detriment of the other, good faith should withhold him from all action, in reference to the common property, that would work exclusively to his own advantage." p. 441.

It will be seen that the Ohio court places remaindermen with respect to each other on the same footing as tenants in common in purchasing tax titles. It does not clearly appear what weight was given to the statute referred to in arriving at the result.

Mississippi decisions are cited by the appellant to sustain the view taken by the Ohio court that remaindermen are to be treated as tenants in common in respect to the purchase of tax titles. In *Harrison v. Harrison*, 56 Miss. 174, it was held that a remainderman who purchased an outstanding tax title arising out of the failure of the life tenant to pay the taxes held it in trust for his cotenant in remainder. In a luminous note in 23 L.R.A. 688, upon the effect of a tax sale on land held by a life tenant, it is said that under the decisions of Kansas and other states named, the tax sale extinguishes all prior titles of every kind, while in other states the sale is limited to the life estate. Mississippi is classified with the latter.

In *Defreese v. Lake*, 109 Mich. 415, 32 L.R.A. 744, 63 Am. St. Rep. 584, 87 N. W. 505, 508, it appears that land was devised to a wife for life, then to a son for his life with remainder to the heirs of the son. Taxes being delinquent during the life of the widow, the land was sold at tax sale to the son. After the widow died the son took possession, and after two years conveyed the land to Lake. After the son's death his heirs claimed the lands as remaindermen, and Defreese claimed under them; that is, one party claimed through conveyances from the son, and the other through conveyances from his heirs. When the son owning the life estate died, his heirs could not hold the property otherwise than under the tax deed which he had taken while his mother, the first life tenant, was in possession. The court said: "We have found no case upon all fours with this, and we doubt if it can

be said that the law imposes any such duty [to pay taxes] upon the second life tenant during the tenancy of his predecessor. But we think it does not necessarily turn upon a duty to pay. While he was under no obligation to preserve the estate, if he chose to do so that he might reap the benefit of the devise, he should be content to look to the occupant, whose duty it was to pay them, for reimbursement, or, if not, he could expect no more than contribution from the other remaindermen, to whose benefit, as well as his own, such payment inured. It would be inequitable to permit him to claim title under such circumstances, where he took under the same will that gave them an estate, thereby recognizing their right. Good faith towards the testator should forbid such an attempt to defeat his purpose. Were this claim to be sustained, it would make it easy for two life tenants, by collusion, to defeat the remaindermen, under circumstances like these." p. 427.

The distinguishing feature of the Defreese Case appears to be the fact that there were two successive life estates. The question presented did not relate to the duty of the son to coremaindermen, but to the owners of the succeeding life tenancy created by the same will. The opinion refers to the earlier case of *Blackwood v. Van Vleit*, 30 Mich. 118, where the same court had said: "To preclude any person from making and relying upon a purchase of lands at tax sale, there must be something in the circumstances of the case which imposes upon him a duty to the state to pay the tax, or something which renders it inequitable, as between himself and the holder of the existing title, that he should make the purchase. . . . While a party is not to build up a title on his own neglect of duty, yet, if he can show he owes no duty in the premises, he is as free to become purchaser at a tax sale as any other person." pp. 121, 123.

In the Defreese Case, 109 Mich. 428, 32 L.R.A. 744, 63 Am. St. Rep. 584, 67 N. W. 509, the court also said: "In *Sands v. Davis*, 40 Mich. 14, the question arose between tenants in common. In that case one bought a tax title that was outstanding at the time of the purchase of his interest in the premises, and therefore which he owed no duty, to the state or his cotenants, to pay, and it was held that he might set up such title against his cotenants. Both of these cases recognize the proposition that one asserting a tax title may be under a disability, owing to his relations to others claiming interests in the land."

Thus it appears that, notwithstanding the decision in the Defreese Case, the court still adhered to the principle that one may as-

sert a tax title who owes no duty to pay the tax.

In *Freeman on Cotenancy*, at § 158 the general rule is stated that a cotenant will not be permitted to assert against his companion a title founded upon taxes imposed on the common property, adding, however: "But where the purchasing cotenant has paid his taxes, and is therefore free from fault, and there is nothing in the relations between the parties imposing any obligation on either to pay the charge upon the moiety of the other, then it is difficult to assign any reason for restraining the tenant not in default from bidding for his own use at the tax sale."

The part we have italicized in the above quotation appears to be in harmony with the proposition that the disability is consequent upon the obligation, and this, notwithstanding the apparent contrariety in decisions, is the controlling principle, which is tersely stated in *Crawford v. Meis*, 123 Iowa, 610, 66 L.R.A. 154, 101 Am. St. Rep. 337, 99 N. W. 186, supra: "It is true, as contended for by counsel for appellants, that where there exists, as between joint tenants or tenants in common, a reciprocal duty of protecting the joint estate, one may not absorb or get rid of the interest of his cotenant by allowing the property to go to tax sale, and thereunder acquire title to the entire estate through the medium of a tax deed. . . . It is to be noted, however, that in each of the cases cited, and in others where the like rule is declared, the cotenants were in possession or entitled to possession, and each was charged with the duty of protecting the joint estate. And it is under such circumstances that payment by one cotenant is held to be presumably for the benefit of all, and he who pays may charge the several interests of his cotenants with the proportionate parts which such cotenants should have paid. *Cooley, Taxn.* 467. The reason for the rule seems to be that, there being a reciprocal duty on the part of the cotenants to pay the taxes assessed, and as a part of the taxes for which the land is sold is a claim upon the purchaser's share, the sale is based in part upon his own default." p. 614.

It is not deemed necessary to refer further to cases relied upon by the appellants. Following the principle which we believe to be the logical deduction from our own decisions, and the weight of the reasoning in the opinions of other courts, it is held that because there was no obligation or duty at the time Mrs. Ford purchased the tax title, she could assert it, not only against the life tenant, but against the other owners of the estate in remainder.

Two incidental questions remain to be considered. The appellants earnestly and forcibly argue that, notwithstanding the averments of the petition to the effect that Mrs. Ford was in possession under her tax deed before she obtained the quitclaim deed, the proceedings in forcible entry and detainer and her affidavit there filed estop her from asserting that she had such previous possession, or conclusively prove that she did not. On the other hand, Mrs. Ford contends that the appellants are estopped by their pleading to deny that she had such prior possession. But the evidence tended to prove that the subtenant attorned to her. If that was the fact, her possession under the tax deed was sufficiently shown. *Sheaff v. Husted*, 60 Kan. 770; 57 Pac. 976. A subsequent action to obtain possession, caused by a repudiation of the agreement by the occupant, would not be inconsistent with previous possession. The affidavit contained evidence tending to show a reliance upon the quitclaim deed, but was not conclusive. The time when possession was taken was a fact to be determined on the pleadings and all the evidence.

The district court by dismissing the case against the minors remitted them to their right of redemption in the manner provided by statute. Gen. Stat. 1909, § 9466. As the remedy there provided is simple, involving only a computation by the proper authorities and payment of the proportionate sum by the redemptioner, no reason appears for resorting to a court of equity. If the statutory right had been denied, or there had been a substantial disagreement over the amount, or other ground for resorting to the court, such action might have been upheld. The rights of the minors were fully protected, and they have no just ground of complaint.

The judgment is affirmed.

Petition for rehearing denied January 19, 1915.

WASHINGTON SUPREME COURT. (Department No. 2.)

GRACE ANGUS, Resp.,
v.
GEORGE A. DOWNS, Appt.
(— Wash. —, 147 Pac. 630.)

Bills and notes — theft from maker — enforcement.

That a note was stolen from the maker without delivery is no defense to its enforcement by a bona fide holder for value before maturity, under a statute providing that

where the instrument is in the hands of a holder in due course, a valid delivery by all prior parties so as to make them liable to him is conclusively presumed.

(April 13, 1915.)

APPEAL by defendant from a judgment of the Superior Court for Spokane County in plaintiff's favor in an action brought to recover the amount alleged to be due on a promissory note. Affirmed.

The facts are stated in the opinion.

Messrs. Mulligan & Bardsley, for appellant:

A negotiable promissory note stolen from the maker or indorser before it has become effective as an obligation by actual or constructive delivery cannot be enforced by any subsequent innocent holder.

Burson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497; *Cline v. Guthrie*, 42 Ind. 227, 13 Am. Rep. 357; *Branch v. Sinking Fund Comrs.* 80 Va. 427, 58 Am. Rep. 596; *Salley v. Terrell*, 95 Me. 553, 55 L.R.A. 730, 85 Am. St. Rep. 433, 50 Atl. 896; *Hall v. Wilson*, 16 Barb. 556; *Bedell v. Herring*, 77 Cal. 572, 11 Am. St. Rep. 313, 20 Pac. 129; *District of Columbia v. Cornell*, 130 U. S. 655, 32 L. ed. 1041, 9 Sup. Ct. Rep. 694; *Germania Sav. Bank v. Suspension Bridge*, 73 Hun. 590, 26 N. Y. Supp. 98; *Yakima Valley Bank v. McAllister*, 37 Wash. 666, 1 L.R.A. (N.S.) 1075, 107 Am. St. Rep. 823, 79 Pac. 1119.

Mr. George W. Shaefer for respondent.

Note. — Right to recover on a bill or note stolen before delivery.

I. In general, 351.

II. Rights of bona fide holders.

a. In general, 352.

b. Under negotiable instruments law, 355.

I. In general.

It is a general principle, well established, that delivery of a bill or note is essential to complete the contractual relation intended to be created between the parties. As between the immediate parties or persons whose rights are no higher than those of the immediate parties, there can be no doubt of the validity of this principle. Consequently, notes which have been stolen before delivery confer no rights to the payee or one holding under him with notice.

Thus a payee to whom notes had been executed but not delivered, who, in a conversation with the maker, asked for the privilege of looking at the notes, and upon getting them in his possession put them in his pocket and left the maker and refused to return them upon demand, cannot recover on such notes. *Carter v. McClintock*, 29 Mo. 464.

In *Lenheim v. Wilmarling*, 55 Pa. 73,

Fullerton, J., delivered the opinion of the court:

This is an action brought by the respondent, Grace Angus, against the appellant, George A. Downs, to recover upon a promissory note. In her complaint the respondent alleged that the note had been assigned to her for value, prior to maturity, and that she was a holder thereof in due course. The appellant interposed two defenses: First, that the note was stolen from his possession prior to delivery; and, second, that the respondent was not a holder of the note in due course. At the trial, which was being had before the court and a jury, the respondent introduced testimony tending to establish the allegations of her complaint. The appellant thereupon offered to show

that the note was stolen from his possession after its execution, and that there had been in fact no delivery of the note by him or on his behalf, but made no offer to combat the evidence of the respondent to the effect that she was a holder in due course. On objection by the respondent, the proffered evidence was excluded, and the jury instructed to return a verdict for the respondent for the amount due upon the note. A verdict was so returned and judgment subsequently entered thereon. This appeal is prosecuted from the judgment so entered.

The appellant's assignments of error are based upon the ruling of the court excluding the proffered evidence. He first contends that a holder of commercial paper, although received by him in due course, can-

the defendant had indorsed a blank note and delivered it to another for the purpose of being filled out and given to a stated creditor. The blank note was taken from the safe of the person to whom it was thus given by another, and filled out by him, and delivered to one of his creditors. In a suit by such creditor against the indorser, the creditor who was not a bona fide holder of the note was held not entitled to recover.

Bank bills which had been stolen from a bank and fraudulently put in circulation were held good as against the bank in the hands of the bona fide holder for value, in *Pelletier v. State Nat. Bank*, 114 La. 174, 38 So. 132, but in the hands of one not a bona fide holder it was held no recovery could be had.

See *Hall v. Wilson*, 16 Barb. 548, *infra*. Where a non-negotiable note which has been returned by the payee to the maker, and a negotiable note substituted therefor, has been stolen from the safe of the maker, where it was placed, and transferred to another, to whom the maker states upon inquiry, not knowing that any but the second note was out, that "the note that [the payee] holds against me for the sum of \$300 is correct," there is no evidence tending to show negligence on the part of the maker so as to work an estoppel against him. *Erickson v. Roehm*, 33 Minn. 53, 21 N. W. 861.

A bank which paid a non-negotiable check of one of its depositors made payable to himself and indorsed by him in blank, and which was stolen from him before delivery to the person to whom he intended to deliver it, will be protected in making such payment. *Bowden v. Third Nat. Bank*, 8 Ohio Dec. Reprint, 394, 7 Ohio L. J. 288. It is stated that leaving the check in this shape, and carelessly affording any person the opportunity of becoming the holder, the drawer of the check cannot complain if the bank recognized his indorsement as an order or assignment of his personal right to collect the amount of the check.

As to the rights of owner of negotiable paper payable to bearer or indorsed in blank as against bona fide purchaser from L.R.A.1915E.

one unlawfully in possession thereof, see note to *Voss v. Chamberlain*, 19 L.R.A. (N.S.) 107.

As to the title of one who takes money from thief or embezzler, see note to *First Nat. Bank v. Gibert*, 25 L.R.A. (N.S.) 681.

As to duty to see that spaces in commercial paper are filled so as to prevent raising, see note in 21 L.R.A. (N.S.) 402.

II. Rights of bona fide holders.

a. In general.

In the case of a bona fide holder of paper stolen before delivery, there is a difference of opinion as to the right of recovery.

One line of authorities holds that the paper has never become a contract, that it lacks an essential element of a contract, viz., delivery, and, this being true, no rights are acquired under it even by a bona fide holder, if the maker has not been negligent.

A note payable to A or bearer, signed by the maker under the belief that he was writing his name on a blank piece of paper to enable the payee to see how his name was spelled or written, and which was not, after discovery by the maker that he had signed the note, voluntarily delivered to the payee, but was wrongfully and forcibly taken by them and carried away against his consent and over his objection, was held in *Cline v. Guthrie*, 42 Ind. 227, 13 Am. Rep. 357, not to be a valid obligation even, in the hands of a bona fide holder.

An order which in legal effect amounts to a promissory note, which was taken by the person in whose favor it was drawn and by him sold and indorsed to a bona fide purchaser, is invalid even in the hands of a bona fide purchaser, and no recovery can be had thereon: *Salley v. Terrill*, 95 Me. 553, 55 L.R.A. 730, 85 Am. St. Rep. 433, 50 Atl. 896.

A similar holding appears in *Burson v. Huntington*, 21 Mich. 415, 4 Am. Rep. 497, where the note had been signed by the maker and left on the table at his house, where he and the payee had been transacting

not recover thereon against a maker from whose possession it has been taken before delivery by theft. His learned counsel argue that the question is not controlled by the negotiable instruments act, and they cite many cases decided under the common-law rules applicable to the law merchant which sustain the principle that recovery cannot be had under such circumstances. There are, however, many cases maintaining the contrary rule, and, were we to conclude that the act cited is without application to the question, it would be an interesting inquiry to ascertain with which side lay the better reason. But we think the act itself controlling. Section 16 of the original act (§ 3407, Rem. & Bal. Code) provides:

"Every contract on a negotiable instru-

ment is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the

business. The maker of the note left the room for the purpose of obtaining a surety, and expressly directed the payee not to touch the note until he came back; while he was thus gone, the payee picked up the paper and left with it and afterwards transferred it to a bona fide purchaser, being indorsed in blank by the payee.

Following *Burson v. Huntington*, it was held in *Sheffer v. Fleischer*, 158 Mich. 270, 122 N. W. 543, that there could be no recovery upon notes by a bona fide holder thereof against a merchant who had signed notes in payment of an order he had given a salesman, and left them on a show case when he was called away to wait on a customer, and such notes were taken therefrom by the salesman without any delivery by the maker.

That a note not delivered is not given vitality as a promissory note of the maker thereof by the delivery by one who has stolen it is the theory of *Hall v. Wilson*, 16 Barb. 548, but the decision in that case, denying a recovery against the maker, is put upon the ground that the purchaser from the thief was not a bona fide holder.

In *Baxendale v. Bennett*, L. R. 3 Q. B. Div. 525, 47 L. J. Q. B. N. S. 624, 26 Week. Rep. 899, 4 Eng. Rul. Cas. 637, there was held to be no right of recovery by a bona fide holder on a draft by one in blank for the accommodation of a third person, and placed in his desk, from which it was stolen, filled up by another person, and negotiated.

It has been urged, in at least some of these cases, that such a case falls within the principle that when one of two innocent persons must suffer by the act of the third, he who has enabled such third person to occasion the loss must sustain it. In answer to this it is stated that this rule applies where the drawer or maker has intrusted the paper to a third person, to be delivered in a certain event not apparent on the paper, and it is wrongly delivered, or if sent by mail, gets into wrong hands; that in such cases as the party intended to deliver to someone and selected his own mode of conveyance, or when the maker has himself been deceived by fraudulent acts or

representations of the payee or others and thereby induced to deliver or part with the note or indorsement, and the same is fraudulently obtained from him. It is further stated that there may be such gross carelessness or recklessness of the maker in allowing an undelivered note to get into circulation as will justly estop him from setting up nondelivery. *Salley v. Terrill*, 95 Me. 553, 55 L.R.A. 730, 85 Am. St. Rep. 433, 50 Atl. 896; *Burson v. Huntington*, 21 Mich. 415, 4 Am. Rep. 497.

In *Salley v. Terrill*, supra, there was held to be no such negligence as would render the maker liable where an order was drawn which in effect amounted to a promissory note, and momentarily left upon a table with other papers of the drawer to which no one had right of access, and whence it could only be extracted by a criminal act, which the drawer could not reasonably anticipate.

In *Burson v. Huntington*, supra, under the facts as stated above, the maker of the note is held to be guilty of no such negligence as would bring into operation this rule.

Municipal bonds which were lithographed, signed, and sealed and numbered, but which were never delivered or intended to be delivered, but were stolen and negotiated, are not valid obligations of the municipality, although in the hands of a bona fide holder. *Germania Sav. Bank v. Suspension Bridge*, 73 Hun. 590, 26 N. Y. Supp. 98, appeal dismissed in 159 N. Y. 362, 54 N. E. 33.

An opinion in accordance with this line of authorities is expressed in *Andrews v. Thayer*, 30 Wis. 228, but there is no decision of the question, but in *Roberts v. McGrath*, 38 Wis. 52, recovery by a bona fide holder was denied where the note which had been executed by the maker and turned over to a custodian, who was to hold the same subject to the order of the maker, was obtained by an agent of the payee from a clerk of the custodian, with the statement that he desired to make an abstract of this and other notes given under like circumstances, and would return them as soon as that had been done, but failed to do so, delivering it to the payee.

possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

This section, it will be observed, provides in terms that, where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. Language could hardly be made plainer, and is as applicable to a holder in due course of commercial paper stolen before delivery as it is to commercial paper stolen subsequent to delivery, or commercial paper the title to which is defective for any other reason.

Our attention has not been called to many adjudicated cases where this precise ques-

tion was at issue. In *Greaser v. Sugarman* 37 Misc. 799, 76 N. Y. Supp. 922, the defendant executed a promissory note payable to the order of himself. It reached the hands of a holder in due course, who brought an action thereon. The defendant sought to defend on the ground that it was lost or stolen from his desk, and that there was hence no valid delivery of the note. The court, quoting the section of the negotiable instruments law of New York corresponding to the section quoted above, held that the fact, if shown, would constitute no defense to the action.

In *Poess v. Twelfth Ward Bank*, 43 Misc. 45, 86 N. Y. Supp. 857, the plaintiff held a certified check on the bank named, drawn by himself against his own deposit. Some

In *Dodd v. Dunne*, 71 Wis. 578, 37 N. W. 430, a note was executed by the owner of real estate in payment of commissions of an agent for a sale thereof, but not delivered to the agent, but placed in the desk of the maker, from which it was fraudulently taken by the real estate agent without the consent, either express or implied, of the maker; it was subsequently sold to a bona fide purchaser, who brought suit thereon. The questions were submitted to the jury, which found that there had never been a delivery of the note, and upon this state of facts it was held there could be no recovery even by a bona fide holder. It was also found by the jury that the maker had not been guilty of negligence in not preventing the payee from procuring possession of the note.

A purchaser of railroad bonds which had been stolen before they were completed by filling in the place of payment, the kind of money in which they should be paid, and the amount thereof, was allowed to recover of his vendor the amount so paid, in *Ledwich v. McKim*, 53 N. Y. 307.

In other decisions a bona fide holder is held entitled to recover. The theory of these cases does not clearly appear. It seems evident, however, that these decisions rest upon the theory that the maker of the note is negligent in signing a note and laying it away without delivery, or in signing a note without the intention of delivering it. In *Worcester County Bank v. Dorchester & M. Bank*, *infra*, bank bills, which circulate as money, were involved.

It was held in *Worcester County Bank v. Dorchester & M. Bank*, 10 Cush. 488, 57 Am. Dec. 120, that a bona fide holder of bank bills forcibly stolen from the bank in a complete state of preparation for issue, but not issued, may recover thereon against the bank, where there is nothing in the conduct of the purchaser amounting to fraud or gross negligence. It is stated, however, in the opinion, in discussing the rules applicable to such cases, that it was once held in the case of a bill of exchange or promissory note fraudulently put into circulation, that the holder must show that

he had used due and reasonable caution in taking it, but it has since been adjudged if he took it in good faith he is entitled to recover on it, and that even gross negligence in him is not tantamount to fraud, although it may be given in evidence to the jury as tending to prove fraud, thus indicating that nothing but fraud will affect the rights of one under the circumstances.

In *Mulberger v. Morgan*, — Tex. Civ. App. —, 34 S. W. 148, a bona fide holder is held entitled to recover on a note which was executed by certain persons in the purchase of a horse, and which was retained by one of the signers until all the persons who were interested in the purchase had signed, but which was obtained by an agent of the payee without the knowledge and consent of the custodian or of any of the persons who signed the note. This holding was approved in *Worsham v. State*, 56 Tex. Crim. Rep. 253, 120 S. W. 439, 18 Ann. Cas. 134, in a prosecution for the theft of a check in which it was claimed by the defense that the check not having been delivered, it was not the subject of theft. In answer to this contention it was held that delivery of a negotiable instrument is not essential to its validity in the hands of an innocent holder for value, and this is true though the maker lost possession by theft.

That there may be a recovery by a bona fide holder although there has been no delivery is held also in case of a note payable to A or bearer. *Kinyon v. Wohlford*, 17 Minn. 239, Gil. 215, 10 Am. Rep. 165.

In *Shipley v. Carroll*, 45 Ill. 285, the note was written and signed by the maker simply and solely as a matter of amusement and in the presence of the person who was made payee therein, without any design of delivering the same to the payee named, but the payee subsequently stole the note and transferred it to the person who brought suit and who was a bona fide holder. The facts as above recited were held to constitute no defense to the action. This case was followed with very little discussion in *Clarke v. Johnson*, 54 Ill. 296, where a note was executed upon the maker's giving an order for certain goods, but was not deliv-

time thereafter he indorsed the check in blank and made out a deposit slip for redeposit in the bank. On the way to the bank he lost the check, and about five days thereafter it came up through the exchange for collection from another bank which had cashed it. The plaintiff sued the bank for the amount of the deposit, but the court held he could not recover; the court saying that the title of the bank cashing the check, since it recovered it in due course, "was not affected by the fact that it had been stolen and never had a valid delivery."

In *Buzzell v. Tobin*, 201 Mass. 1, 86 N. E. 923, the defendant sought to defend against the suit of an indorsee of his check on the ground that the check had been delivered by his clerk without authority, and hence was unlawfully in circulation, and no title passed by its subsequent negotiation. But the court held the check valid in the hands of a holder in due course under the section of the negotiable instruments law of that state corresponding to the section of the law from our state which we have quoted.

The commentators on the negotiable instruments act are seemingly in accord with the interpretation thus given by the courts to this section of the act.

Daniel on Negotiable Instruments, vol. 1, § 838, 6th ed. after discussing the conflict of authority existing on the question prior to the statute, uses this language: "While the statute provides that every contract on a negotiable instrument is incomplete and revocable until delivery, it further declares that, where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusive-

ly presumed. So that, in those states which have enacted the statute, the conflict of authority discussed in the foregoing sections is settled against the rule that a maker is not liable unless he has been guilty of negligence, and in favor of the protection of an innocent purchaser, as to whom a valid delivery is conclusively presumed."

And the editors of *Ruling Case Law*, under the title *Bills & Notes*, at § 233, use this language: "As a general rule, a negotiable promissory note, like any other written contract, has no legal inception or valid existence, as such, until it has been delivered in accordance with the purpose and intent of the parties. There accordingly is no doubt that delivery of a negotiable instrument is necessary to create any liability as between the immediate parties. But the authorities have long been in violent conflict as to whether a bona fide holder can recover on an instrument which has never been delivered by the maker or drawer to anyone for any purpose. Some courts have held that delivery is not essential to the validity of an instrument in the hands of a due-course holder. And this rule has been declared to be applicable in case the instrument has been taken from the maker's possession by theft. On the other hand, many courts have taken the view that an innocent holder for value of paper commercial and negotiable in form, but which has never been completed by delivery, cannot acquire rights thereto against the alleged maker. And it has been held that a negotiable security, stolen from the maker before it has become effective as an obligation by actual or constructive delivery, may not be enforced by any subsequent innocent holder. These courts have reasoned that the wrongful act

ered, the maker testifying that he intended to insert a condition therein before delivery that would insure the delivery of the goods ordered or render the note void. The person taking the order snatched the note from the maker, and ran off with it, and subsequently transferred it to the one who brought suit, who was treated as occupying the position of a bona fide holder.

That a bona fide holder may recover, see *Pelletier v. State Nat. Bank*, 114 La. 174, 38 So. 132, *supra*.

b. Under negotiable instruments law.

Under the negotiable instruments law "where the instrument is in the hands of a holder in due course, a valid delivery thereof by all the parties prior to him so as to make them liable to him is conclusively presumed."

Under this act the defense that a note was lost or stolen from the desk of the maker before delivery is ineffectual. *Greaser v. Sugarman*, 37 Misc. 799, 76 N. Y. Supp. L.R.A.1915E.

922. The same conclusion was reached in *Schaeffer v. Marsh*, 90 Misc. 307, 153 N. Y. Supp. 96, with reference to a check stolen from the maker before delivery, but complete in all other respects. See *Angus v. Downs*.

There is an *obiter* statement of like effect in *Poes v. Twelfth Ward Bank*, 43 Misc. 45, 86 N. Y. Supp. 857, although in that case the holder of the check had repaid the amount thereof upon demand of the bank.

But an incomplete instrument which has not been delivered does not become a valid obligation even in the hands of a bona fide holder. Thus an incomplete check which is signed and thereafter stolen from a drawer where it is placed, completed and negotiated, does not become a valid obligation in the hands of the purchaser, and if he has collected the amount thereof, the drawer, upon paying it, may recover the same. *Linick v. A. J. Nutting & Co.* 140 App. Div. 265, 125 N. Y. Supp. 93.

W. A. E.

of a thief or a trespasser may deprive the holder of his property in a note which has once become a note, or property, by delivery, and may transfer the title to an innocent purchaser for value, but that a note in the hands of the maker before delivery is not property, nor the subject of ownership, as such; it is, in law, but a blank piece of paper. Sound reason would seem to require the question to be resolved with a view to the facts of the particular case and the principles of negligence. No doubt, where the maker of a negotiable instrument negligently allows the same to get into circulation, he should be held liable to a bona fide holder upon the ground that he is estopped by his own negligence to deny a valid delivery. The maxim declaring that, where one of two innocent persons must suffer by reason of the wrong of a third party, he whose act made the wrong possible should bear the loss, should apply with full force. But it is somewhat shocking to suppose that the maker, having exercised due care, may be deprived of his property without his consent. Nevertheless this is clearly the intention of the negotiable instruments law, which declares that, 'where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed.' This principle applies only to complete instruments, however, for it is declared, also, by the act that 'where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.'

See also Crawford, Neg. Inst. Law, § 35, ¶ "c;" Ogden, Neg. Inst. p. 284.

We conclude, therefore, that it is not a defense against the suit of a holder in due course of commercial paper to show that the paper was stolen from the maker thereof prior to delivery.

The appellant next contends that there was sufficient evidence to send the case to the jury on the question of the respondent's good faith, but we differ with him upon this contention also. The respondent testified that she paid value for the note, and that she had at the time no notice of any kind that the appellant disputed his liability thereon. In this she is corroborated not only by the circumstances surrounding the transaction, but by other witnesses as well. Nothing was offered to contradict this testimony, and we think it an instance where the trial court could well say there was no L.R.A.1915E.

fact in dispute for the consideration of the jury.

The judgment is affirmed.

Crow, Ellis, Mount, and Main, JJ., concur.

OHIO SUPREME COURT.

NANCY C. LOUDEN, Plff. in Err.,

v.

CITY OF CINCINNATI et al.

(— Ohio St. —, 106 N. E. 970.)

Explosion — negligence — liability.

1. The use of high power explosives in making excavations of rock and earth is a lawful method of accomplishing that purpose; but where dirt and stone are thrown by the force of the blast upon the property of another, or where the work of blasting is done in such proximity to adjoining property that, regardless of the care used, the natural, necessary, or probable result of the force of the explosion will be to break the surface of the ground, destroy the buildings, and produce a concussion of the atmosphere, the force of which will invade the adjoining premises, injuring the buildings thereon, and making them unfit and unsafe for habitation, the person or corporation making use of such explosives will be liable for the damage proximately and naturally resulting therefrom, irrespective of the question of negligence or want of skill in the blasting operations.

Pleading — explosion — cause of action.

2. A petition averring that defendants in the use of high explosives broke into plaintiff's land and dwelling house with force and violence, by means of explosions of great power and frequency in the street adjacent to and in close proximity to plaintiff's dwelling house, and thereby produced concussions and vibrations of the earth and air, causing foundations, walls, chimneys, ceilings, cistern, vault, and window glass of plaintiff's house to break and fall, rendering such house unsafe for habitation and untenable, states a cause of action.

(March 17, 1914.)

Headnotes by the COURT.

Note. — Liability for injury to person or property from concussion caused by blasting.

The earlier cases on this question are treated in the notes to Bessemer Coal, Iron & Land Co. v. Doak, 12 L.R.A.(N.S.) 389, and Hickey v. McCabe, 27 L.R.A.(N.S.) 426, and the present note is merely complementary thereto.

As to liability for injury in consequence of frightening horse by blasting, see note to

ERROR to the Circuit Court for Hamilton County to review a judgment affirming a judgment of the Court of Common Pleas sustaining a demurrer to the amended petition in an action brought to recover damages for injuries to plaintiff's property by blasting. Reversed.

Statement by Donahue, J.:

The plaintiff filed an amended petition in the common pleas court of Hamilton county, which amended petition reads as follows:

"Now comes Nancy Loudon, the plaintiff herein, and by leave of court files this her amended petition herein, and says that the defendant the city of Cincinnati, is a municipal corporation under the laws of the state of Ohio; that the defendant the board of trustees, 'commissioners of waterworks,' Cincinnati, Ohio, is a legally constituted board appointed and qualified under and in pursuance of the laws of the state of Ohio, for the construction, enlargement, extension, and improvement and addition to the waterworks of the city of Cincinnati; that the defendant the W. J. Gawne Company is a

corporation under the laws of the state of Delaware.

"And plaintiff says: That during all the times hereinafter mentioned this plaintiff was, and has been ever since, and still is the owner in fee simple and in possession of lot No. — in S. W. Hartshorn's subdivision, with a dwelling house thereon known and numbered as No. 3521 Humbert avenue in the city of Cincinnati.

"That at the time of the doing of the wrongs hereinafter stated said dwelling house was a frame and plastered building, with stone and brick foundation and stone and brick chimneys, all occupied by plaintiff as her home and dwelling house.

"That said defendant the city of Cincinnati, through its said board of trustees, 'commissioners of waterworks,' Cincinnati, Ohio, defendant contracted with and employed the defendant the W. J. Gawne Company to excavate and to construct for said city a tunnel for supplying water to said city.

"That said defendants made the excavation for and construction of said tunnel

Hieber v. Central Kentucky Traction Co. 36 L.R.A.(N.S.) 54.

As to liability, in absence of negligence, for damages to land or buildings from substances thrown in blasting, see note to Langhorne v. Turman, 34 L.R.A.(N.S.) 211.

The holding in LOUDEN v. CINCINNATI, that the user of high explosives is liable for the damage proximately and naturally resulting from concussion, irrespective of the question of negligence or want of skill in the blasting operations, is in accord with what seem to be the better considered cases on the question.

And it was held that negligence need not be shown to render one who uses upon his own premises such heavy charges of explosives in blasting that he destroys his neighbor's well, liable for the injury. Patrick v. Smith, 75 Wash. 407, 48 L.R.A.(N.S.) 740, 134 Pac. 1076, 6 N. C. C. A. 108: The court said: "The authorities are agreed upon the question that one who, in blasting upon his premises, casts *débris* upon the land of another, is liable in damages regardless of the degree of care or skill used in doing the work. 19 Cyc. 7. But where one in blasting upon his land, exercising reasonable care, causes a concussion in the air or a vibration in the earth, or both, to the injury to the premises of another, but casts no physical substance upon his property, the authorities are divided on the question of liability. One line of cases holds that the injured party is without remedy; the other line holds that an actionable wrong has been committed. We think the latter view is both logical and just. It seems illogical to say that if one puts off a blast of powder, a substance inherently dangerous, on his own premises, which causes a stone to be thrown through his neighbor's

window, he is liable without regard to the degree of care used; but if it destroys his neighbor's house, but casts no physical substance upon the premises, he is immune from liability unless it can be shown that reasonable care was not exercised. Moreover, we think the doctrine of *damnum absque injuria*, when no negligence has been shown, has been rejected in at least two cases in this court."

That persons who destroyed a neighbor's well by blasting were engaged in constructing a roadbed for a railroad does not relieve them from liability for the injury, if it does not appear that the grading operations necessarily interfered with the water which supplied the well. *Ibid*.

In *Probat v. Hinesley*, 133 Ky. 64, 117 S. W. 389, the court said: "Upon the question of blasting there are two classes of cases. In one line of cases, it is held that injuries to a house from blasting caused merely by the shaking of the earth or pulsation of the air, or both, give no right of action in the absence of negligence in doing the blasting. *Benner v. Atlantic Dredging Co.* 134 N. Y. 156, 17 L.R.A. 220, 30 Am. St. Rep. 649, 31 N. E. 328; *Holland House Co. v. Baird*, 169 N. Y. 136, 62 N. E. 149, 11 Am. Neg Rep. 166. In the other line of cases, it is held that the work of blasting is necessarily and inherently dangerous, and that a person who undertakes to blast near or so close to another's property as to cause injury assumes all risk of his operation. *Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17; *Colton v. Onderdonk*, 69 Cal. 157, 58 Am. Rep. 558, 10 Pac. 395; *Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166. In the case at bar the court did not fully adopt either one of these views, but very properly, we think, left to the jury the de-

along, through, and under the ground adjacent to the said dwelling house of the plaintiff.

"That in the process of so doing said defendants loosened and removed the earth and rock by means of blasts of high power explosives.

"And that in so doing the said defendants trespassed upon and under and broke into the plaintiff's said land and dwelling house with force and violence by means of said explosions of great power and frequency, and in close proximity to plaintiff's said dwelling house.

"And that the defendants thereby produced concussions and vibrations of the earth and air and of the material of this plaintiff's said dwelling house.

"And the defendants thereby caused the foundations, walls, chimneys, ceilings, cistern, vault, and window glass of plaintiff's said house to crack and break and fall, and rendered said house unsafe for habitation and untenable, and deprived plaintiff of the use of said house.

"And that said defendants by said explosions continued through day and night caused terrifying and disturbing noises and vibrations of the ground and air and dwelling house of this plaintiff, and deprived plaintiff and her family of sleep and rest and of the enjoyment of her home and property, and thereby caused her great inconvenience, discomfort, suffering, injury, damage, and loss.

"That the excavation for and construction of said tunnel was entirely within and under the management and control of the defendants, and said plaintiff had nothing to do with it, except to endure the injuries, suffering, losses, and damages herein complained of.

"That by reason of the above described acts of the defendants the plaintiff has been damaged by the said defendants in the sum of one thousand dollars (\$1,000).

"Wherefore the plaintiff asks judgment against said defendants and each of them for \$1,000.

"And plaintiff further prays for an order directed to the defendants the city of Cincinnati and the board of trustees, 'commissioners of waterworks,' Cincinnati, Ohio, and each of them, from paying over any money now in their hands to the said defendant the W. J. Gawne Company until after the claim of this plaintiff has been fully paid and satisfied. And plaintiff further prays for her costs, and for all other and further relief to which she is entitled."

To this amended petition the defendants filed the following demurrer: "Come now the defendants herein and jointly and severally demur to plaintiff's amended petition, for the reason that same does not state facts sufficient to constitute a cause of action."

The common pleas court sustained the demurrer to this amended petition and dismissed the action at plaintiff's costs. The circuit court affirmed the judgment of the common pleas court.

Mr. Patterson A. Reece, for plaintiff in error:

The amended petition alleges sufficient facts to make out a strong prima facie case of negligence on the part of the defendant.

Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co. 60 Ohio St. 560, 45 L.R.A. 658, 71 Am. St. Rep. 740, 54 N. E. 528, 6 Am. Neg. Rep. 674; Lawson, Presumptive Ev. 2d ed. p. 122; Tiffin v. McCormick, 34 Ohio St. 644, 32 Am. Rep. 408, 2 Mor. Min. Rep. 194; Cleveland, C. C. & I. R. Co. v. Walrath, 38 Ohio St. 461, 43 Am. Rep. 433; Iron R. Co. v. Mowery, 36 Ohio St. 418, 38 Am. Rep. 597, 6 Am. Neg. Cas. 176; Cincinnati, H. & D. R. Co. v. Brown, 9 Ohio C. C. 198, 6 Ohio C. D. 225; Cincinnati

termination of the question whether or not, under the circumstances of the case, and natural and probable result of the blasting was to injure the plaintiff's property."

The doctrine of the earlier New York cases that where one resorts to blasting to adapt his property to a lawful use, that mode being the only proper one, and the work being conducted with due care, there can be no recovery for damages caused by the result of concussion and vibrations, is followed in *Stancourt Laundry Co. v. Lamura*, 147 N. Y. Supp. 895; *Viele v. Mack Pav. & Constr. Co.* 150 App. Div. 839, 135 N. Y. Supp. 147, previous appeal in 144 App. Div. 694, 129 N. Y. Supp. 604; *Henry Hall Son's Co. v. Sundstrom & S. Co.* 138 App. Div. 548, 123 N. Y. Supp. 390; *Adler v. Fox*, 74 Misc. 483, 132 N. Y. Supp. 302. L.R.A.1915E.

In *Stewart v. Handredy*, 212 Mass. 340, 98 N. E. 1030, where the injury was found to have been caused by the vibration and shock due to blasting out a tunnel by defendant, it was held that the defendant was bound to exercise reasonable care and skill in blasting out the tunnel, having due regard to the nature of the work and local conditions.

Negligence will not be presumed from the jarring of the earth or the concussion of the air, but the burden is upon the claimant to make it appear that the explosion was unnecessarily violent and carelessly prepared for, having regard to the place and the surroundings. *Morrissey v. Cincinnati*, 33 Ohio C. C. 541, affirmed without opinion in 87 Ohio St. 525, 102 N. E. 1121.

W. W. A.

Street R. Co. v. Kelsey, 9 Ohio C. C. 170, 6 Ohio C. D. 209; Lake Shore & M. S. R. Co. v. Yokes, 12 Ohio C. C. 499, 5 Ohio C. D. 599; Toledo Consol. Street R. Co. v. Fuller, 17 Ohio C. C. 562, 9 Ohio C. D. 123; Mt. Adams & E. Park Inclined Plane R. Co. v. Isaacs, 18 Ohio C. C. 177, 10 Ohio C. D. 49.

Messrs. Stanley W. Merrell and J. B. Frenkel, with Mr. J. W. Heintzman, for defendants in error:

If plaintiff is to recover at all it must be upon the charge of negligence of the defendants, and the principle that one always must exercise his own rights so as not to injure his neighbor.

Booth v. Rome, W. & O. Terminal R. Co. 140 N. Y. 267, 24 L.R.A. 105, 37 Am. St. Rep. 552, 35 N. E. 592; Holland House Co. v. Baird, 169 N. Y. 136, 62 N. E. 149, 11 Am. Neg. Rep. 166; Armstrong v. Cincinnati, 82 Ohio St. 454, 92 N. E. 1108, affirming 12 Ohio C. C. N. S. 76; Morrissey v. Cincinnati, 14 Ohio C. C. N. S. 19; Cherryvale v. Studyvin, 76 Kan. 285, 11 L.R.A. (N.S.) 385, 91 Pac. 60; Simon v. Henry, 62 N. J. L. 486, 41 Atl. 692; 12 Am. & Eng. Enc. Law, 2d ed. 509; French v. Vix, 143 N. Y. 90, 37 N. E. 612; Thurmond v. Ash Grove White Lime Asso. 125 Mo. App. 73, 102 S. W. 617; Bessemer Coal, Iron & Land Co. v. Doak, 152 Ala. 166, 12 L.R.A. (N.S.) 389, 44 So. 627; 19 Cyc. 7, 8; Elster v. Springfield, 49 Ohio St. 82, 30 N. E. 274; Letts v. Kessler, 54 Ohio St. 73, 40 L.R.A. 177; 42 N. E. 765; Wheeling & L. E. R. Co. v. Harvey, 77 Ohio St. 235, 19 L.R.A. (N.S.) 1136, 122 Am. St. Rep. 503, 83 N. E. 66, 11 Ann. Cas. 981, 21 Am. Neg. Rep. 272; Huff v. Austin, 46 Ohio St. 386, 15 Am. St. Rep. 613, 21 N. E. 864.

Donahue, J., delivered the opinion of the court:

The question in this case is raised by the demurrer to the amended petition, and it is one that materially affects property rights in this state. Plaintiff in her amended petition avers that the defendants in the process of constructing a tunnel through and under Humbert avenue, for supplying water to the city of Cincinnati, loosened and removed earth and rock by means of high power explosives; that plaintiff was the owner of a frame dwelling house, with stone and brick foundation and stone and brick chimneys, occupied by her and her family as a home; that this tunnel was being constructed through and under the street adjacent to this dwelling house; that defendants trespassed upon and under and broke into plaintiff's land and dwelling house with force and violence by means of

explosions of great power and frequency, and in close proximity to plaintiff's dwelling house, and thereby produced concussions and vibrations of the earth and air, destroying the cistern on her lot, the foundation of her building, breaking the glass in the windows, cracking and destroying the chimneys, and thereby rendered her house unsafe and unfit for habitation, and depriving plaintiff of its use, enjoyment, and occupation.

A demurrer to this amended petition was sustained by the trial court, for the reason that it contained no averments of negligence or want of skill in the handling of these explosives. The amended petition charges a trespass upon plaintiff's land by the transmission of force through the soil and sub-surface and concussion of air produced by the explosion of blasts used in loosening rock and earth in the construction of the tunnel in the street in front of plaintiff's premises.

The question presented is whether the owner of property may make use of high explosives on his own premises in the accomplishment of a lawful purpose, provided he uses due care, notwithstanding the necessary, natural, or probable result thereof is to injure or destroy adjacent property. The supreme court of California, in the case of Colton v. Onderdonk, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395, has spoken in no uncertain terms upon this question. In the fourth proposition of the syllabus it is held that "where the owner of a lot situated in a large city, and contiguous to the dwelling house of another, uses gunpowder to blast out rocks on his lot, he is liable for the damage proximately and naturally resulting to the house of the adjoining owner from the act of blasting, whether the damage was caused by rocks thrown against the house or by a concussion of the air around it."

The court, on page 159 of 69 Cal. uses this language: "The defendant seems by his contention to claim that he had a right to blast rocks with gunpowder on his own lot in San Francisco, even if he had shaken Mrs. Colton's house to ruins, provided he used care and skill in so doing, and although he ought to have known that by such act, which was intrinsically dangerous, the damage would be a necessary, probable, or natural consequence. But in this he is mistaken."

In the case of Cahill v. Eastman, 18 Minn. 324, Gil. 292, 10 Am. Rep. 184, it was held: "Where it is sought to make one accountable for the consequences of acts done by him upon his own land, the question, in general, is not whether he exercised due care, but whether his acts caused the damage. If they necessarily tend to injure his

neighbor in his pre-existing rights of property, he is liable in damages for the natural and necessary consequences thereof, irrespective of any considerations as to the care and skill with which such operations may have been conducted."

To the same effect is the case of *Shipley v. Fifty Associates*, 106 Mass. 194, 8 Am. Rep. 318; *Ball v. Nye*, 99 Mass. 582, 97 Am. Dec. 56; *Wilson v. New Bedford*, 108 Mass. 261, 11 Am. Rep. 352; *Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17.

The New York court of appeals held, in the case of *Hay v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279, that defendant was liable for injury caused from blasting on its own premises, although no negligence or want of skill in executing the work was alleged or proven. The same principle in relation to the storing of water is announced in the case of *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72. Also in reference to the storage of gunpowder and other explosive materials, in the case of *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654, 11 Mor. Min. Rep. 74. In the case of *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659, an injunction was granted against defendant from operation of machinery by steam power which produced jarring and shaking of plaintiff's building.

In the case of *Sutton v. Clarke*, decided in England in 1815, 6 Taunt. 29, 1 Marsh. 429, 16 Revised Rep. 563, it was stated in the opinion by Sir Vicary Gibbs, Ch. J., that where a person improves his own land for his own benefit, according to his best skill and diligence, and not foreseeing that his act will produce injury, yet if he unwittingly injures his neighbor he is answerable. This was the settled law of England at that time, and many authorities are cited in that case in support of the conclusion reached by the court. That doctrine has been modified, at least in this country, to the extent that where the injury was not the natural, necessary, or probable consequence of the act of plaintiff, and could not have been foreseen, no recovery can be had, unless there be an actual or constructive trespass or negligence in doing the work.

In the case of *Booth v. Rome, W. & O. Terminal R. Co.* 140 N. Y. 267, 24 L.R.A. 105, 37 Am. St. Rep. 552, 35 N. E. 592, the court of appeals seems to have departed from the doctrine announced in the case of *Hay v. Cohoes Co.* supra. However, the court distinguishes these cases. In the latter the court held that defendant was not liable for the injury caused by blasting, notwithstanding that during the progress of the work it was informed of the injury that was being done. This decision was largely predicated upon the particular facts in that case. The rocky surface of the upper part

of Manhattan island made blasting necessary in the work of excavating, and unless permitted the value of the lots, especially for business purposes, would be seriously affected. However, the fair and legitimate interpretation and application of the doctrine announced in that case, as elaborated and explained in the opinion (140 N. Y. at page 278), would permit the second proprietor to destroy the building of the first, and the third to destroy the building of the second, and in like manner each succeeding proprietor might destroy the building of his predecessor until the territory was exhausted, and then there would remain upon this territory but one building, the last one, fit and safe for use and occupancy, unless the several owners followed in the trail of devastation and repaired or restored their buildings.

There are, of course, two very important considerations to be kept in mind in the disposition of a question of this character: First, to give to the owner the largest liberty possible, in the use, occupation, and improvement of his own property, consistent with the rights of others, and the right to employ modern methods and machinery in accomplishing the improvements desired; second, that one may not use his own property to the injury of any legal right of another. This maxim of the common law, *Sic utere tuo ut alienum non laedas*, is so well established and so universally recognized that it needs neither argument nor citation of authority in its support. But it must be conceded that this is no longer the law if the owner of a lot may employ such means in the improvement of his property as will naturally and necessarily result in the destruction of adjoining property. Particularly would this be true if, as in the case of *Booth v. Rome, W. & O. Terminal R. Co.* supra, he is informed that the means and methods that he is employing are in fact destroying his neighbor's property, and notwithstanding that knowledge he may continue in the use of these methods and these means without liability therefor, unless perchance he is guilty of negligence or want of skill in the handling of the explosives used. If the means employed will, in the very nature of things, injure and destroy his neighbor's property, notwithstanding the highest possible care is used in the handling of the destructive agency, the result to the adjoining property is just as disastrous as if negligence had intervened. If one may knowingly destroy his neighbor's property in the improvement of his own, it is little consolation to the neighbor to know that his property was destroyed with due care and in a scientific manner. If the consequences of the act could not be foreseen, if

the means employed by a person in the improvement of his own property would not naturally, necessarily, or probably cause the destruction of adjoining property, then the question of negligence in doing the work would become important; but when he makes use of such means as will naturally, necessarily, or probably result in the destruction of property, a different rule must obtain, otherwise the maxim of the law above stated, so well established and so universally recognized, must be abandoned forever.

The doctrine announced in the case of *Booth v. Rome, W. & O. Terminal R. Co.* supra, was reaffirmed by the court of appeals in the case of *Benner v. Atlantic Dredging Co.* 134 N. Y. 156, 17 L.R.A. 220, 30 Am. St. Rep. 649, 31 N. E. 328, and *Holland House Co. v. Baird*, 169 N. Y. 136, 62 N. E. 149, 11 Am. Neg. Rep. 166. In the later case the court stated in its opinion that this is the settled law of that state. The great weight of authorities, however, would seem to indicate that other states have not adopted this rule. Thompson, on Negligence (vol. 1, § 765), says: "It is obvious, upon a moment's reflection, that the work of blasting rocks, being absolutely necessary in excavating through beds of rock, in mining, in digging wells, in excavating foundations for buildings, in improving roads and streets, in digging canals, and in building railways,—cannot under all circumstances be regarded as a nuisance *per se* and condemned as being negligent as matter of law. On the other hand, it must be regarded—and the decisions so regard it—as a work which one proprietor may lawfully do upon his own land, provided he takes due care to avoid injuring persons or property in the vicinity, and subject to his obligation to pay damages for any injury which he does in case his blasting involves a direct invasion of the premises of an adjacent proprietor."

In § 764 the rule is stated that a recovery may be had for damages to adjoining property from blasting: (1) Where dirt and stones are thrown by the blast upon the adjoining property, irrespective of the question of negligence. (2) Where the work of blasting is done in a situation where it is necessarily dangerous to persons or property, whether the injury proceeds from the impact of rocks thrown or from atmospheric concussion, irrespective of the care or skill used. (3) In all other cases liability will attach to the person or corporation carrying on the dangerous employment where the work has been negligently done.

This would seem to be the rule in Ohio. This court affirmed without opinion the case of *Columbus v. Williard*, 7 Ohio C. C. 113, L.R.A.1915E.

7 Ohio C. D. 33, in which it was held that "a municipal corporation which proceeds with skill and care, and without malice, to drain a street for a lawful purpose, is liable to the owner of an abutting lot for such injury as may result to his soil from the withdrawal of its natural support, even though the support withdrawn consists of percolating waters and sand of such nature and so blended with the waters as to be inseparable from them."

In this case it is not necessary to extend the rule of liability that far. In that case it does not appear from the report that the damage caused was the necessary, natural, or probable consequence of the act of the defendant. Not only that, but it involved the question of percolating waters.

We think the correct rule is stated in the case of *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408, 2 Mor. Min. Rep. 194, in which it was held that "where the owner of a stone quarry, by blasting with gunpowder, destroys the buildings of an adjoining landowner, it is no defense to show that ordinary care was exercised in the manner in which the quarry was worked."

Judge McIlvaine in that case said: "Neither can one in possession of a parcel of land operate and manage a mine or quarry upon it in such manner as to injure or destroy the property of an adjoining proprietor, justify himself by showing that he used ordinary care in the use of his own property."

In the case of *Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co.* 80 Ohio St. 560, 45 L.R.A. 658, 71 Am. St. Rep. 740, 54 N. E. 528, 6 Am. Neg. Rep. 674, it was held by this court that "Nitroglycerin is a substance usually recognized as highly explosive and dangerous, the storage of which at any place is a constant menace to the property in that vicinity. And one who stores it on his own premises is liable for injuries caused to surrounding property by its exploding, although he neither violates any provision of the law regulating its storage, nor is chargeable with negligence contributing to the explosion."

It is insisted by counsel for defendant in error that this case does not apply to the case under consideration; but when that case was before this court it was then contended that the authorities in reference to the use of explosives did not apply to that case, because in one instance the party to be charged was actively engaged in the work that caused the injury, and purposely and intentionally caused the explosion, while in the other case he was merely using the premises to store the dangerous substance, not intending that it should explode. But

this court held that both cases involved the same principle, and in the discussion of that question said: "The blasting doubtless is a menace to adjacent property, but so is the storing of a highly explosive substance."

In the cases of *Defiance Water Co. v. Olinger*, 54 Ohio St. 532, 32 L.R.A. 736, 44 N. E. 238, and *Ohio Gas Fuel Co. v. Andrews*, 50 Ohio St. 695, 29 L.R.A. 337, 35 N. E. 1059, this question is further considered and discussed.

We are informed by counsel that the case of *Armstrong v. Cincinnati*, 12 Ohio C. C. N. S. 76, affirmed by this court in 82 Ohio St. 454, 92 N. E. 1108, involved facts similar to the facts averred in the amended petition in the case now under consideration. In that case the trial court charged the jury that, if the defendants exercised the highest degree of care in the use of explosives, they would not be liable for the damages resulting therefrom. The jury found for the defendants. The plaintiff prosecuted error to reverse this judgment upon two grounds: First, that the verdict was not sustained by sufficient evidence; second, for error in the charge of the trial court. The circuit court affirmed the judgment of the common pleas court, and among other things held there was no error in the charge of the court, citing in support of its conclusion the New York cases to which we have referred. The circuit court further found from an examination of the record that "the jury might well find that the injury, if any, to plaintiff's property, was not caused by the work of defendants."

The fact that that case involved the weight of the evidence may have been the reason for its affirmation by this court. The law of this state in reference to this subject having been declared in the cases of *Tiffin v. McCormack* and *Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co.* supra, it would follow that, if this court intended to depart from the doctrine announced in these cases, it would have reported the case and overruled these authorities.

It is insisted by counsel for defendants in error that, because no rock, soil, or *débris* was actually thrown upon plaintiff's premises, there was no actual trespass; but neither was there such a trespass in the case of *Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co.* supra. We are unable to distinguish between a case where a fragment of rock or a portion of the soil is thrown onto an adjoining property and a case where the force of an explosion is transmitted through the soil and substratum, jarring, cracking, and breaking it, destroying the cistern and foundation of the building, and L.R.A.1915E.

wrecking the building itself by a concussion of the air around it, thereby doing far more injury than a fragment of rock could do. It is a distinction without a difference. If this terrific force may be set in motion by the owner of one parcel of ground, with full knowledge upon his part that such force will invade, damage, and destroy the property of the adjoining proprietor, what difference does it make how this force accomplishes the result that, in the very nature of things, must have been anticipated? Is not a concussion of the air, and jarring, breaking, and cracking the ground with such force as to wreck the buildings thereon, as much an invasion of the rights of the owner as the hurling of a missile thereon? If there is any difference whatever, it is purely technical, and ought to find no favor with the courts. Certainly the application of a force sufficient to crack the surface of the land to such a depth as to destroy the foundations of buildings, to break windows, and throw down chimneys, is a direct invasion of property rights.

The amended petition does not aver in terms that the injury to plaintiff's property was the natural or necessary or probable result of defendants' acts, but it does aver a trespass, and it also avers that these explosives were exploded in such close proximity to plaintiff's premises, and that they were of such great power and frequency, day and night, that they did result in the destruction of plaintiff's property. It was not one single explosion, the result of which defendants might not have foreseen, but it was a continuous bombardment, which finally resulted in the injury complained of. It is not necessary that a pleader should draw a conclusion from the facts pleaded. It is sufficient if the allegation of the petition states the facts upon which plaintiff relies for recovery, and if the plaintiff is able to maintain by proofs the allegations of her amended petition, she is entitled to recover for the damages resulting from the invasion of her rights and the destruction of her property.

The judgment of the Circuit Court affirming the judgment of the Common Pleas Court, and the judgment of the Common Pleas Court sustaining the demurrer to the petition, are reversed, and the cause remanded to the Common Pleas Court, with directions to overrule the demurrer to the petition, and for further proceedings according to law.

Nichols, Ch. J., and Johnson, Wana-maker, Newman, and Wilkin, JJ., concur.

TENNESSEE SUPREME COURT.

MARK ARROWSMITH, Appt.,
v.

STATE OF TENNESSEE.

(131 Tenn. 480, 175 S. W. 545.)

Criminal law — speedy trial — right of one serving sentence.

1. One charged with other crime while undergoing imprisonment for one offense is entitled to the benefit of the constitutional and statutory provisions guarantying a speedy trial, and is entitled to his discharge if the state, before proceeding with trial of the second indictment, awaits termination of the former sentence, when under normal conditions it should have proceeded sooner.

Note — Right to a speedy trial of one under confinement for another offense.

For right to put upon trial one undergoing imprisonment for another offense, see the note to *Re Trammer*, 41 L.R.A.(N.S.) 1095.

For failure to demand trial as waiver of right to speedy trial in criminal case, see the note to *Head v. State*, 44 L.R.A.(N.S.) 871.

It should be stated that in the cases cited in this note the offense in question was not committed during imprisonment, except in *Ruffin v. Com.* 21 Gratt. 790, and in *People v. Flynn*, 7 Utah, 378, 26 Pac. 1114 (committed while escaping).

As stated in *ARROWSMITH v. STATE*, by the weight of authority, an accused is not deprived of his right to a speedy trial by his imprisonment for another offense. *People v. Smith*, 2 N. Y. Crim. Rep. 45; *State v. Stalnaker*, 2 Brev. 44; *State v. Keefe*, 17 Wyo. 227, 22 L.R.A.(N.S.) 896, 98 Pac. 122, 17 Ann. Cas. 170; *Flagg v. State*, 11 Ga. App. 37, 74 S. E. 562; see also as approving the doctrine, *Gaines v. State*, — Tex. Crim. Rep. —, 53 S. W. 623; *People v. Flynn*, 7 Utah, 378, 26 Pac. 1114.

Thus, where three indictments were found against the prisoner in one month, and he had been tried and convicted on one, and after he had served his sentence he was committed for trial on the others, it was held that he should be discharged on his own recognizance. *People v. Smith*, 2 N. Y. Crim. Rep. 45, supra. The court said, *inter alia*: "From the fact that I sentenced the defendant for the maximum of punishment, upon his conviction in 1880, I am led to believe that it was then understood that he was not to be tried on the two other indictments. But whether this be so or not, I do not think that it is a wise or just practice to establish where there are several indictments, for the people to allow years to elapse between the trials on each. They should all be tried when the witnesses are alive and accessible, and when the testimony for both sides is readily to be had."
L.R.A.1915E.

Definition — speedy trial.

2. The speedy trial guaranteed by the Constitution is one as soon after indictment as the prosecution can with reasonable diligence prepare for it, having in view its regulation and conduct by fixed rules of law.

(April 17, 1915.)

A PPEAL by defendant from a judgment of the Circuit Court for Giles County convicting him of forgery. Reversed.

The facts are stated in the opinion.

Messrs. R. E. Dotson, T. M. Pierce, and J. L. Howell, for appellant:

It was error to reinstate the case upon the docket, over the objection of defendant, since

In *State v. Stalnaker*, 2 Brev. 44, supra, a prisoner indicted on two bills, who demanded his trial on both, was tried and convicted on one and sentenced to be hung, but was pardoned and released. Thereafter he was apprehended on the second indictment, and, being brought up for trial, the state was not ready to proceed, and it was held (by three judges to two) that it was error to refuse to discharge him. The court said: "The conviction on one indictment did not prevent the state from proceeding on the other. The prisoner demanded his trial in both cases, and he ought to have been tried at the second court after demanding his trial on both indictments, or discharged as to the indictment not proceeded on. The solicitor and the court should not have calculated on his suffering death on the conviction in the case tried. A new trial might have been granted, and the prisoner admitted to bail, or judgment might have been arrested, or (as it happened) there might be a prospect of his being pardoned. To keep him in confinement under these circumstances would be contrary to the spirit and intention of the habeas corpus act." That act provided that "if a person is committed for treason or felony specially expressed, yet if he shall, in open court, the first week of the term, or first day of assize, petition to be tried, and shall not be indicted some time in the next term or assize, after the commitment, he shall, upon motion, the last day of the term, or assize, be bailed, unless it shall appear to the judge, upon oath, that the King's witnesses could not be produced within that time; and then if he is not tried in the second term, or assize, he shall be discharged from his imprisonment."

A statute requiring that any person indicted for any offense and committed to prison shall be discharged as to such offense, if not brought to trial before the end of the second term of court, applies although the accused is confined in the penitentiary serving his sentence for another offense. *State v. Keefe*, 17 Wyo. 227, 22 L.R.A.(N.S.) 896, 98 Pac. 122, 17 Ann. Cas. 170. The court was of the opinion that, in the absence of such a statute, the

the order retiring the case from the docket amounted to a dismissal and termination of the prosecution.

State v. Sims, 1 Overt. 253; *Dudley v. State*, 55 W. Va. 472, 47 S. E. 285; *Re Begerow*, 85 Am. St. Rep. 187, note; *People ex rel. Woodruff v. Matson*, 129 Ill. 591, 22 N. E. 456; *People v. Morino*, 85 Cal. 515, 24 Pac. 892; *Re McMicken*, 39 Kan. 406, 18 Pac. 473; *State v. Radoicich*, 66 Minn. 294, 69 N. W. 25.

The court erred in refusing to sustain the motion of defendant that he be discharged because denied a speedy trial as guaranteed by the Constitution and laws of the state of Tennessee.

People v. Smith, 2 N. Y. Crim. Rep. 45; *State v. Keefe*, 17 Wyo. 227, 22 L.R.A.

prisoner's constitutional right to a speedy trial would not permit his trial on the untried indictment after the serving of such sentence, where during the serving of it he had repeatedly demanded such trial, and the prosecution had on such demands announced that it was ready for trial.

So, one accused of a crime not affecting his life must be discharged where he demanded trial at a term, and was not tried at that or the next term, although he was serving sentence on a misdemeanor at the time of said last-mentioned term, where the Constitution guarantees a speedy trial and the statute allows the accused to make demand for trial for an offense "not affecting his life," and requires that, unless a trial be had at the first or second term after demand, the prisoner shall be discharged. *Flagg v. State*, 11 Ga. App. 37, 74 S. E. 562.

In *Gaines v. State*, — Tex. Civ. App. —, 53 S. W. 623, where the prisoner objected to his being taken from the penitentiary, where he was confined on another case, to stand his trial for murder, the court said: "We fail to see how the prisoner can complain. The Constitution guarantees him a speedy trial, and at his request he would be entitled to be tried in cases pending against him, although he might be confined in the penitentiary."

In *People v. Flynn*, 7 Utah, 378, 26 Pac. 1114, the court, in overruling the contention that one committing larceny in escaping from prison where he was serving a term for felony, could not be tried for the larceny until such term had expired, stated that a practice of postponing the trial of a convict for a new offense committed by him while serving his term of imprisonment, until after the expiration of such term, "would not only greatly delay the execution of public justice, but in many cases would prevent a speedy trial that is guaranteed to all accused persons."

Reference may be made in this connection to *Dudley v. State*, 55 W. Va. 472, 47 S. E. 285, where it was held that if, on the state's motion, there was retired from the docket without consultation with the defendant an indictment against him while illegally

(N.S.) 896, 98 Pac. 122, 17 Ann. Cas. 161; *Re Garvey*, 7 Colo. 502, 4 Pac. 758; *State v. Stalnaker*, 2 Brev. 44; *State v. Thompson*, 32 Minn. 144, 19 N. W. 730; *Cummins v. People*, 4 Colo. App. 71, 34 Pac. 734; *State v. Webb*, 155 N. C. 426, 70 S. E. 1064; *Flagg v. State*, 11 Ga. App. 37, 74 S. E. 562; *Rigor v. State*, 101 Md. 465, 61 Atl. 631, 4 Ann. Cas. 719; *United States v. Fox*, 3 Mont. 512.

Defendant had committed forgery in Giles county, Tennessee, where the venue in the indictment was laid.

Norris v. State, 127 Tenn. 437, 155 S. W. 165; *Foute v. State*, 15 Lea, 719, *Re Carr*, 28 Kan. 1; *Mockowik v. Kansas City, St. J. & C. B. R. Co.* 196 Mo. 571, 94

confined in the penitentiary for another offense, this would be considered equivalent to a dismissal for failure to prosecute, although the prosecuting attorney and the court thought the confinement legal. The court said: "Had he been brought into court, he would have had the right to have demanded a speedy trial or a dismissal of the indictment, and the court may not do that in the absence of the prisoner which it could not do were he present." The court said further: "The petitioner was not afforded the opportunity to insist on a speedy trial, but was illegally held in custody, and if the indictment had remained a live indictment on the docket, while the state was illegally holding him, he might well insist that he should be discharged under the foregoing section, as his illegal detention does not come within any of its provisions, and he might well claim as he was subject to the order of the court that he was being held to answer the pending indictment against him, as this was the only legal cause for his detention." The statute referred to provided that "every person charged with felony and remanded to a circuit court for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court, after the indictment is found against him, without a trial, unless the failure to try him was caused by his insanity, or by the witnesses for the state being enticed or kept away, or prevented from attending by sickness or inevitable accident, or by a continuance granted on the motion of the accused; or by reason of his escaping from jail, or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict."

The cases usually cited as taking a contrary view are the *Brophy* and *Gillespie* Cases, *infra*.

In *State v. Brophy*, 8 Ohio S. & C. P. Dec. 698, it was held that one serving a term in prison could not move to *nolle pros.* other indictments, or else to have an immediate trial under the statutes providing that where a defendant is in jail and more than two terms of court have passed, he

S. W. 256; *Higgins v. St. Louis & S. R. Co.* 197 Mo. 317, 95 S. W. 863.

Mr. Frank M. Thompson, Attorney General, for the State:

No appeal will lie from an order suspending sentence, in order that a second trial may be had.

Allen v. State, 9 Lea, 651.

Every prosecution stands for trial at the same term at which the indictment is found, but the same may be continued by the state or defendant upon proper application.

State v. Evans, 1 Overt. 211.

The court had the right to make the rule retiring this case from the docket, because of the confinement in the penitentiary of the defendant under a conviction for another crime.

Gillespie v. People, 176 Ill. 239, 52 N. E. 250; *State v. Keefe*, 17 Wyo. 227, 22 L.R.A. (N.S.) 896, 98 Pac. 126, 17 Ann. Cas. 161.

It is not essential to an offense of forgery that some one has in fact been injured, but it is sufficient that the instrument forged with a fraudulent intent may be used prejudicially to the rights of another.

State v. Humphreys, 10 Humph. 443; *Hale v. State*, 1 Coldw. 169, 78 Am. Dec. 488; *State v. Corley*, 4 Baxt. 411; *State v. Ward*, 7 Baxt. 78.

Venue is not an element of the crime, and it need be proved only by a preponderance of the evidence, and it is not required to be proved as an ingredient of the crime to the

may demand, and must be accorded, a trial, or be discharged, and that if he is out on bail he may have a trial upon demand, if more than three terms of the court have passed, or he must be discharged. The prosecuting attorney claimed that the statutes referred to did not apply to the prisoner because he was in the penitentiary; that "he was practically dead as a civilian, and before he could make this demand he must serve his sentence."

In *Gillespie v. People*, 176 Ill. 238, 52 N. E. 250, there were two defendants, one committed during the term when the indictment was returned, the other having pleaded guilty at the same term to another felony, and it was held that the trial was in time under the statute providing that "any person committed for a criminal or supposed criminal matter, and not admitted to bail and not tried at or before," etc., "shall be set at liberty," etc., the court stating further as to the defendant who had pleaded guilty of another crime: "The statute could not be applied to the case of the defendant Gillespie in any event, since he was not committed for this offense. He pleaded guilty to another felony at the March term, 1897, of the same court, and has been in the state penitentiary at Chester ever since, except when brought into court and tried on this charge. This was sufficient answer to his application in any event." It will be seen that the argument upon the word "committed" is by no means convincing.

It is not very clear just where the matter is left by the decision in *Re Tranner*, 35 Nev. 56, 41 L.R.A. (N.S.) 1095, 126 Pac. 337, but perhaps the court means that a convict, in order to obtain the benefit of Constitution and statute providing for a speedy trial, must demand it or lose the right. In that case it was held that the prisoner, having made no objection to an order of continuance, could not thereafter object to his trial as not a speedy trial under the Constitution and statute, although his trial was not at the "next session," the statute requiring trial at the next session at which the indictment is triable L.R.A.1015E.

after the same is found, unless good cause be shown to the contrary. The court said: "It was held in *Gillespie v. People*, supra, that the statute does not apply while a defendant is in prison serving a sentence upon another charge, and to the same effect is *State v. Brophy*, 8 Ohio S. & C. P. Dec. 698. We think this is the law, for the reason for the rule does not exist in such cases. Undoubtedly, a defendant serving a sentence on another charge has the right to demand that he be tried on all indictments pending against him, and a refusal to try him might enable him to successfully invoke the statute. *State v. Keefe*, 17 Wyo. 227, 22 L.R.A. (N.S.) 896, 98 Pac. 122, 17 Ann. Cas. 161; *Dudley v. State*, 55 W. Va. 472, 47 S. E. 285." The facts were that in March the prisoner was in H. county indicted separately for the murder of two persons, and was tried on one indictment in July in W. county by change of venue, and sentenced to imprisonment for life, and the other indictment was, in March, by order continued for further setting; there were terms in H. county in May and October, but such indictment by change of venue was sent to W. county in October, and the trial to which the prisoner objected was held in the following January.

It seems that the fact that the statute provides that a sentence of imprisonment for any term less than life "suspends all civil rights of the person so sentenced" does not impair the right to a speedy trial for another offense than that for which he is sentenced. Such a statute was quoted by the court as in force in *People v. Flynn*, 7 Utah, 378, 26 Pac. 1114. The holding in *People v. Smith*, 2 N. Y. Crim. Rep. 45, supra, was under a similar statute, but the court does not refer to it.

It was after quoting a similar statute that the court said in *Byers v. Sun Sav. Bank*, — Okla. —, 52 L.R.A. (N.S.) 320, 139 Pac. 948 (a case without the scope of this note), having first quoted a statute excepting "persons deprived of civil rights" from the class capable of contracting: "The language of these statutes, in the absence of other recognized and established principles

satisfaction of the jury beyond a reasonable doubt.

Norris v. State, 127 Tenn. 437, 155 S. W. 165.

Williams, J., delivered the opinion of the court:

At the October term, 1911, of the circuit court of Giles county, there were eleven indictments pending against appellant Arrowsmith, seven of them for forgery. At that term he was put to trial on one of the indictments for forgery, convicted, and sentenced to serve a term of three years in the state penitentiary.

The other cases were continued at that

term by consent and set for trial January 26, 1912.

Arrowsmith was incarcerated in accordance with the sentence in December, 1911, and at the January term, 1912, the record shows, as to the remaining cases, that "these causes were continued to the next term of this court;" the proof showing that the continuance was not at the instance of the accused.

At the October term, 1912, the record order, made in the absence of accused and without his consent, was as follows: "Came the attorney general for the state, and, it appearing to the court that defendant is serving a term in the penitentiary, it is considered by the court that said cases be

of law, would seem to devalue a citizen of all rights whatsoever, and render him absolutely *civilliter mortuus*, but the principles of law which this verbiage literally imports had its origin in the fogs and fictions of feudal jurisprudence, and doubtlessly has been brought forward into modern statutes without fully realizing either the effect of its literal significance or the extent of its infringement upon the spirit of our system of government. At any rate, the full significance of such statutes has never been enforced by our courts, for the principal reason that they are out of harmony with the spirit of our fundamental laws and with other provisions of statutes."

In the absence of a statute suspending or taking away the civil rights of convicts, the matter stands on general law. While it is not intended to take up the general question of the rights of convicts, the tendency of the modern cases on the subject is shown by the opinion in State v. Keefe, supra, where the court said, besides the passage quoted in ARROWSMITH v. STATE: "The right of a speedy trial is granted by the Constitution to every accused. A convict is not excepted. He is not only amenable to the law, but is under its protection as well. No reason is perceived for depriving him of the right granted generally to accused persons, and thus in effect inflict upon him an additional punishment for the offense of which he has been convicted. At the time of defendant's trial upon the one information, he was under the protection of the guaranty of a speedy trial as to the other. It cannot be reasonably maintained, we think, that the guaranty became lost to him upon his conviction and sentence, or his removal to the penitentiary. Possibly in his case, as well as in the case of other convicts, a trial might be longer delayed, in the absence of a statute controlling the question, than in the case of one held in jail merely to await trial, without violating the constitutional right, for an acquittal would not necessarily terminate imprisonment."

See also Platner v. Sherwood, 6 Johns. Ch. 118; Presbury v. Hull, 34 Mo. 29; Re Tranner, 35 Nev. 58, 41 L.R.A. (N.S.) 1095, L.R.A.1915E.

126 Pac. 337, supra; People v. Flynn, 7 Utah, 378, 26 Pac. 1114, supra, and other cases cited supra in the first part of this note.

On the other hand, reference should be made to State v. Brophy, supra, and to Ruffin v. Com. 21 Gratt. 790, where the court stated as to a convicted felon: "He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state. He is *civilliter mortuus*; and his estate, if he has any, is administered like that of a dead man." In this case a convict hired out to work on a railroad killed one of his guards, and it was held that there was no constitutional objection to the statute declaring that all the proceedings against convicts in the penitentiary should be in the circuit court of the city of Richmond, where the penitentiary was located, although the Constitution gave an accused a right to a jury "of his vicinage."

As to civil death in the United States, see the note to Davis v. Laning, 18 L.R.A. 82; and as to capacity of convict to contract, see the note to Byers v. Sun Sav. Bank, 52 L.R.A. (N.S.) 320.

It may be noted that the court in ARROWSMITH v. STATE does not refer to the early Tennessee case of Crenshaw v. State, 1 Mart. & Y. 122, 17 Am. Dec. 788, holding a conviction for one felony to be a discharge of all precedent felonies not capital, which has been referred to as perhaps the only American case so holding.

But in State v. Fayetteville, 6 N. C. (2 Murph.) 371, where the town commissioners were indicted by several bills, charging that several streets were out of repair, and, being convicted on one bill, pleaded it in bar to the others, the plea was sustained, but the court seemed to decide on the ground that the spirit and policy of the law would not permit crimes to be rendered infinitely divisible.

Re Garvey, 7 Colo. 502, 4 Pac. 758, cited in ARROWSMITH v. STATE, was not a case of two offenses. B. B. B.

retired from the docket until the expiration of said sentence."

It is disclosed by the record that in April, 1914, before Arrowsmith's term of service expired in June, 1914, the prosecuting attorney directed the warden of the penitentiary to send Arrowsmith to Giles county for the purpose of procuring from him a compromise judgment of conviction terminating the untried causes, and not for the purpose of trying any one of them. This effort at compromise failing because of the refusal of the accused to assent, he was returned to the penal institution, where he completed his term in June.

At the October term, 1914, he was put on his trial on another indictment for forgery, found guilty, and again sentenced.

When at this term a motion was made by the prosecuting attorney to reinstate four of the untried cases on the docket, the counsel for the defense filed written objections as follows:

"First. Because this court, at the October term, 1912, caused an order to be entered of record retiring said case from the docket, and there has been no further order made in said case restoring the same to the docket.

"Second. Because this court, when it retired said case from the docket, lost jurisdiction thereof and is without power or authority to further proceed.

"Third. Because said case has been delayed until now, and no effort has been made by the state to prosecute or bring this defendant to trial, thus denying him a speedy and public trial as guaranteed by the 6th Amendment to the Constitution of the United States, and § 9, article 1, of the Constitution of the state of Tennessee, and in violation of § 6951, Shannon's Code of Tennessee."

The court sustained the motion of the attorney general and restored said cases to the docket. To this action and ruling of the court the plaintiff in error excepted. Thereupon one of these forgery cases was reinstated on the docket and set for trial *instantly*, with the result above stated.

Following verdict, plaintiff in error filed a motion for discharge from custody in substantially the same terms as the motion above. This was overruled by the trial judge after oral evidence was heard in support of and in opposition to the motion.

On appeal to this court the same grounds have been made the bases of the errors assigned in behalf of plaintiff in error.

The Constitution, in art. 1, § 9, provides that "in all criminal prosecutions, the accused hath the right . . . in prosecutions by indictment or presentment [to] a speedy public trial by an impartial jury of L.R.A.1915E.

the county in which the crime shall have been committed."

By an accordant provision of the Code (Shannon), § 6951, it is stipulated: "In all criminal prosecutions the accused is entitled to a speedy trial, and to be heard in person and by counsel."

We have no statute which prescribes definitely the period within which an accused must, as a matter of his right, be brought to trial, in default of which he must be released; but by § 7155 it is provided that where the trial has not been postponed on his application, and he be not brought to trial at the next regular term of the court in which the indictment is triable, after the same is found, the court may order it to be dismissed, unless good cause to the contrary be shown.

By § 7250 it is declared that a conviction for any one offense is not a bar to a prosecution for any other public offense committed previously, not necessarily included in the offense for which the defendant was convicted.

There cannot be doubt that one under conviction and while imprisoned in the penitentiary may be brought to the bar for trial and sentenced for another crime, whether charged to have been committed before or during such imprisonment. This practice has been followed in this state and in this court, and many reported cases sustain it. *Thomas v. People*, 67 N. Y. 218; *People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597, 5 Am. Crim. Rep. 486; *Henderson v. James*, 52 Ohio St. 242, 27 L.R.A. 290, 39 N. E. 805, 9 Am. Crim. Rep. 711; *Rigor v. State*, 101 Md. 465, 61 Atl. 631, 4 Ann. Cas. 719.

In the last-cited case it is said: "The penitentiary is not a place of sanctuary, and an incarcerated convict ought not to enjoy an immunity from trial merely because he is undergoing punishment on some earlier judgment of guilt. Why should there be a delay in bringing him to trial on an indictment pending against him, a convict who has not yet completed the service of a previous sentence? No reason can be suggested for such a delay in the case of a convict adjudged guilty of some other offense and actually in execution of a sentence thereunder, that does not apply equally to an individual who has been indicted, but has not yet been tried. . . . If the contention made in the case at bar is sound, the arm of the criminal law would be paralyzed,—not a step could be taken towards prosecuting him so long as the convict remained sheltered within the walls of the penitentiary. That is not the law. The criminal court had jurisdiction to bring the plaintiff in error before it, . . . and to place him

on trial under the indictment there pending against him."

The right of the state to prosecute him is not abridged or delayed by the fact that the accused is in such confinement, and by parity of reasoning his rights to be tried and to a speedy trial are not deferred until his period of sentence has been served or terminated.

In only two reported cases, and in only one case decided by a court of last resort, is it held in accord with the state's contention in this case, that the right to a speedy trial does not apply to a convict, and that not until his confinement is at an end may he be tried for the commission of another offense, or invoke the constitutional guaranty of a speedy trial.

In *Gillespie v. People*, 176 Ill. 238, 52 N. E. 250, it is seemingly so ruled, but in an opinion that is lacking in convincing argument.

In *State v. Brophy*, 8 Ohio S. & C. P. Dec. 698, one of the courts of common pleas of Ohio held that such a convict "was practically dead as a civilian, and before he could make this demand he must serve his sentence." Civil death has sometimes been imputed to convicts for life, but never, except in the cited case, so far as we have observed, to one incarcerated for a period less than life.

By a decided weight of authority the contrary rule is upheld. *State v. Stalnaker*, 2 Brev. 44; *Re Garvey*, 7 Colo. 502, 4 Pac. 758; *Dudley v. State*, 55 W. Va. 472, 47 S. E. 285; *State v. Keefe*, 17 Wyo. 227, 22 L.R.A. (N.S.) 896, 98 Pac. 122, 17 Ann. Cas. 170.

The reasons in support of this holding are well stated in the case of *State v. Keefe* supra, and approve themselves to us: "The purpose of the provision against an unreasonable delay in trial is not solely a release from imprisonment in the event of acquittal, but also a release from the harassment of a criminal prosecution and the anxiety attending the same; and hence an accused admitted to bail is protected as well as one in prison. Moreover, a long delay may result in the loss of witnesses for the accused as well as the state, and the importance of this consideration is not lessened by the fact that the defendant is serving a sentence in the penitentiary for another crime."

Indeed, the importance of that consideration is accentuated by the fact of the accused's imprisonment. He is less able on that account to keep posted as to the movements of his witnesses, and their testimony may be lost during his continued confinement. It would be a harsh construction of the clause containing this guaranty, embedded

in our Bill of Rights, that would deny it application to those who stand most in need of it.

Holding against this insistence of the state, we turn to the inquiry whether appellant, Arrowsmith, as one entitled thereto, has been denied a speedy trial within the meaning of the constitutional guaranty.

We have in this state but one decision on the question (*State v. Sims*, 1 Overt. 253), decided in 1807, under the Constitution of 1796, which is said to be "the first case in which the right to a speedy trial in a criminal case found judicial determination in this country." It was there held that an accused, invoking the right given in the Bill of Rights to the citizen to a speedy public trial, is entitled to his discharge if the state has omitted to provide a public prosecutor to appear and prosecute; that the omission cannot render the provision of the Constitution inefficient.

A "speedy trial," so guaranteed, means a trial as soon after indictment as the prosecution can, with reasonable diligence, prepare for it, without needless, vexatious, or oppressive delay, having in view, however, its regulation and conduct by fixed rules of law, any delay created by the operation of which rules does not in legal contemplation work prejudice to the constitutional right of the accused.

As we have seen, the orders entered on October 24, 1912, by which the several untied cases against Arrowsmith were "retired from the docket until the expiration of said sentence," were made in the absence and without the knowledge or consent of the accused, who was at the time an inmate of the state penitentiary, and without the knowledge or consent of his counsel.

The only cause for this action is that appearing in the face of the order: "It appearing to the court that the defendant is serving a term in the penitentiary, it is considered by the court," etc.

The record discloses that no effort was made by the prosecution to put the accused on trial, though, confessedly, there was sufficient time and opportunity therefor. The fact that the defendant was then incarcerated was no legal excuse for the delay, as has been observed.

Arrowsmith was conditioned so that he could not personally demand that his own trial be proceeded with; and without the knowledge of either himself or his counsel the court in legal effect, through the order, continued the cases for approximately two years,—needlessly and vexatiously. *Benton v. Com.* 90 Va. 328, 18 S. E. 282; *Jones v. Com.* 114 Ky. 599, 71 S. W. 643.

We hold that this operated to deny the

accused the speedy trial contemplated in the constitutional provision.

No question is made by the state touching the manner in which the defendant raised in the lower court the question here considered, if indeed it could do so with any show of reason under the authorities.

Reversed, with judgment in this court for the release of appellant from custody.

ALABAMA SUPREME COURT.

TENNESSEE COAL, IRON, & RAILROAD
COMPANY, Appt.,

v.

BEN MOODY.

(— Ala. —, 68 So. 274.)

Master and servant — epileptic — assumption of risk.

1. An epileptic assumes, in undertaking work about a blast furnace, the risk of injury from a seizure which causes his fall into contact with molten metal or cinders.

Note. — Liability of master for injury to servant, other than minor, due primarily to his physical unfitness for the work.

For the assumption of risk of overstraining muscles in lifting weights under the immediate direction of a master or vice principal, see *Stenvog v. Minnesota Transfer R. Co.* 25 L.R.A.(N.S.) 362, and note, such cases being excluded from the present note.

In *Warren Vehicle Stock Co. v. Siggs*, 91 Ark. 102, 120 S. W. 412, which was an action for injury to plaintiff received in coming in contact with a saw upon which he was put to work, where it appeared that when the defendant's foreman employed plaintiff to do the work, plaintiff told him that his eyesight was defective, and the foreman assured him that he could do the work safely and that he wanted him to do that work for a short time only, when he would get another man, the court said concerning the duty of a master in employing a servant: "It is the duty of the master to see that the servant is competent for his position. There is an obligation resting on the master to see that the servant possesses the ordinary mental and physical qualifications which will enable him to do the work without exposing him to greater dangers than the work necessarily entails."

Upon the question of negligence and contributory negligence in the above case, the court said: "What might be obvious and patent to a man whose vision is unimpaired is not necessarily so to a man whose eyesight is very defective. What, therefore, would be an act of contributory negligence on the part of one might not, under the circumstances of the case, be such negligence on L.R.A.:915E

Accord and satisfaction — method of ascertaining amount to be paid.

2. The method by which an amount received by a servant from his employer in satisfaction of a claim for personal injury was arrived at is immaterial upon the question of its being a bar to an action for the injury.

(April 22, 1915.)

A PPEAL by defendant from a judgment of the Circuit Court for Jefferson County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

Plaintiff had been in defendant's employ at its blast furnace for several years, and had many years of experience in breaking metal from the furnace. In 1911, he was laid off from work for several months on account of having epileptic fits. He was then employed "to work the cinder fall." This was a task he was accustomed to perform with or without direct orders from his superiors. When breaking a runaway about

the part of the other, if, on account of the known physical infirmity, the danger was not obvious and patent to him. And therefore, if the master under such circumstances employs such a servant and fails to instruct and warn him, the master is guilty of negligence." And it was held that under the circumstances the question of whether the plaintiff used due care, or was himself guilty of contributory negligence, was peculiarly a question for the jury to determine.

Upon the question of assumption of risk, the court said that if, as the evidence tended to prove, defendant's foreman assured plaintiff that he could safely perform the service notwithstanding his defective eyesight, the plaintiff with his inexperience had a right to rely on this assurance, without being held to have assumed the risk thereof. *Ibid.*

In *Goss v. Kentucky Ref. Co.* 137 Ky. 398, 125 S. W. 1061, where it appeared that decedent, for injury to whom action was brought, who had been subject to epileptic fits for several years, so that his mental and physical faculties were considerably impaired, was set to work by defendant's foreman in gluing barrels over a vat of hot glue, although he objected to doing that character of work because of its danger to him, defendant's foreman assuring him that there would be no danger during the short time he would be required to work in that place, and, because of his impaired mental faculties, he did not appreciate the dangerous character of the work, but relied upon the assurance of his foreman that the work would not be dangerous to him, the court said that if decedent's mind was so impaired that he could not and did not realize or perceive the danger incident to

4 A. M., he fell into a pit and was badly burned.

There were special pleas of assumption of risk and of accord and satisfaction, and a written instrument was submitted reciting the receipt of \$182 in satisfaction of plaintiff's claim against defendant, and releasing the latter from further liability.

The request for affirmative charge by defendant was refused. The following charges were also requested by him in writing:

"If you believe from the evidence that, at the time plaintiff got work at defendant's furnace breaking runner, that he knew he was subject to fits, and that such a fit might cause him to fall into the hot iron, you must find for defendant. A man, laboring under any physical disability, of which he has full knowledge, who accepts employment with another, cannot recover damages of that other in the event he sustains personal injuries while in his employment, where such personal injuries were directly caused by such physical disability. Even though you should find from the evidence that defendant through its employee knew that plaintiff was subject to fits, plaintiff cannot recover in this case, if you should find from the evidence that at the time he accepted such employment plaintiff also knew that he was subject to said fits, and

of the danger of his sustaining personal injuries while at work as a result of falling in such fit. If you believe from the evidence that plaintiff accepted from defendant a sum of money in settlement of any claim for damages which he might have against defendant on account of sustaining personal injuries while in its employment, your verdict must be for defendant regardless of the amount of such sum of money, and regardless of any calculation by which it was arrived at."

Messrs. Percy, Benners, & Burr for appellant.

Mr. W. A. Denson for appellee.

Somerville, J., delivered the opinion of the court:

The reported cases present only a few instances in which a servant has sought to recover from a master for injuries which have resulted primarily from the physical unfitness of the servant for the work which he had undertaken to do. As noted by Mr. Labatt: "The reason why recovery on this ground is so rarely sought is doubtless that, in the nature of the case, the unfit servant is almost always aware of his unfitness. The effect of his knowledge is to bring the situation within the scope of the principle that, if a person of apparently full age and

the labor he was ordered to perform, and the defendant knew it, then defendant was guilty of actionable negligence in assigning him to work at that place, and would be liable for an injury to him received in falling into the vat of glue during an epileptic fit.

In *Crowley v. Appleton*, 148 Mass. 98, 18 N. E. 675, where the evidence tended to show that plaintiff was subject to epileptic fits which would render him unconscious without premonition of their approach; that he did not know he was subject to such fits, but that defendant knew of them, and that plaintiff's wife at one time asked defendant to give him work which was not dangerous, the court sustained a verdict for defendant rendered under instructions that it was necessary for plaintiff to show that he was subject to the fits, that he did not know it himself, and further that defendant knew or had cause to know that plaintiff did not know anything about it. But see *TENNESSEE COAL, IRON & R. CO. v. MOODY*.

In *Parlin & O. Co. v. Finfrouek*, 65 Ill. App. 174, an action for injury to plaintiff from gas fumes from a blast furnace, received while he was engaged in charging the furnace, where it appeared probable that plaintiff's injury was due to the fact that his lungs were oversensitive from an attack of la grippe or pneumonia only a few months before, and that he was not therefore fit to work in such a place, but that it was not dangerous or every uncomfortable.

ble to a man having sound lungs, a judgment for plaintiff was reversed where it was not shown that defendant knew, or has reason to suppose, that plaintiff was not sufficiently strong to endure the work without risk.

Where the master of a tug boat ordered plaintiff to jump ashore, a distance which was not so great as to render the service unnecessarily dangerous to a man of ordinary strength and activity, but plaintiff failed to reach the shore safely, due to the fact that he was unaccustomed to jumping, the master being justified in assuming that he was accustomed to all the ordinary services required of men on such vessels, the court said that if libellant was deficient in capacity to jump, he should have said so, and if he had, and, notwithstanding, had been required to jump, the result might possibly have been different. *Phillips v. Pilot*, 82 Fed. 111.

In *Hasty v. Cincinnati, N. O. & T. P. R. Co.* 30 Ky. L. Rep. 144, 97 S. W. 433, where it appeared that plaintiff injured his arm so as to partially disable him, and he immediately made complaints to his foreman, and announced his desire to suspend work on account of the disability, but the foreman refused to allow him to quit, assured him that a continuance of his work would not injure him, and told him that he would give him lighter work to do, but did not keep his promise to put him on lighter work, and on the contrary required him to do heavier work than he had previ-

complete understanding undertakes certain duties, he is presumed to appreciate and accept the risks incident to those duties. Or, from another standpoint, he may be regarded as being guilty of contributory negligence in undertaking work for which he knows himself to be unfitted, especially where his culpability takes the form of an omission to inform the master of his unfitness." 1 Labatt, Mast. & S. § 180.

✓ The author cites the case of *Crowley v. Appleton*, 148 Mass. 98, 18 N. E. 675, where, as here, the plaintiff was an epileptic and subject to fits, and sued for injuries received while serving in a place of peculiar danger. The trial judge instructed the jury that the plaintiff must show that he was subject to such fits; that he himself did not know it, that the defendant did know it, and that the defendant knew, or had cause to know, the plaintiff did not know anything about it, and refused an instruction making the defendant responsible if the plaintiff was ignorant of and the defendant acquainted with the malady, without regard to the defendant's knowledge of the plaintiff's ignorance. On appeal it was held that the trial court did not err.

In the instant case, it might perhaps be justly affirmed on the plaintiff's own showing that, with or without the order com-

plained of, he would equally have undertaken his regular work on this occasion, with the same result, and hence that the order was not the proximate cause of his injury. *Mobile & O. R. Co. v. George*, 94 Ala. 199, 10 So. 145, 13 Am. Neg. Cas. 29; *Birmingham Furnace & Mfg. Co. v. Gross*, 97 Ala. 220, 228, 12 So. 36. But, conceding that it was, the defendant cannot be held responsible for that result. So far as their own safety is concerned, persons not under contractual disability should be, and are, allowed to determine for themselves whether their physical infirmities, known to themselves, shall debar them from any particular employment. According to the nature and degree of their infirmities, they must be more or less exposed to dangers, naturally resulting from their attempt to serve, in almost any of the modern industries. It is no doubt a hard choice, but such persons must estimate for themselves the chances of injury, and it would be unjust as well as illogical to visit the consequences of their choice upon their employers. It may be a matter of delicacy as well as difficulty for the employer to undertake in each case to determine the nature and extent of the malady or infirmity of one who offers to work, or the likelihood of injury resulting therefrom; and we think the employer may,

ously done, whereby his arm was further injured so as to incapacitate him from any work, it was held that the defendant was not liable, the court saying that a servant must determine for himself when he is able to work, and that plaintiff necessarily knew better than the foreman whether his arm was so injured as to incapacitate him for service, and, furthermore, it was not within the apparent scope of the foreman's authority to determine whether he could safely continue at his work without injury to his arm.

In *Huber v. Jackson & S. Co.* 1 Marv. (Del.) 374, 41 Atl. 92, 13 Am. Neg. Cas. 766, the court, in instructing the jury, said that if plaintiff applied for and accepted employment as a machine man to run machinery, he held himself out as possessing such competent knowledge to run the machinery, and as possessing skill enough to do the work, and being physically capable of it, and if the jury believed that the injuries resulted from the want of such skill or capacity, the verdict should be for the defendant.

The following cases in which the injury complained of was due directly or indirectly to some physical defect of plaintiff, which, however, because of its nature or temporary character, did not unfit him generally for the work in which he was injured, have been included by way of illustration and analogy, without attempting to cover all that class of cases:

Thus, in *Siela v. Hannibal & St. J. R. L.R.A.1915E.*

Co. 82 Mo. 430, plaintiff's nearsightedness was apparently taken into consideration in determining whether he was negligent in not discovering a defect in the handle of a hand car upon which he was working.

In *Kitteringham v. Sioux City & P. R. Co.* 62 Iowa, 285, 17 N. W. 585, where the injury to plaintiff was due to poisoning in a cut received while he was removing worn brasses from the boxes of cars, and the evidence very strongly tended to show that the injury to plaintiff did not result from any poisonous condition of the brasses, and to raise a strong presumption that it arose solely from an ordinary cut in connection with the depraved condition of plaintiff's system, an instruction to the jury that they should find for the defendant if they found that plaintiff's injury occurred by reason of the impurity of his blood was held to be proper.

And in *Helton v. Alabama Midland R. Co.* 97 Ala. 275, 12 So. 276, an action for injuries to a flagman who had been sent along a track at night to signal an approaching train, it was held that if plaintiff became sick, faint, and unconscious, by reason whereof he fell upon the track and remained there in such condition, unable to protect himself against the on-coming train, he was not guilty of contributory negligence; but if he negligently fell asleep and thereby contributed to his hurt, his negligence would bar a recovery.

R. L. S.

without liability, legal or moral, accept the judgment of a would-be servant who knows his own condition.

Nor would the imposition of liability upon the master in such cases be either politic or humane, even from the servant's point of view, since it would inevitably result in depriving of a livelihood many afflicted persons who have no choice but to labor, and who are impelled by experience or necessity to choose the more lucrative, if more dangerous, employment.

We approve the rule as affirmed by the Massachusetts court, and hold that the order in question was not negligent under the circumstances, and that plaintiff assumed the risk of injury when he undertook to do the work in which he was engaged.

It results that the special charges, and also the general affirmative charges, as requested by defendant, should have been given to the jury, and their refusal was error.

If plaintiff accepted from defendant a sum of money in settlement of his claim for damages by reason of this injury, no matter how the amount was arrived at, he was not entitled to recover in this action. The only issue under the plea of accord and satisfaction being upon plaintiff's acceptance of the money as a satisfaction, defendant's requested charge, embodying the proposition stated, should have been given, and its refusal was error.

For the errors noted, the judgment will be reversed and the cause remanded.

Anderson, Ch. J., and Mayfield and Thomas, JJ., concur.

ALABAMA SUPREME COURT.

J. O. CROW, Appt.,

v.

J. H. MCKOWN.

(— Ala. —, 68 So. 341.)

Appeal — refusal of charge — absence of evidence.

1. A judgment cannot be reversed for refusal to give the affirmative charge if the evidence is not shown to be all in the record.

Animal — killing to protect others — knowledge of vicious character — necessity.

2. Knowledge by its owner of the vicious

Note.—Generally, as to right to kill dogs, see notes to *Graham v. Smith*, 40 L.R.A. 510; *State v. Churchill*, 19 L.R.A. (N.S.) 835; *State v. Clifton*, 28 L.R.A. (N.S.) 673; and *Thurston v. Carter*, L.R.A. 1915C, 359. L.R.A. 1915E.

propensities of a dog is not necessary to justify another in killing it to protect an animal of his own from its attack.

(April 15, 1915.)

A PPEAL by plaintiff from a judgment of the Circuit Court for DeKalb County in defendant's favor in an action brought to recover damages for the alleged wrongful killing of plaintiff's dog. Affirmed.

The facts are stated in the opinion.

Messrs. Davis & Baker for appellant.

Messrs. Isbell & Scott for appellee.

Gardner, J., delivered the opinion of the court:

This case was transferred to this court from the court of appeals as provided by law. The cause of action arose from the killing by appellee of a dog, the property of the appellant. The defense seems to have been justification for the act for that the dog, together with a number of others, was, at the time he was shot, engaged in an attack upon a goat or kid, the property of the defendant, at the premises of the defendant, and from which attack the animal died.

The bill of exceptions does not disclose that the evidence there set out was all the evidence in the case, and, under the rule of indulging presumption in favor of the ruling of the court below, error cannot be predicated upon the refusal of the affirmative charge. The other assignments of error and argument of counsel show the insistence of appellant to be that plaintiff was entitled to recover unless the evidence shows that he had knowledge or notice that his dog was of a vicious character, or was known to attack sheep or goats, etc.

We are of the opinion that this insistence is without merit. This is not an action for damages against the owner for injuries caused by the act of a vicious animal (2 Cooley, Torts, 3d ed. §§ 402-404, pp. 690-696), but the action is by the owner of the dog for the wrongful killing, and the question of justification is clearly not dependent upon such knowledge on the part of the owner.

That the owner of domestic animals has the right, under certain circumstances, to defend them from serious injury or destruction through the attack of a dog, seems to be well settled, and was so recognized in the following language found in the opinion in *Means v. Morgan*, 2 Ala. App. 547, 56 So. 759, cited by appellant's counsel: "The right to defend domestic animals from injury or destruction through the attacks of other animals, and the extent to which a person may lawfully go in such defense, necessarily depends on the circumstances

and necessities of the particular case, as to whether or not the right is reasonably and properly exercised, so as to make it a lawful and justifiable act."

See also the following authorities, where the question is treated: 2 Cyc. 416; 1 Jagard, Torts, pp. 152, 153; Nesbett v. Wilbur, 177 Mass. 200, 58 N. E. 586; Anderson v. Smith, 7 Ill. App. 354; 6 Mayfield's Dig. p. 274; Hubbard v. Preston, 15 L.R.A. 249, and note (90 Mich. 221, 30 Am. St. Rep. 428, 51 N. W. 209); Parrott v. Hartsfield, 20 N. C. 242 (4 Dev. & B. L. 110), 37 Am. Dec. 673; 9 Eng. Rul. Cas. 687, note.

The question of justification is treated very succinctly by the Massachusetts court in Nesbett v. Wilbur, 177 Mass. 200, 58 N. E. 586, as follows: "No doubt, such a justification as that relied on depends upon a number of variable facts,—the imminence and nature of the danger, the kind of property in peril, from whom or what the danger proceeds, the relative importance of the harm threatened, and that which is done in defense."

Much consideration is also given the question in the case of Anderson v. Smith, 7 Ill. App. 354. However, it is unnecessary that we here consider this feature, or that we state any conclusion in reference thereto, as we are only concerned on this appeal with the insistence just stated, and to which alone the assignments of error relate; that is, the necessity of a knowledge on the part of the owner of the vicious character of the dog. A reading of the cases cited will demonstrate that such is not necessary, and that principle is without application here.

After referring to certain instances in which justification is claimed because of a necessity to protect against a vicious dog, Mr. Cooley, in his work on Torts (vol. 2, p. 702), says in such justifiable instances "the dog may be killed, whether the owner has notice of his disposition or not."

The charge of the court does not appear in the record, nor does the bill of exceptions show that it contains all the evidence in the case. The assignments of error relate to the refusal of charges presenting the question just discussed and exceptions to a portion of the oral charge, which portion does not appear in the bill of exceptions, but enough is shown to indicate that it raises the same question we have here treated.

We find no reversible error in the record, and the judgment of the court is accordingly affirmed.

Anderson, Ch. J., and McClellan and Sayre, JJ., concur.
L.R.A.1915E.

MARYLAND COURT OF APPEALS.

MOUNT AIRY MILLING & GRAIN COMPANY, Appt.,
v.

CHARLES A. RUNKLES.

(118 Md. 371, 84 Atl. 533.)

Evidence — burden of proof — provision for liquidated damages.

1. That a provision for liquidated damages in case the vendor of a mill re-engaged in business was inserted in the contract, which made no provision for sale of good will, after it had been prepared for signature, places upon the vendee the burden of showing that it was intelligently inserted, and with the deliberate purpose of fixing a measure of damages in case the vendor re-entered the business.

Damages — liquidated — practical expiration of period.

2. A provision as liquidated damages in case the vendor of the mill re-entered the business within five years after selling it, of a sum equal to one half the purchase price of the mill, which included merely the value of the property, with no separate allowance for good will, will not be enforced as liquidated damages where the breach occurs within a few months of the expiration of the five-year period.

(June 13, 1912.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Montgomery County in defendant's favor in an action brought to recover damages for breach of a contract not to re-engage in business. Affirmed.

The facts are stated in the opinion.

Note. — Effect upon character of sum agreed upon for breach, as penalty or liquidated damages, of single or multiple stipulations in contract.

I. Penalty.

- a. Generally, 374.
- b. Not to resume business, 376.
- c. To build, 378.
- d. Landlord and tenant, 380.
- e. Carriers, 380.
- f. Surety, 380.
- g. Sale, 381.
- h. To furnish machinery, 382.
- i. Work to be completed, 383.
- j. Sale of land, 384.
- k. Employment, 386.
- l. Award, 388.

II. Liquidated damages.

- a. Not to resume business, 389.
- b. Sale, 390.
- c. Vendor and purchaser, 390.
- d. Landlord and tenant, 392.
- e. Employment, 393.
- f. Work and labor, 393.
- g. Miscellaneous, 394.

Messrs. Talbott & Prettyman, for appellant:

The sum named in the contract is to be construed as liquidated damages, and not as a mere penalty.

Pennsylvania R. Co. v. Reichert, 58 Md. 277; Willson v. Baltimore, 83 Md. 212, 55 Am. St. Rep. 339, 34 Atl. 774; United Surety Co. v. Summers, 110 Md. 95, 72 Atl. 775; Salem v. Anson, 40 Or. 339, 56 L.R.A. 169, 91 Am. St. Rep. 485, 67 Pac. 190; Emery v. Boyle, 200 Pa. 249, 49 Atl. 779; March v. Allabough, 103 Pa. 335; Malone v. Philadelphia, 147 Pa. 416, 23 Atl. 628; Kilbourne v. Burt & B. Lumber Co. 111 Ky. 693, 55 L.R.A. 275, 64 S. W. 631; Tennessee Mfg. Co. v. James, 91 Tenn. 154, 15 L.R.A. 211, 30 Am. St. Rep. 865, 18 S. W. 262;

Monmouth Park Asso. v. Wallis Iron Works, 55 N. J. L. 132, 19 L.R.A. 459, 39 Am. St. Rep. 626, 26 Atl. 140; 19 Am. & Eng. Enc. Law, 2d ed. 440; Holbrook v. Tobey, 66 Me. 410, 22 Am. Rep. 581; Muse v. Swayne, 2 Lea, 251, 31 Am. Rep. 607; Nash v. Hermosilla, 9 Cal. 584, 70 Am. Dec. 676.

And no evidence of damages is necessary or admissible.

Kelso v. Reid, 145 Pa. 606, 27 Am. St. Rep. 716, 23 Atl. 323.

Mr. Guy W. Steele for appellee.

Pearce, J., delivered the opinion of the court:

There is but one question in this case, *viz.*, whether the sum named in a contract

I. Penalty.

a. Generally.

Where the distinction is made between damage clauses that apply to a single stipulation or to several, in the cases holding that the damage clause is a penalty, an attempt is made to formulate a rule to suit each case, the result of which seems to be as follows: It has been held to be a penalty where the various stipulations are of different degrees of importance; where the same sum is specified for any of several stipulations that differ; where the sum would be too large or too small for different stipulations; where the agreement does not specify the particular stipulation as to liquidated damages; where some of the breaches are easily measured; where the damages are easily measured; where the same sum is fixed for a minor breach as for a total breach; where some stipulation is the payment of money and the damage clause exceeds that amount; where the amount is unconscionable; where the payments are required without regard to the magnitude of violation; where the damages are controlled by a statutory provision. In some of the cases there was a combination of these factors that controlled the determination and fixed the sum to be a penalty. Originally the courts said that intent of the parties controlled the nature of the obligation. Subsequently the courts did not in some cases refer to the intent, but construed the damage clause by the rules above stated.

Where the sum of \$100 was mutually agreed upon as liquidated damages in a contract in the form of a bond, such sum was held to be a penalty where the contract contained several distinct stipulations of various degrees of importance, to be performed at different times, most of them for the payment of money and some for the payment of semi-annual instalments of interest, the value of which could be easily estimated. Fisk v. Gray, 11 Allen, 132.

In McPherson v. Robertson, 82 Ala. 459, 2 So. 333, a contract for liquidation of a L.R.A.1915E.

partnership provided \$1,000 damages for the violation of any part of the contract by either party. It was held to be a penalty. The court said: "Agreements sometimes contain more stipulations than one, and then express a promise to pay a gross sum on the breach of such agreement. The sum thus expressed and promised is treated as the agreed compensation or recoverable damages for an entire breach of all the stipulations, and, hence, not recoverable in gross for a partial breach, and, consequently, is not liquidated damages. And this rule applies where, as in this case, some of the stipulations are of a class for whose breach there is no known or satisfactory rule for estimating the damages, provided there are other stipulations, one or more, to which a known rule or standard of damages can be applied."

And where the agreement contained several matters of various degrees of importance, and the sum named was payable for the breach of any one, it was held that it was a penalty. Keck v. Bieber, 148 Pa. 645, 33 Am. St. Rep. 846, 24 Atl. 170.

A contract provided for sending a list of 30 debtors who owed \$150 in the aggregate, and to send the first \$36 received; for failure to comply with agreement, then to pay \$36 as liquidated damages. It was held to be a penalty, as the same damages were fixed for the nonperformance of a single minor condition as for a total breach; regardless of detriment. The contract showed that compensation for actual detriment was not the thought of the parties. Raymond v. Edelbrock, 15 N. D. 231, 107 N. W. 194.

A sum named as damages in a bond to furnish husband and wife food, raiment, and house room when well and medical attendance when sick, during their lives, was held to be a penalty. Hallock v. Slater, 9 Iowa, 599.

A bond to remove a case to the Federal court was held to entitle to nominal damages and the amount specified in it was a penalty. Henry v. Louisville & N. R. Co. 91 Ala. 585, 8 So. 343. The court said: "Agreements sometimes contain more stipulations than one, and then express a promise

for the sale of certain property, though stated therein to be liquidated damages for a breach of one of the terms of the contract, was so in fact, or was merely a penalty.

The facts of the case are as follows: On February 5, 1906, the appellee, Charles A. Runkles, owned and operated a grain elevator and flouring mill at Mount Airy, Carroll county, Maryland, and Charles C. Gorsuch at that time was engaged in the same business at Westminster, in the same county. On the date above named, Runkles gave to Gorsuch a ten-day option for the purchase of the above property, described therein as "my flouring mill plant, grain elevator, warehouse and office, and all the roads, rights, ways, waters, and privileges

thereto belonging or appertaining, in Mount Airy, in Carroll county, Maryland, also my one-half interest in the waterworks connected with said flouring mill plant, including the lot of ground upon which the said plant, elevator, warehouse, and office are located, at and for the sum of \$12,500, to be paid for by said Charles C. Gorsuch, in the event of his exercising his right to purchase the above-described property, as follows:" Then follow the terms, which it is not necessary to set out, as they have been fully complied with, and in no wise affect the question here. The option makes no reference to the sale of the good will of the concern, nor to any restriction upon Runkles's right to go into the same business at Mount Airy. On February 15, 1906, Gorsuch exer-

to pay a gross sum on the breach of such agreement. The sum thus expressed and promised is treated as the agreed compensation or recoverable damage for an entire breach of all the stipulations, and, hence, not recoverable in gross for a partial breach, and consequently is not liquidated damages."

And where the sum which was to be a security for the performance of an agreement to do several acts would in some instances of breaches be too large and in others too small a compensation, that sum was held to be a penalty. *Davies v. Penton*, 6 Barn. & C. 216, 9 Dowl. & R. 369, 5 L. J. K. B. 112, 30 Revised Rep. 298.

In *Lange v. Werk*, 2 Ohio St. 519, it was said "that where the contract contains several stipulations of various degrees of importance, as to some of which the damages might be considered as liquidated, while for others they may be deemed unliquidated," the amount named is a penalty.

In *Mason v. Callender*, 2 Minn. 350, Gil. 302, 72 Am. Dec. 102, it was said that "if, on the breach of any one covenant contained in it [contract], the damages are ascertainable by a jury with any degree of certainty, the stipulation will be held to be a penalty to cover the damages on such breach."

In *Hahn v. Horstman*, 12 Bush, 249, it was said: "Liquidated damages must be construed as a mere penalty in all cases where the agreement contains various stipulations, differing in importance, and it is to each and all of them the damages apply. *Kemble v. Farren*, 6 Bing. 141, 3 Moore & P. 425, 3 Car. & P. 623, 7 L. J. C. P. 258, 31 Revised Rep. 366.

In *Shute v. Taylor*, 5 Met. 61, it was said: "It is like the case of an obligation to perform two or more independent acts, with a provision for single liquidated damages for nonperformance; if one is performed, and not the other, it is not a case for the recovery of the liquidated damages."

In *Parlin & O. Co. v. Boatman*, 84 Mo. App. 67, later report in 89 Mo. App. 43, it was said: "Where the agreement secures the performance or omission of various

acts which are not measurable by any exact pecuniary standard, together with one or more acts in respect of which the damages on a breach of contract are readily ascertainable by a jury, and there is a sum stipulated as damages for a breach of any one of the covenants, such sum is to be regarded as a penalty merely."

In *Kelly v. Fejervary*, 111 Iowa, 693, 83 N. W. 791, it was said that if "a sum certain is specified as ascertained damages for the breach of any one of several stipulations when the losses resulting from such breaches must necessarily differ in amount . . . the sum designated under any of these conditions is to be construed a penalty."

In *Sun Printing & Pub. Asso. v. Moore*, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240, it was said: "It may, we think, fairly be stated that when a claimed disproportion has been asserted in actions at law, it has usually been an excessive disproportion between the stipulated sum and the possible damages resulting from a trivial breach apparent on the face of the contract, and the question of disproportion has been simply an element entering into the consideration of the question of what was the intent of the parties,—whether bona fide to fix the damages, or to stipulate the payment of an arbitrary sum as a penalty, by way of security."

In *Madler v. Silverstone*, 55 Wash. 159, 34 L.R.A.(N.S.) 1, 104 Pac. 165, it was said that "on the other hand, if the stipulation is inserted to secure the payment of a definite sum of money, or if the actual damages suffered are easily ascertainable and are less than the stipulated sum, or if the principal agreement contains provisions for the performance or nonperformance of several acts of different degrees of importance, and the stipulated sum is to be paid on the violation of any or all of them, and the sum will in some instances be too large, . . . it should be treated as a penalty."

In *Craig v. Dillon*, 6 Ont. App. Rep. 116, it was said: "The rule contended for by Mr. Richards, on the question whether a sum is to be considered a penalty or liqui-

cised his right of purchase, and Runkles signed and delivered to Gorsuch a paper of that date certifying to that fact, as well as to the payment of the cash stipulated to be paid by the option, and the delivery of the notes for the residue of the purchase money, and binding himself to execute and deliver a conveyance upon the delivery by Gorsuch to him of certain collateral security for said notes, as stipulated in said option. This paper also contained the following clause: "and for the consideration aforesaid, I hereby agree not to go into the same business hereby transferred for five years at or near Mount Airy under a penalty of \$6,200 as liquidated damages. Witness my hand and seal this 15th day of February, 1906." Subsequently Gorsuch as-

signed all his interest under said contract to the Mount Airy Milling & Grain Company, a corporation which the said option showed was to be formed for carrying on said business, and whose bonds were to be, and in fact were, delivered to Runkles as collateral security for the notes of Gorsuch; and this suit was brought by that corporation.

The narr. contained only one count, with all the necessary averments as to the terms of the contract, and alleging as the breach thereof that on or about October 22, 1909, the defendant did go into the same business transferred to Gorsuch at Mount Airy, and continued therein up to the bringing of that suit, within a few hundred feet of the plant so sold to said Gorsuch, and then owned by

dated damages, is now well established; *viz.*, that where the same sum is stipulated as recoverable for the breach of several matters of various degrees of importance, it shall be regarded as a penalty, and not as liquidated damages, even though the agreement states that it shall not be taken as a penalty."

In *Barton v. Clover*, Holt, N. P. 43, note, it was said that "where a deed contains covenants, or an agreement contains provisions for the performance of several things, and then a large sum is stated at the end, to be paid upon the breach of performance, that must be considered as a penalty."

In *Reynolds v. Bridge*, 6 El. & Bl. 528, Crompton, J., said: "It is not like what we find in some of the old cases where damages are stipulated for severally in respect of several breaches, as for not ploughing land, and so on. This belongs to another class of cases, where there are not distinct penalties for each breach, but, by the agreement, if the covenant is once broken as to any provision which it contains, the whole is at an end, the liquidated sum is to be recovered, and there can be no recovery in respect of anything which occurs afterwards."

In *Lea v. Whitaker*, L. R. 8 C. P. 70, Keating, J., said: "In many cases it has been held that the parties could not have meant what they have apparently said; as, for instance, where a number of things are stipulated to be done, it has been held that the parties could not have meant that a large sum should be payable as liquidated damages for a failure to perform one or more of them."

b. Not to resume business.

In *MT. AIRY MILL. & GRAIN CO. v. RUNKLES*, it was held that where the sum named was payable on the breach of any covenant, and there were several, this was a penalty.

In *Wilkinson v. Colley*, 164 Pa. 35, 26 L.R.A. 114, 30 Atl. 286, a physician covenanted in the penal sum of \$400 not to practise in that locality. The court said: L.R.A.1915E.

"In determining the equities of the particular case, the relation which the sum bears to the extent of the injury provided against will be considered."

A contract to sell a physician's practice contained several stipulations on both sides, and provided that if either failed to comply, \$500 was to be paid by him to the other party. It was held to be a penalty, as if it was a penalty as to the stipulation to pay \$50, it would be a penalty as to all other stipulations. *Niver v. Rossman*, 18 Barb. 50. If parties would stipulate damages, they should express the sum to be paid on each distinct breach.

On a sale of an omnibus line, each party was bound in the sum of \$300 for the faithful fulfilment of the contract. The vendor violated the contract by running a rival line. The provision for damages was held a penalty, and \$602 was recovered. *Moore v. Colt*, 127 Pa. 289, 14 Am. St. Rep. 845, 18 Atl. 8. The court said: "Had the breach been by Colt, and he had refused to pay the \$150, what would have been the measure of damages in a suit against him by Moore? Would it have been the sum he agreed to pay, \$150 with interest, or would it have been the \$300 as liquidated damages? The latter proposition cannot well be maintained."

And where a bond not to engage in business called the sum a penalty, and the stipulations were various, to some of which the damages might be considered liquidated, and to others not, the stipulated sum being made payable on a breach of any of them, it was held not liquidated damages. *March v. Allabough*, 103 Pa. 335.

One sale of three veranda columns after a contract not to engage in the lumber business, fixing \$5,000 as stipulated damages in case of a violation, was held not to render the vendor liable as for stipulated damages. *Broadbooks v. Tolles*, 114 App. Div. 646, 99 N. Y. Supp. 996. The court said: "It could not have been within the contemplation of the parties that if one sale was made in three years, it was such an invasion on this stipulation that the defendant forfeited the entire sum agreed upon."

the plaintiff, to the great damage and injury of the plaintiff. It averred that the defendant had not paid the plaintiff nor the said Gorsuch the said sum of \$6,200, and claimed therefor said sum of \$6,200 as liquidated damages.

The defendant pleaded (1) never indebted as alleged; (2) never promised as alleged; (3) for defense on equitable grounds "that the alleged contract in writing is without any valuable consideration;" (4) "for defense on equitable grounds that the alleged contract in writing was not based upon any valuable consideration, and the contract of purchase of defendant's flouring mill and appurtenances, as alleged in the declaration, for the sum of \$12,500, was fully entered into and completed, and did not include the

promise of the defendant not to go into the same business as alleged, and such promise was voluntarily made, and without any valuable consideration being received therefor, by the defendant."

Issue was joined on the first and second pleas, and motion *ne recipiatur* as to the third and fourth pleas was filed, on the ground that, under the circumstances of the case, they were not proper pleas for defense on equitable grounds. This motion being overruled, the plaintiff demurred to the third and fourth pleas, and the demurrer was sustained. The case then went to trial on the issues already joined and resulted in a verdict and judgment thereon for the defendant, from which this appeal is brought.

It appears from the evidence of Thomas

On a sale of a ship the vendor covenanted that he would not be interested in any voyage to the Northwest coast of America, or in any adventure to that coast, or any traffic with the natives of that country for seven years, binding himself in the penal sum of \$8,000. It was held that this was a penalty. This was on the ground that if it was liquidated damages, "then for one instance in which the contract should be broken, and for a thousand in which the defendant should interfere in the trade contemplated by the parties to be secured to the plaintiffs for seven years, exclusively of him and of all acting under him, the same damages, the same amount of demand, would be recovered; and having been once paid, if demanded as a penalty, there would be an end of the contract; but if demanded as damages, then, it seems, the demand might be repeated." In this view it meant a penalty. *Perkins v. Lyman*, 11 Mass. 76, 6 Am. Dec. 158.

And where the vendor of a hardware store bound himself in the sum of \$500 not to engage in the same business in that place for five years, it was held to be a penalty, as it was to prevent engaging in the business of dealing in any hardware or any implements, not only for one day, one week, one month, but for the entire period. *Heatwole v. Gorrell*, 35 Kan. 696, 12 Pac. 135. The court said the "sum of \$500 was considered as an ample and sufficient compensation, not only for a single breach of the contract for a single day in dealing in the smallest quantity of hardware or the smallest number of implements, but was considered as a sufficient compensation for all possible breaches."

The vendor of a hardware store agreed to lease the same, to pay the taxes for the year, and not to engage in business there during the lease. The purchaser refused to complete the contract of sale. Notes of \$1,000 were executed to secure the performance. It was held that these were to secure a penalty, and not liquidated damages. *Steer v. Brown*, 106 Ill. App. 361. The court said: "Where a contract pro-

vides for the payment of a gross sum as damages for a failure to fulfil any one of several covenants, and the damages arising from some of the breaches are uncertain and difficult to ascertain, while the damages arising from others are susceptible of easy ascertainment, the courts will construe the contract as one affording a penalty, not liquidated damages.

In *Crisdee v. Bolton*, 3 Car. & P. 240, where £500 were held liquidated damages for opening another public house, it was said: "So, if but one sum is mentioned, and there may be several breaches, and it is not distinctly stated that this sum is to be paid on each breach, I should hold as the court held in *Astley v. Weldon*, 2 Bos. & P. 346, 5 Revised Rep. 618, that the sum mentioned was to be considered only as a penalty."

On a sale of a banking business the vendor covenanted to quit banking and abstain from the banking business at that place. To insure this the damage was fixed at \$10,000, liquidated. It was held that receiving deposits from the 17th of February to the 7th of April would only entitle to the recovery of a penalty. *Hoagland v. Segur*, 38 N. J. L. 230. This was on the ground that where the agreement contains disconnected stipulations of various degrees of importance, the sum named will be considered a penalty unless the agreement specifies the particular stipulation to which the liquidated damages are to be confined.

And a bank business, influence, patronage, safe, and fixtures were sold, the vendor agreeing not to engage in the banking business in the same place, the contract providing for forfeiture of threefold the consideration paid. It was held to be a penalty, on the performance by the vendor of certain bank functions. *Trower v. Elder*, 77 Ill. 462. The court said that "where there are several covenants or stipulations in an agreement, the damages for the nonperformance of some of which are readily ascertainable by a jury, and the damages for the nonperformance of the others are not measurable by any exact pecuniary standard, and a sum is named as damages for a breach of

Watkins that in the summer of 1909 the defendant was farming near Mount Airy, and that in a conversation between them witness told him he heard he was going again into the grain business, and witness asked him if he had the nerve to go into the business, and that he replied he had both the nerve and the money. It was also shown that on September 21, 1909, a corporation was formed by Edward M. Molesworth, Charles A. Runkles, the defendant, and Albert H. Runkles, by the name of the Mount Airy Lumber & Grain Company, which was authorized by its charter to buy and sell grain and manufacture flour and other grain products, and had been engaged in that business at Mount Airy, directly across the road from the plaintiff's plant,

buying grain since July, 1910, and manufacturing flour and other grain products since December, 1910, down to February 15, 1911, which marked the period of five years from the date of said contract, and that defendant was and always had been an officer and stockholder of the Mount Airy Lumber & Milling Company, whose capital stock was \$25,000.

The defendant offered no testimony, but offered the three following prayers: (1) That there was no evidence offered legally sufficient to entitle the plaintiff to recover. (2) That under the pleadings the plaintiff has offered no evidence legally sufficient to establish or prove any damages suffered by it; and, if the verdict of the jury is for the plaintiff, they can allow only nominal dam-

any of the covenants or stipulations, such sum is held to be merely a penalty."

In *Jaquith v. Hudson*, 5 Mich. 123, which held that a contract to refrain from business at a certain place provided liquidated damages, it was said, speaking of contracts for the performance of several stipulations of various degrees of importance, "though there may be more difficulty in ascertaining the precise amount of damage, yet, as the contract exacts the same large sum for the breach of a trivial or comparatively unimportant stipulation, as for that of the most important, or of all of them together, it is equally clear that the parties have wholly departed from the idea of just compensation, and attempted to fix a rule of damages which the law will not recognize or enforce." In this case the court said that the correct rule of interpretation was just compensation, rather than "intent."

c. To build.

A bond was given in the sum of \$15,000 by an electric light company for the completion within three months of a plant to supply electricity for light, heat, and power, that the work should be begun by a certain day, and be completed by a certain day. The sum was held to be a penalty, as payments were required without regard to the magnitude or the number of breaches, and the contract could be partially violated. *El Reno v. Cullinane*, 4 Okla. 457, 46 Pac. 510.

And where an agreement secured the performance or omission of various acts, together with one or more acts in respect to which the damages on a breach of the covenants were certain and readily ascertainable, and there was a sum stipulated as damages to be paid by each party to the other for a breach of any of the covenants, it was held that such sum was a penalty. *East Moline Co. v. Weir Plow Co.* 37 C. C. A. 62, 95 Fed. 250. This was a contract to donate land, give railroad service, water, and light, and, on the other hand, to move a plant and build up a town.

And where, to secure the performance of the terms of a contract to construct and L.R.A.1915E.

operate a number of public utilities, there was a stipulation for the payment of a fixed sum upon the breach of any of several promises of varying degrees of importance, and the damages for the breach of some of them were easily ascertainable, such sum was construed to be a penalty. *Brunswick v. Aetna Indemnity Co.* 4 Ga. App. 722, 62 S. E. 475, distinguished in *Florence Wagon Works v. Salmon*, 8 Ga. App. 197, 68 S. E. 866.

In an agreement to build a gristmill, the parties covenanted to each other for faithful performance, in the sum of £250, as settled damages to be paid by the failing party. It was held that this sum was a penalty, as it was given to secure the performance of several things on each side; for the £250 was to have been payable if the defendant had deviated in the most trifling degree from the plan, and so also for a similar deviation on the plaintiff's part. *Brown v. Taggart*, 10 U. C. Q. B. 183.

A bond given to a city by a sewer contracting company was held to provide a penalty, because it named a "penal sum," and was given to secure performance of all the covenants, conditions, warranties, and agreements "contained in the principal contract, which were quite numerous and some of them trivial," and the sum could not be construed as liquidated damages for some covenants, and a penalty only as to others. *Madison v. American Sanitary Engineering Co.* 118 Wis. 480, 95 N. W. 1097.

The contractors for building a school gave bond in the sum of £1,000 for any breach of the contract, which included all the breaches specially provided for in the contract. This was held to be a penalty. *Re Newman*, L. R. 4 Ch. Div. 724, 46 L. J. Bankr. N. S. 57, 35 L. T. N. S. 718, 25 Week. Rep. 244. *Bramwell, J. A.*, held that it was controlled by the statute 8 & 9 Wm. III. chap. 11, § 8.

The defendant contracted to construct a dam and a bond was given to secure performance, the dam to be completed by a certain day, and to pay \$5,000 on failure to complete. This was held to be a penalty.

ages. (3) That under the pleadings the plaintiff has offered no evidence legally sufficient to enable it to recover; and therefore the verdict of the jury must be for the defendant.

The defendant's first and second prayers being rejected, the third prayer above remains for consideration, which raises the single question in this appeal, viz., namely, whether the \$6,200 is to be construed as liquidated damages, or as a mere penalty. It is conceded that this question is very frequently one of the most difficult and perplexing inquiries encountered in the construction of written agreements. Let us see, therefore, how far the general principles controlling this question have been established in this state. In *Willson v. Balti-*

more, 83 Md. 211, 55 Am. St. Rep. 339, 34 Atl. 775, Chief Judge McSherry said: "There are to be found both decisions and *dicta* that are conflicting and irreconcilable; but the general principles which are usually invoked, and which are peculiar to contracts of this character, are nowhere seriously disputed or denied. As just compensation for the injury done is the end which the law aims to reach, the intention of the parties at the time the contract was entered into is often, though not always, given weight; and, whilst the language they have used in the instrument, if they declare that the damages shall be liquidated, is a circumstance that may have its influence, . . . yet even their explicit words will be sometimes disregarded, . . . and the

Owens v. Hodges, 1 McMull, L. 106. The court said: "It may be that that sum was the estimate of Owens' loss, if the dam was not constructed at all, but they never could have intended the defendant should pay as much for failure in a part, however inconsiderable, as for default in the whole."

A bond of \$3,000 was given to secure the faithful performance of a contract to build a house for \$2,500. It was held to be a penalty, on the ground that whether an agreement provides for the performance of one single act, or of several separate acts, if the stipulation renders the defaulting party liable in the same amount for a total and a partial failure, it will be a penalty. *Johnson v. Cook*, 24 Wash. 474, 64 Pac. 729.

Where the owner of the property having a mill built thereon was liable to pay \$1,000 on his failure "to perform all and any of the terms, conditions, and agreements by him to be performed," it was held a penalty. *Fitzpatrick v. Cottingham*, 14 Wis. 219. He was required to furnish material as fast as needed. If he had delayed one day he would have been liable for \$1,000 by the agreement.

And where a contract for a right of way provided that the railroad should build cattle guards and fence both sides of the road, it was held that on failure, the damages provided for in the contract were a penalty, as the agreement admitted of partial performance, and the breach of each stipulation was capable of accurate valuation. *St. Louis & S. F. R. Co. v. Shoemaker*, 27 Kan. 677.

A building contract to provide a building within a certain time, and give a lease for six months, with privilege of twelve months or more, or to pay \$500 in case of failure, was held to give a penalty, and not liquidated damages, as there were several things for the defendant to do, and a failure to perform any one would have been a violation of the agreement. *Nash v. Hermosilla*, 9 Cal. 584, 70 Am. Dec. 676.

And where a contract to build three steamers provided for payment as the work advanced, and bound either party to pay to the other, for failure to perform any part of L.R.A.1915E.

his covenants, \$20,000 as liquidated damages, such sum was held to be a penalty, as it would be a penalty for the nonpayment of the money, and would therefore be a penalty for a breach by the other party. *Ward v. Jewett*, 4 Robt. 714.

A contract for work provided for the retention of 10 per cent, to be forfeited as liquidated damages if the work was not completed in time. It was held to be a penalty, as several of the undertakings were of a trivial nature, and damages for the breach of any would vary from that sustained by a breach of the contract to perform the work, which was the main purpose. *Monmouth Park Asso. v. Warren*, 55 N. J. L. 598, 27 Atl. 932.

A roofing contract provided for a bond in the sum of \$1,570 as liquidated damages. This was held to be a penalty. *Moore v. Platte County*, 8 Mo. 467. The court said: "It can hardly be imagined that it was intended that the defendants were expected to pay \$1,570 if they failed to finish this work on the exact day, for example, if they failed by one, or even two days, or if there were only a slight neglect in the execution of a particular part of the work."

A building contract contained many mutual stipulations in regard to work and payment. The parties bound themselves for performance of all and every covenant in the penal sum of \$500 as settled damages. This was held to be a penalty. *First Orthodox Cong. Church v. Walrath*, 27 Mich. 232. The court said: "But many of the conditions of the contract before us are capable of adequate and exact vindication in pecuniary damages, and most of them could be compensated with very little difficulty."

And where a party contracted to build a party wall or to remove a certain house on another lot, and \$500 was stated as liquidated damages on failure to perform, it was held to be a penalty. *Condon v. Kemper*, 47 Kan. 126, 13 L.R.A. 671, 27 Pac. 829.

Under U. S. Rev. Stat. § 961, Comp. Stat. 1913, § 1599, providing that in suits to recover forfeiture where the forfeiture appears by default, the court shall render judgment for the plaintiff to recover so

measure of damages will be restricted to such as the evidence shows have been actually sustained, if the entire agreement and the peculiar circumstances of the subject-matter of the contract indicate that the reason and justice of the case require this to be done. . . . A stipulation to pay a specified sum upon the nonperformance of a contract is regarded as a penalty, rather than as liquidated damages, if the intention of the parties as to its effect is at all doubtful, or is of equivocal interpretation. . . . Finally, the tendency of late years has been to regard the statements of the parties as to liquidated damages in the light of a

penalty, unless the contrary intention is unequivocally expressed, so that harsh provisions will be avoided, and compensation alone will be awarded." *Id.* 212.

Looking into the record with these established principles in view, we find that while the plant and all its appurtenances are minutely described in the option separately and apart from the lot of ground upon which the buildings stand, as also the half interest in the waterworks connected with the plant, for the aggregate consideration of \$12,500, there is no mention of any good will of the property sold. By agreement of counsel, the original of the certificate which

much as is due according to equity, it was held that the damages to be ascertained were a penalty. *Chicago House Wrecking Co. v. United States*, 53 L.R.A. 122, 45 C. C. A. 343, 106 Fed. 385. The only complaint was that the contractor overran his time a little in removing buildings.

d. Landlord and tenant.

Where tenancy of premises was transferred and the good will sold, and the contract provided that for the failure of either party to perform all and every part of the agreement, he should pay to the other, who shall be willing to complete the same, the sum of £100 as damages, it was held that the £100 was a penalty where the assignee failed to get possession of a coach house. This contract involved several events of various degrees of importance. *Magee v. Lavell*, L. R. 9 C. P. 115, 43 L. J. C. P. N. S. 131, 30 L. T. N. S. 169, 22 Week. Rep. 334.

Where the lessee covenanted to consume the hay and straw on the premises and to pay additional rent of £3 per ton for every ton of hay or straw sold, it was held that sum was a penalty, and not liquidated damages. The manurial value of hay sold was the measure of damages, and differed from that of straw, and the lease called it a penalty, and provided the same sum for breach of stipulation with regard to hay and for that with regard to straw. *Willson v. Love* [1896] 1 Q. B. 626, 65 L. J. Q. B. N. S. 474, 74 L. T. N. S. 580, 44 Week. Rep. 450.

And where a sum was to be paid on refusal to grant a lease, and on the other side, in respect of two acts or omissions of different degrees of importance,—the refusal to execute a counterpart and the refusal to pay the expenses of instruments,—it was held that the damages were a penalty, and not liquidated damages. *Boys v. Ancell*, 5 Bing. N. C. 390, 7 Scott, 364, 2 Arnold, 9, 8 L. J. C. P. N. S. 267, 3 Jur. 316.

e. Carriers.

The damage clause of a charter party was in form of a penalty, and covered alike an entire refusal to perform the contract, and a failure to perform it in any particular, L.R.A.1915E.

however slight; and for any breach, whether total or partial, a just compensation could be estimated in damages. It was held to be a penalty. *Watta v. Camors*, 115 U. S. 353, 29 L. ed. 406, 6 Sup. Ct. Rep. 91. In this case the charterer refused to furnish the cargo of wheat, as he had agreed.

A contract to provide freight for a ship at Calcutta, and to provide the ship, contained a "penalty for the nonperformance of this agreement by either party, \$2,200." This was held to be a penalty, as the penalty named would be alike incurred by the nonperformance by either party of any of its numerous stipulations, and the actual damage caused by a failure to perform some of them might be very trifling in amount, and capable of very exact pecuniary estimation. *Higginson v. Weld*, 14 Gray, 165.

A contract provided for furnishing 4,000 bushels of wheat as freight, and guaranteed so many feet of water for a steamer by a certain date, and in case of default of any conditions authorized a recovery of \$550, the amount of the freight. This was held to be a penalty, on the ground that where a forfeiture of the entire sum is agreed upon on the failure of any one of several things, it will be held to be a penalty. *Gower v. Saltmarsh*, 11 Mo. 271.

And, where the sum was made payable for one breach and for many, for a breach attended with a small loss or a great loss, and the actual damage could be easily computed, it was held to be a penalty. *People v. Central P. R. Co.* 76 Cal. 29, 18 Pac. 90. This suit was on a bond where the state had granted aid to a railroad which had agreed to carry certain persons free and to perform certain acts. This ruling was approved in *Radloff v. Haase*, 96 Ill. App. 74, reversed in 196 Ill. 365, 63 N. E. 729, which has rehearing denied in 197 Ill. 98, 64 N. E. 557, where the vendor opened up his business after contracting to abstain.

f. Surety.

One half of a schooner was transferred to a surety, who agreed to pay certain debts, and, if repaid, to reconvey the schooner, and to pay \$2,500 as liquidated damages in case of failure on "my part to comply." The defendant sold the schooner. The provision

contains the restriction upon the resumption of business, and which was in evidence in the court below, was exhibited at the argument in this court; and it was plainly apparent therefrom that this clause was not a part of the paper as originally prepared, but was inserted between the preceding paragraph and the attestation clause. It is not possible, in the light of that fact (there being no explanatory evidence), to regard this as other than an afterthought, and as imposing upon the appellant the burden of showing that its addition to the certificate was made with the intelligent and deliberate purpose of the parties to add to the

original contract a provision fixing the sum named as the measure of damages for a breach of that clause of the certificate. In *Taylor v. Sandiford*, 7 Wheat. 13, 5 L. ed. 384, Chief Justice Marshall, speaking of a sum of money in gross for the nonperformance of an agreement, said: "It will not, of course, be considered as liquidated damages, and it will be incumbent on the party who claims them as such to show that they were so considered by the contracting parties." In 2 *Greenleaf on Evidence*, § 259, the rule is said to be that it must be "apparent that the damages have already been the subject of actual and fair calcula-

was held to be a penalty, as the sum agreed to be paid by way of damages was for the breach of any of the stipulations, which were of different degrees of importance and value. *Thoroughgood v. Walker*, 47 N. C. (2 Jones, L.) 15.

A contract by a surety to pay \$240 on the failure to deliver two boatloads of coal, one in April and one in October, was construed as providing a penalty. *Curry v. Larer*, 7 Pa. 470, 49 Am. Dec. 486. The court held that the stipulation would be unconscionable to its full extent, if enforced for nonperformance of merely one half the contract, and therefore was a penalty.

And where the agreement was to pay certain debts of another, it was held that the sum agreed upon between the parties was a penalty. *Morris v. McCoy*, 7 Nev. 399. This was because it secured the performance of various acts, some of which were not readily measurable, together with others in respect of which damages on the breach were certain or readily ascertainable.

Where the object of the bond was to secure the obligee's discharge from a large number of claims against him, held by certain third persons severally, varying from \$8,000 to \$10, it was held that the sum of \$10,000 would be regarded as a penalty. *Signall v. Gould*, 119 U. S. 495, 30 L. ed. 491, 7 Sup. Ct. Rep. 294.

g. Sale.

The plaintiff sold a tenant right, furniture, and farming stock, the plaintiff to pay all rates and taxes. He sued for the price. The defendant set up £100 agreed as liquidated damages as a set-off. It was held that, as there were several stipulations, the sum was a penalty only. *Horner v. Flintoff*, 9 Mees. & W. 678, 11 L. J. Exch. N. S. 270, distinguished in *Lynde v. Thompson*, 2 Allen, 456.

A contract provided for the sale of stock in trade, to be valued and possession given by a certain date. In the event of either party not complying in every particular, he should forfeit and pay the other £50 and all other expenses. The purchaser failed to take possession. This was held nonliquidated damages. *Betts v. Burch*, 4 Hurlst. & N. 506, 1 Fost. & F. 485. This was held to L.R.A.1915E.

be controlled by 8 & 9 Wm. III. chap. 11, § 8, providing that no more than actual damages should be recoverable at law in actions upon any bond or any penal sum for nonperformance of any covenant or agreement in writing. *Bramwell, B.*, said: "It seems as if, by some singular instinct, the courts have been right, though without referring to the statute by which they ought to have been governed."

In *Wallis v. Smith*, L. R. 21 Ch. Div. 243, *Lindley, J.*, said: "In order to understand *Betts v. Burch*, it is necessary to observe that the larger sum there, the £50 would have been payable not only in the event of the nonpayment of the whole, but on nonpayment of the last pound of the price, and the judgment of Baron Martin proceeds entirely upon this."

A contract to purchase cattle provided that on the failure to accept the cattle, \$3,000 advanced was to be forfeited. This was held to be a penalty, as the intent of the parties was construed to be that they contemplated the forfeiture as applying only to a case of total, and not a partial, failure. *Farrar v. Beeman*, 63 Tex. 175. The stipulated sum was held not applicable as a basis for determining the proportionate damage in case of partial failure. That was to be found from evidence.

And where damages were fixed for the failure to deliver a lot of cattle, and a partial delivery was accepted, it was held that the liquidated damages were converted into a penalty. *Wibaux v. Grinnell Live Stock Co.* 9 Mont. 154, 22 Pac. 492. This was on the ground that otherwise the plaintiff could have waived his right to a full delivery at one time, and on the slightest failure subsequently to deliver the full number could have claimed the whole sum. Such was not the intention.

An agreement for the sale of a play provided for the payment of \$10 for a night performance and \$5 for a matinee, till \$3,000 was paid, secured by a damage clause of \$5,000. It was held that this was a penalty, on the ground that where a party agreed to do several things, one of which was to pay a sum of money, and in case of failure to perform any or either of the stipulations, to pay a larger sum as liquidated damages, the larger sum would be a

tion and adjustment between the parties." No attempt has been made to comply with this requirement.

In *Clydebank Engineering & Shipbuilding Co. v. Yzquierdo y Castaneda* [1905] A. C. 6, Lord Robertson said: Courts should refuse to enforce performance of such an obligation when the payments specified "could not possibly have formed a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation." And this was said in a case where the damages were graduated at so much per week for delay in delivery as shipbuilders,—a class of cases in which liquidated damages are most frequently enforced. They were enforced in that case, but only because of the peculiar

importance of prompt delivery and the amounts involved in the contract. But a consideration of all the circumstances of the present case, we think, will show that \$6,200 could not possibly have formed a genuine pre-estimate of the interest of the appellant in the observance by the appellee of this clause of the contract. The property and rights combined, as described in the option and in the certificate, were in the aggregate valued at \$12,500. The consideration stated for the agreement not to resume business within five years was "the consideration aforesaid;" that is, the \$12,500 already declared to be the consideration for the property and rights purchased, apart from any good will. There was no super-added consideration for the good will for

penalty; and, being a penalty as to one stipulation, would be a penalty as to all. *Bryton v. Marston*, 33 Ill. App. 211.

A contract to furnish all the turpentine made on a plantation, which the purchaser was to take and pay for in carload lots, either party failing to perform to forfeit \$1,000, was held to provide a penalty, and the \$1,000 was not liquidated damages. *Lee v. Overstreet*, 44 Ga. 507, Ga. Code, § 2890, provides that penalties in bonds are not liquidated damages, and even if called such, if it appears unreasonable, and not actually so intended, the law will give only actual damages.

And where a number of things were to be done, and one large sum was to be paid in respect of the nonperformance of various matters of different degrees of importance, it was held to be a penalty. *Charleston Fruit Co. v. Bond*, 26 Fed. 18. This contract was to sell consignments of fruit to defendant only at a certain place, in the penal sum of \$1,000.

And an agreement was held to provide a penalty where the contract was to pay 20 per cent of the invoice price of goods ordered, if the defendant countermanded the order in whole or in part, or delayed the order beyond the season. *Mansur & T. Implement Co. v. Tissier Arms & Hardware Co.* 136 Ala. 597, 33 So. 818. The court said: "That the measure of damages in the event of a breach in either of the particulars named would be a matter of easy ascertainment seems clear, and equally plain that the damages would not be the same for the different breaches."

A contract provided for the delivery for one year of 1,000 barrels of oil per month, payment to be made monthly. \$10,000 was fixed "not as a penalty, but as stipulated damages." This was held to be a penalty. This was on the ground that if all had been delivered but the last lot, it would be unreasonable to impose the whole sum as damages. Besides, the damages could be estimated without difficulty. Judgment was for \$25,308. *Shreve v. Brereton*, 51 Pa. 175.

A contract provided for the delivery of two engines at different times, and the L.R.A.1915E.

parts were to be erected after delivery. The damages stipulated were held to be a penalty. *Iroquois Furnace Co. v. Wilkin Mfg. Co.* 181 Ill. 582, 54 N. E. 987, reversing 77 Ill. App. 59. This was on the ground that where an agreement contained several stipulations of various degrees of importance, as to some of which the damages might be considered liquidated, whilst the damages for the nonperformance of the others were not measurable by any exact pecuniary standard, and a sum of money was made payable in gross for a breach of any of them, such sum would be a penalty only.

The contract price of 100 grain drills was \$1,600. A bond was given by the vendor in the sum of \$1,600 that he would carry out this contract. This was held to be a penalty. *Hamaker v. Schroers*, 49 Mo. 406. This was on the ground that the damages were easily ascertainable, and that if 90 had been delivered it would not be just to give as damages the amount of the bond.

A contract to deliver weekly the edition of a newspaper for one year was held executory and severable. A contract to allow judgment to be entered as liquidated damages for failure to comply was held to provide a penalty, as the damages would vary. *Trenwith v. Meesser*, 12 Phila. 366.

h. To furnish machinery.

A contract to complete an engine for a vessel on or before a certain day under a forfeiture of \$100 per day was held to provide a penalty. *Colwell v. Lawrence*, 38 Barb. 643, 24 How. Pr. 324. The court said: "Here the contract was for doing a piece of work in building a vessel. The defect in completion might have been a hinge or a lock, or some trifling matter which a very little expense would remedy, and consequently a very small amount of damage would be the result."

A contract to equip a flour mill provided that no payment was to be made for the machines furnished, and they were to be retained, unless the grade and capacity for flour was of a certain standard. This was held to be a penalty. *Pennypacker v. Jones*,

the period of five years, as there might have been, and naturally would have been, if the parties designed to fix that large sum finally as the measure of damages for breach of resumption of business during that period. It cannot be contended that \$6,200, so much of the \$12,500, was settled upon as the value of the good will, because this would leave but \$6,300 as the value of the property and rights which they had already valued at \$12,500. If the damages in this case should be held to be liquidated, the effect would have been, in event of a breach occurring the day before the expiration of the five years, to allow a recovery of \$6,200, when no greater amount could have been allowed for a breach occurring the day after the contract went into

operation, and continuing for the whole five years. It is impossible to believe, in the absence of positive evidence, that the parties designed to establish such a situation. The application of such a principle to a breach occurring near the expiration of the five-year period would do gross injustice to one party; while its application to a breach occurring early in the period of restriction might work equal injustice to the other party.

Where the agreement has been partially performed, it is the policy of the courts to regard the damages as a penalty, and allow the plaintiff to recover only such damages as he has actually sustained. 13 Cyc. 104; *Shute v. Taylor*, 5 Met. 61. Here the restriction expired February 15, 1911. Runk-

106 Pa. 237. The court said: "In the contract between these parties nothing is said to the effect either that for any breach the entire machinery may be retained. . . . It is manifest that if the defendants produced all the results agreed upon except a deficiency of one or two barrels in the daily product, the forfeiture of the entire contract price of the machinery would be entirely out of proportion to the damages sustained."

4. Work to be completed.

The defendant engaged that he would clear, burn off, or remove all the timber and rubbish on a piece of land, by a certain day, and fence the land, and on default would pay £100 as liquidated damages. This was held to be a penalty. He was entitled to the benefit of 8 & 9 Wm. III. chap. 11, the effect of which statute was to restrict the party to the recovery of such damages as he had received. *Ainslee v. Chapman*, 5 U. C. Q. B. 313. This was an action of debt, and the complaint did not make certain whether suit was on a penalty or for liquidated damages.

A defendant sued for damages for breaking up a highway gave a cognovit for £200, no execution to issue if the road was restored by April 15, to the satisfaction of Smith, a surveyor. This was held to be a penalty. *Charrington v. Laing*, 6 Bing. 242. *Tindal, Ch. J.*, said: "In the defeasance there are stipulations of various degrees of importance; and as it would be unjust to say that if the road were completed only one day after the term agreed on, the defendant should pay the whole £200, it would be equally so to say he should pay the whole after performance of a portion of the work."

And where damages were secured for failure to plant fruit trees, to plant cover crop, to care for the trees, it was held that these were of different degrees of importance, and that the damage clause was only a penalty. *Sledge v. Arcadia Orchards Co.* 77 Wash. 477, 137 Pac. 1051. The damages, if reasonable for a total failure, would be unreasonable for a partial failure.

L.R.A.1915E.

In *Van Buren v. Digges*, 11 How. 461, 13 L. ed. 771, it was said that "the clause of the contract providing for the forfeiture of 10 per centum on the amount of the contract price, upon a failure to complete the work by a given day, cannot properly be regarded as an agreement or settlement of liquidated damages. The term 'forfeiture' imports a penalty; it has no necessary or natural connection with the measure or degree of injury which may result from a breach of contract, or from an imperfect performance."

Where the contract was to draw all the timber on a certain tract at \$1.50 per 1,000 feet, 50 cents thereof to be retained as fixed and liquidated damages in case the contract was not completed, it was held that this was a penalty, as the damages would be greater under the contract the nearer it would be towards completion. The damages for not drawing 5,000 feet of 500,000 feet would be \$247.50, whereas the damages for failing to draw 495,000 feet would be \$2.50. *Davis v. Freeman*, 10 Mich. 188.

And where a subcontractor for carrying mail gave a bond in the sum of \$1,000, stipulating that it would be liquidated damages in case of failure to perform the mail service, it was held to be a penalty only, as it would lead to an absurdity to forfeit \$1,000 for the loss of \$1 by negligent performance of the duty to carry the mail. *Brevard v. Wimberly*, 89 Mo. App. 331.

A railroad stipulated a sum in damages for failure to perform a contract for work at the intersection of certain streets. It was held that where the agreement was for the performance of several things, and the stipulation was for the payment of a sum in gross in the event of a failure to perform in whole or in part, the sum stated would be a penalty. *Hooper v. Savannah & M. R. Co.* 69 Ala. 529. The court said: "It is scarcely possible that the work to be done on the crossings of each street involved the same labor and expense, or that the injury resulting to the appellants from the obstruction or interruption of each crossing was the same in degree; yet the stipulation is for the payment of the same sum for each

les had a right to prepare for the resumption of business at that date by organizing the corporation, as he did, and erecting and equipping his plant. The first breach of this contract was in July, 1910, in buying and shipping grain when the contract was nine tenths performed; and there was another breach in December, 1910, in commencing the manufacture of flour when but two months of the five years were unexpired. It would be unconscionable to ask and unreasonable to declare these to be liquidated damages in such a case of part performance. This is a very different situation from that existing in *United Surety Co. v. Summers*, 110 Md. 95, 72 Atl. 775, re-

lied on by the appellant, where a reasonable sum, fixed by the contract as damages for each day's delay beyond the prescribed time for completing a building, was held to be liquidated damages, and was not rendered excessive or unreasonable because of protracted delay on the part of the contractor. The appellant might, if he had seen proper, have amended the narr. and claimed for actual damages; but, not having done so, he must abide the result of standing upon the pleadings.

For the reasons stated, the judgment will be affirmed. Judgment affirmed, with costs to the appellee above and below.

day's default in the performance of any part of the work, as for a default in entire performance."

1. Sale of land.

A contract was made to convey lands consisting of several tracts and crops; on failure to convey any part, the damages were stipulated to be \$10,000. Titles were to be secured; some were perfected and some were not. It was held that where articles covenant for the performance of several things, and stipulate for the payment of a sum in gross in the event of a breach, the sum expressed is a penalty; that if the parties would stipulate the damages in such a case, they should express the sum to be paid upon each distinct breach. *Watts v. Sheppard*, 2 Ala. 425.

A vendor gave bond in the sum of \$500 to procure a patent from the government, to cause judgment to be canceled, to produce proof that C. P. and Charles P. Bacon were the same, that D. and David Mulholland were the same. It was held to be a penalty, as only one condition was of any importance to procure a patent. The others were trivial. *Sanders v. McKim*, 138 Iowa, 122, 115 N. W. 917. This was on the ground that if a bond secures the performance of two or more conditions of varying degrees of importance, or if the stipulated sum is excessive, it will be held to be a penalty.

And where the sum claimed as damages was payable whether the title failed, or whether the right of selection failed, it was held a penalty. *Lyman v. Babcock*, 40 Wis. 503. The court said: "It would be as unjust to sanction a recovery of the sum agreed to be paid, alike for any one trivial breach, or for one important breach, or for breach of whole contract, as it would be to sanction such a recovery equally for damages certain and uncertain in their nature."

Parties agreed to exchange lands, to assume encumbrances, to make improvements, to assign insurance, to furnish an abstract, the party in default in any of the conditions to pay \$200 as stipulated damages. On failure of defendant to perform, it was held that the damages were a penalty. *Carter v. Strom*, 41 Minn. 522, 43 N. W. 394. The L.R.A.1915E

court said that "where a contract, specifying one certain sum as liquidated damages, contains various stipulations, to all of which the clause as to damages is clearly applicable, such stipulations either varying greatly in their character and importance, or being of such a nature that the damages from a breach of some of them could be easily and certainly measured, and especially if such damages would obviously be inconsiderable as compared with the sum stated in the agreement as damages for any breach, the latter should be regarded as a penalty."

A contract for conveying several tracts of land to each party, each assuming certain mortgages, provided that each party failing should pay to the other \$5,000 as fixed or liquidated damages. This was held to be a penalty, as some of the covenants were certain and fixed value, and the rule applied, "whenever the sum stipulated is to be paid on the nonpayment of a less sum made payable by the same instrument, it will always be held a penalty." *Hough v. Kugler*, 36 Md. 186.

In *Catton v. Bennett*, 51 L. T. N. S. 70, where £500 were deposited as earnest money by a purchaser, who failed to complete, the contract provided that if either failed, £500 were to be paid to the other party. Kay, J., said: "Does this contract mean that if some minute provision were not carried out, as, for example, if possession were not given on the very day named, £500 damages were to be recovered? or does it mean this: if you repudiate the agreement entirely, or if your conduct by neglect is such that the agreement cannot be carried out at all, then £500 damages are to be paid? In my opinion it does mean that."

And where a contract provided for the payment of \$500 in case the purchaser failed to pay for the property by June 1, it was held that this was a penalty. *Myers v. Ralston*, 57 Wash. 47, 106 Pac. 474. In this case he paid \$1,000 and received a conveyance of a portion of the lots. The court said: "Damages for partial nonperformance must be alleged and proven."

And where all the rights in a land-purchase contract were assigned as security for the performances of a contract to purchase land from the assignee, it was held

NEW JERSEY COURT OF ERRORS
AND APPEALS.CITY OF SUMMIT, Plff. in Err.,
v.MORRIS COUNTY TRACTION COMPANY
et al.

(85 N. J. L. 193, 88 Atl. 1048.)

Damages — Liquidated — penalty — form of stipulation.

1. When damages are to be ascertained for the breach of a single stipulation contained in an agreement, and they are uncertain in amount and not readily susceptible of proof, then if the parties have agreed upon a sum as the measure of compensa-

tion for the breach, and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages; but where the agreement contains disconnected stipulations of various degrees of importance, the sum named therein to be paid in case of a failure of performance will be considered as a penalty, unless the agreement specifies the particular stipulation or stipulations to which the liquidated damages are to be confined.

to be a penalty only. *Miller v. Moulton*, 77 Wash. 325, 137 Pac. 491. This was because the assignors were required to do many things,—care for the premises, maintain the orchard, pay taxes, and pay interest.

A purchaser on a bill of sale brought a suit for refusal to convey. It was held that the sum named in the contract was designed to be a penalty, as it was so called, and the agreement bound the defendant to do more than one act. He was to make a deed to two parcels, and to put on the fence 500 rails. The stipulations varied in importance, and the damages to arise from a breach of some of the stipulations were not uncertain. *Foley v. McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107.

The last case was followed in *Lord v. Gaddis*, 9 Iowa, 265, where the vendor of a hardware store brought suit on a contract to purchase and to give four notes as soon as the cost and transportation could be ascertained, fixing the damages at \$500.

On a dissolution of partnership it was agreed that a suit should be dismissed, the lands and effects to be divided, that one partner should have an option, that a certain parcel should be applied to debts, that notes should be given by the party found indebted, that conveyances should be made, that bond should be given, that debts should be paid. Damages were fixed at \$10,000, to be paid for any failure by either party. It was held to be a penalty. *Carpenter v. Lockhart, Smith (Ind.)* 326. This case follows the rule stated in *Hamilton v. Overton*, 6 Blackf. 208, 38 Am. Dec. 138. The court said: "The various stipulations in the agreement are also of vastly different degrees of importance, and the damages for the violation of some of them would be very trifling."

Where there were three stipulations in a contract,—First, to give security in ten days, Second, to give a mortgage as additional security, Third, to pay for recording, it was held that the provision for damages was a penalty. *Swift v. Crow*, 17 Ga. 609. This was on the ground that where the covenant was to perform several things or pay the sum specified, and the claim could extend to the breach of any stipulation, it should be a penalty.

L.R.A.1915E.

Same — bond given by traction company to comply with terms of franchise.

2. The payment called for by a bond given by a traction company to a city, in accordance with a provision of the ordinance granting it a franchise, for the faithful

And where a purchaser of real estate contracted to pay a certain amount in one year, and to pay a mortgage on the property, and interest thereon, it was held that the sum provided as damages was a penalty. *Smith v. Newell*, 37 Fla. 147, 20 So. 249. This was on the ground that where the stipulations varied in importance, and breaches of them could be valued, and the sum stipulated was excessive for any of these, it would be a penalty.

In a contract to sell real estate the vendor had bound himself in several covenants to keep the premises in repair, to insure, to furnish an abstract, and to put a deed in escrow; and it was provided that either party who shall fail to perform his part should pay the other party \$500 as liquidated damages. This was held to be a penalty. *Boulware v. Crohn*, 122 Mo. App. 571, 99 S. W. 796. This was on the ground that where there are several stipulations, and for the breach of any the same sum is to be paid, it will be treated as a penalty.

A contract to exchange lands provided that either party forfeiting by failure to comply "is to forfeit to the opposite party the sum of \$50 as liquidated damage for the nonperformance." It was held that this was a penalty, as it applied to several different stipulations of very different degrees of importance, and by the terms of the stipulation would be payable equally on the failure to perform the least as well as the most important, or the whole of them together. *Daily v. Litchfield*, 10 Mich. 29.

A contract to sell a drug store provided, on failure of either party to perform the agreements, that \$1,000 is agreed upon as liquidated damages. It was held that the contract did not provide "for any breach of the written contract," but "the agreements," i. e., "all the agreements contained therein." It was held that plaintiffs were not entitled to recover the \$1,000 stipulated. *Cook v. Finch*, 19 Minn. 407, Gil. 350. The case does not show what were the breaches, but says the contract contained some six or eight distinct agreements on the part of the defendants, and three on the part of plaintiffs.

In *Bright v. Rowland*, 3 How. (Miss.) 398, \$5,000 was covenanted to be paid as

performance of the conditions specified in the ordinance, which were many in number and of varying importance, most of them carrying with them a specific penalty for violations thereof by the company, is by way of penalty, and not as liquidated damages; so that, in the absence of proof of special damage sustained by the city, only nominal damages may be recovered in an action thereon.

Judgment — stipulation for penalty — action on.

3. Where a statute provides that in an action on a bond for a penalty judgment shall be entered for the penalty, but that the execution thereon shall issue only for such damages as have been assessed, the

entry of a judgment for 6 cents damages is error.

(Swayze, J., dissents.)

(November 17, 1913.)

ERROR to the Supreme Court to review a judgment allowing nominal damages only in a suit to recover damages for failure of defendant to perform certain duties imposed upon it by different sections of an ordinance granting it leave to construct a trolley line through the streets of the plaintiff city. Affirmed.

The facts are stated in the opinion.

"liquidated damages" for failure of either party to perform a contract of purchase and sale of land, corn, and fodder, the purchaser to pay cash and give notes. This was held to be a penalty. The court said: "Suppose Bright had paid for the land, but had failed to pay for the corn or the fodder; such failure would have been equally a breach of the covenant, and could it be seriously contended that \$5,000 could be recovered for the nonpayment of \$406.25, which was the price of the corn? Such a position cannot be maintained."

A sum named in an agreement containing disconnected stipulations of various degrees of importance was held a penalty. *Whitfield v. Levy*, 35 N. J. L. 149. This was a contract to sell a store, so much to be paid down, so much on delivery of deed. Searches were to be made, and the vendor was not to carry on the business of grocer.

And where there was an agreement to convey, and an agreement to pay, the damages were held to be a penalty, for the measure of damages for unpaid purchase money could be ascertained, and if not liquidated as to that covenant, it would not be liquidated as to any. *State, Lansing, Prosecutor, v. Dodd*, 45 N. J. L. 525. The courts prefer to hold damages to be a penalty, and intention was looked at from the entire contract.

An agreement to pay \$1,000 as actual and assessed damages in the event of either party failing to fulfil any part of a contract to sell and to buy a farm and personal property was held to be a penalty. *Staples v. Parker*, 41 Barb. 648. This was on the ground that the sum named could not be considered as a penal sum as to one part of the agreement, without construing it to be such as to the whole. Suppose the plaintiff had failed to deliver the six milk pails or the cheese press or the three pitchforks, "Was it the intent of the parties that he should in that event pay the defendant \$1,000? I think not."

A contract to sell real estate and to buy, to pay, and to assume a mortgage, provided a forfeiture of \$5,000 as liquidated damages for any violation of the agreement or any part thereof. This was held to be a penalty. *Jackson v. Baker*, 2 Edw. Ch. 471. This was on the ground that the contract provided for a number of things on both sides, L.R.A.1915E.

some of greater and others of less importance. There might be a trifling omission, producing no actual injury. The parties also spoke of the provision as a penalty.

On a contract of sale, the vendor was to execute a deed on receiving \$1,350 and a mortgage for \$4,000. \$350 of this was for rents of the previous year. The parties bound themselves in the sum of \$1,000 as liquidated damages to be paid by the party failing. It was held that if the amount thus fixed was not intended to be full compensation for the rent, it would have to be a mere penalty for the nonperformance of any other part of the agreement. *Shiell v. McNitt*, 9 Paige, 101.

Plaintiff agreed to convey land, and the defendant agreed to make certain payments and give a mortgage. The contract provided that each party would pay to the other \$500 as liquidated damages in case one should fail to perform. It was held that this was a penalty, as it would be a penalty to all the stipulations if it were a penalty to any. *Lampman v. Cochran*, 16 N. Y. 275. In *Clement v. Cash*, 21 N. Y. 253, where the vendor defaulted, this case was distinguished, saying: "The case but reaffirmed the doctrine in *Astley v. Weldon*, 2 Bos. & P. 346, 5 Revised Rep. 618, that where a larger sum is stipulated as damages for the nonpayment of a smaller one, the larger sum will be held to be a penalty."

An agreement was to purchase a farm, to assume a mortgage on the same, and to save the vendors harmless from said debt, to convey a tract, to leave the deed in escrow, to submit to arbitration and pay the difference in value in exchange, to forfeit \$1,500 in case the purchaser failed, and the vendor to forfeit his deed and property in case he failed to comply with the award. The sum was held to be a penalty. *Cheddick v. Marsh*, 21 N. J. L. 463. This was on the ground that where articles of agreement contain several distinct and independent covenants, upon which there may be several breaches, and one sum is stated at the close to be paid upon breach of performance, that sum will be considered a penalty.

k. Employment.

An agreement hiring an actress provided that either of the parties neglecting to per-

Mr. Corra N. Williams, for plaintiff in error:

The failure to complete the road and to run the cars thereon as provided in the ordinance constitutes a breach of the bond.

Carlstadt v. City Trust & Surety Co. 69 N. J. L. 44, 54 Atl. 815.

Where the damages in case of breach of bond are necessarily speculative, uncertain, and incapable of definite ascertainment, the sum stipulated must be regarded as liquidated damages, and can be recovered as such without proof of actual damage, unless the language of the contract shows, or the circumstances under which it was

made indicate, a contrary intention of the parties.

Kemble v. Farren, 6 Bing. 141, 3 Moore & P. 425, 3 Car. & P. 623, 7 L. J. C. P. 258, 31 Revised Rep. 366; Hodges v. King, 7 Met. 583; Clark v. Barnard, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878; Salem v. Anson, 40 Or. 330, 56 L.R.A. 169, 91 Am. St. Rep. 485, 67 Pac. 190; Indianola v. Gulf, W. T. & P. R. Co. 56 Tex. 594; Monmouth Park Asso. v. Wallis Iron Works, 55 N. J. L. 132, 19 L.R.A. 456, 39 Am. St. Rep. 626, 26 Atl. 140; Robinson v. Centenary Fund, 68 N. J. L. 723, 54 Atl. 416; Sedgw. Elements of Damages, 2d ed. 248; 19 Am.

form the agreement should pay to the other £200. The plaintiff furnished costumes, but the defendant refused to perform. This was held to be a penalty. Astley v. Weldon, 2 Bos. & P. 346. The defendant was to pay a small sum, according to the rules of the theater, for every absence. Chambre, J., said: "The jurisdiction of courts of equity in relieving on penalties is of very high antiquity. The legislature has now adopted this practice, and affords the same benefits to defendants in actions at law."

In Cotheal v. Talmage, 9 N. Y. 551, 61 Am. Dec. 716, 12 Mor. Min. Rep. 299, the cases of Astley v. Weldon, supra, and Kemble v. Farren, 6 Bing. 141, 3 Moore & P. 425, 3 Car. & P. 623, 7 L. J. C. P. 258, 31 Revised Rep. 366, were distinguished, saying: "The principle to be deduced from them is, that where a party agrees to do several things, one of which is to pay a sum of money, and in case of a failure to perform any or either of the stipulations, agrees to pay a larger sum as liquidated damages, the larger sum is to be regarded in the nature of a penalty; and being a penalty in regard to one of the stipulations to be performed, is a penalty as to all."

In Williams v. Green, 14 Ark. 315, the case of Astley v. Weldon, supra, was distinguished, saying it held "that 'where articles contain covenants for the performance of several things, and then one large sum is stated at the end, to be paid upon breach of performance, that must be considered as a penalty,' though often quoted, furnishes a rule of very limited application to such contracts. It is demonstrated by the subsequent cases in England that it is no objection to an agreement for stipulated damages, where there are several acts to be done or abstained from, because they appear to vary in importance."

An agreement for services as an actor provided that for neglect or refusal to fulfil the agreement or any part thereof, or any stipulation, such party should pay to the other party £1,000, to be liquidated damages, and not a penalty. This was held to be a penalty where the defendant refused to act. Kemble v. Farren, supra. This case follows Astley v. Weldon, supra.

The cases were distinguished in Heard v. Bowers, 23 Pick. 455. L.R.A.1915E.

In Atkyns v. Kinnier, 4 Exch. 776, the case of Kemble v. Farren, supra, was distinguished, Alderson, B., saying "that it was improbable and absurd to suppose that the parties intended to apply a penalty of a large amount to a particular stipulation, which merely required the payment of a small weekly sum."

In Beckham v. Drake, 8 Mees. & W. 846, the contract was to pay £500 for breach of stipulation to employ and pay a foreman for seven years. It was agreed that the case could not be distinguished from Kemble v. Farren, supra, as there were many stipulations on each side, of different degrees of importance. This case held that the right of action did not pass to the assignee in bankruptcy. This was reversed in 11 Mees. & W. 315, 12 L. J. Exch. N. S. 486, 7 Jur. 204, which case was affirmed in 2 H. L. Cas. 579, 13 Jur. 921.

In Brewster v. Edgerly, 13 N. H. 275, it was said that the rule laid down in Kemble v. Farren, supra, was: "If a party agree to pay a sum of money, and agree also to do certain specified things, the damages resulting from a nonperformance of which are uncertain, and promise to pay a larger sum of money, as liquidated damages, and not as a penalty if he should fail to fulfil any part of his agreement, although it appear that the parties actually intended that the sum should be paid as liquidated damages upon any breach of the contract, still, even in an action for the breach of one of the specific clauses sounding in uncertain damages, the sum must be regarded as a penalty because in the contract there is also a stipulation for the payment of a sum of money smaller than the liquidated damages, even if that sum be payable by the plaintiff, and not by the defendant." This rule was not approved, because inequitable where an agreement was free from fraud and illegality, and the substitution of an agreement made by the court tended to render private contracts uncertain.

A contract with an opera singer provided for five months' services, for payment of her expenses and that of her mother and attendant, for furnishing her costumes. For the due performance of everything covenanted, each agreed to pay the other £3,000 as liquidated damages. In a suit by the

& Eng. Enc. Law, 2d ed. 402; Clark, Contr. 600; Com. v. Ginn, 111 Ky. 110, 63 S. W. 467; Malone v. Philadelphia, 147 Pa. 416, 23 Atl. 628; Emery v. Boyle, 200 Pa. 249, 49 Atl. 779.

Mr. Elmer King, with Messrs. King & Vogt. for defendants in error:

Plaintiff is only entitled to recover nominal damages.

Cheddick v. Marsh, 21 N. J. L. 463; Whitfield v. Levy, 35 N. J. L. 149; Hoagland v. Segur, 38 N. J. L. 230; Monmouth Park Asso. v. Wallis Iron Works, 55 N. J. L. 132, 19 L.R.A. 459, 39 Am. St. Rep. 626, 26 Atl. 140; Van Buskirk v. Board of Education, 78 N. J. L. 650, 75 Atl. 909.

employer for damages it was held that the sum specified in the bond was a penalty, as the stipulations differ in importance, and the damages apply to each and all. Beale v. Hayes, 5 Sandf. 640.

A contract to give his entire time as salesman, to perform his work, to engage in no other business for himself or for any other person, providing, for a violation of this agreement, \$1,500 as stipulated damages, was held to mean, the violation of the whole, and not the violation of one stipulation. Brownold v. Rodbell, 130 App. Div. 371, 114 N. Y. Supp. 846. The court said: "There is no provision that if the plaintiff should violate any of its provisions, then the plaintiff would be liable for the stipulated damages, but that if the plaintiff should 'violate this agreement,' then the stipulated damages should be payable." No set-off as to damages of any kind were allowed.

A contract binding the party in the sum of \$1,000 to go to California to dig gold, to make his own clothing and shoes, to furnish his own gun, two knives, belt, tomahawk, and weapons, to do certain work, to divide gold, was held to provide a penalty, as for failure to do some of the acts required damages could be easily ascertained, and for some damages would be merely nominal. Basye v. Ambrose, 28 Mo. 39.

In Long v. Towel, 42 Mo. 545, 97 Am. Dec. 355, the case of Basye v. Ambrose, supra, was approved and followed; but it was held that there was no consideration for the penal bond.

Where a contract to make beer provided for several things on both sides, some of which were of a character where a breach could be easily ascertained, the sum specified in the contract was held to be a penalty. Hammer v. Breidenbach, 31 Mo. 49. The contract said: "Whosoever of the two contracting parties breaks this contract without sufficient cause, and which is contained in said contract, has to pay to the other party the sum of \$500 in cash." The court said it in terms declares the \$500 to be a penalty.

A contract to employ a superintendent of markets provided that, in default of any of the covenants, the sum of \$200 was to L.R.A.1915E.

Gammere, Ch. J., delivered the opinion of the court:

The city of Summit in 1907, on the application of the defendant company, passed an ordinance granting leave to it to construct and operate a trolley line through the city streets, upon certain conditions specified in the ordinance and agreed to by the company. These conditions were many in number and of varying importance. Some of them related to the construction of the road, others to the operation thereof, and still others to the payment to the city of compensation for the privilege of using the city streets. Most of those relating to construction and operation carried with them

be paid by the failing party as liquidated damages. It was held to be a penalty. Wilhelm v. Eaves, 21 Or. 194, 14 L.R.A. 297, 27 Pac. 1053. The court said: "The contract, when analyzed, contains some sixteen different stipulations of varying degrees of importance, the damages for a breach of some of which would be easily ascertainable."

A note was given by an apprentice, providing payment of \$300 if a breach of the contract occurred within three years. He left within three months. This was held to be a penalty. Berry v. Wisdom, 3 Ohio St. 241. The court said: "There are several covenants in the agreement, the performance of some of which must be of less importance to the plaintiff than others, and the damages for a breach of which could be easily ascertained; such, for instance, as the nonperformance of labor for a few days." They never could have intended such a thing.

In Grasselli v. Lowden, 11 Ohio St. 349, the case of Berry v. Wisdom, supra, was distinguished, the court saying: "The agreement in that case was 'for the performance of several things, and a gross sum (\$200) was made payable upon a breach of the contract, and some of the things to be performed are of less importance than others, and the damages sustained could be easily ascertained' . . . while in the case at bar the stipulated damages are made payable upon the breach of one particular covenant only, upon which the damages are entirely uncertain and indeterminate."

l. Award.

An agreement to arbitrate provided a forfeiture of \$1,500 as liquidated damages. This was held to be a penalty. Wallis v. Carpenter, 13 Allen, 19. The court said: "It would be extremely harsh to regard it as liquidated damages, because there are a variety of things to be done under the award, especially by the defendants."

Parties agreed to arbitrate a boundary line, and that one who should fail to keep the award should pay to the other \$1,000 as liquidated damages. It was held, where one damaged the other to the extent of \$5 by

a specific penalty for violations thereof by the company. The ordinance also contained a provision that the company should, at the time of its acceptance thereof, give a bond to the city, with sufficient surety, in the sum of \$5,000, with a condition that the company and its successors should fully and faithfully keep, observe, and perform all the provisions of the ordinance on its part to be kept, observed, and performed. A bond was given in accordance with this provision, and the present suit is brought to recover the damages alleged to have been sustained by the city by the failure of the company to perform diverse duties imposed upon it by different sections of the ordinance. The

breaches alleged having been proved at the trial, the court found for the plaintiff, but, no special damage having been proved to have been sustained by the city, only nominal damages were permitted to be recovered by it; the court holding that the payment called for by the bond was by way of penalty, and not as liquidated damages. The plaintiff now seeks to review the ruling of the trial court upon this point.

We think the view of the trial court that the bond in suit provided a penalty for a breach of any of the conditions thereof, and not for damages liquidated by agreement of the parties for such breach, is the correct one. The rule to be gathered from our de-

placing a fence over the line, that the sum agreed on was a penalty. *Henderson v. Canaler*, 65 N. C. 542.

II. Liquidated damages.

a. Not to resume business.

When the damages for a breach of all the stipulations are uncertain in their nature and cannot be ascertained, the sum provided for in the contract is held to be liquidated damages. So where the stipulation is construed to be for a single thing, and it will be difficult to ascertain the damages, it will be held liquidated.

A sale contract of horses and wagons and good will of an express business provided for refraining from that business there as long as the purchaser continued in business there, and provided payment of \$900 in case of violation. This was held liquidated damages, as the stipulation was for a single thing, to abstain from interference, and it would be difficult to estimate the damages. *Cushing v. Drew*, 97 Mass. 445.

In *Green v. Price*, 16 Mees. & W. 346, 16 L. J. Exch. N. S. 108, 9 Jur. 880, 6 Eng. Rul. Cas. 406, affirming 13 Mees. & W. 695, 14 L. J. Exch. N. S. 105, 9 Jur. 857, it was held that a covenant to pay £5,000 in case the vendor of a hairdressing establishment resumed business at London or Westminster, or within 600 miles from there, was void as to the last restriction, but the covenant was separable, and applied to London and Westminster, and was liquidated damages.

A contract was made to enter into partnership as physicians for three years; that after that time, one of the parties was to reside more than 2½ miles from the office, and refrain from interfering with the other's practice, and if he infringed in any respect was to pay £1,000 as liquidated damages. It was held liquidated damages. *Atkins v. Kinnier*, 4 Exch. 776. *Park, B.*, said: "In this case there is no pecuniary stipulation for which a sum certain of less amount than £1,000 is to be paid, but all the stipulations are of uncertain value."

On dissolution of partnership it was agreed that one of the parties would not carry on the business of an attorney or L.R.A.1915E.

solicitor within 50 miles of that place, nor interfere with, solicit, or influence the clients of the late firm; that if he infringed the covenant in any respect he would pay £1,000 as liquidated damages, and not as a penalty. This was held liquidated damages. *Galsworthy v. Strutt*, 1 Exch. 659. *Parke, B.*, said: "The defendant would not be bound to pay more than £1,000; that is, in case he should violate either of those two or three matters mentioned in the covenant. These matters are each of them incapable of exact estimation."

An agreement taking an assistant surgeon, who promised not to practise at a certain place under a penalty of £500, was held to provide liquidated damages. *Sainter v. Ferguson*, 7 C. B. 716. *Wielde, Ch. J.*, said: "This agreement does not prohibit the defendant's doing several distinct and independent acts, each of which might be incapable of exact estimation; nor does it involve any of the circumstances that have, in any of the cases, induced the court to hold the sum to be a penalty only."

A covenant to abstain from practising as a physician was broken. It was held that the damages were liquidated. *Reynolds v. Bridge*, 6 El. & Bl. 528. *Erle, J.*, said: "From the nature of the contract, the damages for the breach of it are clearly undefined; it is impossible, on ascertaining the fact that any one or more breaches have been committed, to say with certainty what damages have resulted."

A bond for £300 was given not to practise medicine or surgery, or open another pharmacy within a mile of the one sold. It was held to be liquidated damages. *Mercer v. Irving*, El. Bl. & El. 563. *Coleridge, J.*, said: "Reliance seems to be placed on the circumstances that some of the matters provided for are slight, and that some breaches of the agreement might even be made unintentionally. There is, no doubt, weight in that consideration; but when we look on the other side, the result seems to be the opposite way. The stipulations are provisions for uninterrupted enjoyment throughout a small area; and they point out how much is to be considered an interruption. It is idle to say that, if the defendant attends a single patient within

cided cases is this: That when damages are to be ascertained for the breach of a single stipulation contained in an agreement, and they are uncertain in amount and not readily susceptible of proof under the rules of evidence, then if the parties have agreed upon a sum as the measure of compensation for the breach, and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages (*Monmouth Park Asso. v. Wallis Iron Works*, 55 N. J. L. 132, 19 L.R.A. 456, 39 Am. St. Rep. 626, 26 Atl. 140; *Robinson v. Centenary Fund*, 68 N. J. L. 723, 54 Atl. 416); but where the agreement contains disconnected stipulations of various degrees of importance, the sum named therein to be paid in case of a failure of performance will

be considered as a penalty, unless the agreement specifies the particular stipulation or stipulations to which the liquidated damages are to be confined. *Whitfield v. Levy*, 35 N. J. L. 149; *Hoagland v. Segur*, 38 N. J. L. 230. The determination of the trial court was in consonance with this rule of law. It was also in harmony, we think, with the intention of the parties as exhibited by the provision of the ordinance which required the bond to be given; for apparently in every case in which the municipal authorities considered that the breach by the company of any stipulation contained in it should carry an obligation on the part of the company to pay to the city a specific sum, it is so declared, and the sum fixed, by the ordinance itself.

the area, the loss of the emolument in the particular case measures the damage resulting from the breach."

In *Merica v. Burget*, 36 Ind. App. 453, 75 N. E. 1083, which held that a bond to quit the banking business in that town, and not to resume it, was for liquidated damages, it was said: "We are not unmindful of the established principle that a contract containing various stipulations, for the breach of some of which the damages would be uncertain, and as to others certain and easily shown by the evidence, then the sum mentioned in an obligation to secure the performance of the contract is regarded as a penalty, and not as liquidated damages."

b. Sale.

A contract provided \$200 liquidated damages for failure to deliver cattle purchased. The defendants refused to deliver any unless the plaintiff would take all, some of which did not comply with the contract. It was held that, as none were delivered, the \$200 damages were recoverable. *Frost v. Foote*, — Tex. Civ. App. —, 44 S. W. 1071.

In *Little v. Banks*, 85 N. Y. 258, where the contract with the state provided that, for failure to keep on hand for sale certain reports, Banks should forfeit and pay \$100 as liquidated damages suffered by the persons aggrieved, it was held that this was not a penalty, as "the breach provided for was a single one,—a failure to keep on sale, furnish, and deliver the volumes named at a price fixed."

A contract by a partner to sell to his co-partner his interest in the property, consisting of a store, furniture, and other property, most at cost and some at appraisal, provided that the party who should break the agreement should forfeit to the other \$500. It was held to be liquidated damages. The property was worth \$25,000. It was the purchaser's proposition. It included all which the purchaser was to pay for a total failure to perform. It would be difficult to ascertain the real damage. *Maxwell v. Allen*, 78 Me. 33, 57 Am. Rep. 783, 2 Atl. 386.

L.R.A.1915E.

In *Lynde v. Thompson*, 2 Allen, 456, the contract provided that in case either party failed to comply with an agreement of sale and purchase of stock of tinware and trade, he should forfeit to the other party \$300. The purchaser failed to perform. It was held liquidated damages. The court said: "It was not a contract for the performance of divers acts of different degrees of importance, each of which could be easily estimated and measured in money; but it was a contract for the doing of a single specific act, and the sum named was in respect of a breach of this one stipulation only."

A department store called "Famous" sold most of its lines of goods to a rival store, retaining certain lines, the purchaser contracting that it would not use the words "Famous" on advertising any goods not so purchased. It was held that a bond of \$5,000 as liquidated damages was such, and not a penalty. *May v. Crawford*, 142 Mo. 390, 44 S. W. 260. The court said: "The fact that some of the particulars of the agreement are less weighty than others is an important consideration in reaching the true intent of the parties . . . but it is not an absolute guide."

The contract for the conditional sale of a piano provided that on failure to make any payment or attempt to sell or remove the instrument the vendor should have the right of possession and should retain the payments made as liquidated damages. This was held not to be a penalty. *Eilers Music House v. Oriental Co.* 69 Wash. 618, 125 Pac. 1023. This was on the ground that each stipulation was of equal importance, and the longer the delay the more the instrument would be injured; so the rule as to partial damages does not apply.

c. Vendor and purchaser.

A large sum was stipulated to be paid in a variety of events, where a purchaser of property was to open up a brickyard and lay out sites and construct buildings, and the vendor was to share in the profits. The purchaser defaulted. The stipulated sum was held liquidated damages. *Wallis v.*

We deem it proper to say that we have not reached the conclusion expressed without a consideration of the cases of *Clark v. Barnard*, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878; *Salem v. Anson*, 40 Or. 339, 56 L.R.A. 169, 91 Am. St. Rep. 485, 67 Pac. 190, and *Indianola v. Gulf, W. T. & P. R. Co.* 56 Tex. 594, relied upon by counsel for plaintiff in error in support of his contention. They are each of them cases where the ascertainment of damages for the breach of a single stipulation contained in the agreement was involved, and so come within the first division of the rule which we have said prevails in this state, and are in accord with it. The opinions themselves, as we read them, do not, we think, militate

against the conclusion which we have reached.

The judgment under review will be affirmed.

We are not to be understood, however, by our affirmation of this judgment, as approving the form in which it is entered. The *consideratum est* is that the plaintiff do recover against the defendants "its said damages by the court, in form aforesaid, found to be the sum of 6 cents, and by the court now here adjudged to the said plaintiff," etc. The bond in suit, being one for the payment of money, the 5th section of our act concerning obligations (3 Comp. Stat. 1910, p. 3778) required that the judgment should be entered for the penalty of the bond; the

Smith, L. R. 21 Ch. Div. 243. *Cotton, L. J.*, said: "I do not see on what possible ground it should be held that if there are a number of covenants of equal importance, or, at any rate, of considerable importance, contained in the contract, and none of those are of such a nature that the damages arising from a breach can be accurately ascertained, the parties may not reasonably fix beforehand an ascertained sum for the purpose of saying what shall be the damages." *Lindley, L. J.*, said: "But when I come to look at the cases I cannot find a single case in which the larger sum has been treated as penalty where there has been no smaller sum ascertainable as the amount of damages."

In *Willson v. Love* [1896] 1 Q. B. 626, the case of *Wallis v. Smith*, supra, was distinguished, the court saying: "But the question which in effect was being dealt with was as to the forfeiture of a deposit." But in the *Wallis Case* £500 were to be paid down and £4,500 were to be paid into the bank by defendant, and £5,000 were to be the damages in case either party defaulted. The defendant failed to improve the property or to build, and paid nothing, and the vendor brought suit for £5,000 liquidated damages. It could not be a forfeit, as it never had been paid.

A contract to exchange land for grocery stock and mules provided a forfeiture of \$500 for noncompliance by either party. In a suit by the landowner it was held that the sum named was stipulated damages, as the plaintiff could not be expected to show by evidence what profits he might have made with the goods or mules if the trade had been completed. *Williams v. Green*, 14 Ark. 315. The court said: "That wherever the act to be done or abstained from is other than the payment of money, the circumstance that the actual damages may be more or less easily susceptible of ascertainment ought not to influence the construction of an agreement to be one way or the other,—a stipulation for damages or merely by way of penalty."

A contract was "to forfeit the sum of \$500 in case either party fails to comply." L.R.A.1915E.

On the sale of a hotel \$3,000 was to be paid on the signing of the deed. The price to be paid was \$14,000, but time was not stated for the balance. The purchaser totally defaulted. The \$500 was held liquidated damages, as it was inadequate to be purchase money, and the damages were indefinite. *Streeper v. Williams*, 48 Pa. 450.

Plaintiff agreed to convey land, with a store thereon, and to sell the goods in the store. The defendant agreed to pay \$950, also the value of the goods, to be estimated; either party failing to fulfil the "covenants" and agreements to pay \$1,000 as liquidated damages. This was held not to be a penalty. *Mundy v. Culver*, 18 Barb. 336. The damages would be uncertain. "The sum agreed upon as damages was designed as damages for a total nonperformance."

Where the purchasers holding an option covenanted that if they declined to make the purchase they would pay \$300, and to the true performance of each and every covenant each of the parties bound himself to the other in the sum of \$1,000, it was held that the measure of damages was \$300 where the purchasers breached the covenants. *Heard v. Bowers*, 23 Pick. 455. It was held that the covenants by the defendants were not of various degrees of importance.

A contract required plaintiff to pay \$4,000, to assign two mortgages, one for \$3,737, to convey a house and lot, and to deliver two notes for \$500. It provided that in case either of the parties failed to perform his part, he should pay the other \$2,000 as liquidated damages. It was held not to be a penalty. *Clement v. Cash*, 21 N. Y. 253. The court said: "The contract in question in legal effect provided but for the performance of a single act on each side, and at the same period of time, viz., the execution and delivery of a deed of the land by the defendant and the payment therefor by the plaintiff. . . . If the defendant failed to convey or the plaintiff to make payment in the way covenanted, there was a total nonperformance."

The plaintiff agreed to make two conveyances, and transfer hay, grain, and trees.

execution thereon issuing only for such damages as were assessed. The wisdom of the statutory provision referred to is peculiarly apparent in a case like the present, where the bond is intended as an indemnity against breaches of various and unrelated conditions; for the judgment is not only in satisfaction of the damages resulting to the plaintiff from the breach sued upon, but stands as security for future breaches. *Roll v. Maxwell*, 5 N. J. L. 493.

But as the form of the judgment is not attacked by any assignment of error, this defect cannot be made a ground of reversal.

The defendant agreed to pay money and give a bond. Each party agreed that on failure on his part he would pay the other \$500 as liquidated damages. The defendant defaulted and the damages were held liquidated. *Esmond v. Van Benschoten*, 12 Barb. 366. Hand, J., dissented on the ground that where the instrument contained covenants for the performance of several things of various degrees of importance, and a large sum is stated at the end to be paid for a breach, it will be a penalty. The prevailing opinion was on the ground that the damages were called liquidated, and the covenant was not to secure a payment of a less sum, consequently there was no apparent disproportion. "The sum became due only on a total failure to perform."

In *Morse v. Rathburn*, 42 Mo. 594, 97 Am. Dec. 359, land was sold and deed was tendered, but the purchaser failed to comply with the contract, which bound the party failing to forfeit \$2,000. This was held to be liquidated damages. The court said: "The general rule may be formally stated that when the agreement contains several distinct covenants, on which there may be divers breaches, some of an uncertain nature and others certain, with one entire sum to be paid on breach of performance, then the contract will be treated as one for a penalty."

d. Landlord and tenant.

A covenant by a lessee that in case he did not farm the land as specified, or did farm it in another way, he would pay double rent, was held to provide liquidated damages. *Smith v. Ryan*, 9 Ir. L. Rep. 235; *Wright v. Tracey*, Ir. Rep. 7 C. L. 134; *Rolfe v. Peterson*, 2 Bro. P. C. 436; *Farant v. Olmius*, 3 Barn. & Ald. 692; *French v. Macale*, 2 Drury & War. 269; *Dickson v. Lough*, Ir. L. R. 18 C. L. 518. In this case it was claimed that it was the same as those cases where the damages were payable on breach of any of several distinct matters of varying importance, but it was held otherwise. *Huband v. Grattan*, Alcock & N. 389.

Lessees agreed to restore land on which L.R.A.1915E.

Swayze, J., dissenting:

On this suit upon a bond in the penal sum of \$5,000, breaches of condition were proved and a judgment entered for 6 cents. The effect is that the bond is merged in the judgment, and 6 cents is all the city can ever recover. The judgment should have been entered for the penalty and execution issued for the proper amount from time to time. This, however, is a mere technical or perhaps clerical error. My real objection to the result is that the opinion of the court precludes any substantial recovery, not only on this bond, but on any bond that may be taken by a municipality to secure the performance of public obligations; for it can

they had dumped slag to its proper condition, or to pay the lessor £100 per acre. It was held to be liquidated damages. *Elphinstone v. Monkland Iron & Coal Co.* L. R. 11 App. Cas. 332. *Watson, L. J.*, said: "When a single lump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal, and subject to modification. The payments stipulated in article 12 are not of that character; they are made proportionate to the extent to which the respondent company may fail to implement their obligations, and they are to bear interest from the date of the failure."

The defendant agreed to take an assignment of a lease of an inn, and pay £2,300 and also the amount of goods and effects appraised; porter, 12 butts, ales, 30 bbls., wines, 150 l., depositing £50. Either party not fulfilling all and every part to pay £500 as liquidated damages. The purchaser defaulted. The damages were held liquidated. *Reilly v. Jones*, 1 Bing. 302, 8 J. B. Moore, 244, 1 L. J. C. P. 105. This case was distinguished in *Boys v. Ancel*, 5 Bing. N. C. 390, 7 Scott, 364, 2 Arnold, 9, 8 L. J. C. P. N. S. 267, 3 Jur. 316, as in the *Reilly Case*, in addition to the contract to assign, there was a stipulation that the expense of the instrument should be paid by both parties in equal moieties; the agreement did not contain the word "penalty." *Greenleaf's Overruled Cases* says that the case of *Reilly v. Jones*, supra, was overruled in *Davies v. Penton*, 6 Barn. & C. 216, 9 Dowl. & R. 369, 5 L. J. K. B. 112, 30 Revised Rep. 298; *Kemble v. Farren*, 6 Bing. 141, 3 Moore & P. 425, 3 Car. & P. 623, 7 L. J. C. P. 258, 31 Revised Rep. 366. The opinion in neither case refers to it.

In *Bright v. Rowland*, 3 How. (Miss.) 398, referring to *Reilly v. Jones*, supra, it was said "It was decided, however, some time anterior to the case of *Kemble v. Farren*, supra, and as it was cited on the argument of the latter case, it may be considered as virtually, although it was not expressly, overruled."

rarely happen that the municipality as such is damaged by failure to perform. The damage is to the public, not to the municipality. The reason for the rule on which the opinion rests is the presumption that what the parties meant to secure was the actual damages rather than the penalty, and this reason must fail where there can be no actual damage to the obligee. In this respect the case is like *Clark v. Barnard*, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878. It differs, however, since this bond is conditioned for the performance of all the provisions of the ordinance. Among those provisions are provisions for the payment of specific fixed penalties for the violations of

certain covenants to be performed by the traction company. Those covenants have been violated, and I think the penalties are due. It seems to me a great stretch of the law to hold that specific penalties fixed by a municipal ordinance are in fact meant only to secure actual damages. The penalties are actual damages, and the loss of the penalties is the only damage the city as a municipality can suffer.

For affirmance: The Chancellor, Chief Justice, Garrison, Trenchard, Parker, Voorhees, Kallisch, Vredenburg, Congdon, White, Terhune, Heppenheimer, J.J.

For reversal: Swayze, Minturn, J.J.

e. Employment.

A party employed for four years to faithfully perform his duties as a workman and keep accounts gave bond of \$3,000 as liquidated damages for faithful performance and to prevent disclosing the secrets of a pen-maker. It was held to be liquidated damages, as the damages to result from a breach of any of the stipulations were uncertain and conjectural. *Bagley v. Peddie*, 16 N. Y. 469, 69 Am. Dec. 713, reversing 5 Sandf. 192.

The plaintiff agreed with a company, in consideration of \$100, paid to him by each, to transport them to San Francisco, with subsistence for one year, and furnish mining tools. They covenanted to mine metals, to give plaintiff a certain proportion, to give bond in the sum of \$500 as liquidated damages. One having refused to comply by leaving the miners' district, it was held that \$500 was liquidated damages. *Cotheal v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716, 12 Mor. Min. Rep. 299. The court said: "The only plausible ground for withholding the doctrine in any case is that the party might be made responsible for the whole amount of damages for the breach of an unimportant part of his contract, and so be made to pay a sum by way of damages grossly disproportionate to the injury sustained by the other party. Without undertaking to deny that this rule may be properly applied to some cases, I cannot think it ought to be applied to the present."

In *Colwell v. Lawrence*, 38 Barb. 643, the case of *Cotheal v. Talmage*, supra, was distinguished, as there "the contract was of that particular character which could not be separated as to performance so as to assess damages for a breach of one part, and not the other."

In *Brownold v. Rodbell*, 130 App. Div. 371, 114 N. Y. Supp. 846, the case of *Cotheal v. Talmage*, supra, was distinguished, as there the breach was of the entire contract.

In *Bilz v. Powell*, 50 Colo. 482, 38 L.R.A. (N.S.) 847, 117 Pac. 344, which held that a contract for employment and to do certain specific acts, such as to remain sober and make sales of automobiles, provided for liquidated damages, it was said: "Where L.R.A.1915E.

the agreement imposes several distinct duties or obligations of different degrees of importance, and the damages resulting from the violation of some, although not all, are readily ascertainable, the sum to be paid by the party in default is a penalty. But where the covenant is for the purpose of a single act, or several acts, or of several things which are but minor parts of a single complex act, and the damage resulting from the violation of each is wholly uncertain, or incapable of being readily ascertained, and especially where the contract provides that the sum named shall be paid as liquidated damages . . . the sum so fixed in the contract is liquidated damages." In this case the court said, referring to the contract: "If it imposes several distinct duties or obligations of different degrees of importance, which we do not wish to be understood as conceding, nevertheless the damages resulting from the violation of each is wholly uncertain, and incapable of being readily ascertained."

In *Werner v. Finley*, 144 Mo. App. 554, 129 S. W. 73, it was contended that the contract of employment involved several covenants, and that the covenant for liquidated damages, being applicable to all these covenants alike, such a contract would not be enforced by the court. The contract provided for the employee paying \$10 per week if he terminated the contract before the term expired. It was held liquidated damages.

A contract provided a "penalty" of \$500 if the actor employed performed for any other theater during the life of the contract. This was held to be liquidated damages. *Pastor v. Solomon*, 26 Misc. 125, 55 N. Y. Supp. 956. The court said: "It is true that there are several conditions which the defendants have assumed to perform of varying importance. . . . An attentive consideration of the contract, however, shows that many of the alleged conditions are rather in the nature of limitations upon the liability of the plaintiff, and so far as the others are concerned, I cannot say . . . the amount in question transcends the permissible limit of liquidated damages."

f. Work and labor.

A contract by which one agreed to put

teams on plaintiff's land, to carry on a lumbering operation thereon, and pay an agreed amount for stumpage, binding himself in the full and liquidated sum of \$1,000 over and above the actual damage, was held to provide for liquidated damages. *Dwinel v. Brown*, 54 Me. 472. This was on the ground that the contract consisted of several stipulations, the damages for the breach of which independently of the sum named in the instrument were uncertain and could not well be ascertained.

A contract to build a race track grand stand for \$133,000 provided for the payment by the contractor of \$100 per day for each and every day in default as damages, and not as penalty, to be deducted from any amount due. This was held liquidated damages, as it was for the breach of a single stipulation, uncertain in amount, not readily susceptible of proof, and not disproportionate to the loss. *Monmouth Park Assn. v. Wallis Iron Works*, 55 N. J. L. 132, 19 L.R.A. 456, 39 Am. St. Rep. 626, 26 Atl. 140.

And where the parties declared in clear and unambiguous terms that a certain sum should be paid by way of compensation upon a breach of the contract, or where the covenant was to do several acts, the damages arising from the breach of which were uncertain and incapable of being ascertained by any fixed pecuniary standard, the sum fixed and named as liquidated damages should be so held. *Pennsylvania R. Co. v. Reichert*, 58 Md. 261. The railroad condemning a trestle agreed to rebuild and give switch connections.

A contractor on a sewer covenanted to pay on default £100, and £5 for every seven days incomplete after a certain date. It was held to be liquidated damages, as the sums were payable on a single event,—the noncompletion of the work. *Law v. Local Bd. of Redditch* [1892] 1 Q. B. 127. *Kay, L. J.*, said: "I cannot agree with the ingenious argument that, because there may be many matters, some very small, which would constitute noncompletion, these sums may be regarded as payable on several events. According to that argument, there must be considered to be several different noncompletions of the work. There may be different causes of noncompletion, but noncompletion is only one single event."

And where an agreement was made to remove a stone fence by a certain date, unless, on resurvey, it was found to be on the proper line, it was held that \$200 agreed upon was liquidated damages. *Craig v. Dillon*, 6 Ont. App. Rep. 116. It was held that the removal of the stones was the main thing contracted to be done.

g. Miscellaneous.

A defendant imprisoned for disobedience of an injunction gave bond to obtain his release, covenanting to refrain from trespassing on land, walls, fences, gates, or injuring the same, or inciting others. The bond L.R.A.1915E.

was held to provide liquidated damages, as the condition depended on one event,—a breach of the injunction. *Strickland v. Williams* [1899] 1 Q. B. 382, 68 L. J. Q. B. N. S. 241, 80 L. T. N. S. 4, 15 Times L. R. 131. It was held that this bond did not come under 8 & 9 Wm. III. chap. 11. *Smith, L. J.*, said: "There is no covenant or agreement for nonperformance of which the £100 is agreed to be paid."

An agreement in settlement of a lawsuit to allow a confession of judgment for \$5,000 to be taken as liquidated damages if there was a violation of the contract not to allow the publication against the other of any defamatory article in the newspapers controlled by one of the parties was held liquidated damages. *Emery v. Boyle*, 200 Pa. 249, 49 Atl. 779. The court said: "Generally where the covenant is for the performance or the nonperformance of a single act or of several acts, damages for the breach of which cannot be measured by any fixed standard, the sum named, if reasonable in amount, will be considered as liquidated damages. The fact that there are a number of stipulations of different degrees of importance does not vary the rule, if the measure of damages for all of them is uncertain, but regard should be had to it in ascertaining the intention." The first sentence above was quoted and approved in *York v. York R. Co.* 229 Pa. 236, 78 Atl. 128.

And where a contract contained a condition for payment of a sum of money as liquidated damages for the breach of stipulations of varied importance, none of which was for the payment of a certain sum of money, it was held to be liquidated damages. *Schrader v. Lillis*, 10 Ont. Rep. 358. In this case the cigar manufacturers' association agreed not to submit to the dictation of a union,—not to buy or sell union brands, not to employ union men at the dictation of the union, or to discharge their own men,—and in default to pay \$500 as liquidated damages.

A charter party contained many stipulations of greater or less importance, the breach of any one of which, however minute, would in one sense be a nonperformance of the agreement. It was held that for a minor breach the damages were those actually sustained within the freight. It was also held that, in case of entire nonperformance, such as neglect or refusal to put any cargo on board, the parties had agreed that the damages should be the full amount of the freight stipulated for in the instrument. *Dimech v. Corlett*, 12 Moore P. C. C. 199.

Where a bond of \$1,000 was given not to sell any liquor in the county, not to manufacture liquor, to pay a liquor bill, and to prevent persons from bringing liquor into the county, it was held to provide liquidated damages. *Studabaker v. White*, 31 Ind. 211, 99 Am. Dec. 628. This was on the ground that where the agreement consisted of one or more stipulations, the breach of which could not be measured, then the contract must be taken to have meant that the

sum agreed on was to be liquidated damages.

And where the agreement was to abstain from the use of liquor, to remain sober and to attend to business, the damages were held to be liquidated as they could not be ascertained with certainty. *Keeble v. Keeble*, 85 Ala. 552, 5 So. 149. The court said: "Where the agreement is for the performance or non-performance of a single act, or of several acts, or of several things which are but minor parts of a single complex act, and the precise damage resulting from the violation of each covenant is wholly uncertain, or incapable of being ascertained save by conjecture, the parties may agree on a fixed sum as liquidated damages, and the courts will so construe it unless it is clear on other grounds that a penalty was really intended."

On subscription to aid in building a hotel, it was agreed that on failure there was to be paid for the benefit of the subscribers \$20,000 as fixed and liquidated damages. This was held to be liquidated damages on the ground that the contract consisted of several stipulations, the damages for a breach of which could not well be ascertained. *Chase v. Allen*, 3 Gray, 42. The damages to each person were peculiarly uncertain.

In *Los Angeles Olive Growers' Asso. v. Pacific Surety Co.* 24 Cal. App. 95, 140 Pac. 295, it was said that the rule stated by *Pomeroy on Equity Jurisprudence*, § 443, "Where an agreement contains provisions for the performance or nonperformance of several acts of different degrees of importance, and then a certain sum is stipulated to be paid upon a violation of any or of all of such provisions, and the sum will be in some instances too large and in others too small a compensation for the injury thereby occasioned, that sum is to be treated as a penalty, and not as liquidated damages," has been modified by Cal. Civ. Code, §§ 1670 and 1671, the latter providing that "the parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable . . . to fix the actual damage."

In *Hamilton v. Overton*, 6 Blackf. 206, 38 Am. Dec. 136, an agreement was to deliver a certificate of bank officers that three notes signed by this obligor and others had been shown them and were good, discountable paper; that if he failed he would pay \$500. It was held that the damages were liquidated.

In *Foley v. McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107, the case of *Hamilton v. Overton*, supra, was distinguished, as in that case there was but one covenant, and from its nature the damages for a violation of it were entirely uncertain, and could not be ascertained by evidence, and the damages were stipulated "liquidated."

I. T.

L.R.A.1915E.

ARKANSAS SUPREME COURT.

J. S. CALHOUN, Appt.,

v.

J. S. AINSWORTH et al.

(— Ark. —, 176 S. W. 316.)

Bills and notes — maturity — provision for extension.

1. A note payable one year after date matures at that time, so as to render its transfer thereafter subject to equities, notwithstanding a collateral provision that it will be extended from year to year upon payment of a portion of the principal, which payment has not been made.

Same — overdue — payment after transfer.

2. Payments to the original holder, who has no authority to collect on an overdue note which was transferred after maturity, and is not in possession of such holder, are not valid as against the true owner.

Custom — local — binding effect.

3. One purchasing notes of a bank is not bound by its custom of which he had no notice, to make collections for such purchasers.

Subrogation — lien of vendor.

4. One purchasing notes given for the purchase price of real estate is entitled to subrogation to the lien of the vendor.

(May 3, 1915.)

APPEAL by plaintiff from a decree of the Chancery Court for Miller County, allowing defendants a credit for payments to a former owner in an action brought to recover the amount alleged to be due on a purchase money note, and to enforce a lien on land embraced in the contract of sale. **Reversed.**

The facts are stated in the opinion.

Mr. Gustavus G. Pope, for appellant:

The moneys deposited with the Texarkana

Note. — Payment to prior party as a defense against one to whom paper was transferred after maturity.

The earlier cases discussing the question considered in the present note may be found in note to *Y. M. C. A. Gymnasium Co. v. Rockford Nat. Bank*, 46 L.R.A. 778.

As to availability, as against transferee of negotiable paper after maturity, of equities or defenses against intermediate indorsers, see note to *Reardan v. Cockrell*, 50 L.R.A. (N.S.) 87.

As to right to set off against transferee of negotiable paper after maturity, claim against the original payee, see notes to *Vann v. Marbury*, 23 L.R.A. 326, and *McKay v. Hall*, 39 L.R.A. (N.S.) 658.

Generally, as to paper transferred after maturity, see Index to L.R.A. Notes, "Bills and Notes," § 36.

Trust Company, for the sole benefit of defendant, should not be allowed as a credit upon the note sued on. Plaintiff knew nothing of them, and he purchased the note before any of the payments were made, hence he cannot be bound by them.

Hatch v. Hutchinson, 64 Ark. 119, 40 S. W. 578; Exchange Nat. Bank v. Little, 111 Ark. 263, 164 S. W. 731; Morgan v. Perkins, 159 Ky. 98, 166 S. W. 799; Griswold v. Davis, 125 Tenn. 223, 141 S. W. 205; Miles v. Dodson, 102 Ark. 427, 50 L.R.A.(N.S.) 83, 144 S. W. 908; Koen v. Miller, 105 Ark. 152, 150 S. W. 411; State Nat. Bank v. Hyatt, 75 Ark. 170, 112 Am. St. Rep. 50, 86 S. W. 1002, 5 Ann. Cas. 296; Wales-Riggs Plantations v. Dye, 105 Ark. 446, 141 S. W. 998; Powers v. Woolfolk, 132 Mo. App. 354,

111 S. W. 1189; Mammoth Vein Coal Co. v. Bishop, 113 Ark. 585, 168 S. W. 1086.

If, under the law, the court should hold that the credits claimed by defendant Ainsworth should be allowed, then this money is a trust fund in the hands of the receiver, and he should be directed to pay it over to plaintiff.

Covey v. Cannon, 104 Ark. 550, 149 S. W. 514.

Mr. Frank S. Quinn, for appellee receiver:

The evidence is insufficient to establish a trust fund in the hands of the receiver.

Oswego Mill. Co. v. Skillern, 73 Ark. 324, 84 S. W. 475; Powell v. Missouri & A. Land & Min. Co. 99 Ark. 553, 139 S. W. 299; Covey v. Cannon, 104 Ark. 550, 149

There are many cases declaring generally that payment to a prior holder is a good defense against negotiable paper in the hands of a purchaser after maturity (see note in 46 L.R.A. 778); but, as stated in the opinion in CALHOUN v. AINSWORTH, the authority is meager upon the question as to the effect, as against a purchaser after maturity, of a payment made to the original holder after the transfer. An examination of the note just referred to, however, discloses some cases on that precise question.

In Mammoth Vein Coal Co. v. Bishop, 113 Ark. 585, 168 S. W. 1086, relied upon in the CALHOUN CASE, it was held that the maker of a note payable to a bank could not, as against one to whom the note was transferred after maturity in part payment of a deposit, claim that the note had been paid as the result of a transaction after the transfer, by which a third person assumed to pay the note to the bank, taking a new note from the maker; such third person being informed at the time that the note was not in the bank, but would be surrendered later, and the maker having been notified of the transfer of the original note before he made a payment upon the new note.

In Mammoth Vein Coal Co. v. Bishop, supra, the court cites Blook v. Kirtland, 21 Ark. 393, as stating that "a payment by the maker of a negotiable note to the original payee after the note has been assigned is not a good defense to an action by the assignee against the maker under the statute, nor by the law merchant. The maker must take care that the person to whom he pays a negotiable note is its holder or in possession of it. "In that case, however, the court stated that the note was assigned before it was due, and the legal presumption was, in the absence of proof to the contrary, that the payment was made after the maturity of the note, and hence after the assignment. It was expressly shown that the payment of \$400 was made long after the assignment, and under circumstances that would have put a prudent man on his guard.

In Powers v. Woolfolk, 132 Mo. App. 354, 111 S. W. 1187, where, after the transfer of a past due negotiable note without his L.R.A.1915E.

knowledge, one made a payment thereon without demanding its production by the payee bank, the court laid down the rule that the payor of a negotiable note, though he does not know of its transfer, is not protected by paying to the payee, who has sold and indorsed it to another, the statute protecting the payment of a non-negotiable note to the payee, if the payor has no notice of its being transferred, not being applicable to negotiable paper, even though it is past due. The court stated that before the statute was enacted, even the payment of a non-negotiable note to the payee, after it had been assigned, and was not in the latter's possession, was not a discharge of the note, though the payment was made without notice, it being held to be the duty of the payor to "look after his note, and to know that he pays his money to whom it is due."

In Williams v. Weekley, — S. C. —, 84 S. E. 299, holding that the claim of an innocent purchaser for value without notice of payments could not avail because the note in question was not assigned until nearly three years after maturity, the payments seem to have been made before the transfer.

In Hagin v. Shoaf, 9 Ala. App. 300, 63 So. 764, certiorari denied in 186 Ala. 394, 64 So. 615, a suit by transferee of original payee bank against an accommodation maker, it was held that payment of a note by the principal maker with his own money operated as an absolute discharge of the indebtedness and a release of the sureties, so that a transfer after maturity was ineffectual, and the transferee took nothing by it.

Where the holders of notes past due contracted with the makers to take land in full payment thereof, it was held in Cooney v. Dandridge, — Tex. Civ. App. —, 158 S. W. 178, that the contract operated as a complete novation of the obligations evidenced by the notes, and a purchaser of the notes after maturity with knowledge took the notes subject to the rights of the makers acquired under the contract aforesaid, and she could not demand payment in specie according to the original terms of the note.

J. D. C.

S. W. 514; Hill v. Miles, 83 Ark. 486, 104 S. W. 198.

Mr. J. D. Cook for other appellees.

McCulloch, Ch. J., delivered the opinion of the court:

The Texarkana Trust Company (now defunct), a corporation engaged in the banking business in the city of Texarkana, agreed to sell certain lots of real estate in Texarkana to the defendants J. S. Ainsworth and his wife, Jennie Ainsworth, executing a contract in writing covering the sale, and said defendants executed to the vendor a negotiable promissory note for the sum of \$625 for the purchase price of said lots, with 8 per cent interest from date until paid. The note was due and payable on its face one year after date, but the contract of sale contained a stipulation that on payment of as much as \$100 per annum the date of payment would be extended from year to year. The note was dated April 6, 1908, and was sold and transferred by the payee to the plaintiff, J. S. Calhoun, on December 1, 1910. Plaintiff resided in Memphis, Tennessee, and the negotiations for the purchase of the note, together with other transactions, were conducted by correspondence. The Texarkana Trust Company failed, and was placed in the hands of a receiver by the chancery court of Miller county on November 12, 1913. Nothing had been paid to plaintiff on the note except the interest, but there was a credit of \$330.16 standing on the books of the Texarkana Trust Company in favor of Mrs. Jennie Ainsworth, which was placed there to be paid on the note, but had never been reported to nor paid over to the plaintiff, Calhoun. It was, according to the testimony, held in the bank to be finally applied on the note, but was never so applied. This is an action by the plaintiff to recover the amount due on the note, and to enforce a lien on the land embraced in the contract of sale. The receiver of the bank was joined as defendant, and the controversy in the case relates solely to the alleged credit of the amount of money in the bank, which defendants insist should be placed on the note in the hands of the plaintiff. The chancellor decided the disputed issue in favor of defendants, and rendered a decree in favor of the plaintiff for the balance due on the note after crediting said sum in bank, and enforced a lien on the lots therefor.

The plaintiff was, as before stated, a resident of the city of Memphis, and was never in Texarkana, and had no acquaintance with any of the officers or employees of the bank except through correspondence concerning this and similar transactions which

he had with the bank. The undisputed evidence shows that he purchased the note in good faith and paid face value therefor, and, according to his own testimony, he never authorized the bank to make any collections for him except when he sent the note to the bank for the interest to be collected and credited thereon. He purchased the note after maturity. The point is made that the stipulation in the contract for an extension of time operated as a postponement of the date of payment, so that the note was immature at the time of the assignment. We are of the opinion, however, that the contention is not sound, and that this note must be treated as mature upon its face, which carried with it notice to the assignee of any defects or any defenses to which the makers were entitled as against the original payee.

But, treating the note as one which had been assigned after maturity, we are of the opinion that the evidence fails to show that the payments made to the bank were authorized by the plaintiff, or that he was bound by them; and such payments as were made to the bank after it ceased to be the holder of the note, and without having the note in its possession, were not valid as against the true owner.

In the recent case of Mammoth Vein Coal Co. v. Bishop, 113 Ark. 585, 168 S. W. 1086, we held that the maker of a negotiable note transferred after maturity would not be protected by payments to the original holder unless the latter was authorized by the true owner to collect it, or produced the note at the time of the payment. In that case we said: "This was a negotiable note transferred and delivered to the appellant, it is true, after it became due; but this did not prevent it continuing negotiable, and gave the assignee the right to collect it, subject only to defenses existing at the time of the transfer."

The authorities on this precise question are meager, but all that has been said and written on the subject is in support of the position which this court has taken. The rule was thus laid down by Mr. Daniel in his work on Negotiable Instruments, 6th ed. vol. 2, § 1233a. The Virginia court of appeals, in the case of Davis v. Miller, 14 Gratt. 1, in discussing the subject, referred to the paucity of authority on this particular question, and explained it by saying that the proposition was so plain that it had rarely ever been controverted. The same rule was declared by Chief Justice Shaw in Baxter v. Little, 6 Met. 7, 39 Am. Dec. 707, in language which appears to be *dictum*, but it is undoubtedly sound, and is in accord with the few authorities on the subject. In a recent case decided by the Mis-

souri court of appeals it was said: "It being a negotiable note, payable to order, though past due, it was defendant's duty to demand its production by the bank, as payee, before making the payment. The payor of a negotiable note, though he does not know of its transfer, is not protected by paying to the payee, who has sold and indorsed it to another." *Powers v. Woolfolk*, 132 Mo. App. 354, 111 S. W. 1187.

Now, the evidence in this case is sharply conflicting as to whether or not the defendants Ainsworth and his wife were apprised of the fact that the note had been transferred to plaintiff at the time the money was placed in the bank. Mrs. Ainsworth testified positively that she had no knowledge or information on the subject, and never received any communication from the plaintiff, Calhoun, until after the failure of the bank. The testimony of the officers and employees of the bank tends to establish a custom in cases of this sort, where they would transfer paper secured by real estate through transactions in that department of the bank, to open up a savings account with the vendees and allow payments to be made in instalments, which were credited, but not allowed to be drawn against, and at intervals the amounts would be credited on the notes. The bank officials claim that these payments received from Mrs. Ainsworth were treated in that way, but Mrs. Ainsworth denied that she had any information of that method of doing business, and says that they were straight payments on the note. On the other hand, the testimony of the plaintiff is that he had no information whatever of the bank's method of doing business, and never authorized the bank to make any collections except when he sent the note to the bank for the collection of interest, supposing at the time that the bank was representing the makers of the note. At all other times he says that he kept the note in his possession at Memphis. He testified also that he generally wrote to Ainsworth and wife, giving notice to them of the approaching date for the payment of interest, and he exhibits a carbon copy of a letter dated March 30, 1911, notifying the Ainsworths that the interest would be due on April 6th of that year. Mrs. Ainsworth testified that she did not receive that letter or any other letter from plaintiff on the subject. Her husband's testimony on the subject is somewhat equivocal. He first said positively, in response to the question of his attorney, that he did receive the letter from plaintiff in 1911 informing him of the fact that plaintiff held the note, but, after being pressed on the subject, he retracted that statement, and stated that he meant to say that he re-

ceived a letter from the plaintiff in 1914, and that that was the first notice he had of the assignment of the note. It is unimportant to decide whether or not the defendants or either of them did, in fact, receive notice of the assignment before the disputed payments were made to the bank; for we are of the opinion that in either event the evidence fails to show any authority on the part of the bank to collect the money for plaintiff, and that the latter is not bound by those collections which were not, in fact, paid over to him.

It is thoroughly established by decisions of this court that the assumption of authority, under such circumstances as shown in this case, is not binding upon the holder of a note, and in order to bind him they must show actual authority or acceptance of the payments with knowledge of the assumption. In *Koen v. Miller*, 105 Ark. 152, 150 S. W. 411, we said: "Authority of an agent to collect interest on a mortgage does not afford ground for inferring authority to collect the principal, where the agent is not intrusted with the possession of the securities."

There is testimony in this case on the part of the bank employees tending to show that in transactions between plaintiff and the bank the plaintiff authorized the bank to collect notes which had been transferred, but this is positively denied by the plaintiff, and we are of the opinion that the record fails to show enough to sustain the decree on that point. The testimony adduced on this subject by the bank officials is far from convincing, on account of the fact that every transaction was carried on by correspondence, and they fail to produce a single line from the plaintiff which would tend to show that he gave the bank any authority to collect. There is a letter which relates to another transaction, which might have some tendency to show authority to collect in that particular matter, but it does not go to the extent of showing any authority to collect in other transactions.

There is, too, testimony of custom on the part of that particular bank to make collections for its customers to whom notes had been assigned, but the usage of that bank is not sufficient to establish a general custom, and, unless notice of it was brought home to the plaintiff, he was not bound by any such usage. *Exchange Nat. Bank v. Little*, 111 Ark. 263, 164 S. W. 731.

It is unfortunate that, as between two innocent parties, the plaintiff, on the one hand, and the defendants Ainsworth and wife, on the other, one or the other must be the loser on account of the wrong done by the officials of the bank either in accepting the money from Mrs. Ainsworth in the

first instance, or failing to transmit it to the plaintiff on the other hand; but plaintiff cannot be made to bear the loss if he did nothing to cause it, and was a bona fide holder of the note. We think that the plaintiff made out his case, and is entitled to a decree for the amount of the note, less the payments which were made to him.

He should also be decreed a lien on the land; for he is entitled to subrogation to the rights of the original vendor. *St. Peter's Lit. Asso. v. Webb*, 31 Ark. 140; *Martin v. O'Bannon*, 35 Ark. 62.

The decree is therefore reversed, and the cause remanded with directions to the Chancellor to enter a decree in favor of the plaintiff in accordance with this opinion.

GEORGIA SUPREME COURT.

A. L. OWENS et al., Plffs. in Err.,
v.

GEORGE S. WAY.

(141 Ga. 796, 82 S. E. 132.)

Search and seizure — arrest — property as evidence.

1. A municipal officer who has arrested an alleged violator of a municipal ordinance has no power, without other authority than the warrant against the accused, to take and carry away the property of a third person from the latter's premises, on the ground that the property of such third person so seized may contain evidence to be used against the defendant in the warrant. Such a seizure is a violation of the constitutional guaranty against unreasonable searches and seizures, as contained in Civil Code 1910, § 6372.

Headnotes by EVANS, P. J.

Note. — *Right to seize for purposes of evidence property of one person under a warrant of arrest against another.*

In *Newberry v. Carpenter*, 107 Mich. 567, 31 L.R.A. 163, 61 Am. St. Rep. 340, 65 N. W. 530, the facts of which are sufficiently set out in *OWENS v. WAY*, the court said: "The broad claim of the learned prosecutor is that the courts possess the power upon his motion to enter upon the premises of private persons and seize any property which may, in his judgment, have any bearing upon a crime with which another is charged. If the order in this case be sustained, it results in holding that a citizen's team, with which he earns a livelihood, may be seized by the police authorities because the prosecutor believes that such team was used by an alleged criminal in the commission of a crime. If A be arrested, charged with arson in the burning of B's house, and there be some evidence in the house believed to

Injunction against injury to property.

2. The person whose property is thus seized is entitled to the remedy of injunction to restrain the officers who have taken into their possession his property, from forcibly or otherwise effecting a threatened injury to the same, or interfering with his possession.

(June 11, 1914.)

ERROR to the Superior Court for Glynn County to review a judgment enjoining defendants from forcibly opening plaintiff's safe or from interfering with his possession of it. Affirmed.

The facts are stated in the opinion.

Mr. J. T. Colson, for plaintiffs in error:

Where parties are engaged in illegal transactions, no relief in equity will be granted.

Bugg v. Towner, 41 Ga. 315; *Howell v. Fountain*, 3 Ga. 182, 46 Am. Dec. 415; *Carey v. Smith*, 11 Ga. 547; *Robertson v. Porter*, 1 Ga. App. 223, 57 S. E. 993; *Alford v. Burke*, 21 Ga. 46, 68 Am. Dec. 449.

It is the duty of every peace officer to seize any property or thing that is being used in the commission of crime or in violation of law.

Spalding v. Preston, 21 Vt. 9, 50 Am. Dec. 68; *State v. Robbins*, 124 Ind. 308, 8 L.R.A. 438, 24 N. E. 978; 35 Cyc. 1271; *Woolfolk v. State*, 81 Ga. 562, 8 S. E. 724.

Mr. A. D. Gale for defendant in error.

Evans, P. J., delivered the opinion of the court:

The facts necessary to be stated for a decision of the question made by the record are as follows: H. L. Edwards formerly conducted a saloon for the sale of "near beer" in the city of Brunswick. He was convict-

connect A with the crime, the police authorities may seize and hold possession of the house for months, and until the trial, and prevent the owner from rebuilding. So, under like circumstances, a manufacturer might be deprived of the possession of his property necessary for the successful carrying on of his business. Other illustrations will readily suggest themselves. The power is certainly an extraordinary one, and those who assert it ought to be able to find some common or statute law authorizing it. The exercise of power no more arbitrary than this has caused revolutions."

No other authorities have been found on this question.

OWENS v. WAY turns upon the rights of the owner of the property seized as evidence. For annotation dealing with searches or seizures from the standpoint of the protection or rights of the accused, see in *Index to L.R.A. Notes*, the title, "Search and Seizure," and §§ 49-52 under "Criminal Law."

L. A. W.

ed of selling intoxicating liquors therein, and, under the statute and by virtue of his conviction, his license became forfeited and he was disqualified from engaging in the business. The city of Brunswick granted a license to sell "near beer" to George S. Way in the same premises previously occupied by Edwards. Way was the nephew of Edwards. Edwards was the agent of a lightering company and a transportation company, and kept his books in a safe located in Way's place of business. A warrant was issued against Edwards, charging him with violating the ordinance against keeping on hand intoxicating liquor for purposes of sale. He was arrested under this warrant by the police officers of the city, who also carried away an iron safe to police headquarters, taken from the premises where Way was conducting his business. There was not warrant against Way.

Thereupon Way filed a petition to enjoin the police officers from opening the safe, forcibly or otherwise, as threatened, or from interfering with his possession of it. The police officers admitted that they had removed the safe from the place of business of Way to police headquarters, and justified their conduct on the ground that the safe, if opened, would show that it contained intoxicating liquor which they wished to use as evidence on the trial of Edwards. They submitted evidence to the effect that, not long before the arrest, a witness bought from a clerk of Way certain whisky, which was taken from the safe, and that the sale was made upon the express approval of Edwards, who was standing near-by at the time the sale occurred. There was a conflict of evidence as to whether the safe belonged to Edwards or Way. The court granted the injunction as prayed, and the police officers excepted.

1. Inasmuch as the court granted an injunction, in the discussion of the case the facts will be taken as found by the court in consonance with the judgment rendered. Accordingly, we will regard the safe as the property of Way; and the legal question relates to the authority of an officer who arrests a defendant under a warrant charging the violation of a municipal ordinance, to take into possession the property of a third person on the assumption that such property contains incriminating evidence against the defendant in the warrant. The Constitution of Georgia declares that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue except upon probable cause supported by oath or affirmation, particularly describing the place or places to be searched and the per-

son or things to be seized. Civil Code 1910, § 6372. It has always been recognized as within the authority of the arresting officer to search the person of the defendant and take therefrom any property which will be material as evidence of the crime charged in the warrant. A warrant to seize the keeper of a gambling house carries with it the power or legal authority to seize the implements of his crime. *Kneeland v. Connally*, 70 Ga. 424.

But the power of an arresting officer to take the property of the defendant, to be used as evidence of the crime charged against him in the warrant, is quite different from the taking of the property of third persons by virtue of no other process save that of the warrant against the accused. The constitutional protection against unreasonable seizure of property would go for naught, if it should be conceded that an arresting officer may arbitrarily possess himself of the property of a third person, taken from the place of business of such third person, solely upon the ground that it may be used as evidence against the defendant in the warrant. We find no authority which extends the power of an arresting officer so far. And, indeed, if one with a warrant for A, charging him with crime, may go into the house of B and take therefrom property belonging to B, without other authority than that it may be used as evidence on the trial of A, then the constitutional guaranty against unreasonable seizures would be mere idle words. A similar case to the one at bar was decided in Michigan, where it was held that the constitutional protection against unreasonable seizures is violated by entering a private inclosure and taking away from the possession of the owner, under order of court, a wrecked boiler, engine, and other material for use as exhibits in the prosecution of another person for criminal negligence in causing an explosion of the boiler, resulting in the death of several persons. *Newberry v. Carpenter*, 107 Mich. 567, 31 L.R.A. 163, 61 Am. St. Rep. 346, 65 N. W. 530.

But it is contended that there was evidence authorizing an inference that intoxicating liquors were in the safe, and that it was necessary that the safe should be carried to police headquarters, in order that it might be opened and the incriminating evidence taken therefrom. This contention carries with it the power of police officers to open the safe for the purpose of ascertaining whether intoxicating liquor in fact was contained therein, irrespective of the manner of effecting the entrance. If such a proposition be allowed, then it would follow that a police officer who arrests a violator of a municipal ordinance under a municipal

warrant would have the power to enter the home of another citizen for the purpose of procuring property of such third person, which might be competent evidence bearing upon the guilt of the offender, and, if such third person refused a surrender of his property to be so used, then the police officer would have the right either to the exclusive possession of the home of such third person, or, without other authority, to break therein for the purpose of taking such property to be used as evidence upon the trial of the person under arrest. The bare statement of the proposition illustrates that such a seizure would be unreasonable, and a flagrant violation of the constitutional provision.

2. Furthermore it is said that the plaintiff is not entitled to the remedy of injunction; that by appropriate action at law he could recover his property from those who have it in possession. The reply is that there was evidence that the officers threatened to effect an entrance into the safe of the plaintiff, and the injunction was to prevent not only interfering with the plaintiff's possession, but also any act of violence to his property while in possession of the defendants.

Judgment affirmed.

All the Justices concur.

ILLINOIS SUPREME COURT.

PEOPLE OF THE STATE OF ILLINOIS
EX REL. JAMES B. DIBELKA et al.,
Petitioners,

v.

PETER REINBERG et al.

(263 Ill. 536, 105 N. E. 715.)

Office — term — when begins.

1. When the law does not fix any time for the commencement of a term of office to be filled by appointment, the term will begin to run from the date of the appointment.

Same — reappointment — resignations — effect.

2. Undated resignations placed in the

Note. — Officers: effect of resignation before appointment or election.

As said in *PEOPLE EX REL. DIBELKA v. REINBERG*, there is little authority on this question. The few decisions which have been found to bear in any way upon the point support the conclusion reached in that case.

It was held in one case that, even after a person's election to office, he could not resign until he had duly qualified, and that, notwithstanding that the abortive resignation was accepted, he could reconsider, and *L.R.A.1915E.*

hands of an appointing power by persons about to be appointed to office are without effect, and their acceptance after the appointment does not vacate the office.

Appeal — quo warranto proceeding — effect.

3. An appeal or supersedeas bond does not suspend a judgment ousting persons from office so as to prevent the granting of a mandamus to compel recognition of the claimant in whose favor the judgment was entered.

(June 13, 1914.)

PETITION by relators for a writ of mandamus to compel respondents to recognize them as members of the board of education of the city of Chicago. Writ awarded.

The facts are stated in the opinion.

Mr. Collin C. H. Fyffe for petitioners.

Messrs. William H. Sexton, Richard S. Folsom, Angus Roy Shannon, and Leon Hornstein, for respondents:

The applicant for a writ of mandamus must show his absolute right to the same regardless of other proceedings.

26 Cyc. 185; *Highway Comrs. v. People*, 99 Ill. 587; *People ex rel. Storey v. Knickerbocker*, 114 Ill. 539, 55 Am. Rep. 879, 2 N. E. 507; *State ex rel. Graber v. Matley*, 17 Neb. 564, 24 N. W. 200; 19 Am. & Eng. Enc. Law, 771; *Atty. Gen. v. New Bedford*, 128 Mass. 312; *People ex rel. Wilson v. Salomon*, 51 Ill. 37; *People ex rel. McLaughlin v. Police Comrs.* 79 N. Y. Supp. 710.

The resignation was addressed to the proper party, and the mayor had the right to accept it.

Dill. Mun. Corp. 5th ed. § 416; *State, New Jersey R. & Transp. Co., Prosecutor, v. Newark*, 27 N. J. L. 185; *Van Orsdall v. Hazard*, 3 Hill, 243.

The intention of the relators after their appointment conferred power on the mayor to accept the resignations.

Dill. Mun. Corp. 5th ed. § 416; *Rogers v. Slonaker*, 32 Kan. 191, 4 Pac. 138; *State ex rel. Van Buskirk v. Boecker*, 56 Mo. 17; *Biddle v. Willard*, 10 Ind. 66; *Bunting v. Willis*, 27 Gratt. 144, 21 Am. Rep. 338; *State ex rel. Williams v. Beck*, 24 Nev. 92,

compel the acceptance of his bond if otherwise sufficient. *Miller v. Sacramento County*, 25 Cal. 93.

Upon the ground that a resignation implies the election of the person resigning, and that a man cannot resign an office to which he is not entitled, it was held in *Reg. v. Blizard*, L. R. 2 Q. B. 55, 7 Best & S. 922, 36 L. J. Q. B. N. S. 18, 15 L. T. N. S. 242, 15 Week. Rep. 105, that where a candidate for an office for which he was ineligible received the highest number of votes, he could not, by resigning, create the occasion for a

49 Pac. 1035; *Mimmack v. United States*, 97 U. S. 426, 24 L. ed. 1067; 16 Cyc. 805; *Scott v. Jackson*, 89 Cal. 258, 26 Pac. 898; *Hollings v. Bankers' Union*, 63 S. C. 192, 41 S. E. 90.

The time when a tender of resignation is written does not affect its validity.

State ex rel. Williams v. Fitts, 49 Ala. 403; *Mimmack v. United States*, 97 U. S. 426, 24 L. ed. 1067; *Van Orsdall v. Hazard*, 3 Hill, 243; *Taylor's Case*, Popham, 134; 7 Cyc. 620, 621; *Gill v. Hopkins*, 19 Ill. App. 74; *Maxwell v. Vansant*, 46 Ill. 58.

The term of office expires July 1, 1914.

State ex rel. Withers v. Stonestreet, 99 Mo. 361, 12 S. W. 895.

Farnier, J., delivered the opinion of the court:

The relators, James B. Dibelka, John C. Harding, Henry W. Huttman, and Charles O. Sethness, by leave first obtained, filed in this court, at the April term, their petition for a writ of mandamus directed against Peter Reinberg, president, and Lewis E. Larson, secretary, of the board of education of the city of Chicago, commanding said respondents, as officers of said board of education, to recognize the relators as members of said board until the expiration of their terms of office, July 17, 1914.

The petition alleges the city of Chicago, prior to the year 1909, and until the present time, was and is acting under and governed by the general cities and villages act and acts amendatory thereto; that from a time prior to July 17, 1911, and until the present time, there has been, and now is, a board of education in said city, consisting of twenty-one members appointed by the mayor by and with the advice and consent of the city counsel, as provided by "An Act to Establish and Maintain a System of Free Schools," approved and in force June 12, 1909. *Hurd's Rev. Stat. 1913*, chap. 122, § 128. The petition alleges the relators were appointed by the mayor by and with the advice and consent of the city council, July 17, 1911, as members of the board of education of said city for a term of three years each, and that, pursuant to such appointment, the relators qualified and entered

upon the duties of members of the board of education, and acted as such officers until December 23, 1913. The petition further alleges that prior to the appointment of the relators, July 17, 1911, each received the following request from the mayor:

Dear Sir:—

I send you herewith a blank form of resignation from the position of member of the board of education, to be signed by you and returned to this office at once. I have your name under consideration for this position, and, unless later developments cause me to change my mind, will send it to the city council at next Monday night's meeting. In order to avoid any future misunderstanding I would prefer to have a signed resignation in my hands prior to making the appointment.

Yours very truly,

Carter H. Harrison, Mayor.

Pursuant to such request, and before appointment, they each sent to the mayor their written, undated resignations, which remained in the possession of the mayor until December 12, 1913, when, without any further action on the part of relators as to resigning, the following letter was received by each of them:

Dear Sir:—

I hold your letter tendering your resignation as a member of the board of education of the city of Chicago and bearing date of July 18, 1911. I hereby accept the same, to take effect at once.

Yours very truly,

Carter H. Harrison, Mayor.

After receipt of this notice the relators continued to act as members of the board of education until December 23, 1913, when respondents, the officers of the board of education, refused to further recognize relators as members of said board. The petition further alleges the relators did not resign July 18, 1911, nor at any other time subsequent to their appointment, but that December 17, 1913, the mayor appointed, and the council confirmed, Joseph A. Holpuch,

new election, and thus deprive an unsuccessful candidate in the first election of the right to claim the office. Generally, as to right of candidate receiving next highest number of votes where person receiving highest number is ineligible, see notes in 13 L.R.A.(N.S.) 1013 and 34 L.R.A.(N.S.) 240.

Largely upon the authority of the *Blizard Case* and upon the ground therein taken, the court in *Re Corliss*, 11 R. I. 639, 23 Am. Rep. 538, held that where an unqualified person was chosen as a presidential elector, L.R.A.1915E.

he could not, by declining the office, create such a vacancy as was contemplated by a statute providing that if any elector should decline the office, the other electors, when officially convened, should fill the vacancy. It was further held that the situation was covered by a statute providing that if, by reason of the votes being equally divided, "or otherwise," there should not be an election of the number of electors to which the state was entitled, the general assembly should fill the vacancy. L. A. W.

John A. Metz, and John W. Eckhart, and December 22, 1913, the mayor appointed, and the council confirmed, Axel A. Strom, as members of the board of education to take the places of relators; that respondent Peter Reinberg is president of the board, and respondent Lewis E. Larson is secretary of said board, and as such officers they have refused to recognize relators as members of said board. The relators further allege that January 20, 1914, they filed in the superior court of Cook county an information in the nature of quo warranto, in which they alleged the execution and delivery by the relators of their resignations, their subsequent appointment, the acceptance of their resignations by the mayor, and the appointment of their successors, and prayed their successors, as respondents, show by what authority they held the office of members of the board of education of the city of Chicago; that respondents filed a demurrer to the information, which was heard February 25, 1914, and overruled by the court; that, respondents electing to stand by their demurrer, the court entered a judgment ousting respondents from office, whereupon, on February 27, 1914, they perfected an appeal from such judgment to the appellate court for the first district. The petition further alleges that at a regular meeting of the board of education March 4, 1914, and after the judgment of the superior court, there were present both the relators and respondents in the said quo warranto proceeding; that the judgment of ouster of the superior court was read and entered upon the minutes of said meeting, but nevertheless relators were not recognized nor permitted to take part in such meeting, while respondents in the quo warranto proceeding were recognized and permitted to participate; that March 26, 1914, relators filed a petition in the superior court for a rule on respondents in the quo warranto proceeding, and other members of the board of education, to show cause why they were not in contempt of court; that at the hearing of said motion, March 28, 1914, the respondents in the quo warranto proceeding appeared and agreed to obey the ouster judgment pending the appeal to the appellate court, and by agreement of the parties the rule to show cause was discharged, and said respondents in the quo warranto proceeding have not since acted as members of the board of education. The petition further alleges that at the regular meetings of the board on April 1, 1914, and April 15, 1914, relators were present, but respondent herein, Lewis E. Larson, secretary of said board, at the direction of respondent Peter Reinberg, president of the board, refused to call the names of relators as members of said board, and L.R.A.1915E.

the relators were not permitted to participate in any of the business of the meetings, and their votes upon propositions presented were not counted. The petition further alleges the ousted members of the board were at the meeting on December 24, 1913, appointed by the president of the board members of the committee on buildings and grounds, consisting of eleven members, and that while such appointees have not acted since March 28, 1914, no other appointments to fill such vacancies have been made; that the relators are informed and believe three members of the board are absent, and will continue to be absent from such meetings for some time to come, and that unless the relators are recognized by said board, its meetings will be attended by but fourteen members; that matters of much importance will come before said board between now and July 17, 1914, when relators' terms of office expire, among which are the annual budget of appropriations for the different schools for the period ending June 30, 1914, and the reports of the expenditures of the various committees. The petition alleges the appeal from the quo warranto proceeding will not be determined before the October term, 1914, and the terms of office of relators will expire before that time. The prayer of the petition is that the writ of mandamus issue from this court, ordering the president and secretary of said board of education, respondents herein, at all meetings until the terms of relators expire, to have the names of relators called, and to consider and have recorded their votes, and to permit them in all respects to participate fully in said meetings as members.

Respondents answered, admitting the material allegations of the petition, except that the relators were appointed for three years from July 17, 1911, and averring the appointments, though made on said date, under the provisions of the statute, began or were dated from July 1, 1911. The answer admits the mayor wrote the letters requesting the resignations, and received the resignations prior to the appointments, but avers the same were never asked for or inquired about by the relators after appointment, and that such conduct amounted to a continuing tender of the relators' resignations, to be accepted by the mayor at his pleasure. The answer denies that relators' terms of office expire July 17, 1914, but avers such terms of office expired by resignations, and further denies relators' right to the writ of mandamus as prayed. Relators demurred to the answer, and the questions to be decided are questions of law raised by the pleadings.

Section 128 of the act of 1909 authorized the mayor to appoint, by and with the ad-

vice and consent of the common council, twenty-one members of the board of education, seven of them for the term of one year, seven for the term of two years, and seven for the term of three years. At the expiration of the term of any member the appointment of a successor was authorized to be made in like manner, the person or persons so appointed to hold their office for a term of three years. The answer of respondents avers relators were each appointed to succeed members of the board whose terms expired July 1, 1911, and respondents raise the question whether the terms for which relators were appointed on July 17, 1911, were for three years from the time the appointment was made, or whether it was for three years from July 1, 1911, when, the answer alleges, the terms of office of relators' predecessors expired. The statute does not fix any time at which the appointment is to be made, or when the term of office shall begin. The duration of the term of office after the first appointment subsequent to the passage of the act is fixed at three years. It is not necessary to determine whether, in case a vacancy occurred before the expiration of the three years for which the appointment was made, an appointment could be made for the unexpired time, for that question is not presented by the pleadings. The question raised by the answer is that the terms of the predecessors of relators expired July 1, 1911, and relators were not appointed until July 17, 1911. When the law does not fix any time for the commencement of a term of office to be filled by appointment, the term will begin to run from the date of the appointment. *Atty. Gen. ex rel. Haight v. Love*, 39 N. J. L. 476, 23 Am. Rep. 234; 23 Am. & Eng. Enc. Law, 411-415. We are of opinion the terms of office of relators began to run from the day of their appointment, July 17, 1911.

It was decided in *People ex rel. Post v. Healy*, 231 Ill. 629, 83 N. E. 453, that members of the board of education were not subject to removal by the mayor, but it is contended relators had the right to resign, and that they did so. Respondents admit the resignations were signed by the relators and placed in the hands of the mayor before they were appointed, but it is contended that, as the resignations were not recalled by the relators after their appointment, but were permitted to remain with the mayor without objection, this was, in effect, a continued invitation or permission to the mayor to accept them at his pleasure, and, the mayor having acted upon them, relators cannot now be heard to complain. We cannot agree with this contention. The authorities do not appear to be numerous upon the question, as in the nature of things such a question L.R.A.1915E.

would rarely arise, but all the authorities we have been able to find hold a man cannot resign an office before he is an officer. *Mechem on Public Officers* (§ 410) says: "Upon the principle that one cannot resign what he does not yet possess, it is held that one who has not been elected to a public office cannot resign the same, or, if elected, cannot resign until the time has arrived when he is entitled by law to possess the same, and he has taken the oath and given the required bond and entered upon the discharge of his duties."

23 Am. & Eng. Enc. Law, 421, *Re Corliss*, 11 R. I. 638, 23 Am. Rep. 538, and *Miller v. Sacramento County*, 25 Cal. 93, are to the same effect. In our judgment the rule announced in these authorities is sound, but if no authority could be found upon the question it would seem the only conclusion which could be reached is that a man cannot resign an office to which he has not been elected or appointed. It was never contemplated that where the law conferred the power to appoint, but not to remove, the power to remove might be conferred by requiring a person, before appointment, to place his resignation in the hands of the appointing power. Such a paper is invalid when signed, and lapse of time cannot render it valid.

It is further contended that to grant the writ in this case would prejudicially affect the rights of the parties in the quo warranto proceeding pending on appeal in the appellate court for the first district. The judgment of the superior court is self-executing, and requires no process to enforce it. An appeal bond or supersedeas bond will not operate to suspend such a judgment. *Barnes v. Typographical Union*, 232 Ill. 402, 14 L.R.A.(N.S.) 1150, 122 Am. St. Rep. 129, 83 N. E. 932; 17 Enc. Pl. & Pr. 489; 20 Enc. Pl. & Pr. 1244. The title of relators having been established, their right to the writ of mandamus to compel the officers of the board of education to recognize them seems to us clear.

The demurrer to the answer is sustained and the peremptory writ awarded.

KENTUCKY COURT OF APPEALS.

SAM GRAINGER, Appt.,
v.

GEORGE JENKINS et al.

(156 Ky. 257, 160 S. W. 926.)

Vendor and purchaser — vendee in possession — liability to account.

1. One who has been in possession of land under a parol contract for its purchase is,

where the vendor refuses to perform, liable to account for rent only from the time when the contract was disaffirmed.

Same — interest on purchase money.

2. Upon repudiation of an oral contract for the purchase of land of which the vendee has had possession, interest on purchase money paid will be allowed only from the time when the contract was disaffirmed.

(December 4, 1913.)

APPEAL by plaintiff from a judgment of the Circuit Court for Simpson County in his favor for a less amount than claimed in an action to recover money paid and the value of improvements placed on land purchased of defendant under an oral contract. Reversed.

The facts are stated in the opinion.

Messrs. Whitesides & Evans for appellant.

Messrs. Roark & Finn for appellees.

Hobson, Ch. J., delivered the opinion of the court:

Sam Grainger in 1906 bought, by a parol contract from his son-in-law George Jenkins, a small tract of land lying in Simpson county, containing about 6 acres, for which he agreed to pay Jenkins \$150, and Jenkins agreed to make him a deed when the money was paid. Grainger took possession of the land, made improvements on it, paid Jenkins \$120.50 on the purchase money, and sold a portion of the land for a church lot for \$33; this \$33 being paid by the church people to Jenkins, and he having made them a deed. Grainger then demanded his deed; Jenkins refused to make it. Grainger thereupon brought this suit to recover the money he had paid and the value of his improvements on the land. On a trial of the case, the circuit court entered a judgment in favor of Grainger for \$62.50, and adjudged him a lien on the land for this sum and his cost. Grainger appeals.

Note. — Liability of purchaser who takes possession under parol contract of sale in action for rents or for use and occupation, where vendor refuses to perform.

This note is limited to cases in which the vendor refuses to perform, and does not include those cases in which the failure to perform is due to the vendor's inability to pass good title. Neither does it include cases in which a third person, not holding under the vendor, lays claim to rents on the strength of his adverse title.

As to the effect upon liability for rents of a stipulation that the vendee or mortgagor shall become a tenant, see note to Griffith v. Brackman, 49 L.R.A. 436.

The majority of the cases are in harmony with GRAINGER v. JENKINS in holding the vendee not liable to account for rents while he is holding under the contract.

Thus, it is held in Robards v. Robards, 27 Ky. L. Rep. 494, 85 S. W. 718, that where the owner of land refuses to convey in accordance with her parol contract, she cannot recover rent for the time the vendee has occupied the premises under the contract.

Inasmuch as all the cases do not assign the reason given in GRAINGER v. JENKINS for their decisions, however, there seemed to be grounds for the opinion that they do not rely entirely upon the reason that "the interest on the purchase money should be regarded as the fair equivalent for the use of the land." To do so is to admit that the vendee is liable for rent, and that the amount of such liability is merely offset in a certain way. Where circumstances are such that the interest on the purchase money is less than the value of the use of the land, the logical conclusion of such reasoning would subject the vendee to liability for the difference. Pass v. Brooks, 125 N. C. 129, 34 S. E. 228, modified on rehearing in L.R.A. 1915E.

127 N. C. 119, 37 S. E. 151, is an example of this. Upon the first hearing the court set off the rental of the premises against the interest due on the money paid under the parol contract which the vendor had refused to perform. Referring to that decision, the court says on rehearing: "If the plaintiff thinks he has been damaged by the equitable adjustment the court undertook to make, and wishes an issue submitted to the jury as to what was the rental value of said land in its unimproved condition, when the ancestor of defendants bought it, and to have this deducted from the value of improvements, the amount of the payment, . . . and interest thereon, we think he is entitled to have it."

One other case assigns the reason given in GRAINGER v. JENKINS for failing to make the vendee pay for the use of the premises. Like the principal case, however, it does not seem to consider the possibility of a case in which the interest on the money paid will not equal the value of the use of the land.

In Re Kaas, 2 Pa. Co. Ct. 55, where the vendor refused to clear the land of mortgages, and the sale was never completed, the vendee is held not liable for use and occupation, since "the interest which was thus lost to him may be fairly said to represent the rental value of the premises."

While most of the Kentucky cases neither assign the reason given in GRAINGER v. JENKINS for their holdings, nor contain discussion of the theory upon which the holdings are based, the fact that they concern themselves with discovering the exact time of the vendor's disaffirmance, and charge the vendee with rent thereafter, without referring in any way to an intention to charge rent before that time, seems to be irreconcilable with an intention to hold the vendee liable for rent during such period. Further evidence of the lack of such intention is found

The first question to be determined in the case is: Upon what basis should the account be settled? The circuit court seems to have arrived at his result by charging Grainger with the rent of the land from the time that he took possession. In *Fox v. Longly*, 1 A. K. Marsh. 388, which was a case like this, of a parol purchase which the vendor refused to carry out, the court said: "As, however, the complainant most clearly obtained the possession in good faith, under a fair contract of purchase, he ought not to be accountable for rents until there was a denial of his right or an assertion of title on the part of the vendor or his representatives. For, so long as he was permitted to hold the possession without any denial of his right to do so on their part, their consent that he should enjoy the profits must be presumed."

Again, in *Kay v. Curd*, 6 B. Mon. 104, where the question again arose, the court said: "As Kay obtained possession of the land under a purchase by parol from Curd, according to the rule in *Fox v. Longly*, supra, and which we are inclined to regard as just and equitable, he ought not to be charged with rent until his right was denied by Curd, or an assertion of title by him."

In *Reed v. Lander*, 5 Bush, 21, a similar case, the court said: "As Lander entered on the premises under a just and equitable parol arrangement, by which it was con-

templated that, with the charitable assistance of others, improvements would be made for his use for life, which, with the ground, would at his death revert to Reed, he ought not to be made accountable for rents until Reed disaffirmed the contract and demanded a restitution of the lot (*Fox v. Longly*, supra; *Kay v. Curd*, 6 B. Mon. 100); and, from the time Lander is made to account for rents, he is entitled to interest on the amount of his improvements."

In *Padgett v. Decker*, 145 Ky. 227, 140 S. W. 152, the rule was again followed. We said: "The parol contract, being void, cannot be enforced, but Padgett cannot keep the money which he received, and Decker is entitled to a lien on the land, both for the money which he paid and the enhancement of the value of the property by reason of the improvements which he erected on it while in possession as vendee under the expectation that Padgett would carry out the contract. He should not be charged with rent on his improvements, but should be charged with rent since the year 1910 on the property, considered without reference to his improvements. He should also be allowed interest on his purchase money from that time. No charge should be made for rent and no interest should be allowed on the purchase money previous to the year 1911." To same effect see *Grimes v. Shrieve*, 6 T. B. Mon. 557; *Ewing v. Handley*, 4 Litt. (Ky.) 346, 14 Am. Dec. 140; *Bourne v.*

when it is considered that if the value of the use of the premises and the interest on the money paid under the contract are equivalent, and offset each other before the owner's disaffirmance of the contract, the same must also be true after the disaffirmance, and the one will offset the other as long as the vendee continues to hold the premises and the vendor continues to hold the part of the purchase price paid. The value of Kentucky cases as authority, however, is minimized by the disagreement and confusion found to exist in the decisions in that jurisdiction.

In *Fox v. Longly*, 1 A. K. Marsh, 388, it is said that since the vendee "most clearly obtained the possession in good faith, under a fair contract of purchase, he ought not to be accountable for rents until there was a denial of his right or an assertion of title on the part of the vendor." In this case the first evidence of any denial of the vendee's right is made in the answer of the vendor in the present action of specific performance, "and from that time ought the account for rents and profits to commence."

This rule is followed in the similar case of *Kay v. Curd*, 6 B. Mon. 104, in which a vendee under a parol contract was likewise held not to be chargeable with rents until his title was denied in the answer of the owner denying the purchaser's right to the land.

L.R.A.1915E.

In *McBrayer v. Thomas*, 23 Ky. L. Rep. 1179, 64 S. W. 906, an action by the owner of land to have rescinded a parol contract to sell, it is held that the plaintiff is entitled to the reasonable rents from the date of filing suit.

And it is held in *Padgett v. Decker*, 145 Ky. 227, 140 S. W. 152, that the vendee under a parol contract is liable for rent after the time when his vendor rents the land over his protest to a third person.

Without stating whether the contract in the case was parol or written, it is held in *Jones v. Tipton*, 2 Dana, 295, that a vendor cannot maintain an action of assumpsit against a vendee for his use and occupation of the land between the date of the contract of sale and the rescission of that contract as affected by a judgment for damages against the vendor for failure to convey.

The abstract of *Taylor v. Johnson*, 3 Ky. L. Rep. 615, says: "Purchaser of land by verbal contract being put into possession is not liable for rent for any period prior to the institution of this suit to recover the possession thereof."

Two cases have assigned as their reason for holding the vendee not liable for use and occupation the fact that there is no relationship of landlord and tenant between the parties. This reason does not involve the difficulties attendant upon the one assigned in

Odam, 17 Ky. L. Rep. 696, 32 S. W. 398; *McBayer v. Thomas*, 23 Ky. L. Rep. 1179, 64 S. W. 906; *Robards v. Robards*, 27 Ky. L. Rep. 494, 85 S. W. 718.

It is true that the court in settling the account on equitable principles between the parties where a parol contract to sell land has not been carried out has sometimes approved settlements not made on the basis we have indicated. *Blackburn v. Blackburn*, 11 Ky. L. Rep. 161, 11 S. W. 712; *Burch v. Burch*, 20 Ky. L. Rep. 1614, 49 S. W. 798; *Lucas v. McGuire*, 29 Ky. L. Rep. 1068, 96 S. W. 867; *May v. May*, 33 Ky. L. Rep. 638, 110 S. W. 808. But the facts of those cases were such as to show that the settlement made on the basis followed did not do substantial injustice to either of the parties. The court simply adopted a settlement that did justice under the facts there presented. The opinions were not intended to lay down a new rule or to overrule the older cases.

The statute simply provides that no action shall be brought to enforce the contract; but, although the contract is not enforceable in law, the court should not allow the statute to operate so that the man who refuses to carry out his contract shall enrich himself at the expense of the other party.

We have often held that, where the purchase money on land has been paid and the contract is subsequently rescinded, the interest on the purchase money should be re-

garded as a fair equivalent for the use of the land, as this is in substance what the parties agreed to in the contract. *Glass v. Brown*, 6 T. B. Mon. 358; *Baxter v. Brand*, 6 Dana, 298; *Talbot v. Seebree*, 1 Dana, 56; *Griffith v. Depew*, 3 A. K. Marsh, 180, 13 Am. Dec. 141; *Combs v. Tarlton*, 2 Dana, 466. Though the law will not enforce the parol contract, the parties may themselves lawfully carry it out; and, when the vendor refuses to do this, he should not be permitted to charge the vendee with rent of the land, when the vendee used the land as his own without any expectation by either of the parties that he was to pay rent upon it.

Under all the evidence we fix the enhancement of the value of the land by reason of the improvements at \$90. The action was brought on January 10, 1912. No rent will be charged Grainger up to that time, and no interest will be allowed on the purchase money up to that time. He will be charged with the rent of the land in the condition it was when he got it, and we fix this at \$24 a year. He will be allowed interest on his purchase money, \$120.50, from the same date; and he will also be allowed \$90 for his improvements as of the date of the judgment, and from this will be deducted the rent of the land at \$24 a year for the time he has held it, since January 10, 1912.

Judgment reversed, and cause remanded for a judgment and further proceedings as above indicated.

GRAINGER v. JENKINS, and seems to be founded upon justice and reason.

In *Thompson v. Bower*, 60 Barb. 463, where the vendee under a parol contract refused to make further payments because of vendor's refusal to give receipts therefor, whereupon the vendor ordered him to leave the premises, it was held that the vendor could not maintain an action for use and occupation because the relationship of landlord and tenant did not exist, and that he could not maintain an action for mesne profits because there was no trespass.

And even where the vendee tenders payment and demands a deed at the time stipulated in the parol contract, the refusal of the owner to perform does not render the vendee liable for rent for the following year, where it is shown that he took possession under the contract and remains in possession by virtue of that instrument, until the action for use and occupation is begun, since there is no relationship of landlord and tenant. *Fall v. Hazelrigg*, 45 Ind. 576, 15 Am. Rep. 278.

Of the cases holding the purchaser liable for rents during his tenure under the lease, the Kentucky cases are in the majority. In these cases, however, the question has been passed with very slight consideration, and the failure of the court to take cognizance of its former decisions may easily be a matter of oversight
L.R.A.1915E.

In *May v. May*, 33 Ky. L. Rep. 638, 110 S. W. 808, it is held that the value of the use of the land during the entire time the vendee is using it under the parol contract may be offset against the value of the improvements made on the land by the vendee.

In discussing the rights and duties growing out of repairs and improvements made by one holding under a parol contract which has been repudiated by the owner, the court in *Grimes v. Shrieve*, 6 T. B. Mon. 546, says that the owner is bound to repair the losses sustained by the vendee "in labor and expense bestowed upon the estate in repairs and improvements, not compensated by the use and occupation fairly estimated for the time that *Grimes* [the purchaser] has enjoyed the estate."

Where the owner of an interest in lands fails to carry out his parol agreement to convey his interest therein to his brother in consideration of the latter's taking possession of such lands and supporting their mother, it is held in *Treece v. Treece*, 5 Lea, 221, that the value of the rents and profits is chargeable against the vendee.

And in *Lucas v. McGuire*, 29 Ky. L. Rep. 1068, 96 S. W. 867, in which it does not appear whether the contract was written or parol, the court charges the vendee with rent for the premises during the time he held under the contract of sale.
E. L. D.

MICHIGAN SUPREME COURT.

THOMAS A. GEORGE, Prosecuting Attorney,
EX REL. GEORGE A. JONES et al.
v.

WARREN S. TRAVIS, Appt.

(— Mich. —, 152 N. W. 207.)

Intoxicating liquors — saloon within specified distance from front entrance of church — front entrance defined.

1. Either of the doors leading from the streets on the corners of which a church is situated, into the tower, from which one door leads to the auditorium of the church, must be regarded as the front entrance within the meaning of a statute prohibiting the establishment of a saloon within a specified distance from the front entrance

of a church, although the door from one street may be used more than that from the other.

Nuisance — illegal saloon — power to abate.

2. A saloon established within a prohibited distance of a church may be abated by a court of equity as a nuisance, although a license has been issued by the proper authorities and the statute provides a penalty for its violation, if the license was issued under a mistake of fact.

Parties — abatement and nuisance — prosecuting attorney.

3. The prosecuting attorney may file a bill to abate as a nuisance a saloon conducted within a distance of a church prohibited by statute.

(April 19, 1915.)

Note. — Remedy in equity for wrongful issuance of license for sale of intoxicating liquor.

Generally as to power of equity to cancel false records, see note to *Vanderbilt v. Mitchell*, 14 L.R.A.(N.S.) 304.

But few cases have been found which have considered the jurisdiction of a court of equity to cancel a liquor license or abate a liquor nuisance upon grounds which would or should have prevented the issuance of the license in the first place.

Andrews v. Auer, 177 Mich. 244, 143 N. W. 68, which sustains *GEORGE EX REL. JONES v. TRAVIS*, is sufficiently set out in the opinion to that case.

In addition to that case it has been held that where there is no adequate remedy at law or by appeal or certiorari, a judgment of the county court granting a dramshop license may be vacated and set aside for fraud in procuring the judgment, by a court of equity, on a proper bill therefor. *Burkharth v. Stephens*, 117 Mo. App. 425, 94 S. W. 720; *Kochtitzky v. Herbst*, 160 Mo. App. 443, 140 S. W. 925; *State ex rel. Verble v. Haupt*, 181 Mo. App. 18, 163 S. W. 532 (*dictum*).

In the *Burkharth* case, supra, it was held that equity had jurisdiction where it appeared that there was an insufficient number of qualified signers to a petition for a license, but in making up the records the court granting the license made it appear that it had jurisdiction to grant the same, and so there was no adequate remedy by certiorari.

So, also, in the *Kochtitzky* Case, where the record showed that the petition was signed by a majority of taxpayers in a block bounded by four streets, two of which, though shown on a plat of the city, had not been dedicated nor opened to the public, but it appeared that it was not signed by a majority of taxpayers of a block bounded by four open streets, which the court held was the true intent of the statute, the court said that there was no adequate remedy by certiorari, and so equity would have had L.R.A.1915E.

jurisdiction to cancel the license on a showing of fraud in the court granting the license; but as its judgment was considered consistent with honest error or mistaken view, it was held that it should not be set aside.

On the other hand, it was held in *Cooper v. Hunt*, 103 Mo. App. 9, 77 S. W. 483, that where the facts alleged as ground for canceling a license appear of record and can be reached by certiorari, there is no ground for equitable relief, in the absence of showing of fraud.

That under a statute which confers jurisdiction to abate a liquor nuisance where the premises are used for illegal keeping or sale of intoxicating liquors, a court of equity has jurisdiction to restrain the use of a building for keeping and sale of intoxicating liquors, where a license is illegally issued for sale at such place, is the decision in *Cheney v. Coughlin*, 201 Mass. 204, 87 N. E. 744, which affirmed a decree enjoining the use of a building as a place for the sale of intoxicating liquors on the ground that the license was void because, when granted, it was for sale in "building to be erected." The court said that, assuming, as contended, that the act of the selectmen in granting the license was quasi judicial, and so subject to review only by certiorari, yet it did not follow that the legislature could not provide a remedy by which such action could collaterally be brought under review, and as the language of the statute under which the petition was brought was general and conferred jurisdiction whenever the premises were used for the alleged keeping or sale of intoxicating liquors, it must have been intended to and does, by apt expression, include instances of violation by the holder of a license as well as by unlicensed persons.

And in *McColl v. Rally*, 127 Iowa, 633, 103 N. W. 972, although the jurisdiction of equity was not in question, it was held that an injunction should have been granted where, by a subterfuge, a license was obtained without the consent of a property owner.

J. H. B.

A PPEAL by defendant from a decree of the Circuit Court for St. Clair County, enjoining him from conducting a saloon within a prohibited distance of a church. Modified.

Statement by Ostrander, J.:

The amended bill was filed July 16, 1914, by the prosecuting attorney of St. Clair county as complainant, "upon the relation" of persons named therein, citizens of the county, who composed the board of trustees of the Methodist Episcopal Church of the city of Marine City, in said county. There was an answer, replication, and hearing in open court, and a decree was entered in accordance with the prayer of the bill, restraining defendant perpetually "from conducting his saloon, or any saloon, in the building known as the Broadway Hotel in the city of Marine City having its street door opening on the public street in the said city of Marine City within a distance of 400 feet along the street line from the Broadway front door of the Methodist Episcopal Church, located at the corner of Broadway and Main streets in the said city of Marine City. A writ of injunction may be issued in conformity with this decree."

It is recited in the decree that the material allegations of the bill are found to be true. Under subdivision (f) of the chancery rule 37, counsel have stipulated the facts of the case for review, and the trial court has certified that the facts stipulated are in accord with the testimony and satisfactory to the court. Eliminating the portion which refers to certain exhibits, they are:

"I. That the Broadway Hotel, mentioned in the bill of complaint and pleadings in said cause, was erected and maintained as a hotel many years prior to the erection of the said Methodist Episcopal Church mentioned in the pleadings in said cause, which was constructed in the year 1904, and that during that time, and at the time the church was established, a bar where intoxicating liquors were sold was maintained in said hotel. That about three years prior to the filing of the bill of complaint in this cause Messrs. John Jones and Hale P. Saph became owners of the property through foreclosure proceedings. That thereafter the hotel was vacant, and for about three years prior to May 1, 1914, the premises were unoccupied and became much dilapidated.

"II. That in April, 1914, the defendant, Travis, obtained an option from the owners to purchase the property. That he had been informed that the trustees of said church had objected to the issuance of a license and maintenance of a barroom in said hotel, on the claim that it was within the 400-foot L.R.A.1915E.

limit. That on the advice of counsel, before he obtained his license or improved the property, on April 5, 1914, he came to Marine City and observed the use made of the doors of the church during Sunday service, and came to the conclusion that the only front entrance to the church was on Main street and outside the 400-foot limit. That thereafter he applied for and obtained a license, and established and maintained a bar where he sold intoxicating liquors, in the Broadway Hotel, from May 1, 1914, to the date of hearing.

"III. That after he purchased the premises he expended about \$2,400 in making repairs and improvements. That in its general appearance and surroundings the property is an improvement to the locality. That defendant conducts a quiet and orderly house, that is maintained and patronized as a hotel, with a barroom that is also maintained and operated by defendant.

"IV. That said hotel is on the south side of Broadway street, facing north and with Market street extending along its west side. That the front entrance is on Broadway, at the northwest corner of the building, and opens into an office or lobby. That at the south side of the lobby a door leads into a narrow hallway. That from this hallway patrons may descend a stairway to a basement washroom and public toilet, and they may also turn to the right and pass to the south through a doorway opened and closed by a roller door into the barroom south of the hallway. That a common door opens from this barroom to the west on a platform and steps onto Market street. That a cinder pathway extends from these steps and along the west side of the hotel north to Broadway.

"V. That the church in question is situated on the corner of Broadway and Market street on the north side of Broadway and the east side of Main street. That Main street is one block west from Market street. That the lot upon which the church is built fronts on Main street. That a door opens from Broadway into a small lobby near the middle of the south side of the church building, and from this lobby those attending church service, church meetings, and Sunday school pass into either the Sunday school room or the church auditorium. That there is a large opening between the main auditorium and this Sunday school room, with doors which are frequently opened, throwing both into one auditorium.

"VI. That the principal entrance into the auditorium proper is through a double door across the corner of the side walls of the church on Broadway and Main streets; this opening facing southwest. At this southwest corner of the church building there is

a square tower, the base of which forms a vestibule 10 feet square. From Broadway steps lead from the sidewalk north into the vestibule through a double door. From the sidewalk on Main street like steps lead east through a like double door into the vestibule. Persons attending the church pass from the vestibule from both these entrances directly into the auditorium through the double door at its southwest corner. The doors leading into the church at the Broadway entrance and the Main street entrance are identical in construction and lead to a common entrance into the auditorium. Prior to the beginning of suit the west entrance was used by the congregation and attendants slightly more than that on the south. At all times since the church was built the membership and congregation have used the south door as a means of entering into and leaving the church. Since this suit was begun the south entrance has been used somewhat the most.

"VII. The following distances are established: (1) From a point on the street line on Market street nearest the door of the barroom of defendant's hotel, measuring along the east property and street lines of Market street, north to and across Broadway to its north line, thence west along the north property and street lines of Broadway to a point on said line nearest the doorway into the Sunday school auditorium on Broad street, is 353.6 feet. (2) From a point on Market street nearest the door of the barroom measured along the east property and street line of that street north to and across Broadway, to its north property and street lines, thence along the same west to a point nearest the center of the double door on the south side of the vestibule leading into the auditorium of the church, is 383.9 feet. (3) From a point on Market street nearest the door of the barroom, measured along the east property and street lines, north to and across Broadway, to its north property and street lines, thence west along said last-named lines to the street line on the east side of Main street, is 399.8 feet. (4) From a point on Market street nearest the door of the barroom, measured along the east property and street lines north to and across Broadway to its north property and street lines, thence west along the same to the east property and street lines of Main street, thence north along said last-named property and street lines to a point nearest the center of the double door on the west side of the vestibule leading into the auditorium of the church, is 415.9 feet."

The questions presented to and answered by the court below, and again presented in this court, are:
L.R.A.1915E.

"(1) Whether or not the prosecuting attorney has authority to appear and file the bill of complaint.

"(2) Whether or not the front door of the defendant's saloon is within 400 feet of the front door of the church in question, within the intent and meaning of § 37, act No. 291 of 1909.

"(3) If it be determined that defendant's saloon or barroom is prohibited by virtue of the above-named act, does its illegal operation day after day make it a public nuisance that may be enjoined by a court of equity?"

Messrs. Erskine & Lungerhausen, for appellant:

The mere affixing by the prosecuting attorney of his signature to the bill in his official capacity is not sufficient to impress it with the functions and capacities of an information competent to put in motion the machinery of the courts, whereby they will take cognizance of questions pertaining to the high prerogative powers of the state, or affecting the whole people in their sovereign capacity.

State ex rel. Parker v. Saline County, 60 Neb. 275, 83 N. W. 70; Bigelow v. Hartford Bridge Co. 14 Conn. 578, 36 Am. Dec. 502; State v. Anderson, 5 Kan. 115; Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co. 50 Pa. 100, 88 Am. Dec. 534; Iroquois County v. Keady, 34 Ill. 296; People ex rel. Livingston v. Pacheco, 29 Cal. 213; Atty. Gen. v. East India Co. 11 Sim. 380; Bobbett v. State, 10 Kan. 15; United States v. Throckmorton, 98 U. S. 70, 25 L. ed. 96; People v. Navarre, 22 Mich. 1.

In cases of public nuisances the suit should be by the attorney general, or, at all events, he should be a party to it, unless the individual injury is distinct from that which is done the public at large, in which case alone have the persons injured a special right entitling them to recover.

Atty. Gen. v. Johnson, 1 Wils. Ch. 87, 18 Revised Rep. 156; Baines v. Baker, 1 Ambl. 158; Atty. Gen. v. Cleaver, 18 Ves. Jr. 211; Spencer v. London & B. R. Co. 8 Sim. 193, 7 L. J. Ch. N. S. 281; Sampson v. Smith, 8 Sim. 272, 7 L. J. Ch. N. S. 260, 2 Jur. 563; Parker v. May, 5 Cush. 336; People v. Vanderbilt, 28 N. Y. 396, 84 Am. Dec. 351, 38 Barb. 282; Davis v. New York, 14 N. Y. 526; People v. St. Louis, 10 Ill. 351, 48 Am. Dec. 339; People ex rel. Rondel v. North San Francisco Homestead & R. Asso. 38 Cal. 564; Milhau v. Sharp, 17 Barb. 445; Clark v. Saybrook, 21 Conn. 313; People v. Miner, 2 Lans. 396; Engle v. Chipman, 51 Mich. 524, 16 N. W. 886.

The court will not grant an injunction in a case where property interests are not involved, and simply in aid of a criminal

statute, the enforcement of which is amply provided for in the courts of law.

State ex rel. Oklahoma v. Robertson, 19 Okla. 149, 92 Pac. 144; Atty. Gen. v. Utica Ins. Co. 2 Johns. Ch. 371; Erin Twp. v. Detroit & E. Plank-Road Co. 115 Mich. 465, 73 N. W. 556; Carleton v. Rugg, 149 Mass. 550, 5 L.R.A. 193, 14 Am. St. Rep. 446, 22 N. E. 55; Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; Re Debs, 158 U. S. 564, 592, 39 L. ed. 1092, 1105, 15 Sup. Ct. Rep. 900; State v. Ehrlick, 65 W. Va. 700, 23 L.R.A.(N.S.) 691, 64 S. E. 935; United States Exp. Co. v. State, 99 Ark. 633, 35 L.R.A.(N.S.) 879, 139 N. W. 637; 1 Wood, Nuisances, § 14; 1 Woollen & T. Liquors, § 581; Joyce, Liquors, § 615; Sheridan v. Colvin, 78 Ill. 237.

Messrs. Moore & Wilson, for appellees:

A bill to enjoin a public nuisance may be maintained by the attorney general or any other law officer empowered to represent the government.

21 Am. & Eng. Enc. Law, 708; Wolverine v. Cheboygan Circuit Judge, 162 Mich. 714, 127 N. W. 744; Starks v. Presque Isle Circuit Judge, 173 Mich. 464, 43 L.R.A.(N.S.) 1142, 139 N. W. 29, Ann. Cas. 1914D, 773; Andrews v. Auer, 177 Mich. 245, 143 N. W. 68; Osborne v. Richland, — Mich. —, 150 N. W. 249.

If the language of the statute is given its ordinary meaning, the front entrance of the saloon building is, without any question, the door that opens onto Broadway.

Starks v. Presque Isle Circuit Judge, 173 Mich. 464, 43 L.R.A.(N.S.) 1142, 139 N. W. 29, Ann. Cas. 1914D, 773.

Defendant's saloon was within the prohibited distance. People v. Schneider, 170 Mich. 150, 135 N. W. 973.

The saloon is a public nuisance, and as such may be restrained by a court of equity.

Lee County v. Hooper, 128 Ga. 99, 56 S. E. 997; State ex rel. Lyon v. City Club, 83 S. C. 509, 65 S. E. 730; Lofton v. Collins, 117 Ga. 435, 61 L.R.A. 150, 43 S. E. 708; Cameron v. Fellows, 109 Iowa, 534, 80 N. W. 568; Bartel v. Hobson, 107 Iowa, 644, 78 N. W. 689; Davis v. Auld, — Me. —, 53 Atl. 121; State ex rel. Vance v. Crawford, 28 Kan. 726, 42 Am. Rep. 182; Legg v. Anderson, 116 Ga. 401, 42 S. E. 721; Windfall Mfg. Co. v. Patterson, 148 Ind. 414, 37 L.R.A. 381, 62 Am. St. Rep. 532, 47 N. E. 2, 18 Mor. Min. Rep. 674; Joyce, Nuisances, § 12; Detroit Realty Co. v. Barnett (Detroit Realty Co. v. Oppenheim) 156 Mich. 388, 21 L.R.A.(N.S.) 585, 120 N. W. 804; Andrews v. Auer, 177 Mich. 247, 143 N. W. 68; Smith v. McDowell, 148 Ill. 51, 22 L.R.A.1915E.

L.R.A. 397, 35 N. E. 141; Jackson v. Norris, 72 Ill. 364; 21 Am. & Eng. Enc. Law, 704.

Ostrander, J., delivered the opinion of the court:

The second question may be first considered. The church fronts upon Main street. The entrance is in the southwest corner of the building, and approached as well from Broadway, which is the street south of the church, as from Main street, which is the street west of the church. A point on Main street nearest the front entrance is more than 400 feet from the saloon. The point on Broadway nearest the entrance is less than 400 feet from the saloon. Having gained the little corner vestibule of the church from either street, there is a single entrance into the body of the church. We endeavored, in People v. Schneider, 170 Mich. 150, 135 N. W. 973, to so interpret the somewhat ambiguous language of the statute as to afford a workable rule, doing no violence to the language employed by the legislature. Within that rule, the question must be answered in the affirmative, although it is probable that, if the saloon was situated in a different direction from the church, it would be claimed that the measurement should be made to a point in Main street nearest the front entrance to the church.

2. The other questions may be considered together. Defendant has paid his tax, secured his license, filed his bond, with the express assent and approval of the public authorities charged with official duties in connection therewith. It turns out that, applying the statute as it may be applied, and as I think it should be applied, the saloon door is about 16 feet less than 400 feet from the front entrance to the church. The statute provides that "no license shall be issued to anyone to open up and establish a new bar or saloon having its front entrance within 400 feet along the street line from the front entrance of a church, . . . and after this act takes effect an attempt to open up and establish a new bar . . . having its front entrance within 400 feet . . . from the front entrance of a church . . . shall be a violation of this act, and the person . . . so doing, upon conviction thereof, shall be subject to the penalties prescribed," etc. Act No. 291, Public Acts 1909.

It is not attempted to subject defendant to the pains and penalties of the statute, but, upon the complaint of the prosecuting attorney to a court of equity, to close the saloon, or bar, by the order of the court

and the writ of injunction, and the question is presented whether a court of equity may properly grant the relief. Upon this point the argument advanced by complainant is that the saloon is a public nuisance, which may be abated or restrained by a court of equity. This court has held that equity has jurisdiction to abate a saloon, if a private nuisance, although the nuisance is also a breach of the criminal law. *Detroit Realty Co. v. Barnett* (Detroit Realty Co. v. Oppenheim) 156 Mich. 385, 21 L.R.A. (N.S.) 585, 120 N. W. 804. We held in *Gowan v. Smith*, 157 Mich. 443, 122 N. W. 286, that mandamus was not the proper remedy to compel the observance of the statute relating to the opening and closing of saloons. In *Andrews v. Auer*, 177 Mich. 244, 143 N. W. 68, it appeared that the saloon keeper stated, in applying for a license, that he was a citizen of the United States and of Michigan. It was charged in the bill of complaint that he was not a citizen of the United States, and for relief it was prayed that the approval of his application for license be declared null, that the license be canceled, and that he be restrained from further carrying on the saloon business. Without deciding whether a place where intoxicating liquors are sold contrary to law is a public nuisance, it was held that the jurisdiction of the court of equity extended to the canceling of certificates and other instruments executed by government officials and boards, when obtained by fraud or illegally. The cases cited in the opinion, the most of them, apply the rule that in cases of fraud the jurisdiction of courts of equity is concurrent with the jurisdiction of courts of law, and that courts of equity may grant more complete relief by compelling cancelation, or surrender, of instruments. See *Mack v. Frankfort*, 123 Mich. 421, 82 N. W. 209, where such relief was denied, although fraud was alleged, on the ground that complainant had an adequate remedy at law. The cases of *Wolverine v. Cheboygan Circuit Judge*, 162 Mich. 713, 127 N. W. 744, and *Starks v. Presque Isle Circuit Judge*, 173 Mich. 464, 43 L.R.A. (N.S.) 1142, 139 N. W. 29, Ann. Cas. 1914D, 773, were cases of applications to this court for writs of mandamus to compel the circuit judge, in the first case to dissolve, and in the other case to issue, a writ of injunction. The relief asked for in the first case in the court below was restraint of official action; in the other, to restrain the conducting of a saloon. In neither case in this court was the question now being considered presented. In *Osborne v. Richland*, — Mich. —, L.R.A.1915E.

150 N. W. 249, the direction of official action, by mandamus, was the relief asked for in the court below, the proceeding being reviewed here by certiorari.

In no case called to my attention has this court intimated that the jurisdiction of equity courts extended to enforcement of the liquor law or the control of saloons or saloon keepers; that equity will interfere to prevent violations of the liquor law, or to inflict penalties therefor. There is, however, a distinction between cases like the one at bar and *Andrews v. Auer*, supra, and cases in which, upon the theory that an illy conducted saloon is a public nuisance, a court of equity is asked to interfere. The distinction lies in the fact that in one class of cases, like the present one, the defendant has no right to do business at all, but only has an apparent right, evidenced by the results of his own and of official action, while in the other class of cases the saloon keeper has both a real and an apparent right to conduct the business, but conducts it badly. In the second class of cases, the saloon keeper may conduct his business properly and within the law; in the first class, he has no right to conduct the business, at the particular place, at all. There is in each case responsibility to the criminal law; but in the cases of the first class the penalty is incurred at the outset, is continuing, and cannot be escaped by any method of conducting the business, while in the other class it is incurred only as in the manner of doing business the law is violated.

Defendant cannot, if he would, lawfully carry on his business at his present place of business, and every instrument and every vote or resolution upon which his apparent right is founded ought not to have been given. Possessing the apparent right, the evidences of public permission and indorsement, a court of equity may declare them to be ineffective and insufficient, and compel their surrender or cancelation. In *Andrews v. Auer*, the evidences of right to do business were obtained by fraud; in this case, it must be presumed, they were obtained because of a misapprehension of, or lack of knowledge of, facts which, if understood, would have led to the refusal of the right.

In this view of the matter, the prosecuting attorney was a proper complainant, informing officer, the prayer of the bill may be treated as amended, and a decree entered in this court conformably with the views herein expressed. Neither party will recover costs of this appeal.

OKLAHOMA SUPREME COURT.

A. C. BESHIRS, Plff. in Err.,
v.
EARL ALLEN.

(— Okla. —, 148 Pac. 141.)

Slander — statement to sheriff — charging felony.

1. Words actionable in themselves, because they charge the plaintiff with having committed a felony, spoken to a sheriff while engaged in hunting for the culprits actually guilty of the felony, are qualifiedly privileged if they are spoken in good faith, with an honest belief that they are true, with the sole intent of aiding justice, and with no motive or intent to injure the person spoken of.

Evidence — repetition of slander — malice.

2. In order to show express malice where the scandalous words spoken of the plaintiff were spoken on an occasion of qualified privilege, evidence of a repetition of such charge made to other persons, both before and after an action is commenced, is admissible for the purpose of showing malice,

Headnotes by DEVEREUX, C.

Note. — Libel and slander: privilege of informal communication with respect to criminal charge.

The earlier cases on this question are discussed in the note to Flynn v. Boglarsky, 32 L.R.A. (N.S.) 740, and that to Miller v. Nuckolls, 4 L.R.A. (N.S.) 149.

It has been held that informal statements made to an officer investigating a crime, charging one with the crime, are absolutely privileged. Wells v. Toogood, 165 Mich. 677, 131 N. W. 124 (statement made to an officer investigating a robbery).

But in the majority of cases such accusations are held conditionally privileged. If the words were spoken without malice and in the honest belief that the one accused was guilty of the crime charged, the matter is privileged. Flanagan v. McLane, 87 Conn. 220, 87 Atl. 727, 88 Atl. 96 (letter written to an officer):

Likewise, a second letter written to the same officer advising him that the stolen property had been recovered, reiterating the belief of the writer in the guilt of the one named in the first letter, is privileged where it was written, while he was acting honestly and without malice, to the officer, already engaged in investigating the loss, and for the guidance of the officer in case it was or might become his duty to pursue the investigation with a view to criminal proceedings. Ibid.

A statement made to a committee investigating the police department of the city, by a councilman and chairman of the police committee, but not a member of the investigating committee, that a certain hotel in the city is conducted as a disorderly house, L.R.A.1915E.

but not for the purpose of increasing the damages.

Trial — instruction — refusal — evidence.

3. Where such evidence is admitted and defendant requests a special instruction to the jury that they cannot consider such evidence in arriving at the amount of the damage, and such request is refused, held error.

(April 13, 1915.)

ERROR to the District Court for Bryan County to review a judgment in plaintiff's favor in an action brought to recover damages for an alleged slander. Reversed.

Statement by Devereux, C.:

This was an action for slander, tried in the district court of Bryan county, before Hon. A. H. Ferguson, judge. There was a verdict and judgment in favor of the defendant in error (plaintiff below), and the case is brought to this court by proper proceedings in error. For convenience the defendant in error herein will be called plaintiff, and the plaintiff in error defendant, being the positions they occupied in the trial court.

is qualifiedly privileged. Ivie v. Minton, — Or. —, 147 Pac. 395. It is stated by the court that the committee was considering a subject of grave importance to good government and public morals, for the purpose of enlightening the city government, and thereby enabling it to secure a more efficient service, and that the defendant was at the time a councilman charged to the extent of his ability with securing for the public the best results in this direction, and that therefore the statement was qualifiedly privileged.

A communication made in good faith and without malice, by one interested in a corporation proposing to erect a cheese factory in place of one which had been burned, to one whom he sought to interest in the proposed enterprise, that the plaintiff in the libel action was suspected of having burned the first factory, is privileged, although made in the presence of the wife and son of the person addressed, it being the custom of persons in like situation with the latter, to consult their wives and other members of their family about engaging in new business enterprises of importance. Cook v. Gust, 155 Wis. 594, 145 N. W. 225.

But an accusation of burning a mill not owned by the one making it, but in the operation of which he had an interest, is not privileged where made in the presence of third persons, and not in reply to questions asked by the accused, nor with the sole purpose of ascertaining the origin of the fire. Fields v. Bynum, 156 N. C. 413, 72 S. E. 449.

As to communications made in response to inquiries by person defamed, see note to Christopher v. Akin, 46 L.R.A. (N.S.) 104.

W. A. E.

The plaintiff in his petition alleged, in substance: That he was a citizen of the county of Bryan, Oklahoma, and is, and was at the times mentioned, engaged in the business of civil engineer, and was the county surveyor for Bryan county; and that the defendant is a citizen and resident of Bryan county, Oklahoma; that on or about the 24th day of May, 1911, at the town of Albany, in the county of Bryan, a certain bank, known as the Albany State Bank, was robbed by persons unknown to the plaintiff, and that subsequent thereto, and on the 25th day of May, 1911, in a certain conversation which the defendant had in the hearing and presence of one A. S. Hamilton, who was at said time the sheriff of Bryan county, the defendant maliciously spoke and published of and concerning the plaintiff the following slanderous, false, malicious, and defamatory words: "I can tell you who robbed that bank; it was that surveyor, Earl Allen; I think it was he who robbed that bank on account of what he said to me on yesterday in Kemp; I tell you right now if he did not rob that bank he was closely connected with persons who did rob it, and knows all about it. If I was the sheriff of this county I would put him in jail before night." That this conversation referred to the robbing of the Albany State Bank at Albany, and at the time this conversation was had with the sheriff he was investigating the robbery for the purpose of ascertaining who had robbed the bank. The plaintiff further alleges that on or about the 24th of May, 1911, in a conversation that the defendant had with Earl Allen, and in the presence of Earl Allen and J. A. Groves, and in the hearing of other persons whose names are unknown to the plaintiff, in the town of Kemp, in said county, the defendant maliciously spoke of and concerning the plaintiff the following slanderous, false, malicious, scandalous, and defamatory words: "If I were the sheriff of Bryan county, I would put you in jail before night for robbing this bank."

The petition, then, in the usual form, alleges that these words were maliciously and slanderously spoken of the plaintiff by the defendant, charging him with the commission of a crime, and tending to blacken and injure his honesty, virtue, integrity, morality, and reputation, and to expose him to public contempt and ridicule, and to injure and damage his business, and that the words so spoken were utterly false. The petition further alleges that by the acts of the defendant the plaintiff was permanently injured and damaged in his good name and reputation, and he is exposed to public contempt, and was and is damaged in his business of civil engineer, all of which amounts reasonably to the sum of \$10,000.

L.R.A.1915E.

The evidence in this case is directly conflicting in a great many respects. The plaintiff's evidence tended to prove that the defendant, who was a stranger to him, met him in the wagon yard at Kemp, and told the plaintiff of the bank being robbed; the information conveyed by the defendant of the robbery of the bank being, according to plaintiff's testimony, the first intimation that he had that the bank had been robbed. On the part of the defendant evidence was offered that plaintiff, at Kemp, first told the defendant of the robbery of the bank, of which fact the defendant was at that time ignorant, and proceeded to give a description of the men who robbed the bank, and of the horses they rode, and other particulars of the robbery; that the defendant asked the plaintiff how he knew so much about this robbery, and where he got his information, whereupon the plaintiff answered, "At the telephone office," and the defendant asked the plaintiff if he had been to the telephone office, and plaintiff did not say whether he had or not; that at that time the defendant used the words, "I believe you either robbed the bank or you know who did, and if I was the sheriff of Bryan county, I would put you in jail." It will be noticed in the petition that one count sets out that the slanderous words were spoken to the sheriff of Bryan county at a time when the sheriff was investigating the robbery for the purpose of ascertaining who had robbed the bank. The evidence of the sheriff that the defendant had spoken these words to him was allowed to go to the jury over the objection of the defendant, who claimed that the words were privileged, being given to an officer in the discharge of his duty. During the trial the plaintiff was allowed to introduce the testimony of the deputy sheriff of Bryan county, who served the summons in this case on the defendant; that at the time summons was served the defendant told the sheriff, in regard to the charge he had made against the plaintiff of robbing the bank, "I said it, but I seen my way clear when I did say it, that he is guilty of the robbery." This repetition of the alleged scandal, of course, was not set out in the petition, as the conversation took place after the action was commenced. The plaintiff was also allowed to introduce testimony that one Walker had a conversation with the defendant before the institution of the suit, in which the defendant said that the bank was robbed from the inside, and the man that was riding around with John Groves was known to him, there being evidence on the part of the plaintiff that he was riding with Groves on the day on which the bank was robbed. The court charged the jury on the question of damages: "You are

therefore instructed that, if you believe and find from the evidence in this case that the defendant spoke or published the matters and words alleged in plaintiff's petition, or substantially as alleged in the petition, and that the same were false, and no justifiable motive is shown by the defendant for having made the same, and the same were not privileged, as the court has heretofore instructed, and that the same were spoken or published to some person or persons other than the plaintiff, then it would be your duty to find for the plaintiff. And in determining the amount that the plaintiff is entitled to recover, you may take into consideration what he has been damaged in reputation and humiliation and standing in the community. In no event should your verdict, if for the plaintiff, be for less than the sum of \$100, and costs."

The defendant requested the following instructions, which were refused, and exceptions duly saved, and the refusal to give these instructions is one of the assignments of error:

No. 6. "You are further instructed that you cannot consider the evidence of the witness Dickerson in arriving at the amount, if any, the plaintiff is entitled to recover of the defendant, for the reason that the plaintiff does not allege that the making of the said statement to the said witness Dickerson damaged the plaintiff in any sum whatsoever or contributed to such damage."

No. 7. "You are further instructed that you cannot consider the evidence of the witness Walker as to the statement made by the defendant to him, for the reason that the plaintiff does not in his petition allege such as a cause of damage, or that the plaintiff was damaged thereby."

Messrs. Charles E. McPherrren, Charles F. Cochran, and W. H. Ritchey, for plaintiff in error:

The demurrer to the allegation that plaintiff "was damaged in his said business of civil engineer" should have been sustained.

Newell, Slander & Libel, 2d ed. p. 174; Com. v. Wardwell, 136 Mass. 164; Sander-son v. Caldwell, 45 N. Y. 398, 6 Am. Rep. 105; Oakley v. Farrington, 1 Johns. Cas. 129, 1 Am. Dec. 107; Van Tassel v. Capron, 1 Denio, 250, 43 Am. Dec. 687; Rea v. Wood, 105 Cal. 314, 38 Pac. 899.

Evidence as to statements made by the defendant at the place of two alleged conversations between plaintiff and defendant, and during the time of a brief pause between the said conversations, was admissible.

Kidd v. Ward, 91 Iowa, 371, 59 N. W. 279; Dalton v. Gill, 25 Hun, 120; Ritchie v. Stenius, 73 Mich. 563, 41 N. W. 687; L.R.A.1915E.

Cook v. Barkley, 2 N. J. L. 169, 2 Am. Dec. 343; Coleman v. Playsted, 36 Barb. 26.

Where all the words laid are necessary to constitute the slander, they must all be proved substantially as laid.

Baker v. Young, 44 Ill. 42, 92 Am. Dec. 149; Sanford v. Gaddis, 15 Ill. 228; Patterson v. Edwards, 7 Ill. 720; Wilborn v. Odell, 29 Ill. 456; Comerford v. West End Street R. Co. 164 Mass. 13, 41 N. E. 59; Taylor v. Moren, 4 Met. (Ky.) 127; Bundy v. Hart, 46 Mo. 460, 2 Am. Rep. 525; Enos v. Enos, 135 N. Y. 609, 32 N. E. 123; Gray v. Elzroth, 10 Ind. App. 587, 53 Am. St. Rep. 400, 37 N. E. 551; Stanfield v. Boyer, 6 Harr. & J. 248; Wheeler v. Robb, 1 Blackf. 330, 12 Am. Dec. 245; Coe v. Griggs, 76 Mo. 619; Stern v. Loewenthal, 77 Cal. 340, 19 Pac. 579; Schmisser v. Kreilich, 92 Ill. 347; Irish-American Bank v. Bader, 59 Minn. 329, 61 N. W. 328; Birch v. Benton, 26 Mo. 153; Berry v. Dryden, 7 Mo. 324; Christman v. Christman, 36 Ill. App. 567; Mayo v. Sample, 18 Iowa, 306; Grimes v. Coyle, 6 B. Mon. 301; Dale v. Harris, 109 Mass. 193; Eames v. Whittaker, 123 Mass. 342.

It was the duty of the court to withdraw from the consideration of the jury the sheriff's evidence, under the uncontraverted facts in this case.

Newell, Slander & Libel, 2d ed. §§ 9, 391; Wharton v. Wright, 30 Ill. App. 343; Neeb v. Hope, 111 Pa. 145, 2 Atl. 568; Strode v. Clement, 90 Va. 553, 19 S. E. 177.

The burden of proof was upon the plaintiff to establish actual malice, and having himself disproved malice he failed to establish a liability against the defendant.

Kirkpatrick v. Eagle Lodge, 26 Kan. 384, 40 Am. Rep. 316; Redgate v. Roush, 61 Kan. 480, 48 L.R.A. 236, 59 Pac. 1050; Fahr v. Hayes, 50 N. J. L. 275, 13 Atl. 261; Williams v. Bryant, 4 Ala. 44; Doherty v. Brown, 10 Gray, 250; Olmstead v. Miller, 1 Wend. 506; Liddle v. Hodges, 2 Bosw. 537.

Defendant had the right to introduce all the facts and circumstances known to him which would have caused him to believe a statement which he had made to the witness Walker.

Huson v. Dale, 19 Mich. 17, 2 Am. Rep. 66; Donahoe v. Star Pub. Co. 4 Penn. (Del.) 166, 55 Atl. 338; Montgomery v. Knox, 23 Fla. 595, 3 So. 211; Kennedy v. Dear, 6 Port. (Ala.) 90; Jones v. Townsend, 21 Fla. 431, 58 Am. Rep. 676; Coogler v. Rhodes, 38 Fla. 240, 56 Am. St. Rep. 170, 21 So. 109; Thompson v. Powning, 15 Nev. 195.

Messrs. C. C. Parker and Utterback, Hayes, & MacDonald, for defendant in error:

The words spoken were actionable *per se*.

Malone v. Stewart, 15 Ohio, 320, 45 Am. Dec. 577; Dial v. Holter, 6 Ohio St. 241; Brooker v. Coffin, 5 Johns. 189, 4 Am. Dec. 337.

Failure to prove all the words alleged does not constitute a fatal variance, provided sufficient of the precise words alleged are proved so as to constitute a cause of action, and the proof need not correspond in every particular with the words as alleged, provided the identity of the charge is substantially made out.

25 Cyc. 484, 495; Nicholson v. Dunn, 21 Ky. L. Rep. 643, 52 S. W. 935; Lovejoy v. Cooksey, 19 Ky. L. Rep. 87, 39 S. W. 514; Robbins v. Fletcher, 101 Mass. 115; Wheeler v. Robb, 1 Blackf. 330, 12 Am. Dec. 245; Bundy v. Hart, 46 Mo. 460, 2 Am. Rep. 525; Gray v. Elzroth, 10 Ind. App. 587, 53 Am. St. Rep. 400, 37 N. E. 551; Baker v. Young, 44 Ill. 42, 92 Am. Dec. 149; Sharp v. Bowlar, 103 Ky. 282, 45 S. W. 90; Downs v. Hawley, 112 Mass. 237; Bower v. Deideker, 38 Iowa, 418.

Statements made by defendant to plaintiff in regard to the latter's connection with the robbery do not come within the rule of privilege.

25 Cyc. 523, 524; Smedley v. Soule, 126 Mich. 192, 84 N. W. 63; Quinn v. Scott, 22 Minn. 456; Carpenter v. Bailey, 53 N. H. 590; Harwood v. Keech, 6 Thomp. & C. 665; Douglass v. Daisley, 57 L.R.A. 475, 52 C. C. A. 324, 114 Fed. 628; Mitchell v. Bradstreet Co. 116 Mo. 226, 20 L.R.A. 138, 38 Am. St. Rep. 592, 22 S. W. 358, 724.

Devereux, C., filed the following opinion:

It will be noticed that the petition does not set out the alleged slanderous words spoken to Walker nor those spoken to Dickerson. The words spoken to Dickerson, who was deputy sheriff, were spoken after the suit was commenced. This evidence was admissible because one of the causes of action of the petition showed that the alleged slanderous words were spoken to the sheriff of the county while engaged in hunting for the culprits, and this, without proof of notice, would be privileged, and therefore not actionable. While repetition of the words used to the sheriff were privileged at the time he used them, yet the using of such words to other persons prior to the making of the privileged communication is evidence to go to the jury to show malice. In Newell on Slander & Libel, 3d ed. § 499, p. 480, the author says: "The theory of privilege in connection with the law of defamation involves a variety of conditions of some nicety, and also a doctrine not always of easy application to a set of facts; and such being the case in any trial, whether civil or criminal, while the questions of

libel or no libel, malice or no malice, are matters of fact for a jury, the question of privilege or no privilege, where the circumstances under which the communication was made are not disputed, is entirely one of law for the judge, but where such circumstances are in doubt, the jury must first find what they were or what the defendant thought they were."

The testimony, therefore, on this question, was competent to go to the jury on the question of express malice in the privileged communication made to the sheriff.

The communication made to the sheriff under the facts of this case is a qualified privilege, that is, it is a privilege which exists only if the defendant made it in good faith, with an honest belief that it was true, and with the sole intent to aid justice, and with no malice toward the plaintiff, or intent to injure him; but the fact that he made the charges to Dickerson and Wallace, all practically the same that he told the sheriff, was evidence to go to the jury to show malice. However, that was the only purpose for which such evidence was admissible, and it could not be considered by the jury for the purpose of enhancing damages. By the sixth and seventh instructions, set out above, the court was expressly requested to charge on this subject, but failed to do so, and this, we think, is error.

In Bodwell v. Swan, 3 Pick. 376, the question is discussed as to whether evidence of libelous statements made after the action was commenced was admissible or not, and the court came to the conclusion that it was, but cited with approval the decision of Lord Ellenborough in Russell v. Macquister, 1 Campb. 49, note, in which evidence of this kind was admitted, but it was said that the court should charge the jury not to give damages for it.

In 2 Greenleaf on Evidence, 15th ed. § 418 (4), it is said: "As to the proof of malice or intention: If the words are in themselves actionable, malicious intent in publishing them is an inference of law, and therefore needs no proof, though evidence of express malice may perhaps be shown in proof of damages. But if the circumstances of the speaking and publishing were such as to repel that inference and exclude any liability of the defendant, unless upon proof of actual malice, the plaintiff must furnish such proof. To this end he may give in evidence any language of the defendant, whether oral or written, showing ill-will to the plaintiff, and indicative of the temper and disposition with which he made the publication; and this whether such language were used before or after the publication complained of. But if such collateral evidence consists of matter action-

able in itself, the jury must be cautioned not to increase the damages on that account."

This is in point in the case at bar. In one cause of action, as set out in the petition, the conversation had with the sheriff charging the plaintiff with the crime of robbing the bank was a qualified, privileged communication, and before the plaintiff could recover he must show express malice. This he could do by showing the repetition of the scandalous matter to other persons, both before and after the suit was commenced; but, under the rule laid down by Mr. Greenleaf, although this evidence is admitted, the jury must be cautioned not to increase the damages on that account.

In the case at bar the judge was expressly requested to charge on this subject, but the request was refused, and in his general charge above set out he did not tell the jury for what scandalous language damages may be recovered. It does not require argument to show that the repetition of a scandalous charge to three or four people is more likely to increase the verdict than words spoken to a single person.

The same conclusion was reached by the supreme court of Kentucky in *Letton v. Young*, 2 Met. (Ky.) 562. That was a case somewhat like the present, in which other declarations to those set out in the petition were allowed to go to the jury, but the jury were not charged not to consider them in assessing damages, and the court in its opinion say: "We do not wish to be understood as saying that the failure to admonish the jury as to the effect of the letter at the time of its introduction might not have been cured by an explicit instruction to the same effect at a subsequent stage of the trial, although the warning should have accompanied its admission; but we have no hesitation in saying that in this case there was no sufficient caution at any time; and, in as much as the appellants objected to the letter, and it was only admissible for one purpose, our opinion is that the court erred to their prejudice in not explicitly admonishing the jury at some time before their retirement, not to give it any effect whatever in estimating the amount of the damages."

In *Chamberlin v. Vance*, 51 Cal. 75, in an action for slander, words were repeated after the action was commenced, and the court held that they were admissible to prove enmity with which the alleged slander was spoken, citing *Bodwell v. Swan*, 3 Pick. 378. The court, however, go on and say: "It would, perhaps, have been the duty of the court, had counsel requested it, to charge the jury that no additional damages could be given for the publication of the L.R.A.1915E.

words spoken after the commencement of the action, as for a publication of a distinct slander, and that they were to be considered only with reference to the motives with which the words declared on were spoken."

In the case under consideration this request was specially made, but refused, and we think that such refusal was reversible error.

There are numerous other assignments of error, but, as the case must be reversed on this ground, it is not necessary to consider them.

We therefore recommend that the judgment below be reversed, and the cause remanded for a new trial.

Per Curiam:

Adopted in whole.

Petition for rehearing denied May 11, 1915.

KANSAS SUPREME COURT.

FRANK NICHOLSON

v.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Appt.

ANNIE M. NICHOLSON, Admr., etc., of Frank Nicholson, Deceased,

v.

SAME, Appt.

(95 Kan. 13, 147 Pac. 1123.)

Master and servant — construction work — assumption of risk.

1. Where a portion of a line of railroad in process of construction has been completed, inspected, and passed, and a speed of 10 miles per hour over that portion has been authorized, the conductor of a construction train carrying materials to the site of track-laying operations, and running at the rate of 4 miles per hour, does not assume the risk of injury from the sinking of an approach to a bridge in the completed part of the road, due to negligent construction and inspection.

Same — relation — evidence.

2. The effect of certain evidence stated, and held, that the plaintiff was the servant of the defendant, who chose to construct the new line through the instrumentality of a

Headnotes by BURCH, J.

Note. — For assumption by train employee of risk due to defects in track or roadbed, see *Smith v. Chicago, R. I. & P. R. Co.* 28 L.R.A.(N.S.) 1255, and *Luebben v. Wisconsin Traction, Light, Heat. & P. Co.* 49 L.R.A.(N.S.) 517.

corporation which it created, officered, and financed entirely within itself.

(April 10, 1915.)

A PPEALS by defendant from a judgment of the District Court for Reno County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. William R. Smith, Owen J. Wood, Alfred A. Scott, and Harlow Hurley, for appellant:

The defendant railway company did not own, was not constructing or engaged in the operation of, the Dodge City & Cimarron Valley Line.

Kansas C. R. Co. v. Fitzsimmons, 18 Kan. 34; St. Louis, Ft. S. & W. R. Co. v. Willis, 38 Kan. 330, 16 Pac. 728; Southern Kansas & P. R. Co. v. Towner, 41 Kan. 72, 21 Pac. 221; Atchison, T. & S. F. R. Co. v. Cochran, 43 Kan. 225, 7 L.R.A. 414, 19 Am. St. Rep. 129, 23 Pac. 151; Chapman v. Western Irrig. Co. 75 Kan. 767, 90 Pac. 284; State ex rel. Coleman v. International Harvester Co. 81 Kan. 610, 106 Pac. 1053; Interstate Commerce Commission v. Stickney, 215 U. S. 98, 54 L. ed. 112, 30 Sup. Ct. Rep. 66.

Plaintiff assumed the risks arising from the condition of the track in the course of its construction.

3 Labatt, Mast. & S. ¶¶ 1175, 1177; Walling v. Congaree Constr. Co. 41 S. C. 388, 19 S. E. 723; Manning v. Chicago & W. M. R. Co. 105 Mich. 260, 63 N. W. 312; Baltimore & O. S. W. R. Co. v. Welsh, 17 Ind. App. 505, 47 N. E. 182, 2 Am. Neg. Rep. 707; Luebben v. Wisconsin Traction, Light, Heat & P. Co. 154 Wis. 378, 49 L.R.A. (N.S.) 517, 141 N. W. 214; Rush v. Missouri P. R. Co. 36 Kan. 129, 12 Pac. 582; Clark v. Missouri P. R. Co. 48 Kan. 654, 29 Pac. 1138; Southern Kansas R. Co. v. Drake, 53 Kan. 1, 35 Pac. 825; Walker v. Scott, 67 Kan. 814, 64 Pac. 615.

Mr. John S. Simmons also for appellant.

Mr. A. C. Malloy, for appellees:

A railroad corporation cannot evade legal responsibilities by holding up a "dummy" corporation to the public and to its employees, which "dummy" is indebted to it from its inception in an amount exceeding its apparent worth; and where not a single dollar has ever gone into the "dummy's" treasury from either bona fide sales of stock or bonds.

2 Cook, Corp. 6th ed. §§ 663, 664; 3 Cook, Corp. § 709, p. 2231; Lehigh Valley R. Co. v. Delachesa, 76 C. C. A. 307, 145 L.R.A.1915E.

Fed. 617; James McNeil & Bro. Co. v. Crucible Steel Co. 207 Pa. 493, 56 Atl. 1067; Chesapeake & O. R. Co. v. Howard, 14 App. D. C. 262; Kelly v. Ning Young Benev. Asso. 2 Cal. App. 460, 84 Pac. 321; Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. 36 C. C. A. 155, 95 Fed. 497; O'Brien v. Champlain Constr. Co. 107 Fed. 338; Oriental Invest. Co. v. Barclay, 25 Tex. Civ. App. 543, 64 S. W. 80; Bloch Queensware Co. v. Metzger, 70 Ark. 232, 65 S. W. 929; Re Horgan, 97 Fed. 319; Day v. Postal Telegr. Co. 66 Md. 354, 7 Atl. 608; Hirschmann v. Iron Range & H. B. R. Co. 97 Mich. 384, 56 N. W. 842; St. Louis & S. F. R. Co. v. Kirkpatrick, 52 Kan. 104, 34 Pac. 400.

Plaintiff did not assume the particular risk.

Colorado Midland R. Co. v. Naylor, 17 Colo. 501, 31 Am. St. Rep. 335, 30 Pac. 249, 13 Am. Neg. Cas. 550; 3 Labatt, Mast. & S. 2d ed. § 1178; Ford v. Fitchburg R. Co. 110 Mass. 240, 14 Am. Rep. 598; George v. Clark, 29 C. C. A. 374, 56 U. S. App. 505, 85 Fed. 608; Baltimore & O. & C. R. Co. v. Rowan, 104 Ind. 88, 3 N. E. 627; Pantzar v. Tilly Foster Iron Min. Co. 99 N. Y. 376, 2 N. E. 24, 16 Am. Neg. Cas. 832; Underwood v. Gulf Refining Co. 128 La. 968, 55 So. 641; Buzzell v. Laconia Mfg. Co. 48 Me. 113, 77 Am. Dec. 212, 15 Am. Neg. Cas. 256; Northern P. R. Co. v. Hambly, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; Cudahy Packing Co. v. Sedlack, 69 Kan. 472, 77 Pac. 102, 16 Am. Neg. Rep. 329; Allison v. Stivers, 81 Kan. 713, 106 Pac. 996; Smith v. Chicago, R. I. & P. R. Co. 82 Kan. 136, 28 L.R.A. (N.S.) 1255, 107 Pac. 635; Every v. Rains, 84 Kan. 560, 115 Pac. 114; Griffin v. Fredonia Brick Co. 84 Kan. 347, 40 L.R.A. (N.S.) 1088, 114 Pac. 217; Baker v. United Iron Works Co. 90 Kan. 430, 133 Pac. 737; Emporia v. Kowalski, 66 Kan. 64, 71 Pac. 232; Barnett v. United Kansas Portland Cement Co. 91 Kan. 719, 139 Pac. 484; Miller v. Foundation Co. 93 Kan. 38, 143 Pac. 493.

Messrs. George A. Neeley and C. M. Williams also for appellees.

Burch, J., delivered the opinion of the court:

The action was one for damages for personal injuries. The plaintiff recovered, and the defendant appeals.

The defendant, desiring to construct a line of railroad running in a southwesterly direction from Dodge City, a division point on its main line, chose to accomplish its purpose through the medium of a corporation which it organized, officered, and financed entirely within itself. The road-bed was constructed by one firm of con-

tractors, and the track was laid by another. The rails were relay rails taken from other parts of the Santa Fé system, and train crews and train service were furnished to the contractors who laid the track. W. H. Durbin, an employee of the defendant on its eastern division, was appointed trainmaster and track inspector of the new line. Previous to June 11, 1912, some 25 miles of track had been laid. The track had been fully spiked and surfaced, had been inspected and passed by the track inspector to a point some distance beyond a bridge just west of a place called Ensign, and the track inspector had authorized a speed of 10 miles per hour over this portion of the track. The plaintiff, who had been an employee of the defendant for a number of years, was assigned to a construction train on the new line as conductor. No other engine having sufficient power being available, the defendant supplied a switch engine, with footboards at the front and rear, for use in operating the construction train. On the morning of June 11, 1912, the plaintiff left Ensign with his train, carrying construction materials, for the site of the construction work some miles beyond. The plaintiff, Durbin, and Joe Ault, who was boss tracklayer of the construction crew, were riding on the footboard of the engine. As they came near the bridge west of Ensign, the plaintiff observed that Ault had a spike hammer in his hand and asked what he intended to do with it. Ault replied that he intended to spike down some bad track near a bridge. The plaintiff signaled the engineer to slow down, which the engineer did, when Ault said, "This is not the bridge." The speed of the engine had been reduced to about 4 miles per hour, and when it passed over the approach to the bridge the track sunk, the footboard caught on the bridge, was turned under and broken off, and the plaintiff was dragged a considerable distance before the engine stopped. He was badly bruised and mangled, and died in November, 1913, soon after the trial of the case was concluded.

Revivor proceedings took such a course that two appeals were docketed in this court. The ground of the action was negligence in the construction, inspection, and maintenance of the track at the place where the plaintiff was injured. The defense was that the plaintiff assumed the risk of injury at all times while engaged in construction work.

An effort was made to show that the plaintiff had equal opportunity with the defendant to know, and that he did know, the condition of the roadbed and track at the time and place of injury. These matters were determined adversely to the defendant.

by findings of fact returned by the jury. It was the plaintiff's business to deliver construction material by means of his train at places designated by those having authority over that subject. He was not engaged in constructing roadbed or in laying track. Contractors were employed for that purpose, and the plaintiff's duties consisted in moving his train over the track provided for him. The plaintiff freely admitted knowledge of conditions at the front, where his engine would frequently go off the track because rails were not spiked and surfacing was not done; but the engine never went off the track going to and from work, it did not rock particularly, the plaintiff noticed no depressions where the track had been surfaced, knew of no bad track where it had been surfaced, and did not notice any unevenness of the track at the place where the injury occurred when he passed over it returning from the front on the evening of June 10th. The track had been inspected, and had been passed by the official upon whose judgment he had the right to rely. It had taken on the character of permanency, and he had been authorized to run his train at more than double the rate of speed at which he was moving when the accident occurred. He did not observe any sinking of the track near the bridge at the time of the accident soon enough to avoid injury. The result of the foregoing is that the defendant must rely upon the claim, already indicated, that the plaintiff assumed the risk of injury at all points along the new line while construction work was in progress and until the line was open for general transportation purposes. Manifestly this claim is too broad.

It was the duty of the defendant to make even construction work at the very front as safe as work of that character can reasonably be made, and the plaintiff assumed only those hazards which inhered in construction work performed with reasonable care. As track laying progressed, the same general standard of care applied to stretches of completed track left behind. The plaintiff might well assume the risk of using unsurfaced track only partially spiked, or even held simply by bridle bars, at the site of track-laying operations; but after track had been laid, and safer conditions were practicable, it was the duty of the defendant to establish them. Indeed, the defendant recognized and undertook to discharge this duty to persons who were obliged to go back and forth between material yards and the front. The inspector stated that it was his duty to see that the proper number of ties were used, that rails were properly spiked and plated, and that

the track was properly lined and surfaced. Conceding the right of a master to conduct his business according to his own methods, within the limits of reasonable prudence already outlined, the inspector was stationed in the midst of the defendant's scheme of construction work, and the plaintiff assumed those risks only which inhered in the operation of a construction train over inspected and accepted track while upon track of that kind. He assumed no risk of injury from defective construction of which he was ignorant, and which proper inspection would have disclosed or anticipated. It appears that the track sunk at the end of the bridge because of rain which had fallen upon it. After the accident, Durbin posted a bulletin to all conductors not to take trains out on the new line after heavy rains until advised by him to do so. The plaintiff was then in a hospital.

All the cases cited in the defendant's brief have been examined. Two of them disclose a system of railroad building which was in vogue in the state of Indiana twenty-five years ago. Under that system one-half the necessary number of ties were laid and the rails were spiked to them. Afterwards ties sufficient to complete the road were distributed, laid, and the rails spiked to them. After that the track was leveled and ballasted. All the while construction trains were obliged to go back and forth over the incomplete and insecure track, carrying ties, rails, spikes, ballast, and other construction materials. No more economic, efficient, and safe method was known. "Safety first" was not then a slogan, and it was not perceived that peril to construction crews was unnecessarily and inexcusably prolonged. From such methods of railroad building originated declarations of the courts that employees engaged in construction work assumed the risk of injury until the road was completed and opened for the carrying of freight and passengers generally. The declarations have, on occasions, been repeated by the uncritical, because found in the books; but they are misused when applied to scientific railroad building, as conducted by the defendant.

Other cases cited by the defendant deal with situations like that occupied by the plaintiff when operating his train at the site of track laying. Others deal with impermanent and shifting conditions, constantly undergoing change by the very work which the servant is engaged in performing when injured. Others apply the principle governing cases in which repair trains proceed into the midst of dangerous conditions for the purpose of remedying them. The decision of the supreme court of Texas in the case of *Gulf, C. & S. F. R. Co. v. L.R.A.1915E.*

Redeker, 67 Tex. 181, 2 S. W. 513, cited by the plaintiff, appears to be sound: "The appellant complains that 'the court erred in that part of its charge wherein the jury were instructed that it was the duty of the defendant to furnish a safe roadbed. . . .' Under this assignment it is submitted in substance that, because the evidence showed that appellee was employed as a brakeman on a construction train engaged in building an unfinished road, so much of the charge as instructed the jury that it was the duty of the company to furnish a safe roadbed was calculated to mislead them. That there must of necessity be a time in the constructing of a railroad when its track is not perfectly safe we think a proposition that does not admit of doubt. The employees operating a train at such time must be presumed to have assumed the additional risk incident to that state of affairs. But we cannot assent to the doctrine that, when a portion of a road is completed and is being operated for construction purposes only, the company is not bound to use all reasonable care in putting it into such condition that its employees engaged in running trains over it may use it with safety to themselves and their coemployees. We see nothing in the circumstance that a road is not finished, so as to be opened for the purposes of traffic, to make this an exception to the general rule that the master must furnish the servant with safe machinery and appliances for the work he is called upon to perform. In this case the injury occurred on a side track. The road had been completed beyond this, and trains were being run past it for construction purposes; and in the absence of some proof showing a necessity for leaving the siding in an unfinished state, it must be held that it was the duty of appellant to put it in a condition to be operated in safety by its employees." 67 Tex. 187.

The conclusion is that it was the defendant's duty to furnish the plaintiff a reasonably safe roadbed and track at the place where he was injured, the finding of the jury that this duty was not fulfilled is sustained by the evidence, and the plaintiff did not assume the risk of injury at the place where he was injured.

The defendant made some contention at the trial that the plaintiff was not one of its employees when injured, but was an employee of the Dodge City & Cimarron Valley Railway Company, which has been referred to as the company created by the defendant for the accomplishment of its purposes in building the Dodge City extension. It is not necessary to print the evidence bearing upon the matter. The branch company was a mere instrumentality of the Santa Fe

Company. To be more plain, the Dodge City & Cimarron Valley Railway Company was a ledger heading in the Santa Fé Company's system of accounting, which did not break the relation of master and servant existing between the plaintiff and the defendant when the plaintiff was placed in charge of the construction train.

The judgment of the District Court is affirmed.

Petition for rehearing denied.

NEBRASKA SUPREME COURT.

LUCIE BODIE, Appt.,

v.

EDWARD BATES.

('95 Neb. 757, 146 N. W. 1002.)

Courts — jurisdiction — statute.

1. "The district courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute."

Equity — construction — rules.

2. Where the application of a technical rule of construction would defeat a clear equity, the rule should not be applied.

Judgment — consent — scope.

3. Where consent to the exercise of judicial power in a manner not authorized by statute is relied upon as a bar to equitable relief demanded in another state, it should be made to clearly appear that the *res* of the equity so demanded was within the contemplation of the consenting parties, and was considered by the court when it acted upon their consent. Such consent, and the action of the court based thereon, should

not be extended, by construction, so as to defeat a clear equity of either of the consenting parties in the courts of the other state.

Divorce — foreign — alimony — domestic assets.

4. Where it clearly appears that in a suit for divorce in a sister state, under the statutes of which the courts did not have jurisdiction to take cognizance of real estate then owned by the husband in this state, nor, without consent of the parties, to consider the same in fixing the amount of alimony, and no such consent is affirmatively shown to have been given, and it also clearly appears that the court, in allowing alimony to the wife, did not take cognizance of or consider such real estate in fixing the amount of such allowance, but allowed the wife a reasonable sum only, based upon the property owned by the husband situated within the jurisdiction of that court, the judgment so rendered is not a bar to an independent suit in this state by the wife, after divorce, to recover a reasonable amount of alimony out of the real estate of the husband situated in this state; nor will the fact that she accepted and has retained the allowance made to her by the judgment of the other court, out of the property of her husband situated within the jurisdiction of that court, estop her from prosecuting such suit.

Case law — conflict of decisions.

5. *Eldred v. Eldred*, 62 Neb. 613, and *Cochran v. Cochran*, 42 Neb. 612, examined, and held to be at variance with each other; and upon due consideration, and for the reasons stated in the opinion, *Cochran v. Cochran* is adhered to, and *Eldred v. Eldred*, in so far, but in so far only, as it is in conflict therewith, is overruled.

(April 3, 1914.)

Headnotes by FAWCETT, J.

Note. — *Valid divorce granted in one state as affecting independent suit for alimony in another.*

This note is supplementary to a note on the same subject appended to *Toncray v. Toncray*, 34 L.R.A. (N.S.) 1106.

As to the necessity and sufficiency of service of notice of application for alimony or support or for change of allowance in that regard, after decree of divorce or separation, see note to *Underwood v. Underwood*, L.R.A. 1915B, 674.

Thompson v. Thompson, 226 U. S. 551, 57 L. ed. 347, 33 Sup. Ct. Rep. 129, after holding that a court of Virginia, the matrimonial domicile of the parties, had jurisdiction to render a decree of divorce *a mensa et thoro* in favor of the husband upon constructive service of process upon the wife, and that such decree was entitled to "full faith and credit" in the District of Columbia, held that such a decree foreclosed any right of L.R.A. 1915E.

A PPEAL by plaintiff from a judgment of the District Court for York County

the wife to have alimony or equivalent maintenance from her husband under the local law, where the courts of the state hold upon general principles that alimony has its origin in the legal obligation of the husband to maintain his wife, and that she may by her conduct forfeit it, and that where she is the offender, she cannot have alimony on a divorce decreed in favor of the husband.

As stated in the earlier note, the question whether a decree of divorce upon constructive service is within the "full faith and credit" clause of the Federal Constitution, so far as its effect upon the status of the parties is concerned, is not now under consideration. Upon that question, see notes in 59 L.R.A. 162 and 18 L.R.A. (N.S.) 647.

In *Rogers v. Rogers*, 15 B. Mon. 364, it was held that a decree for alimony rendered in Ohio upon personal service upon the husband, who had previously obtained a divorce in Kentucky, will be enforced in the courts of Kentucky, where the decree was entered

dismissing her suit for additional alimony. Reversed.

The facts are stated in the opinion.

Messrs. Gilbert Brothers and S. P. Davidson, for appellant:

Plaintiff is entitled to the relief prayed for.

Campbell v. Campbell, 37 Wis. 213; Cook v. Cook, 56 Wis. 216, 43 Am. Rep. 706, 14 N. W. 33, 443; Rogers v. Rogers, 15 B. Mon. 375; Harding v. Alden, 9 Me. 148, 23 Am. Dec. 549; Carpenter v. Osborn, 102 N. Y., 552, 7 N. E. 825; Galland v. Galland, 38 Cal. 265; Daniels v. Daniels, 9 Colo. 146, 10 Pac. 666; Cox v. Cox, 19 Ohio St. 512, 2 Am. Rep. 415; Richardson v. Wilson, 8 Yerg. 67; Crane v. Meginnis, 1 Gill & J. 464, 19 Am. Dec. 237; Shotwell v. Shotwell, Smedes & M. Ch. 51; Woods v. Waddle, 44 Ohio St. 449, 8 N. E. 298; Van Orsdal v. Van Orsdal, 67 Iowa, 35, 24 N. W. 579; 2 Nelson, Div. & Sep. p. 895; Bishop, Marr. & Div. p. 892; Crugom v. Crugom, 64 Wis. 253, 25 N. W. 5; Lawson v. Shotwell, 27 Miss. 630; Lyon v. Lyon, 21 Conn. 185; Ellis v. Ellis, 13 Neb. 91, 13 N. W. 29; Cizek v. Cizek, 69 Neb. 800, 96 N. W. 657, 99 N. W. 28, 5 Ann. Cas. 464; Earle v. Earle, 27 Neb. 277, 20 Am. St. Rep. 667, 43 N. W. 118; Garland v. Garland, 50 Miss. 694; Cochran v. Cochran, 42 Neb. 612, 60 N. W. 942; Graves v. Graves, 36 Iowa, 310, 14 Am. Rep. 625; Rhoades v. Rhoades, 78 Neb. 495, 126 Am. St. Rep. 611, 111 N. W. 122; Hoon v. Hoon, 82 Neb. 688, 118 N. W. 563; Tuttle v. Tuttle, 26 S. D. 95, 127 N. W. 637.

The record of the judgment is not conclusive as to jurisdiction, but jurisdiction may be disproved by extraneous evidence.

23 Cyc. 1317, 1580; Hamilton Nat. Bank v. American Loan & T. Co. 66 Neb. 68, 92 N.

W. 189; Matson v. Poncin, 152 Iowa, 569, 38 L.R.A. (N.S.) 1020, 132 N. W. 970.

Messrs. Field, Ricketts, & Ricketts and W. L. Kirkpatrick, for appellee:

The Arkansas judgment is a complete bar to recovery of further alimony.

2 Nelson, Div. & Sep. § 903; Tatro v. Tatro, 18 Neb. 395, 53 Am. Rep. 820, 25 N. W. 571; Beard v. Beard, 57 Neb. 754, 78 N. W. 255; Chambers v. Chambers, 75 Neb. 850, 106 N. W. 993; Eldred v. Eldred, 62 Neb. 613, 87 N. W. 340; Black, Judgm. § 864; Freeman, Judgm. § 221; State ex rel. Kennedy v. Broatch, 68 Neb. 687, 110 Am. St. Rep. 477, 94 N. W. 1016; State ex rel. Clark v. Buffalo County, 6 Neb. 454; Haines v. Flinn, 26 Neb. 380, 18 Am. St. Rep. 785, 42 N. W. 91; Creighton v. Keith, 50 Neb. 810, 70 N. W. 406; Chase v. Miles, 43 Neb. 686, 62 N. W. 35; Fuller v. Brownell, 48 Neb. 145, 67 N. W. 6; Dillon v. Chicago, K. & N. R. Co. 58 Neb. 472, 78 N. W. 927; Stenberg v. State, 48 Neb. 299, 67 N. W. 190; Agnew v. Omaha Nat. Bank, 69 Neb. 654, 96 N. W. 189; Lowe v. Prospect Hill Cemetery Asso. 75 Neb. 85, 106 N. W. 429, 108 N. W. 978; Woods v. Waddle, 44 Ohio St. 449, 8 N. E. 297.

Plaintiff accepted and retains the fruits of the Arkansas decree for alimony, and is estopped to repudiate that decree.

Marvin v. Foster, 61 Minn. 154, 52 Am. St. Rep. 586, 63 N. W. 484; Arthur v. Israel, 15 Colo. 147, 10 L.R.A. 693, 22 Am. St. Rep. 381, 25 Pac. 81; Duff v. Wynkoop, 74 Pa. 300; Denver City Irrig. & Water Co. v. Middaugh, 12 Colo. 434, 13 Am. St. Rep. 234, 21 Pac. 565.

Fawcett, J., delivered the opinion of the court:

From a judgment of the district court for

upon personal service upon the husband, and he appeared and contested the claim. The court states that the divorce decree rendered in Kentucky was not *res judicata* of the matters passed upon by the Ohio courts in the action for alimony, consequently the court of Ohio did not undertake to retry an issue which had been previously decided by a court of competent jurisdiction in Kentucky. The statute in force in Kentucky at the time the divorce decree was rendered required the court pronouncing the decree to "regulate and order the division of the estate, real and personal, in such way as would seem just and right, having due regard to each party and the children, if any." The court states, however, that the right of either party under this statute to a portion of the estate does not depend upon the granting of the divorce to the other party, but upon various other matters, which it was proper for the courts to consider; that none of these matters were pre-L.R.A.1915E.

sent for the consideration of the court, or acted upon by it, and therefore the matter of alimony was not passed upon.

A divorce granted in one state in a proceeding begun by the husband, in which the wife appears and defends, supersedes a judgment of alimony previously rendered in another. Richards v. Richards, 87 Misc. 134, 149 N. Y. Supp. 1025, affirmed in 152 N. Y. Supp. 1140.

White v. Warren, 214 Mass. 204, 100 N. E. 1103, was an action in Massachusetts by a wife who had previously procured a divorce in Rhode Island, to obtain dower in lands of her former husband, owned by him in Massachusetts. The wife had applied in the Rhode Island action for alimony, and this, under the Rhode Island statute, would be a waiver of any other claim upon the estate of her husband. This statute was held to affect the Massachusetts land, and prevent the wife from maintaining her action in Massachusetts.

W. A. E.

York county, sustaining a general demurrer to her petition and dismissing her suit, plaintiff appeals.

The petition alleges that the parties were married in January, 1889, while they were residents of York county, in this state; that, soon after their marriage, defendant became addicted to drinking intoxicating liquors to excess, and was guilty of continued drunkenness and cruelty until about March 1, 1911, when defendant commenced a suit for divorce from plaintiff in the chancery court of Benton county, Arkansas, to which county the parties had removed, the alleged grounds of divorce being "indignity, cruelty, and infidelity;" that, on being served with summons, plaintiff here, defendant in that cause, filed her answer and cross complaint in which she denied the allegations in plaintiff's bill, and alleged, as grounds for a divorce and alimony, plaintiff's drunkenness and cruel treatment, and set out in general terms the amount and value of plaintiff's property, including lands situated in York county, in this state. On the trial of the cause the Benton county court found the issues against the plaintiff on his bill, and dismissed the same; found for the defendant (plaintiff here), and entered a decree granting her a divorce and restoring to her her maiden name of Lucie Bodie. The petition further alleges that the Arkansas court found that defendant was indebted to plaintiff in the sum of \$2,500 for borrowed money; that defendant's personal property "was of the value of about \$4,000, and that said court of chancery did not have any jurisdiction of or over the property of complainant which was situated outside of the state of Arkansas, and that, in consequence of that fact, in determining the amount of alimony to be granted the defendant in that suit, he was limited and prohibited from taking into the account the above-mentioned property situated in York county, Nebraska;" that the laws of Arkansas then in force, after stating the grounds for divorce, further provide: "Where the divorce is granted to the wife each party is restored to all property not disposed of at the commencement of the action, which either party obtains from or through the other during the marriage, and in consideration or by reason thereof; and the wife so granted a divorce from the husband shall be entitled to one third of the husband's personal property absolutely, and one third of all lands of which her husband is seised of an estate of inheritance, at any time during the marriage, for her life, unless the same shall have been released by her in legal form." The petition alleges that the section of the statute just quoted "is the only provision

for allowance of alimony to the wife in case of divorce." It is further alleged that when the case was tried in the Arkansas court during the first days of March, 1911, and when the same was determined, as a part of the finding and decree entered therein, it was ordered and decreed that defendant in that suit should recover from plaintiff the \$2,500 borrowed money, one third in value of plaintiff's personal property, and the then present value of her life interest in one third of the value of a house and lot then owned by plaintiff, and that these items aggregated the sum of \$5,111, which sum was allotted and decreed to her, together with certain articles of furniture which originally belonged to her; that this was the only allotment made to or for defendant in that suit; that that court was limited and prohibited in taking into account, in determining the amount of the allowance to the defendant there, plaintiff here, the lands lying in York county, Nebraska, or their value, and that the only amount of alimony allowed plaintiff was the sum of \$2,611, being the balance of the sum of \$5,111, after deducting the \$2,500 borrowed money. The petition then sets out the value of the York county land at \$48,000, and alleges that the amount of alimony allotted by the Arkansas court is inadequate and insufficient for the support of plaintiff, and is not such fair proportion of the property of defendant owned by him at the date of the Arkansas decree, as plaintiff then was and still is entitled to, in view of the circumstances surrounding the case, "and the services and hardships endured and performed by this plaintiff for this defendant." The prayer is that the court take cognizance of the whole matter, and that on a full and final hearing it decree to plaintiff a reasonable sum out of the value of defendant's property in York county, "as and for alimony, to which she is entitled in addition to the said amount so allowed in and by said court of chancery of Benton county, Arkansas," also for attorneys' fees and costs, and for an injunction restraining defendant from disposing of his York county land until the allowance made by the court is paid. Plaintiff attached to her petition and made a part thereof the decree entered by the Arkansas court.

In the decree it is recited that the court, "being well advised in the premises, doth dismiss plaintiff's bill for want of equity, and doth grant a divorce on the cross bill of the defendant herein. It is ordered, adjudged, and decreed by the court that defendant, Lucie Bates, have and recover of and from the plaintiff, Edward Bates, the sum of \$5,111, in full of alimony and all other demands set forth in the cross bill,

which judgment is rendered by the consent of the plaintiff, on condition that no appeal will be taken by defendant from the judgment or decree herein rendered." It then assigns to Mrs. Bates certain specific articles of silverware and household furniture. The decree then provides that, to secure payment of the judgment, a lien be declared on lot 9, block 8, Beauchamp's addition to the city of Siloam Springs, Benton county, Arkansas, and that, as additional security, the defendant place with the clerk of the court four notes of \$280 each, one note for \$89.60, one for \$112, "the same having been given by one Shockey to Edward Bates, one note for \$500 and two notes for \$40, given by Ida and W. S. Tibbs to Edward Bates, one note for \$400, given by Richard O. Forman to Edward Bates, one note for \$500, given by Norris and Yonkers, being a total of \$2,801.60, which are by the said Edward Bates, in open court, deposited with the said clerk, all of which notes are secured by mortgages." It was then provided in the decree that Bates might sell and dispose of any or all of the property, including real estate and notes, but in making sale he should deposit the proceeds with the clerk until he had paid the full sum of \$5,111, with interest at 6 per cent. It further provided that Mrs. Bates have restored to her her maiden name of Lucie Bodie.

The grounds upon which defendant based his demurrer in the court below, and seeks to defend the judgment of the court in sustaining the same, are: (1) That the Arkansas judgment is a complete bar to a recovery of further alimony. (2) That plaintiff, having accepted and retained the fruits of the Arkansas decree for alimony, is estopped to repudiate that decree. We will consider these two points in the order named. An examination of the Arkansas statute above set out shows that in that state no provision is made authorizing a money judgment as alimony. The law expressly declares just what interest the wife shall take in both the real and personal property of her husband, where she is granted a divorce. As to real estate, the provision is that she shall be entitled to "one third of all lands of which her husband is seised of an estate of inheritance, at any time during the marriage, for her life, unless the same shall have been released by her in legal form." It will not, of course, be contended by anyone that under that statute the Arkansas court could have vested in Mrs. Bates, for life, one third of the lands of which her husband was then seised, located in Nebraska. That provision unquestionably refers to lands situated within the jurisdiction of the court. L.R.A.1915E.

While the decree is not as specific in its findings as set out in plaintiff's petition in this suit, we think it does sufficiently appear from the decree itself that a portion only of the \$5,111 allowed the defendant was for alimony, and that the balance of the sum allowed was for borrowed money, as alleged by plaintiff in her petition here. The wording of the decree is that Mrs. Bates should recover the sum of \$5,111 "in full of alimony and all other demands set forth in the cross bill." The term, "and all other demands set forth in the cross bill," should, in the light of the allegations of plaintiff's petition, as against a general demurrer, be construed as an admission that \$2,500 of the amount allowed by the court was for borrowed money, as alleged. This would leave only \$2,611 allowed as alimony. This fact, in the light of the further fact that Bates at that time owned the Arkansas real estate referred to, and notes secured by mortgages aggregating over \$2,800, which the court required him to deposit as security for the payment of its judgment, makes it appear to our entire satisfaction that the amount actually allowed by the court for alimony was not more than a fair amount to allow Mrs. Bates out of the property which her husband then owned in Arkansas. In the light of the evidence as to what Bates then owned in Arkansas, it would be idle to claim that that court, in making its allowance, took into account or gave any consideration to the valuable lands then owned by Bates in this state. It is clear, therefore, that, as to the Nebraska land, the rights of the parties were not adjudicated in that action.

It is argued by defendant here that, while the Arkansas court may not have been authorized by statute to enter a money judgment for alimony, it could do so by consent of parties, and that the parties gave such consent. The wording of the decree upon which this argument is based is: "Which judgment is rendered by the consent of the plaintiff, on condition that no appeal will be taken by defendant from the judgment or decree herein rendered." In support of his contention, defendant cites *Wood v. Wood*, 59 Ark. 441, 28 L.R.A. 157, 43 Am. St. Rep. 42, 27 S. W. 641. In that case a judgment by way of alimony was allowed in the sum of \$33,000. On appeal the supreme court of Arkansas said (59 Ark. 448): "In allowing alimony in a gross sum, the court departed from the course usually pursued in such matters, but this was done by consent. She was represented by solicitors who were acting within the apparent scope of their authority. She has no right to repudiate her acts of record done by them, but she must abide by them, and hold her solicitors

responsible, if they were derelict in their duties, or unfaithful to her injury. In rendering a decree in accordance with consent of parties, given by their respective solicitors, no error of law was committed by the court." In the light of that decision, it is argued that the court gave Mrs. Bates a money judgment by consent, and that in such case the remedy would be, ordinarily, by appeal; but it is also said she could not have appealed that case, because the court entered judgment, by consent of plaintiff, on condition that she would not appeal. This contention, so far as it goes, is very plausible. If Mrs. Bates had attempted to appeal from that judgment, it is very doubtful if her appeal would have been sustained; but we do not see the application of the case cited, for the reason that there was nothing in that judgment from which Mrs. Bates needed to appeal. The court had adjudicated everything within its jurisdiction, and apparently had awarded her a fair allowance out of Bates's property within the jurisdiction of the court.

It sometimes happens that technical rules of construction stand out on one side against plain, undeniable justice on the other. In such a case, what is the duty of the court? In our judgment the question admits of but one answer: Where the application of a technical rule of construction would defeat a clear equity, the rule should not be applied.

So, therefore, where consent to the exercise of judicial power in a manner not authorized by statute is relied upon as a bar to equitable relief demanded in another state, it should be made to clearly appear that the *res* of the equity so demanded was within the contemplation of the consenting parties, and was considered by the court when it acted upon their consent. Such consent, and the action of the court based thereon, should not be extended, by construction, so as to defeat a clear equity of either of the consenting parties in the courts of the other state. We are therefore unwilling to extend, by construction, either the scope of the consent upon which the Arkansas court acted, or the scope of the jurisdiction of that court in acting thereon.

The learned district court undoubtedly felt bound by the opinion of this court in *Eldred v. Eldred*, 62 Neb. 613, 87 N. W. 340. In that case the parties were married in Iowa, from which state they removed to Illinois. Subsequently the husband came to this state, leaving his wife and children in Illinois. The wife applied to the circuit court in that state for a divorce and alimony. Service was had by publication. The husband did not appear. The wife was granted a decree of divorce, and the Illi-

nois residence was awarded to her as alimony. Later on she instituted suit in this state for alimony and for the support of two minor children. A decree was entered dismissing the cause, but without prejudice to a future suit for the support of the children. She appealed. In the opinion it is said (62 Neb. 614): "The validity of the Illinois decree is not questioned. The court had jurisdiction of the cause, and the decree granting Mrs. Eldred a divorce, being valid there, is likewise valid here. If there had been personal service upon the defendant in the cause, the decree awarding alimony would be conclusive upon the parties, and a new suit for alimony by Mrs. Eldred could not be maintained. But the Illinois decree having been rendered upon constructive service and without any appearance on behalf of the defendant, the portion of the decree relating to alimony perhaps is of no validity, save as to the property within the jurisdiction of the court pronouncing it. This suit, then, is not for an allowance out of the property of the defendant for her maintenance, as incidental to some other proceeding or relief. No divorce is sought herein. If the decided weight of authority in this country should be followed, alimony could not be recovered in an independent suit. But this court is committed to the doctrine that courts of equity have jurisdiction to allow alimony to a wife as an independent right, where no divorce or legal separation is sought. *Earle v. Earle*, 27 Neb. 277, 20 Am. St. Rep. 667, 43 N. W. 118. This decision would be decisive of the present case, had plaintiff not been legally divorced from the defendant, since, in the case cited, the plaintiff was at the time the legal wife of the defendant; no divorce having been previously granted, nor was one sought in the proceeding for alimony. The marriage relation that existed between the present plaintiff and defendant has been dissolved by a court of plaintiff's own selection. They are no longer husband and wife. The duty and obligation that once existed to support and maintain the plaintiff does not now rest upon the defendant. He is no longer her husband, and no legal obligation is imposed upon him to provide for her maintenance; hence there exists no right to alimony." If this decision stood alone in our court, or had been subsequently followed, or if we had never sustained a different theory, we might hesitate to announce a rule at variance with the one so plainly stated by the learned chief justice who wrote that opinion. In that opinion *Cochran v. Cochran*, 42 Neb. 612, 60 N. W. 942, is attempted to be distinguished, but the case is not overruled, nor

is the soundness of its holding at all questioned.

As we read *Cochran v. Cochran*, it is at variance with *Eldred v. Eldred*; and as we consider the two, and compare one with the other, we find the variance so decided that we must now determine which we will follow and establish as the rule in this state. We have no hesitancy in deciding this question in favor of *Cochran v. Cochran*. The opinion concedes that in *Earle v. Earle* we have departed from the rule that the allowance of alimony is a mere incident to a suit for divorce, and have awarded alimony in a suit where no divorce was asked. We have held the same in a number of cases. If, therefore, alimony may be allowed in a suit against the husband where no divorce is asked, then alimony is not necessarily an incident to a divorce suit. If it is not an incident to a divorce suit and inseparable therefrom, then in reason it matters not whether the parties are still husband and wife, or whether that relation has been severed by a decree of divorce. The right to alimony does not depend alone upon the duty of the husband to support his wife. It is not based upon her necessities alone. It is an allowance to her, when her husband has proved recreant, of a just proportion of his (or, more accurately stated, their) estate. Hence it is a right not solely incident to a divorce suit, but a right which this and many other courts have held is enforceable in a separate and independent suit. *Rhoades v. Rhoades*, 78 Neb. 495, and cases cited on page 497, 126 Am. St. Rep. 611, 111 N. W. 122, 123, where it is also said: "And it is clear that the district courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute." *Graves v. Graves*, 36 Iowa, 310, 14 Am. Rep. 525; *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657; *Galland v. Galland*, 38 Cal. 265, where it is held: "The power to decree alimony falls within the general powers of a court of equity, and exists independent of statutory authority. And, in the exercise of this original and inherent power, a court of equity will, in a proper case, decree alimony to the wife in an action which has no reference to a divorce or separation." *Woods v. Waddle*, 44 Ohio St. 449, 8 N. E. 297, where it is held: "A. and P. were married in West Virginia at their domicil, where A. retained his domicil, but P. went to Tennessee, where, in *ex parte* proceedings, she obtained a divorce *a vinculo* from A.; but, as there was no personal service upon A., her application for alimony was dismissed without prejudice, and to enable her to sue for it elsewhere. She then brought suit here for alimony alone, and to reach certain prop-

erty in Ohio belonging to A., in which case she obtained service upon A., who also appeared and filed pleadings in the case, and on trial the court found sufficient cause and allowed her alimony. Held, P. had a right thus to bring her action for alimony alone, and she could have her claim therefor determined, and if sustained, upon trial, the court could allow her reasonable alimony out of the property of A." The fact that her application for alimony was dismissed by the Tennessee court without prejudice, and to enable her to sue for it elsewhere, is immaterial. If *Eldred v. Eldred* is sound, that fact could not aid her in this state, because of the other fact that, at the time of applying for alimony in this state, she would not be the wife of her former husband.

Let us now see what we held in *Cochran v. Cochran*, *supra*. In that case it appears that Cochran left his wife and family in Wisconsin and came to Nebraska, as his wife thought, on a temporary mission and with the intention of returning to his family. Whether he was actuated by that thought or not, it appears that, after coming to Nebraska, he decided not to return to his family, but brought a suit for divorce on the ground of desertion, obtained service by publication, complying with all the requirements of law, and obtained a divorce from his wife. About two years later she instituted suit to recover alimony. In her petition she set out the acts of Cochran in deserting his family and alleged that she had no knowledge of his application for the divorce until after it had been granted. She did not ask to have the decree which her husband had obtained set aside, nor was it set aside. Yet we held, as appears from the syllabus:

"1. A court of equity will entertain an action brought for alimony alone, and will grant the same, although no divorce or other relief is sought, where the wife is separated from the husband without her fault.

"2. The district courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute.

"3. A husband deserted his wife and minor children in the state of Wisconsin, where they resided, took up his abode in this state, and became a citizen thereof, and procured a divorce from his wife on the grounds of desertion, obtaining service on her by publication. The wife had no knowledge of the divorce proceedings until after the date of the decree. Two years after the date of the divorce the wife brought suit in equity against the husband for alimony. Held: (1) That the action was not brought under, nor governed by, § 46, chap. 25, Compiled Statutes of 1893, nor by § 602 of the

Code of Civil Procedure, but was a separate and independent action based on the legal obligation of the husband to support his wife and children; (2) that the petition stated a cause of action for alimony, although it contained no allegation that the wife and children were in destitute circumstances or in actual need of support.

"4. Our divorce laws are liberal and should be liberally construed; but they are not designed for, and should not be used to enable, designing husbands, without cause, to legally discard their wives, whether domiciled in this or other states, or to escape the performance of their marriage contracts."

The venerated Judge Wakeley, who heard the case, rendered a decree in favor of Mrs. Cochran for alimony in the sum of \$2,000, in instalments of \$500 each, and awarded her a further sum of \$250 a year during life. From this decree all parties appealed. The opinion first considers the appeal of the plaintiff's former husband. In that consideration *Cox v. Cox*, 19 Ohio St. 502, 2 Am. Rep. 415, *Graves v. Graves*, 36 Iowa, 310, 14 Am. Rep. 525, *Earle v. Earle*, supra, and *Smithson v. Smithson*, 37 Neb. 535, 40 Am. St. Rep. 504, 56 N. W. 300, are all approved. In his appeal Cochran urged four grounds for reversal: First. That an action for alimony or maintenance cannot be maintained in this state except as an incident to divorce proceedings, and that, as Mrs. Cochran in her petition did not pray for a divorce, the court had no jurisdiction of the subject-matter of the suit. Second. The statute of limitation viz., that under § 46, chap. 25, Comp. Stat. 1893, no proceedings for reversing, vacating, or modifying any decree of divorce could be prosecuted after the expiration of six months. Third. That the court was wrong in awarding any alimony whatever to Mrs. Cochran, for the reason that the petition did not show that she or her children were in need of support. Fourth. That the amount awarded Mrs. Cochran was excessive. His appeal was dismissed. The court then took up the appeal of Mrs. Cochran and said (42 Neb. 629): "Her sole ground of complaint is that the amount of alimony awarded her by the district court is too small." It then proceeded to a consideration in detail of the property owned by Cochran, as shown by the evidence, and after making certain deductions from his real estate by reason of the fact that some of it was in litigation, found the clear net value of the remainder of his property to be \$23,633. The court then added that it did not think alimony should be

awarded in instalments during the life of a party, but held that Mrs. Cochran's appeal should be sustained, but that that portion of the decree of the district court allowing \$250 a year during Mrs. Cochran's life should be set aside, and computed the amount which should be allowed in the gross sum of \$6,000, payable in three equal annual instalments, and entered judgment modifying the decree of the district court as follows (42 Neb. 631): "The decree of the district court as to the amount of alimony awarded Mrs. Cochran is set aside, and a decree will be entered in this court in favor of Mrs. Cochran against Warren Cochran for the sum of \$6,000 alimony, as hereinbefore stated. In all other respects the decree of the district court is affirmed."

It will be seen from the above that this court in the Cochran Case sustained a suit by the woman, commenced two years after her husband had obtained from her a divorce in strict compliance with the laws of this state, and in which suit she did not ask that the divorce theretofore granted to her husband should be set aside, and which divorce this court did not set aside; and under the general equity jurisdiction existing in the courts of this state, which it said are not limited in the exercise of such jurisdiction by statute, it awarded Mrs. Cochran the sum of \$6,000 as alimony. We think our holding in *Cochran v. Cochran* is sound and should be followed; and, in so far as it conflicts therewith, *Eldred v. Eldred* is overruled.

The answer to defendant's second point, viz., that, having accepted and retained the fruits of the Arkansas decree, plaintiff is estopped to repudiate that decree now, is that she is not attempting to repudiate that decree. As in case of *Cochran v. Cochran*, she is not assailing the legality of the divorce, nor is she questioning the adequacy of the allowance made to her out of the property within the jurisdiction of that court. We therefore hold that the decision of the Arkansas court is not *res judicata* here, and that the acceptance and retention by Mrs. Bates of the allowance made her in that case does not estop her from maintaining the present suit.

The judgment of the District Court is therefore reversed, and the cause remanded for further proceedings in harmony with this opinion.

Letton, J., concurs in the conclusion.

Petition for rehearing denied.

**NORTH CAROLINA SUPREME
COURT.**

HALL FURNITURE COMPANY

v.

**CRANE BREED MANUFACTURING COM-
PANY et al., Appts.**

(— N. C. —, 85 S. E. 35.)

Sale — implied warranty that article may be used.

One selling a secondhand hearse not fit for use cannot retain the purchase price, although he expressly refused to warrant its condition, and advised the purchaser to see it, since he was bound to furnish an article capable of being used.

(April 28, 1915.)

A PPEAL by defendants from a judgment of the Superior Court for Guilford County, in plaintiff's favor, in an action brought to recover the purchase price of a secondhand hearse sold and delivered by defendants to plaintiff. Affirmed.

Statement by Allen, J.:

This is an action to recover \$100 which the plaintiff paid to the defendant as the purchase price of a secondhand hearse, which was shipped to the plaintiff after the payment of the money and before he had seen the hearse. The plaintiff refused to accept the hearse because, as he alleged, it was worthless. The contract of sale was entered into by correspondence. On February 27, 1913, plaintiff wrote the defendant: "We are in the market for a good secondhand funeral car—light weight preferred." On March 1, 1913, defendant answered, saying: "We are glad to hear . . . that you are in the market for a good light weight secondhand black funeral car. Accordingly, we inclose herewith the following designs: . . . R. J., 710, is a light weight, secondhand, four column black car which we have stored with one of our customers in Tennessee. It has steel tires on it and the general condition of it is pretty good. . . . Simply inclose your check for whichever one you want."

This letter inclosed a cut of R. J., 710. On March 5, 1913, plaintiff wrote: "If the 710 you speak of in Fayetteville, Tennessee, is in good condition, and like the cut you sent us, and will take any size casket—all complete—we will send you check for \$100 for the same."

On March 7th defendant wrote plaintiff:

Note. — The subject of warranty upon sale of secondhand article is discussed in the note to Fairbanks Steam Shovel Co. v. Holt, L.R.A. 1915B, 477, and see references therein to notes on related questions. L.R.A.1915E.

"Of course you understand we do not guarantee any secondhand vehicles, but from what our representative writes regarding this, we are inclined to think that it is worth every dollar we ask for it. [Price asked was \$150.] Your offer now of \$100 is considerably less than what we expected to realize out of it, but as we have quite a stock of secondhand cars on hand at the present time, and do not want to bring this one in also, we have decided to accept your offer of \$100 cash, and will appreciate your check for that amount at once."

On March 10th plaintiff sent defendant check for \$100, and in his letter stated that he was buying R. J., 710, with the understanding "that it is like the cut sent me and in good condition." On March 12th the defendant wrote the following letter to the plaintiff: "We are in receipt of yours of the 10th inst., inclosing check for \$100, in payment of the R. J., 710 funeral car, which we have stored at Fayetteville, Tennessee. We note your shipping instructions to forward to the Hall Furniture Company, at Leaksville, North Carolina, via the cheapest route. Before ordering this car shipped to you, however, we would want it thoroughly understood that we do not guarantee conditions of any secondhand vehicles. As stated in our last letter, we have not seen the vehicle ourselves, but our representative who did see it and made the transaction, advises us that, in his opinion, he considered it worth every dollar which we are asking you for it. A car that has been out some years evidently does show wear and tear, and if there should be any doubt in your mind as to the value of it, it would pay you to go to Fayetteville, Tennessee, to look at this car, in order that there may be no misunderstanding with us regarding its condition. What may be considered by us as being good condition may not agree with your ideas of good condition, as there is a great deal of room for difference of opinion as to the value of secondhand hearses. We wrote you yesterday that we were informed by our customer that this hearse had a brake on it and steel tires, and we understand that it will be shipped to the buyer with lamps, curtains, pole and everything ready for use. If you, therefore, decide to take it with the distinct understanding that it cannot be returned to us if not satisfactory and that it is not guaranteed by us as to condition, we will instruct our customer to forward it over the cheapest route, sending bill of lading with freight rate inserted for same to us, which we will, in return, forward to you, together with receipted bill for the amount. It is not our intention to deceive any purchaser of goods from us, and therefore, think it best to

write you of the actual conditions, so that if you desire to look into it personally you could do so before making shipment of the vehicle to you. We will hold your check until we hear from you as to your decision in the matter."

The plaintiff offered evidence tending to prove that the hearse was of no value and worthless, that there were no wheels on the hearse, and that those sent with it were not of sufficient strength to hold it up because some of the spokes were out and a part of the felloes loose, and that the top, was weatherworn and rotten so you could tear it off with the hand, and a part of the woodwork was decayed and in bad shape. The defendant offered no evidence as to condition of the hearse. His Honor charged the jury among other things, as follows: "The warranty upon which the plaintiff would be entitled to recover, if any, would be inherent to—or as we say in law, implied by law in the transaction, the implied warranty of identity—that it was the same thing contracted for, and that it was fit for the purpose for which it was intended; not that it was good quality, or first quality, or second quality, but that it was the thing contracted for, a hearse, and that it was fit for use for the purpose for which it was intended. So that, upon this issue, after considering all the evidence, if you find from this evidence and by its greater weight that the hearse received by the plaintiff was not the one that was ordered, or that the car received was worthless and unfit for the purpose for which it was purchased, incapable of being used as a hearse, if you find these to be the facts by the greater weight of the evidence, it will be your duty to answer this issue, '\$100.' But if you find that this car was the one that the plaintiff ordered, and that the condition was not such as stipulated by the plaintiff in his original letter or the cut, yet if it was fit for use for the purpose intended—that is, fit for use as a hearse—if you find these to be the facts, it will be your duty to answer this issue 'Nothing.' The burden is upon the plaintiff to satisfy you that this was not the same car that was ordered specifically, and that when received it was in a worthless condition. If you find from this evidence that it was not the same car, but a different car, or that it was worthless and unfit for the purpose for which it was purchased and incapable of being used as such, you will answer the issue, '\$100'—and the defendant excepted. There was also a motion for judgment of nonsuit, which was denied, and the defendant excepted. There was a verdict and judgment in favor of the plaintiff, and the defendant appealed. L.R.A.1915E.

Messrs. Brooks, Sapp, & Williams, for appellants:

No implied warrant existed under which the defendant was required to deliver to the plaintiff a hearse in such condition as to be immediately usable as such.

J. I. Case Threshing Mach. Co. v. McClamrock, 152 N. C. 405, 67 S. E. 991; Woodridge v. Brown, 149 N. C. 299, 62 S. E. 1076; Dickson v. Jordan, 33 N. C. (11 Ired. L.) 166, 53 Am. Dec. 403.

Messrs. P. W. Glidewell and Manning & Kitchin for appellee.

Allen, J., delivered the opinion of the court:

It was decided in Ashford v. H. C. Shrader Co. 167 N. C. 48, 83 S. E. 29, that although there is no implied warranty as to quality in the sale of personal property, the seller is held to the duty of furnishing property, in compliance with the contract of sale, that is at least merchantable or salable, and to this we may add that it shall be capable of being used, if intended for use. This decision, and others of like import in our reports (Dr. Shoop Family Medicine Co. v. Davenport, 163 N. C. 297, 79 S. E. 602; Tomlinson & Co. v. Morgan, 166 N. C. 557, 82 S. E. 953; Lexington Grocery Co. v. Vernoy, 167 N. C. 427, 83 S. E. 567), rest upon the presumption that both buyer and seller are acting honestly and with no intention to cheat or defraud, and, as "the purchaser cannot be supposed to buy goods to lay them on a dunghill," as expressed by Lord Ellenborough in Gardiner v. Gray, 4 Campb. 144, 16 Revised Rep. 764, it will not be assumed that the seller desires to obtain money for a worthless article. His Honor applied this rule in his charge to the jury, and the defendant, while admitting its correctness in proper cases, insists that it has no application here because the defendant wrote the plaintiff on March 12th, before the contract was closed, that it would not guarantee the condition of the hearse.

The meaning of the word "condition" is not clear, but it is certain that the defendant was not providing against the sale of a worthless article, because in the same letter he assigns as his reason for not guaranteeing condition the great room for difference of opinion as to the value of second-hand hearses, and in the next paragraph says "it understands the hearse will be shipped to the buyer with lamps, curtains, pole and everything ready for use," and again, that its representative, who had seen the hearse, advised that it was worth every dollar the defendant was asking for it. Crediting the defendant with the honesty of purpose declared in the statement in the

letter that "it is not our intention to deceive any purchaser of goods from us," the defendant thought it was selling, and intended to sell, a thing of value, ready for use, and worth \$100, but was not willing to guarantee the condition or quality, as there was so much difference of opinion as to the value of secondhand hearses. As thus understood, the refusal to guarantee condition means only a refusal to warrant as to quality, and although the law writes this into every contract for the sale of personal property, that in the absence of express agreement there shall be no warranty as to quality, it holds the seller to the duty of furnishing an article merchantable or salable, or that can be used. If so, why should the obligation of the seller be less because he writes in the contract what the law would place there? In other words, if the law writes into a contract of sale that there is no warranty as to the quality of the goods sold, and still holds the seller to the duty of furnishing an article that is merchantable or salable, or one that can be used, why does not the same duty rest upon the seller when he, instead of the law, writes into the contract that he will not warrant the quality? It may be said that this gives no effect to the language used, and strikes down one of the terms of the contract, and this would be true but for the correspondence preceding the letter of March 12th. It appears, however, that the plaintiff wrote the defendant on February 27th that it was "in the market for a good secondhand funeral car," and that the defendant replied on March 1st: "We are glad to hear from your favor of the 27th inst., that you are in the market for a good light weight, secondhand, black funeral car. Accordingly we inclose herewith the following design,"—and effect may be given to the refusal to guarantee by relieving the defendant from the possibility of liability upon an express warranty as to quality.

We are therefore of opinion that the charge of his Honor is supported by reason and authority.

There are several exceptions in the record, but all of them relied on by the defendant are dependent upon the question considered and decided.

There was also evidence upon the part of the plaintiff that the hearse was heavy weight, when he had contracted for one of light weight, and that while the description in the design called for steel tires, those on the hearse sent were tires made for rubber, on which there was no rubber.

No error.
L.R.A.1915E.

GEORGIA SUPREME COURT.

G. M. SIMPSON, Plff. in Err.,
v.

DU PONT POWDER COMPANY et al.

(— Ga. —, 85 S. E. 344.)

Nuisance — magazine for high explosives.

The maintenance of a magazine for the storage of high explosives does not constitute a nuisance which will entitle the owner of adjoining property to damages for depreciation of the value of such property because of its presence.

(May 13, 1915.)

ERROR to the Superior Court for Walker County to review a judgment in defendants' favor in an action brought to recover damages for depreciation in the value of certain property because of the maintenance of an alleged nuisance. Affirmed.

The plaintiff owned and resided on certain land in Walker county. The defendants maintained on land adjoining plaintiff several magazines in which were stored high explosives, which, from various causes, were liable to be exploded at any time, which would subject his property to danger. On account of the maintenance of the magazines and explosives plaintiff claimed that his land was rendered practically worthless and of no market value.

Further facts appear in the opinion.

Mr. W. H. Payne for plaintiff in error.
Messrs. Williams & Lancaster and Garvin & Cantrell for defendants in error.

HILL, J., delivered the opinion of the court:

"A nuisance is anything that worketh hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful does not keep it from being a nuisance." Civil Code 1910, § 4457. A private nuisance is one limited in its injurious effect to one or a few individuals, which may injure either the person or property or both; and in either case a right of action accrues. Sections 4454, 4456. From the section first above quoted it follows that not every hurt, inconvenience, or damage caused by one to another is a nuisance. The expression "may otherwise be lawful" shows the act complained of, in so far as it causes "hurt, inconvenience, or damage to another," must be unlawful—that is, a violation of

Note. — For storage of explosives as nuisance, see notes to *Henderson v. Sullivan*, 16 L.R.A.(N.S.) 691; *State ex rel. Hopkins v. Excelsior Powder Mfg. Co.* L.R.A.1915A, 615; and see also references in latter note to annotation on collateral subjects.

some right of plaintiff—to constitute a nuisance. Nuisance being an indirect tort, there is no presumption of damages from its maintenance; and the plaintiff, in order to recover in this case, must show the fact of the nuisance and consequent damages to her. The first question, therefore, for decision, is whether the storage by the powder companies of a “large quantity of dynamite, powder, nitroglycerin, and other high and dangerous explosives” is a nuisance *per se*.

“A nuisance at law or a nuisance *per se* is an act, occupation, or structure which is a nuisance at all times and under any circumstance, regardless of location or surroundings.” 29 Cyc. 1153. See Joyce, Nuisances, § 16. “By far the larger class of nuisances is that which may be termed nuisances in fact or nuisances *per accidens*, and consists of those acts, occupations, or structures which are not nuisances *per se*, but may become nuisances by reason of the circumstances or the location and surroundings.” 29 Cyc. 1154. By the act of 12 Geo. III, chap. 61 (29 Stat. at L. 166), entitled, “An Act to Regulate the Making, Keeping, and Carriage of Gunpowder, within Great Britain, and to Repeal the Laws Heretofore Made for Any of Those Purposes,” we find the manner of keeping, the amount to be stored, the place of location of magazines, and the regulation of its transportation provided for, with penalties fixed for the violation of its provisions. And in *People v. Sands*, 1 Johns. 78, 3 Am. Dec. 206, Thompson, J., said: “The English statute and the statute of this state, regulating the manner of keeping and carrying gunpowder, are not declaratory acts, but contain new provisions and restrictions, which afford an inference that the common law stood in need of some aid to guard against the evils apprehended from the keeping of gunpowder. 4 Bl. Com. 168.”

See the opinion of Kent, Ch. J., in the same case. It would seem, therefore, that at common law the right to own, possess, keep, and store explosives (dynamite and nitroglycerin not being then known), like other articles of property, was established, and that the statutes enacted from time to time in recognition of its dangerous characteristics, regulating its manner of use, and providing penalties for the violation of their provisions, were merely directory or regulative, and not declaratory or creative of new rights. Having seen that the right to deal in explosives was recognized at common law, the next question is: Is there a statute prohibiting its storage in this state? By Civil Code 1910, § 1655, it is provided: “The several incorporated towns or cities of this state, within their corporate limits, L.R.A.1915E.

and the ordinaries within their respective counties (out of said corporate limits) have authority to make and enforce all needful rules and regulations touching the keeping of gunpowder, so as not to endanger the lives and property of the citizens.”

Sections 2745 and 2746 regulate the method of its transportation. There is no statute prohibiting its use or storage. Hence, instead of being classified with houses of ill fame and blind tigers, and outlawed, we find that the business of dealing in explosives has been expressly recognized as legal by the legislature of this state, by thus regulating its use and storage. The business itself being legal, it only becomes a nuisance when conducted in an illegal manner, to the hurt, inconvenience, or damage of another. In the case of *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 37 L.R.A. 381, 62 Am. St. Rep. 532, 47 N. E. 2, 18 Mor. Min. Rep. 674, it was said: “A nuisance *per se*, as the term implies, is that which is a nuisance in itself, and which, therefore, cannot be so conducted or maintained as to be lawfully carried on or permitted to exist. Such a nuisance is a disorderly house, or an obstruction to a highway or to a navigable stream. But a business lawful in itself cannot be a nuisance *per se*, although, because of surrounding places or circumstances, or because of the manner in which it is conducted, it may become a nuisance. Certain kinds of business or structures, as powder houses or nitroglycerin works, are so dangerous to human life that they may be maintained only in the most remote and secluded localities. Others, as slaughterhouses and certain foul-smelling factories, are so offensive to the senses that they must be removed from the limits of cities and towns, and even from the near neighborhood of family residences. Yet there must be some proper place where every lawful business may be carried on, without danger of interference on the part of those who, in some slight degree, may be annoyed or endangered by the nearness of the objectionable occupation.”

In *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654, 11 Mor. Min. Rep. 74, it is said: “The keeping or manufacturing of gunpowder or of fireworks does not necessarily constitute a nuisance *per se*. That depends upon the locality, the quantity, and the surrounding circumstances, and not entirely upon the degree of care used.”

See *Dumesnil v. Dupont*, 18 B. Mon. 800, 68 Am. Dec. 750; note to *Henderson v. Sullivan*, 16 L.R.A.(N.S.) 691, and cases cited. In the case of *Bacon v. Walker*, 77 Ga. 336(a), involving the erection of a jail near the residence of plaintiff, this court said:

"Nothing that is lawful in its erection can be a nuisance *per se*."

See *Rounsaville v. Kohlheim*, 68 Ga. 668, 45 Am. Rep. 505. In the case of *Long v. Elberton*, 109 Ga. 28, 46 L.R.A. 428, 77 Am. St. Rep. 363, 34 S. E. 333, where suit was brought against the city by an owner of adjoining property for damages for erection of a jail, it was held that the action was not maintainable. Mr. Justice Little said: "The simple erection of a necessary prison building cannot, without more, so injure adjacent property as to entitle the owner to have damages for such erection. No one is so hindered in the use of his property, and so restricted as to the character of buildings he shall put upon it, as to make it necessary to consult adjacent lot owners in reference to the improvements to be made. The lot being his own property, the owner may put it to such use as he sees proper, provided the buildings and improvements made by him do not infringe the legal right of his neighbor to the similar enjoyment of his own property. A log house on a fashionable street may be built alongside of a palace, and by its erection the value of the latter may be depreciated, but that depreciation is *damnum absque injuria*. The owner of the lot has as much right to erect the hut as the other has to build his palace—no more, no less; but if the hut or the palace be so used as to interfere in the lawful enjoyment of his property by the other, there the damage with a right to compensation exists."

The maintenance of magazines for the storage of explosives upon one's land, being lawful, is not a nuisance *per se*.

The next question is: Do the allegations of this petition show such facts as make the storing of the explosives a nuisance in fact? The demurrer admits only facts well pleaded. The only allegations that would tend to show that in this case the storage of the explosives is a nuisance as being unlawful in fact are that "such explosives are liable to be exploded at any time, caused by improper handling, lightning, or other causes, in the event of which persons who may be residing upon the property of petitioner would be subjected to the danger incident to such explosion, which renders the property of petitioner undesirable for residence property, or other uses, greatly deteriorating the value thereof," and that the magazines are erected within 1,100 feet of plaintiff's land.

The foregoing amounts to nothing more than a statement of the explosive character of the substances stored, with a conjectural conclusion of the pleader that, if someone were residing upon the 70-acre area alleged to be affected by the magazines located 1,100 L.R.A.1915E.

feet from her land, and in the zone of a probable explosion caused by "improper handling, lightning, or other causes," such an one would be subjected to danger. It is not alleged that the magazines are not properly constructed, or that the explosives are improperly stored or guarded, in violation of any rule or regulation which the ordinary of Walker county is authorized to prescribe.

It follows, therefore, that the allegations failed to make out a case of the maintenance of a nuisance which is forbidden by law; and any damage to the plaintiff's property by reason of the manner in which the defendants are conducting their business is *damnum absque injuria*. The petition set forth no cause of action, and the court properly sustained the demurrer.

Judgment affirmed.

All the Justices concur, except Fish, Ch. J., absent on account of sickness.

MASSACHUSETTS SUPREME JUDICIAL COURT.

RENTON M. PERLEY, Trustee, etc., et. al.
v.

CITY OF CAMBRIDGE.

(220 Mass. 507, 108 N. E. 494.)

Eminent domain — structures affixed to realty.

1. The value of a conduit placed by a municipal corporation upon private property without right must be taken into consideration in assessing the damages for a right of way which it subsequently seeks to condemn across the property.

Damages — right of way for conduit — measure.

2. The damages for taking an easement for a water conduit over private property are the diminution of the fair market value of the property arising from the taking, and in case the value has been enhanced by the wrongful construction of the conduit across the property, that fact may be considered so far as it enhances the fair market value

Note. — As to special value of property for the purpose for which it is taken as an element of compensation in condemnation proceedings, see notes to *Sargent v. Merriam*, 11 L.R.A.(N.S.) 996, and *McGovern v. New York*, 46 L.R.A.(N.S.) 392; and see also subsequent case, *Meskill & C. River R. Co. v. Luedinghaus*, 51 L.R.A.(N.S.) 1090.

As to value of improvements made by one taking property by eminent domain as an element of damages, see notes to *Chase v. Jemmett*, 16 L.R.A. 805, and *St. Johnsville v. Smith*, 5 L.R.A.(N.S.) 922, and *Atchison, T. & S. F. R. Co. v. Richter*, L.R.A.—, —.

of the property; but no consideration can be given to possible necessities of the municipality to take the particular property.

Trial — requested instruction — refusal.

3. Requested instructions inapplicable to the issues involved are rightfully refused.

Easement — for water conduit — effect on sewer rights.

4. The acquisition by a municipal corporation of an easement in a way for the construction of a water conduit to be composed of the most durable material, many feet below the surface, does not deprive the fee owner of the right to construct a sewer above it.

(March 31, 1915.)

EXCEPTIONS by petitioners to rulings of the Superior Court for Middlesex County made during the trial of a petition for the assessment of damages for injuries to their estate caused by the taking by respondent of an easement for laying a water main, under the power of eminent domain, which resulted in a verdict for respondent. Sustained.

The facts are stated in the opinion.

The sixth ruling requested by petitioners is as follows:

"The pipe or conduit was placed by the defendant in the land of the petitioners in 1906 without right, and as a trespasser, and before the taking, and the pipe or conduit then became part of the realty and the property of petitioners immediately on its being installed."

Petitioners' eighth request is as follows:

"Clark street is not a public way, highway, or other way within the meaning of § 3, chapter 256, of the Acts of 1884, under which the taking was made by the respondent."

Messrs. M. H. Sullivan and D. J. Maloney, for petitioners:

The question of the value of the conduit placed in the land of the plaintiff before the taking should have been left to the jury as requested by the plaintiff. The conduit, having been placed in the plaintiff's land, became a part of the realty, and therefore his property.

Butler v. Page, 7 Met. 40, 39 Am. Dec. 757; Hunt v. Bay State Iron Co. 97 Mass. 279; Meriam v. Brown, 128 Mass. 391; Beale v. Boston, 166 Mass. 53, 43 N. E. 1029.

The city of Waltham could not make use of the land except on the condition that the conduit should not be disturbed, and that any expense caused to the city of Cambridge should be assumed by the city of Waltham.

Boston v. Brookline, 156 Mass. 172, 30 N. E. 611.
L.R.A.1915E.

A taking must be interpreted as being as broad as required by all purposes described in the language of the taking, either now or in the future.

Ham v. Salem, 100 Mass. 350; Clark v. Worcester, 125 Mass. 226; Newton v. Perry, 163 Mass. 319, 39 N. E. 1032.

And the fact that the city of Cambridge might not choose to exercise all the rights reserved in the language in taking cannot be considered in assessing damages.

Howe v. Weymouth, 148 Mass. 605, 20 N. E. 316.

Mr. James F. Alyward, for respondent:

All uses to which a street or a way may be put, including the laying of sewer, gas, and water pipes, as well as electrical conduits, are still open to the owners of the fee and the city of Waltham, whenever Clark street may be laid out as a public way, notwithstanding the taking by the respondent.

Clark v. Worcester, 125 Mass. 226.

The taking of private property in the exercise of the right of eminent domain must be limited to the reasonable necessities of the case so far as the owners of the property taken are concerned.

Newton v. Newton, 188 Mass. 226, 74 N. E. 346.

When the power to take land by right of eminent domain is given to a corporation or person, such corporation or person takes only such estate in the land as is necessary to carry out the purposes for which it is permitted to take it.

Atty. Gen. v. Jamaica Pond Aqueduct Corp. 133 Mass. 361; Harback v. Boston, 10 Cush. 295.

The fact that the land is already devoted to one public use by the building of this conduit will not prevent the owners or the city of Waltham at any future time from performing all those works which cities and towns are accustomed to perform in public ways, which are not inconsistent with, or materially interfere with, such use.

Boston v. Brookline, 156 Mass. 172, 30 N. E. 611; Atkins v. Bordman, 2 Met. 457, 37 Am. Dec. 100.

Rugg, Ch. J., delivered the opinion of the court:

This is a petition for the assessment of damages occasioned by taking an easement for laying a water main by the respondent under the power of eminent domain conferred by Stat. 1884, chap. 256. The petitioners were the owners of the fee of the land within which the easement was taken. It had been "dedicated by the owners of the fee as" a private way called Clark street, in the city of Waltham, but it was unbuilt and was passable for teams only

for a portion of its length. It was part of a large tract of land which had been plotted into streets and building lots, some of which had been sold and built upon before the events here in question.

It is stated in the bill of exceptions that "the respondent as trespasser" had entered upon Clark street and constructed a concrete conduit for a water main about a year before the taking, which by description included the land wherein the main had been constructed. It is stated in the respondent's brief that for this trespass an action was brought by the present petitioners and damages recovered, but this must be disregarded for there is no reference to it in the exceptions. The respondent, as a municipality in general pursuing authority conferred by the state in supplying water, may be liable for a trespass committed by its servants outside its statutory power. *Mayo v. Springfield*, 136 Mass. 10; *Aldworth v. Lynn*, 153 Mass. 53, 10 L.R.A. 210, 25 Am. St. Rep. 608, 26 N. E. 229.

The first question is whether the conduit, having been built within the land subsequently taken by the respondent, then became a part of the real estate and the property of the petitioners, so that they are entitled to have their damages assessed on that basis. It is familiar law that, ordinarily, when buildings or other structures are annexed to the realty in such way as to become incorporated with it by a trespasser, or without express or implied agreement to the contrary, they are a part of the land and belong to the owner, who "has the right to that which is united to it by accession or adjunction." *Pierce v. Goddard*, 22 Pick. 559, 33 Am. Dec. 764. There are many illustrations of the application of this principle in our cases. It was held in *Merriam v. Brown*, 128 Mass. 391, that where a railroad company had constructed its track over land without right, and without paying damages, and without making a taking, and subsequently became bankrupt and abandoned the use of its roadbed, the rails had become a part of the land and could not be removed. It was said in *Hunt v. Bay State Iron Co.* 97 Mass. 279, that railroad rails upon private land became part of the realty in the absence of agreement to the contrary, and inured to the benefit of the landowner. Buildings and other structures annexed to land by one rightfully in possession, but without the consent of the owner, generally have been held to be a part of the realty. *Meagher v. Hayes*, 152 Mass. 228, 23 Am. St. Rep. 819, 25 N. E. 105. Difficulties of this nature often arise between landlord and tenant and mortgagor and mortgagee. But the law is settled even under these circumstances that the owner

of the land is the owner of the things incorporated with the realty unless there is some special agreement. *Trask v. Little*, 182 Mass. 8, 64 N. E. 206; *Mitchell v. Stetson*, 7 Cush. 435, 439; *Clary v. Owen*, 15 Gray, 522; *Southbridge Sav. Bank v. Exeter Mach. Works*, 127 Mass. 542; *Hook v. Bolton*, 199 Mass. 244, 17 L.R.A.(N.S.) 699, 127 Am. St. Rep. 487, 85 N. E. 175; *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 377, 378, 60 N. E. 977; *Porter v. Pittsburg Steel Co.* 122 U. S. 267, 30 L. ed. 1210, 7 Sup. Ct. Rep. 1206.

We are able to perceive no sound reason why this well-established rule should not apply in instances where a municipality enters without shadow of right and as a pure trespasser upon the land of another, and without consent of the owner affixes thereto structures which in their nature become part of the realty. A municipality enjoys no special immunity in this respect not accorded in general to others. It commonly possesses the power to exercise eminent domain and thus take the property of the landowner against his will. This factor affords it the less excuse for invading tortiously rights which it may extinguish in a legal manner.

This conclusion is supported by the decisions of courts of recognized authority. *St. Johnsville v. Smith*, 184 N. Y. 341, 5 L.R.A. (N.S.) 922, 77 N. E. 617, 6 Ann. Cas. 379; *Virginia & S. W. R. Co. v. Nickels*, 116 Va. 792, 82 S. E. 693. Similar decisions in *United States v. Land in Monterey County*, 47 Cal. 515, and *Graham v. Connersville & N. C. Junction R. Co.* 36 Ind. 463, 10 Am. Rep. 56, perhaps, have been distinguished or overruled by the later cases of *Albion River R. Co. v. Hesser*, 84 Cal. 435, 439, 24 Pac. 288, and *McClarren v. Jefferson School Twp.* 169 Ind. 140, 144, 13 L.R.A.(N.S.) 417, 82 N. E. 73, 13 Ann. Cas. 978.

If the circumstances were that the city had been lawfully in possession of the land under a defective title, and in good faith or by agreement or consent had attached permanent improvements to the soil, a different question would arise, which need not be decided now. See *Searl v. School Dist.* 133 U. S. 553, 561, 33 L. ed. 740, 745, 10 Sup. Ct. Rep. 374; *Consolidated Turnp. Co. v. Norfolk & O. V. R. Co.* 228 U. S. 596, 602, 57 L. ed. 982, 984, 33 Sup. Ct. Rep. 609, and *Rev. Laws*, chap. 179, §§ 17, 18.

Numerous authorities more or less inconsistent with the conclusion here reached are collected in 2 *Lewis on Eminent Domain*, 3d ed. § 759, and 6 Ann. Cas. 382, 384. But so far as they are out of har-

mony with the principles here stated, we cannot see our way to follow them.

The sixth ruling requested by the petitioners should have been granted, and so much of the charge as was contrary to this principle was erroneous.

At the new trial the petitioners will be entitled to recover for the diminution in the fair market value of their land arising from the taking of the easement. In passing upon this question the jury may consider the fact that the conduit was constructed in the portion of the way in which the easement was taken. Of course, the petitioners will not be entitled to recover the cost of the conduit nor the value of it to the respondent. The existence of the conduit upon the land may be treated as an element affecting the fair market value so far as it would enter into the price which would be given for the petitioners' rights in the land by a prospective purchaser. If it be found to be a certainty that the respondent would be bound to make the taking of this particular property, that circumstance is not an element of value. If the petitioners proceeded to trial upon the theory that the diminution of the fair market value will not compensate them for the damage sustained by the taking, and seek to have considered the real value for actual use upon the principles stated in *Beale v. Boston*, 166 Mass. 53, 43 N. E. 1029, in this respect the rule is the same; they are not entitled to have their damages enhanced by the certainty, if it be found to be a reasonable certainty, that the city would make a taking of the property in question. *May v. Boston*, 158 Mass. 21, 32 N. E. 902. The familiar general rule of damages has been stated so fully in many cases that it need not be repeated. *Sargent v. Merrimac*, 196 Mass. 171, 11 L.R.A.(N.S.) 996, 124 Am. St. Rep. 528, 81 N. E. 970; *Smith v. Com.* 210 Mass. 259, 96 N. E. 666, Ann. Cas. 1912C, 1236, and cases there cited; *McGovern v. New York*, 229 U. S. 363, 57 L. ed. 1228, 46 L.R.A.(N.S.) 391, 33 Sup. Ct. Rep. 876; *United States v. Chandler-Dunbar Water Power Co.* 229 U. S. 53, 77, 57 L. ed. 1063, 1081, 33 Sup. Ct. Rep. 667; *Pastoral Finance Asso. v. The Minister* [1914] A. C. 1083, 1088; *Cedars Rapids Mfg. & P. Co. v. Lacoste* [1914] A. C. 569, 579. It may be added that if the evidence at the new trial should not differ materially from that disclosed upon the present record, the diminution in the fair market value will be the rule of damage to be followed.

The petitioners' eighth request was denied rightly as inapplicable to the issues being tried. The trial did not proceed on any theory that the respondent had laid its L.R.A.1915E.

conduit in such a "way" as is described in Stat. 1884, chap. 256, § 3, and hence was not liable to pay damages therefor. *Cheney v. Barker*, 198 Mass. 356, 302, 16 L.R.A.(N.S.) 436, 84 N. E. 492; *New York, N. H. & H. R. Co. v. Cohasset Water Co.* 216 Mass. 291, 103 N. E. 829. When the petitioners' right to maintain their petition depended on a taking made by the respondent on the basis that it was a private and not a public way, it would have tended only to confuse the jury to undertake to deal with law which would not aid in deciding the case. Submitting the case to the jury was a granting of all that was pertinent in that request.

The judge ruled correctly that the taking by the respondent for the purposes here disclosed did not give to the respondent the right to prevent the construction of a sewer over its conduit by anyone having a right to build a sewer in the way. The respondent had constructed a cement conduit of most durable material and designed to last a long time. It was buried during its course through Clark street on an average 23 feet below the surface, although for a short distance it was only 2 feet below the surface. The only easement acquired by the respondent was to use the land in connection with its water supply. It did not acquire the fee of the land. The structure being so constructed, it is plain that it could not prevent the owner of the fee or others empowered so to do, from making reasonable structures above its conduit. *Clark v. Worcester*, 125 Mass. 226; *Newton v. Newton*, 188 Mass. 226, 74 N. E. 346; *Allen v. Boston*, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519.

The third request of the respondent, in substance to the effect that the jury would be warranted in returning a verdict for the respondent provided they found that the natural and probable uses to be made of the easement taken by the respondent would not prevent its use as a private way by the owners of the fee, was qualified by the instruction that they should consider also any interference with that use which might arise from the fact that the respondent had acquired the right to interfere with such use to some extent. It should be qualified further by the statement that the conduit laid by the city before the taking should be considered, provided it added anything to the market value of the fee of the land owned by the petitioners.

The instruction to the effect that the city of Waltham might lay out a street over the private way, notwithstanding the taking of the respondent, is not open to objection.

Exceptions sustained.

NEBRASKA SUPREME COURT.

JAMES E. JUDGE, Sr.,

v.

JAMES E. WALLEN et al., Appts.

RUTH JUDGE, by Next Friend,

v.

SAME, Appts.

(— Neb. —, 152 N. W. 318.)

Automobile — injury — liability of occupant.

1. While two traveling salesmen are engaged in the joint enterprise of transporting

Headnotes by ROSE, J.

Note. — Automobiles: liability of one other than owner, operator, or guest, for injury by car.

As to responsibility of guest for injury to third person through negligence of person driving car, see note to Wilkerson v. Myatt-dicks Motor Co. post, 439.

For imputed or contributory negligence of passenger riding in automobile driven by another, precluding recovery against third person for injury, see note to Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co. L.R.A.1915B, 953.

This note does not cover cases passing upon the question of who is liable for injuries resulting from the operation of a leased or demonstrating car, or from the operation of a car which is being driven by a chauffeur furnished to the owner by another.

As to who is responsible for negligence of chauffeur operating a leased or demonstrating car, see notes to Gerretson v. Rambler Garage Co. 40 L.R.A.(N.S.) 457; Meyers v. Tri-State Automobile Co. 44 L.R.A.(N.S.) 113; Forbes v. Reinman, 51 L.R.A.(N.S.) 1164.

As to liability of owner for negligence of chauffeur furnished by third person, see notes to Neff v. Brandeis, 39 L.R.A.(N.S.) 933; Dalrymple v. Covey Motor Car Co. 48 L.R.A.(N.S.) 424, and the two later cases Ouellette v. Superior Motor & Mach. Works, 52 L.R.A.(N.S.) 299, and Janik v. Ford Motor Co. 52 L.R.A.(N.S.) 294.

As to liability of joint owners of automobile or carriage for torts of common servant, see note to Goodman v. Wilson, 51 L.R.A.(N.S.) 1116.

As to liability of manufacturer or dealer for personal injuries caused by defects in automobile, see note to Olds Motor Works v. Shaffer, 37 L.R.A.(N.S.) 560.

It is recognized in JUDGE v. WALLEN that an occupant of an automobile concerned in a joint enterprise in the use of the machine, and possessing a joint control over it, may be held liable for its negligent operation.

It has been held that a request of a mother, riding as her son's guest in his automobile, that he call at a house and get a cake promised her does not constitute L.R.A.1915E.

themselves by automobile over the territory canvassed by both for different merchants, one of the salesmen owning and operating the automobile and the other paying sums about equal to the cost of gasoline and oil consumed, the latter, if possessing joint control over the automobile, may be liable for the negligence of the other in operating it; both being occupants at the time.

Trial — jury — responsibility of guest in automobile.

2. Whether a person riding in an automobile of another is engaged in a common enterprise with the latter is a question for the jury, where it is an issuable fact in the case.

(April 3, 1915.)

the enterprise a joint one and render her liable for an injury due to his negligent driving. Anthony v. Kiefner, — Kan. —, 150 Pac. 524.

A person other than the owner or driver of an automobile, or a guest riding in it, may be held liable for an injury resulting from its negligent operation where it appears that he had the right of control over its operation, or that the person driving the car was acting as his servant or agent in operating it.

Thus, in Hannigan v. Wright, 5 Penn. (Del.) 537, 63 Atl. 234, where the defendant in an action to recover for an injury sustained through the negligent operation of an automobile claimed that he was not the owner of the machine, and had no direction or control of it, or of the person operating it, the court instructed the jury that, although the defendant was not the owner of the machine, yet if he had control of it so as to be able to govern its management, the negligence in operating the car would be that of the defendant, and he would be liable for any injury proximately caused thereby, in the absence of contributory negligence on the part of the plaintiff.

And it has been held that two persons who were members of a political committee were liable for an injury resulting from the negligent operation of an automobile while it was being used by a political speaker to whom they had turned it over with authority to give directions as to the route to be taken, where it appeared that one of such persons secured the use of the car under an arrangement whereby he undertook to furnish the gasoline and provide a chauffeur, and that the other engaged and paid the chauffeur of the owner of the car to drive while it was being used for a speaking tour, it being held that under these circumstances the relation of master and servant existed between the chauffeur and such defendants. Pease v. Gardner, — Me. —, 93 Atl. 550.

In Lewis v. National Cash Register Co. 84 N. J. L. 598, 87 Atl. 345, it appeared that a cash register company had employed a sales agent for a certain territory under a contract by the terms of which, for a commission on sales, he was to devote his

A PPEAL by defendants from a judgment of the District Court for Lancaster County in plaintiffs' favor, in consolidated actions brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Mr. T. J. Doyle, for appellants:

There being a complete failure to establish a partnership, the relation of master and servant, or principal and agent, it was the plain duty of the court to instruct a verdict in favor of Binger. When this was done, it was equally the duty of the court to instruct a verdict in favor of Wallen, or dismiss the action as to him, as the court had no jurisdiction.

whole time to the business, conform to the rules and regulations of the company, employ such salesmen to assist him and upon such terms as the company might require, and pay all his expenses, traveling, office, and otherwise. In an action against the company to recover for an injury which occurred while the agent was driving an automobile used by him to carry cash registers, it was held that he was not an independent contractor, but a servant of the company, and that it would be liable for his negligent acts which were within the scope of his authority.

And it was held that under the contract it was fairly within the contemplation of the parties that the agent should use some means of conveyance to prosecute the master's business in transporting registers, and that he was authorized to use an automobile for such purpose, and that the company would be liable for an injury inflicted by the machine while it was being used by the agent for the company's business. *Ibid.*

Another case against this defendant arose in *Williams v. National Cash Register Co.* 157 Ky. 836, 164 S. W. 112, where it appeared that the cash register company by its contracts of sale undertook to make certain repairs on registers sold for a specified time free of charge, the purchaser to pay the transportation charges to and from the seller's agency, and that, by the company's contract with its agent, the latter was required to make repairs on registers free of charge or otherwise, and that the company was to send its bills directly to purchasers, who were to remit directly to the company. In an action to recover against the company for an injury resulting from the operation of an automobile owned by its agent and driven by the latter's employee for the purpose of delivering a repaired register before the expiration of the time during which certain free repairs were to be made on a register which had been sold to the owner of the one repaired, it was held that the agent was not an independent contractor if he was delivering a register which had been repaired under the contract between himself and the company, and that if he was making such a delivery it would be liable for the injury; but that

Loso v. Lancaster County, 77 Neb. 466, 8 L.R.A. (N.S.) 618, 109 N. W. 752; *Union P. R. Co. v. Lapsley*, 16 L.R.A. 800, 2 C. C. A. 149, 4 U. S. App. 542, 51 Fed. 174; *Hartfield v. Roger*, 21 Wend. 615, 34 Am. Dec. 273; *Hayden v. Woods*, 16 Neb. 306, 20 N. W. 345; *Nisbet v. Wells*, 25 Ky. L. Rep. 511, 76 S. W. 120; *McGregor v. Gill*, 114 Tenn. 521, 108 Am. St. Rep. 919, 86 S. W. 318; *Wallace v. Langeland*, 66 Mich. 365, 33 N. W. 519, 1 Am. Neg. Cas. 667; *McKibbin v. Day*, 71 Neb. 280, 98 N. W. 845.

Messrs. Berge & McCarty, for appellees:

The original agreement of defendants as to the joint enterprise not only may make them jointly liable, but also, independently

if he was delivering a register which he had repaired under a separate employment or contract with the purchaser of the register, and not under his written contract with the company, he was an independent contractor, and the company was not liable for the negligence of his chauffeur. This opinion was held controlling on a second appeal of the case, and it was held that if the driver of the automobile when the accident occurred was engaged in the business of the register company, it did not matter whether the agent under the terms of his contract with the company was obligated to make the delivery or not, the question being merely whether he was at the time of the injury engaged in the business of the company. 161 Ky. 550, 171 S. W. 162.

In the first case, where the testimony as to the contract under which the repairs were made was conflicting, it was held that the issue should have been submitted to the jury. *Williams v. National Cash Register Co.* supra.

And upon the second appeal it was held that, the evidence being substantially the same as that on the former appeal, the decision there was conclusive on the question whether the case was properly submitted to the jury. 161 Ky. 550, 171 S. W. 162.

It was also held on the last appeal that, in view of the conflicting evidence, it could not be said that a verdict against the cash register company was palpably against the weight of the evidence. *Ibid.*

It has been held that no cause of action is set forth by a petition which alleged that the defendant firm was notified to send for a disabled car for the purpose of having it repaired, and that one of its men was sent for it, and that he repaired it so that it could be run, and directed an inexperienced person to drive it to the defendant's shop, and that the plaintiff was injured through no fault of his own by such person's negligence while he was proceeding as directed, there being no allegation that the defendant's servant had authority or was authorized expressly or impliedly to employ the person mentioned to drive the machine to its destination, or that such person was an employee of the firm. *White*

of such original agreement, their mutual acts and conduct at the time of the injury make them jointly liable.

Meadows v. Truesdell, — Tex. Civ. App. —, 56 S. W. 932.

One enters a private conveyance of free choice under his own personal arrangements, voluntarily trusting to the sufficiency and safety and the care and prudence of his companions.

Prideaux v. Mineral Point, 43 Wis. 513, 28 Am. Rep. 558.

Several persons voluntarily associating themselves to travel together in one conveyance, not only put a personal trust in the skill and care of that one of them to whom they trust the direction and control of the conveyance, but also put a personal trust each in the discretion of the other against negligence, and each is liable for the negligence of the other.

Prideaux v. Mineral Point, 43 Wis. 528, 28 Am. Rep. 558; *Lightfoot v. Winnebago Traction Co.* 123 Wis. 479, 102 N. W. 30; *Ritger v. Milwaukee*, 99 Wis. 190, 74 N. W. 815; *Omaha & R. Valley R. Co. v. Talbot*, 48 Neb. 627, 67 N. W. 599.

Two or more persons traveling together in a private conveyance, whether it belongs to one, all, or none of them, to reach the same destination, or to carry the private effects of the different ones, are engaged in a joint enterprise.

Omaha & R. Valley R. Co. v. Talbot, supra; *New York, C. & St. L. R. Co. v. Kistler*, 66 Ohio St. 326, 64 N. E. 130, 12 Am. Neg. Rep. 343; *Prideaux v. Mineral Point*, supra; *Brommer v. Pennsylvania R. Co.* 29 L.R.A.(N.S.) 924, 103 C. C. A. 135, 179 Fed. 577; *Kopitz v. St. Paul*, 86 Minn. 373, 58 L.R.A. 74, 90 N. W. 794; *Berry, Automobiles*, p. 176; *Nesbit v. Garner*, 75 Iowa, 314, 1 L.R.A. 152, 9 Am. St. Rep. 486, 39 N. W. 517; *Babbitt, Motor Vehicles*, pp. 419, 426, § 539, p. 474, § 596.

Two or more persons traveling in a conveyance which one of their number is driving are jointly and severally liable for an injury caused by the negligence of the driver.

Bishop v. Ely, 9 Johns. 294; *Adams v.*

v. Levi, 137 Ga. 269, 73 S. E. 376.

And there was held to be no sufficient allegation of ratification of the act of their employee in procuring the subagent, where it was merely alleged that, after the driver was prosecuted for violating an ordinance regulating the operation of automobiles, the defendant gave bond and paid the fine against such person. *Ibid*.

In *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338, it was held that the keepers of a garage do not render another their agent by merely permitting him to take and run an automobile, and that they cannot be L.R.A.1915E.

Swift, 172 Mass. 521, 62 N. E. 1068, 5 Am. Neg. Rep. 607; *Benson v. Ross*, 143 Mich. 452, 114 Am. St. Rep. 675, 106 N. W. 1120.

Rose, J., delivered the opinion of the court:

James E. Judge, Sr., and two minor daughters, seated in a buggy drawn by a horse, were traveling north on the east side of Eleventh street in the city of Lincoln about 7 o'clock in the evening of August 31, 1911. Between Wood and Washing streets they were struck violently by an automobile, which had approached from the rear. James E. Wallen and Benedict E. Binger were occupants of the automobile, and they are the defendants. It is charged in the petition that the automobile was negligently operated, that it was driven at an unlawful rate of speed, about 40 miles an hour, and that the lights were defective. The negligence thus imputed to defendants was denied by them. James E. Judge, Sr., recovered a judgment of \$600 for personal injuries and for damages to his horse and buggy. His infant daughter, Ruth Judge, recovered a judgment of \$2,000 for personal injuries. The two cases were consolidated for the purposes of trial. Defendants have appealed.

The decisive point arises on a challenge to the jurisdiction of the district court for Lancaster county. Wallen was a resident of Gage county, and was therein served with notice of the suit. He was not properly brought into court, unless he and Binger were jointly liable for negligence resulting in the collision. Binger denies responsibility for the accident, and insists that the automobile was owned and operated by Wallen, who had it in his exclusive control. There is convincing proof that the proximate cause of the injuries was negligence in the operation of the automobile. The trial court permitted the jury to find that defendants were jointly liable. Is the ruling correct? There is evidence from which the following facts or conclusions may be inferred: Defendants were traveling salesmen for different wholesale merchants, and canvassed practically the same territory.

held liable for an injury which occurred while it was being driven by such person or another whom he had permitted to operate it.

It was further held in this case that an automobile is not a dangerous agency, and that the garage keepers could not be held liable for an injury occurring while the machine was being operated by one who has arrived at the age of discretion, on the ground that they had left the car where opportunity to take and drive it was given a person inexperienced in its operation. *Ibid*.

J. T. W.

Several weeks before the accident Wallen invited Binger to ride with him over the territory canvassed in common, and the invitation was accepted. Binger paid sums about equal to the cost of gasoline and oil consumed; Wallen owning and operating the automobile. Binger shared the seat with him. For their mutual benefit they were engaged in the joint enterprise of transporting themselves over the territory canvassed by both. Binger was not a mere passenger or a gratuitous guest.

The facts and conclusion stated may fairly be inferred from the proofs. The dangers and liabilities incident to the joint enterprise, the instinct of self-preservation, the demands of business in canvassing territory for a wholesale merchant, safety and comfort in traveling, the furnishing of gasoline, the joint occupancy of the seat in the conveyance, and the obvious rights growing out of the mutual undertaking, may imply that Binger had joint authority to control the means of transportation, and the right to demand ordinary care and observance of the law in operating the automobile. As a reasonably prudent person he must have been familiar with the danger of driving a motor car with defective lights at an unlawful speed along a busy street in the dusk of the evening. The circumstances were such that the negligence of one may be imputed to the other. While it was held in *Loso v. Lancaster County*, 77 Neb. 466, 8 L.R.A. (N.S.) 618, 109 N. W. 752, that the doctrine of imputed negligence is not in force in this state, "except with respect to the relation of partnership or of principal and agent, or of master and servant, or the like," the law applicable to the exceptions has been stated as follows: "Negligence in the conduct of another will not be imputed to a party, if he neither authorized such conduct, nor participated therein, nor had the right or power to control it. If, however, two or more persons unite in the joint prosecution of a common purpose, under such circumstances that each has authority, expressed or implied, to act for all in respect to the control of the means or agencies employed to execute such common purpose, the negligence of one in the management thereof will be imputed to all the others." *Kopplitz v. St. Paul*, 86 Minn. 373, 58 L.R.A. 74, 90 N. W. 794.

To the same effect: *Ward v. Meedes*, 114 Minn. 18, 130 N. W. 2; *Beaucage v. Mercer*, 206 Mass. 492, 138 Am. St. Rep. 401, 92 N. E. 774; *Adams v. Swift*, 172 Mass. 521, 52 N. E. 1068, 5 Am. Neg. Rep. 607; *New York, C. & St. L. R. Co. v. Kistler*, 66 Ohio St. 326, 64 N. E. 130, 12 Am. Neg. Rep. 343; *Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co.* 28 N. D. 128, L.R.A.1915A, L.R.A.1915E.

761, 147 N. W. 791; *Schron v. Staten Island Electric R. Co.* 16 App. Div. 111, 45 N. Y. Supp. 124, 3 Am. Neg. Rep. 61; *Nesbit v. Garner*, 75 Iowa, 314, 1 L.R.A. 152, 9 Am. St. Rep. 486, 39 N. W. 516; *McBride v. Des Moines City R. Co.* 134 Iowa, 398, 109 N. W. 618.

Whether defendants were engaged in a joint enterprise was a question for the jury. *Nesbit v. Garner*, 75 Iowa, 314, 1 L.R.A. 152, 9 Am. St. Rep. 486, 39 N. W. 516; *Ward v. Meedes*, 114 Minn. 18, 130 N. W. 2. In the view thus taken of the evidence and the law applicable thereto, the trial court acquired jurisdiction, and the findings of the jury are justified by the proofs.

The verdicts are assailed as excessive, but sufficient reasons for interference on that ground have not been given.

Affirmed.

Barnes, Fawcett, and Hamer, JJ., not sitting.

LOUISIANA SUPREME COURT.

MRS. LAURA WILKERSON, Appt.,

v.

MYATT-DICKS MOTOR COMPANY et al.

(136 La. 977, 68 So. 96.)

Automobile — liability for act of chauffeur.

1. Liability of passengers for the negligence of the chauffeur of an automobile cannot arise from the simple fact of hiring or riding in such a conveyance.

Same — private car.

2. Passengers are not responsible for the negligence of the chauffeur of an automobile, if they exercise no control over him further than to indicate the route they wish to travel or the places to which they wish to go. This doctrine applies to persons who

Headnotes by LAND, J.

Note. — Automobiles: responsibility of guest for injury to third person through negligence of person driving car.

As to liability of one other than owner, operator, or guest for injury by car, see note to *Judge v. Wallen*, ante, 436.

See also the notes there referred to, as to liability for injuries resulting from the operation of leased, borrowed, demonstrating cars, etc.

Unless a guest who is riding in an automobile at the time an injury occurs through its negligent operation has some control over or takes some part in the operation of the machine, it seems clear that he cannot be held liable merely because of his presence in the car. This is in accord with

ride in private automobiles by permission and invitation of the owners or persons in charge. Where service is restricted to a single act or transaction, the relation of master and servant (if such exist) terminates with the act or transaction.

(March 22, 1915.)

APPEAL by plaintiff from a judgment of the Civil District Court for the Parish of Orleans, Division A, in favor of defendants in an action brought to recover damages for the death of plaintiff's husband, alleged to have been caused by the negligence of defendants' servant. Affirmed.

The facts are stated in the opinion.

Mr. George J. Untereiner, for appellant:

The fact that the employee of the Myatt-Dicks Motor Car Company was accompanied by Harry Rooney, who volunteered to assist him in repairing a machine, and whose services were accepted by the employee of the Myatt-Dicks Motor Company, makes Rooney the servant of the latter, as

to third persons injured by him while so engaged.

26 Cyc. 140, 1521; *Wichtrecht v. Faasnacht*, 17 La. Ann. 166; *Althorff v. Wolfe*, 22 N. Y. 355; *Hill v. Morey*, 26 Vt. 178.

While the doctrine of volunteer service appears to be of great force against the Myatt-Dicks Motor Car Company, the same doctrine strikes Herman Blum and Max Levy with much greater force, and renders them liable to plaintiff for the damages she sustained.

25 Cyc. 1519, 1520; 14 Am. & Eng. Enc. Law, 751; Wood, Mast. & S. §§ 304, 306; Cooley, Torts, 3d ed. p. 1008; Callahan v. Munson S. S. Co. 71 Misc. 525, 130 N. Y. Supp. 869, 141 App. Div. 791, 126 N. Y. Supp. 538; Mound City Paint & Color Co. v. Conlon, 92 Mo. 221, 4 S. W. 922, 16 Am. Neg. Cas. 435; McMahon v. White, 30 Pa. Super. Ct. 178; Gaines v. Bard, 57 Ark. 625, 38 Am. St. Rep. 266, 22 S. W. 570; Kimball v. Cushman, 103 Mass. 194, 4 Am. Rep. 528; Heygood v. State, 59 Ala. 51, 3 Am. Crim. Rep. 253; Denver & R. G. R. Co. v. Gustaf-

the view taken by the court in *WILKERSON v. MYATT-DICKS MOTOR CO.*, and with the conclusion reached in the few cases which have considered the question.

Thus, in *Garcia v. Georgetti*, 4 Porto Rico Fed. Rep. 495, the court, in charging the jury, stated that a person who is merely the invited guest of another in an automobile is not liable to one injured by the negligence of his host or the latter's servant in operating the machine, unless the guest has some control of or takes some part in the negligent direction or management of the car.

Nor will the fact that she did not object to his proceeding at excessive speed for a short distance render her liable. *Ibid.*

And a mother riding with her son as his guest and having no management of the automobile is not liable for an injury due to his negligent driving. *Anthony v. Kiefner*, — Kan. —, 150 Pac. 524.

And it has been held that one who was invited by another to go on an automobile trip, and who accepted the invitation upon the condition that he should be permitted to pay the hotel expenses of the party at their destination, cannot be held liable for an injury resulting from the negligent operation of the car on the trip. *Adamson v. McEwen*, 12 Ga. App. 508, 77 S. E. 591.

And a political speaker is not liable for an injury occurring while he is an occupant of a car which was engaged, and whose chauffeur hired, by members of political committees, although it was put in his charge during a speaking trip so far as directions to the chauffeur as to the route to be taken were concerned, since this situation did not create the relation of master and servant. *Pease v. Gardner*, — Me. —, 93 Atl. 550. The court said: "It was as if the owner of a car should invite a friend L.R.A.1915E.

to ride without the owner accompanying him, and instruct the chauffeur to go wherever the friend might direct. The chauffeur would still remain the servant of the owner, and the friend would still be merely the passenger for whose pleasure or convenience the ride is taken."

Neither can one be held liable for an injury resulting from the negligence of the driver of an automobile which was being towed, in failing to follow the forward car and causing a rope connecting the machines to throw a bicyclist, where it appears that he had been a passenger in the disabled machine and merely assisted in tying the machines together, and that at the time of the injury he was riding as an invited guest in the machine which was doing the towing, it appearing that he did not employ, pay, direct, or control the driver of either car. *Jerome v. Hawley*, 147 App. Div. 475, 131 N. Y. Supp. 897.

In *Apperson v. Lazro*, 44 Ind. App. 186, 87 N. E. 97, 88 N. E. 99, it was held that one of two defendants in an action to recover for the negligent operation of an automobile was not entitled to a judgment in his favor, notwithstanding a general verdict for the plaintiff, on the theory that answers to interrogatories filed showed that he had nothing to do with the injuries inflicted, but was merely an occupant of the car, and that where answers to interrogatories are inconsistent with a general verdict, the verdict cannot stand, it appearing that the complaint in the case alleged that the defendants were in possession and control of the automobile at the time of the injury, and that this was not contradicted by the answers to the interrogatories, since the rule invoked was held to apply only in case of an irreconcilable conflict between the verdict and the answers. J. T. W.

son, 21 Colo. 393, 41 Pac. 505; Shea v. Reems, 36 La. Ann. 966.

To violate the speed ordinance, as Rooney was doing when he drove his automobile into Wilkerson and killed him, is negligence *per se*, which renders the driver, the master, and in this case the occupants of the car, liable in damages to plaintiff for the death of her husband.

Landphere v. Illinois C. R. Co. 132 La. 351, 61 So. 399; Harrison v. Louisiana Western R. Co. 132 La. 761, 61 So. 782; Ballard v. Collins, 63 Wash. 493, 115 Pac. 1050; Stein v. United R. Co. 159 Cal. 368, 113 Pac. 663; Lefkovitz v. Sherwood, — Tex. Civ. App. —, 136 S. W. 850; Rautledge v. Rambler Automobile Co. — Tex. Civ. App. —, 95 S. W. 750; St. Johnsbury v. Thompson, 59 Vt. 312, 59 Am. Rep. 731, 9 Atl. 571; Stradley v. Atlanta, 7 Ga. App. 441, 67 S. E. 107; Foley v. Northrup, 47 Tex. Civ. App. 277, 105 S. W. 229; Daingerfield v. Thompson, 33 Gratt. 151, 36 Am. Rep. 783; 3 Greenl. Ev. §§ 40, 41; McMannus v. Lee, 43 Mo. 206, 97 Am. Dec. 386; Hanrahan v. Cochran, 12 App. Div. 91, 42 N. Y. Supp. 1031; Com. v. Sherman, 191 Mass. 439, 78 N. E. 98; Topeka v. Kersch, 70 Kan. 843, 79 Pac. 681, 80 Pac. 29; Charleston v. England, 3 Hill, L. 56; Moir v. Hopkins, 16 Ill. 313, 63 Am. Dec. 312; Stevens v. Smathers, 124 N. C. 571, 32 S. E. 959; Rockport v. Rockport Granite Co. 177 Mass. 246, 51 L.R.A. 779, 58 N. E. 1017, 9 Am. Neg. Rep. 298; Cleveland, C. C. & St. L. R. Co. v. Gossett, 172 Ind. 525, 87 N. E. 723.

Messrs. Titche & Rogers and Gordon Boswell for appellee motor company.

Messrs. Hall, Monroe, & Lemann and Charles Rosen, for other appellees:

Defendants were merely passengers in the car operated by Rooney, and not responsible for his acts.

Roby v. Kansas City Southern R. Co. 130 La. 880, 41 L.R.A. (N.S.) 355, 58 So. 696; Perez v. New Orleans City & Lake R. Co. 47 La. Ann. 1391, 17 So. 869; Little v. Hackett, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391; Richardson v. Van Ness, 53 Hun, 267, 6 N. Y. Supp. 618; Covington Transfer Co. v. Kelly, 36 Ohio St. 86, 38 Am. Rep. 558, 12 Am. Neg. Cas. 461; Berry, Automobiles, § 180.

Land, J., delivered the opinion of the court:

Plaintiff sued the three defendants for \$15,000 as damages for the death of her husband, who was run over and killed by an automobile on September 11, 1910, at Canal and Villere streets, in the city of New Orleans. Herman Blum and Max M. L.R.A.1915E.

Levy are the codefendants of the motor company.

The petition alleges that the accident was caused by the gross negligence of one Harry Rooney, the driver, in not sounding an alarm, and in running the car at an excessive and unlawful rate of speed.

The petition alleges: "That on September 11, 1910, whilst Calvin Wilkerson, petitioner's husband, was crossing the roadway on the upper side of Canal street at Villere street, at the place usually used by pedestrians, . . . he was run into, knocked down, and killed by an automobile owned and operated by the Myatt-Dicks Motor Company, in which the aforesaid Max Levy and Herman Blum, accompanied by two ladies, were riding, which automobile, petitioner is informed and believes and so alleges, was operated by one Harry Rooney, an employee of the Myatt-Dicks Motor Company, under the joint control of the said Myatt-Dicks Motor Company and the said Max Levy and the said Herman Blum; that, in driving said car, the aforesaid Harry Rooney was acting under the direction of the aforesaid Max Levy and Herman Blum."

The company for answer pleaded the general issue, coupled with a special denial that Rooney was one of its employees, or that said company had any interest in, or control over, the car or its driver, as alleged in the petition, at the time of the accident.

The other two defendants, after filing several exceptions, which were overruled, answered by pleading the general issue, coupled with a special denial that the car was operated under their control or direction, as alleged in the petition. These two defendants also pleaded in supplemental answers contributory negligence on the part of the deceased.

The case was tried before a jury, and, from a verdict and judgment in favor of all the defendants, the plaintiff has appealed.

Plaintiff called Rooney as a witness, who testified substantially as follows: At the time of the accident, Rooney was chauffeur for the Kenilworth Sugar Company, and was operating one of the cars belonging to said company. The accident happened about 1:15 o'clock in the morning of September 11, 1910. Rooney was coming from the Halfway House, at a speed between 20 and 22 miles per hour. He had as passengers the defendants Levy and Blum and two women. These two men became Rooney's passengers under the following circumstances: Rooney was sitting in the garage of the Myatt-Dicks Motor Company when Blum called over the phone for Roy Lloyd, an employee of the company. Rooney re-

plied that Roy was not there, and, on being told by Blum that he was having trouble with the tire of the car, offered to help him out. This offer was accepted; and Rooney, having obtained a new tire from the Myatt-Dicks Motor Company, took it out in a car under his control, belonging to the Kenilworth Sugar Company. On reaching the spot where Blum's car was stalled, Rooney found that he could not, with the tools he had with him, repair the car. How the Blum party became passengers on Rooney's car appears from the following questions and answers:

Q. Were you requested to take them in your car?

A. No, sir.

Q. How did you come to get them in there?

A. I told him there was room inside—I could see it could not be repaired—and if they cared to they could ride in my car.

Q. They accepted the service that way?

A. They got in and rode in.

The foregoing is a summary of all of Rooney's direct examination. His cross-examination developed that he had never been employed by any of the defendants, and that all of the services rendered by him on the occasion in question were volunteered and a matter of accommodation; that neither Blum nor Levy gave him any instructions, nor said anything to him after they got into the car; and that, before starting, the only person he spoke to was Blum, offering to take his party down town to Canal and Royal.

Defendant Levy testified that he did not know Rooney, never spoke to him until after the accident, and had nothing to do with the procurement of his services on the occasion in question.

Defendant Blum's testimony corroborates in the main the statements of Rooney, that the services of the latter were volunteered as a matter of accommodation, and that Blum gave Rooney no directions or instructions as to the operation of the car.

The only connection that the defendant company had with the transaction between Rooney and Blum was that one of its officers or employees gave Rooney a requisition for a tire on another company, which charged the same to Blum or his father. It is manifest that the plaintiff has utterly failed to make out a case against the Myatt-Dicks Motor Company, which must have been sued under a complete misapprehension of the facts.

As to the other two defendants, it seems to be well settled that a person who hires a hack, automobile, or other public convey-

ance does not become responsible for the negligence of the driver or chauffeur, if they exercise no control over him further than to indicate the route they wish to travel or the places to which they wish to go. From the simple fact of hiring the carriage or riding in it, no such liability can arise. *Little v. Hackett*, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391; *Roby v. Kansas City Southern R. Co.* 130 La. 880, 41 L.R.A. (N.S.) 355, 58 So. 696; *Perez v. New Orleans City & Lake R. Co.* 47 La. Ann. 1391, 17 So. 869; *Berry, Automobiles*, 1909, § 180.

The same doctrine applies to a person who rides in a private vehicle by permission and invitation of the owner. See *Dyer v. Erie R. Co.* 71 N. Y. 228, as cited in *Little v. Hackett*, 116 U. S. 378, 29 L. ed. 656, 6 Sup. Ct. Rep. 391. In the latter case the court in summing up said: "But, as we have already stated, responsibility cannot, within any recognized rules of law, be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it, no such liability can arise. The party hiring or riding must in some way have co-operated in producing the injury complained of before he incurs any liability for it." 116 U. S. 379, 380.

Counsel for plaintiff in his brief contends that Rooney was the servant of all the defendants. Rooney was never employed by the defendant motor company, but volunteered to serve Blum in the matter of procuring a new tire. The company assisted Rooney in procuring the tire for Blum, but there all connection between the motor company and Rooney and Blum terminated. Rooney transported himself and the tire in a car belonging to another company, and, after his failure to repair Blum's car, volunteered to take the Blum party in his car to Canal and Royal streets. We fail to perceive any connection between the furnishing of the new tire and this joy ride in the small hours of the morning. It is inconceivable that the defendant company can be held liable for the alleged negligence of the chauffeur of another company.

Rooney may have been the servant of Blum as to the procuring of the new tire and the repair of his car; but, when Rooney announced that the car could not be repaired, the relation of master and servant between them terminated. When Rooney invited the Blum party to ride in his car, the only relation between him and them was of a social nature. As to Levy, there were no business relations whatever between him and Rooney. The argument that Blum and Levy, as passengers or riders in the car,

were the masters of Rooney, the chauffeur, is refuted by the doctrine of *Little v. Hackett*, supra, in which case some English and American cases to the contrary were overruled. The evidence shows that the defendants Blum and Levy exercised no control or authority over Rooney, the chauffeur. Blum and Levy were passive as to the management of the car, and therefore cannot be held to have participated in the chauffeur's alleged violation of the municipal speed ordinance, as argued by counsel for plaintiff.

Judgment affirmed.

Petition for rehearing denied April 12, 1915.

MARYLAND COURT OF APPEALS.

GEORGE A. COX, Appt.,
v.
SAMUEL REVELLE et al.
(125 Md. 579, 94 Atl. 203.)

Contract — unconstitutional impairment.

1. No unconstitutional impairment of contract rights is effected by permitting a reconsideration of the question whether or not a parcel of land under water is natural oyster bed, after a lease has been founded upon a finding that it was not, where provision is made for condemnation of the rights of the lessee in case it is found to be natural bed.

Same — change of standard — effect.

2. One who obtained a lease of ground for oyster raising, after it had been determined not to be natural bed, cannot complain of a provision for a redetermination of the question which fixes a different standard of natural bed as impairment of the obligation of his contract, if provision is made for condemnation of his rights in case the ground is found to be natural bed.

Note. — Exercise of power of eminent domain for purpose of acquiring fishery right, oyster beds, etc.

That the taking for a public fishery is a taking for a public use, for which the power of eminent domain may be exercised, is held in *Shellfish Comrs. v. Mansfield*, 125 Md. 630, 94 Atl. 207, approving the holding in *Cox v. REVELLE*.

An injunction to prevent the maintenance of a dam erected under the authority of a statute authorizing lands to be flowed for the purpose of raising a pond for the culture of useful fishes was denied a landowner whose land was overflowed, although the object of the owner of the pond was merely to secure his own pleasure and profit. *Turn-L.R.A.1915E.*

Eminent domain — acquisition of oyster fishery.

3. The acquisition of natural oyster beds for purposes of public fishery is a public use which will support an exercise of the right of eminent domain, although the exact nature of the use is not defined, and under existing laws the use of beds within the limits of any county is confined to the inhabitants of that county.

Judgment — res judicata — condition of oyster ground.

4. A judgment to the effect that alleged oyster ground is barren, and not desirable for public use, under the provisions of one act, is not a bar to a subsequent proceeding to ascertain whether or not the same ground is barren and not desirable under the provisions of a later act.

(April 8, 1915.)

A PPEAL by defendant from a judgment of the Circuit Court for Somerset County declaring certain ground leased to him natural oyster beds and subject to condemnation. Affirmed.

The facts are stated in the opinion.

Messrs. Alonzo L. Miles and H. Fillmore Lankford, for appellant:

There was an existing contract between Cox and the state.

Chesapeake & O. Canal Co. v. Baltimore & O. R. Co. 4 Gill & J. 128; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162; *New Jersey v. Wilson*, 7 Cranch, 164, 3 L. ed. 303; *Territt v. Taylor*, 9 Cranch, 43, 3 L. ed. 650; *Pawlet v. Clark*, 9 Cranch, 292, 3 L. ed. 735; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629.

The ground leased to defendant, which the court is asked by this proceeding to declare to be a natural bed or bar of oysters, had been finally determined not to be a natural bed or bar, under the law existing at the time the contract was executed.

Cox v. Bennett, 123 Md. 356, 91 Atl. 141.

The state, having leased to the appellant certain ground which, under the law at the

er v. Nye, 154 Mass. 579, 14 L.R.A. 487, 28 N. E. 1048. Such a statute is held not to be unconstitutional as authorizing a taking of private property for a use not public in its nature. The theory of this case is not altogether clear. In the majority opinion the statute is stated not to be an exercise on the part of the legislature of the right of eminent domain; but to have been enacted under a constitutional provision giving the legislature power to "make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, . . . so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the

time the contract was made, was not a natural oyster bed, could not, by a subsequent act, declare it to be a natural bed, without violating the Constitution, which provides that no state shall pass any law impairing the obligation of a contract.

8 Cyc. 931; Cooley, Const. Lim. p. 384; Winter v. Jones, 10 Ga. 190, 54 Am. Dec. 379; People ex rel. McCauley v. Brooks, 16 Cal. 11; McCracken v. Hayward, 2 How. 608, 11 L. ed. 397; Bronson v. Kinzie, 1 How. 316, 11 L. ed. 145; Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; Baltimore & O. R. Co. v. Chase, 43 Md. 36.

Mr. William H. Maltbie also for appellant.

Messrs. Whitelock, Deming, & Kemp and Henry J. Waters, for appellees:

Condemnation proceedings may be abandoned "at any time before actual payment of the amount assessed," and until payment is made no taking occurs.

Norris v. Baltimore, 44 Md. 598; Pitznogle v. Western Maryland R. Co. 123 Md. 667, 91 Atl. 831.

The power of eminent domain, residing in a sovereign state, is superior to any private right, whether obtained under grant from the state directly or otherwise.

West River Bridge Co. v. Dix, 6 How. 507, 531-534, 12 L. ed. 535, 544-546; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 689-691, 41 L. ed. 1165-1167, 17 Sup. Ct. Rep. 718; Baltimore & H. de G. Turnp. Co. v. Union R. Co. 35 Md. 224, 6 Am. Rep. 397; Baltimore & F. Turnp. Road v. Baltimore, C. & E. M. Pass. R. Co. 81 Md. 248, 31 Atl. 854; St. James African M. E. Church v. Baltimore & O. R. Co. 114 Md. 442, 79 Atl. 35; Eastern R. Co. v. Boston & M. R. Co. 111 Mass. 125, 15 Am. Rep. 13; Re Towanda Bridge Co. 91 Pa. 216; Balti-

subjects of the same." In a dissenting opinion the question is discussed as one of eminent domain. It is stated that the taking for such a purpose as was authorized by this statute cannot be justified as an exercise of the right of eminent domain.

On the contrary, the right of the public to fish has been held not such a public use as authorizes the condemnation of a private right to fish in an inland lake, apart from the lake itself, since the natural supply of fish in such a lake is so small as to be incapable of meeting a public demand, and also the object of acquiring such a right is not a use which implies utility, but mere sport or pastime. Albright v. Sussex County Lake & Park Commission, 71 N. J. L. 302, 69 L.R.A. 768, 108 Am. St. Rep. 749, 57 Atl. 398, 2 Ann. Cas. 48. It is stated that the right to be enjoyed under this statute is necessarily the right of each individual who exercises it, to abstract from what is designed by the statute to be common stock L.R.A.1915E.

more & O. R. Co. v. Pittsburg, W. & K. R. Co. 17 W. Va. 853.

Condemnation of oyster leases under the Shepherd law is for a public use.

Smith v. Maryland, 18 How. 71, 15 L. ed. 269; Shoemaker v. United States, 147 U. S. 282, 297, 37 L. ed. 170, 184, 13 Sup. Ct. Rep. 361; New Central Coal Co. v. George's Creek Coal & I. Co. 37 Md. 537; Hess v. Muir, 65 Md. 586, 5 Atl. 540, 6 Atl. 673; Arnsperger v. Crawford, 101 Md. 247, 70 L.R.A. 497, 61 Atl. 413; Webster v. Susquehanna Pole Line Co. 112 Md. 416, 76 Atl. 254, 21 Ann. Cas. 357; Pitznogle v. Western Maryland R. Co. 119 Md. 673, 46 L.R.A.(N.S.) 319, 87 Atl. 917; State ex rel. Blount v. Spencer, 114 N. C. 770, 19 S. E. 93; Albright v. Sussex County Lake & Park Commission, 68 N. J. L. 524, 53 Atl. 612; 15 Cyc. 578, 581; 10 Am. & Eng. Enc. Law, 2d ed. 1061, 1063, notes 4, 5, 1084; Lewis, Em. Dom. § 158; State v. Willis, 104 N. C. 764, 10 S. E. 764.

Urner, J., delivered the opinion of the court:

The board of shellfish commissioners, acting under authority conferred by the act of 1906, chapter 711, leased to the appellant, on May 20, 1912, for the term of twenty years, a lot of ground in the bed of Manokin river, in Somerset county, to be used for the purposes of oyster culture. It was the intent and policy of the law that natural oyster beds or bars should not be subject to lease for private use, but should be reserved as public oyster fisheries for use in common by the people of the state under suitable regulation and license. The land demised to the appellant had originally been classed as ineligible for leasing, as the investigation and survey of oyster grounds for which the act made provision had officially shown it

such portion as he can secure, and to appropriate that to his own benefit. This is for private, rather than public, advantage. The statute does, indeed, contemplate the acquisition of the common stock by public agents, but they are to acquire it for private benefit. If the common stock thus to be acquired were capable of supplying an unlimited number of persons, then they might be deemed, in a constitutional sense, the public; but, as already stated, the stock would be quite inadequate for such a demand. The fact that a small supply is tendered free to the first takers does not show that the public can enjoy it.

That eminent domain can be exercised to authorize the crossing of private lands for the purpose of reaching public waters, for the purpose of taking fish therefrom, is denied in New England Trout & S. Club v. Mather, 68 Vt. 338, 33 L.R.A. 569, 35 Atl. 323.

W. A. E.

to be included in one of the areas designated as natural beds or bars. This ascertainment, however, was later reviewed by the circuit court for Somerset county, upon a petition by residents, as authorized by the statute, and the lot in question, as part of a larger tract, was determined to be "barren bottom," and therefore available for leasing, and the report and plat of the survey were accordingly amended. By the terms of the law, as it then existed, such an adjudication was final. It was about four years after the survey was thus revised that the appellant's lease was executed. In August, 1914, the appellees filed a petition in the court below, alleging that the ground leased to the appellant was natural oyster bar, and praying that it be so declared. This action was taken by virtue of the act of 1914, chapter 265, which amended the act of 1906 by providing, in part, by § 94B, that "three or more residents of this state may at any time before January 1, 1915, file a petition in writing, alleging that five or more adjacent acres of natural beds or bars situated in the Chesapeake bay outside county waters, or one or more acres of natural beds or bars within the territorial limits of any county of this state, to be described in said petition, have been excluded from the surveys or resurveys of natural beds or bars of this state, such petition to be attested by the several oaths of the petitioners, and to be filed in the circuit court for the county in which or nearest to which the area in question is located."

The shellfish commissioners and the lessees, if any, of the disputed ground, are required to be made defendants, and after summons and due opportunity to answer, the court is authorized and directed to "proceed promptly to hear all evidence adduced by the parties," and to "decide whether the area described in said petition is or is not a natural bed or bar as defined in § 83, and judgment shall be entered accordingly." Section 94B continues: "The hearing in said circuit court shall be before a jury, unless jury trial be waived by all parties, in which event the hearing shall be before any judge or judges of said court. An appeal to the court of appeals of Maryland may be taken by either party to said case from the judgment of said circuit court within thirty days thereafter, and the court of appeals shall have power to review all questions of fact or law involved. If the final decision shall be that the area in question is a natural bed or bar, amended plats shall be made and copies filed as provided in § 94A."

A further amendment, contained in § 94C, enacts that "the rights and interests of lessees under leases outstanding and in force L.R.A.1915E.

at the time of the passage of this act (April 3, 1914), covering areas within the limits of natural beds or bars which may be established by the resurveys provided for by § 94A, or by proceedings taken under § 94B, and the oysters belonging to such lessees, located on such areas, shall be condemned by the state of Maryland for the use of the public."

To the petition of the appellees the board of shellfish commissioners filed an answer neither admitting nor denying the allegations as to the character of the ground leased to the appellant, but demanding strict proof. The appellant, by his answer, denied that the lot embraced in his lease was natural bar, and relied upon the previous finding of the court on that subject as the basis of a plea of *res judicata*. In support of the latter theory of defense the answer alleged that in November, 1912, a bill of complaint was filed in the circuit court for Somerset county, in which the present petitioners, with others, were plaintiffs, and the present respondent was one of the defendants, and in which the allegation was made that the area found by the court in the former proceeding to be barren bottom was in fact natural bar, and the judgment to the contrary had been obtained by fraud, and, together with the lease in controversy, should, for that reason, be set aside, and a decree passed to that end was reversed by the court of appeals and the bill dismissed, in *Cox v. Bennett*, 123 Md. 356, 91 Atl. 141, whereby the prior determination as to the leasable nature of the area was left in full force and effect. The answer also averred that the act of 1914, which permitted the action now pending, is in conflict with § 10 of article 1 of the Constitution of the United States, which prohibits state legislation impairing the obligation of contracts, and that it likewise violates § 40 of article 3 of the Constitution of Maryland, which forbids the enactment of any law authorizing private property to be taken for public use without just compensation being first paid or tendered. The petitioners demurred to the lessee's answer in so far as it set up the defense of former adjudication and the constitutional objections we have noted. The demurrer was sustained, and, the case having proceeded to trial upon the question of fact raised by the pleadings as to whether the leased land was a natural bed or bar, a verdict was rendered in the affirmative upon that issue, and a declaratory judgment to the same effect was duly entered. In the course of the trial two exceptions were reserved by the lessee, one relating to the admission of evidence and the other to the action of the court on the prayers. The objections presented in this form were

identical with those which had been overruled on demurrer.

The defense on constitutional grounds will be first considered.

It is entirely clear that in merely providing for a reopening of the investigation as to the nature of the ground leased by the state to the appellant, the act of 1914 does not impair the obligation of their contract. The judgment entered in the proceeding which the act allowed for the purposes of such an inquiry is simply a formal declaration as to an ascertained condition. It makes no reference whatever to the existing lease. Notwithstanding such a determination, the law recognizes the contractual rights of the lessee to their full extent. The interests created by the lease are given the same consideration that any other property is entitled to receive at the hands of the state. The lot demised having been found to be a natural oyster bar, provision is made for its condemnation for public use upon the distinct theory that the adjudication as to its real nature has not impaired or affected the vested estate of the lessee. In directing the acquisition of such a leased lot the act expressly declares, in § 94C, that "no right, interest, or property" of the lessee "shall be divested until the compensation awarded in such condemnation proceedings" has first been paid. The appellant's contractual rights are thus duly regarded and protected by the law, and are required to yield only to the sovereign power of eminent domain.

It is, of course, not disputed that a leasehold interest acquired from the state is as completely subject to condemnation for public use as a title derived from any other source, or that the exercise of the power with respect to such an estate does not cause an impairment of contract within the meaning of the Federal Constitution. *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. ed. 535; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *St. James African M. E. Church v. Baltimore & O. R. Co.* 114 Md. 442, 79 Atl. 35; *Baltimore & F. Turnp. Road v. Baltimore, C. & E. M. Pass. R. Co.* 81 Md. 248, 31 Atl. 854; *Baltimore & H. de G. Turnp. Co. v. Union R. Co.* 35 Md. 224, 6 Am. Rep. 397. But it is urged that the act of 1914, in authorizing proceedings like the one before us, directed the ascertainment of natural beds and bars to be made according to a specified standard which is different from the one applied in the original survey. This contention has reference to the fact that the act of 1906 contained no definition of such areas, while the act of

1914, by an amendment of § 83, provides that the term "natural beds or bars" shall be construed to mean "all oyster beds or bars under any of the waters of this state whereon the natural growth of oysters is of such abundance that the public have successfully resorted to such beds or bars for a livelihood, whether continuously or at intervals, during any oyster season within five years prior to" the new inquiry under the terms of the statute. The annual report of the shellfish commissioners submitted in 1912 shows that they adopted, for the purposes of their survey and location of natural oyster bars under the act of 1906, a definition having practically the same meaning and effect as the one later approved by the legislature. If, however, it be assumed that the act of 1914 prescribed an entirely different rule for determining what areas were to be devoted to the use of the public, we are unable to find in that fact any support for the appellant's claim that his contractual rights under his lease are being impaired. It would have been competent for the state to provide for the appropriation for public use of all the leased oyster grounds, regardless of the question as to whether they were natural beds or barren bottoms. If this course had been pursued in the exercise of the right of eminent domain, and with due provision for just compensation, the lessees could not complain that the constitutional prohibition against legislative impairment of contracts was violated.

The policy of the existing law with respect to the use and disposition of oyster grounds is a question with which this court has no right to be concerned. The sole authority to deal with that subject is vested in the legislature. It is within the discretion of that department of the state government to decide whether the whole or any part of either the natural bars or the barren bottoms shall be open to free or to qualified public use, or shall be reserved and controlled for conservation, cultural, or revenue purposes. In the exercise of its ample power the legislature has determined that oyster areas having certain characteristics shall be devoted to the use of the public. It has provided for a judicial ascertainment of the facts in reference to any location to which leasehold rights have attached, and, in a proper case, for the acquisition of such interests for the public by condemnation. The lessee is summoned and heard upon the preliminary question as to the character of the leased ground, and, by express enactment, he is protected in his title and possession until the state shall have paid him the just compensation which may be awarded him by due process of law. In view of

the safeguards thus placed by the statute around the rights and interests of the appellant, there is clearly no impairment of contract to which the constitutional provision relied upon can be applied.

The contention that the act of 1914 is in conflict with § 40 of article 3 of the Maryland Constitution, prohibiting the taking of private property for public use without just compensation, requires no extended discussion. The provision of the statute against any divestiture of the property rights to be condemned until the compensation awarded is paid has already been emphasized. As the act, by its own terms, gives expression and effect to the constitutional rule to which the appellant refers, there is no room for the theory that the limitation it imposes has, in this instance, been disregarded.

It was urged that the act does not state for what public use the natural bars under lease are to be condemned, and that the court is consequently not in a position to decide whether the intended use is in fact of a public nature. The further point is made that if the lots so acquired by the state are designed to be used for the purposes of a public oyster fishery under existing law, regard must then be had to the statutory provision that the right to take oysters for sale from grounds within the limits of any county shall be confined to its own residents, and it is said that this is not to be considered a public use within the intent of the Constitution. As to the question thus proposed, we can have no doubt or difficulty. The plain purpose of the act is to secure all natural beds or bars for the public use to which oyster areas owned by the state may be subjected under laws now in force or hereafter enacted. There can be no doubt as to the public nature of the use to which such grounds are susceptible. The taking of oysters by the public, under license of the state, from lands and waters subject to its ownership and control, is undeniably a public use. *Smith v. Maryland*, 18 How. 71, 15 L. ed. 269; *State v. Applegarth*, 81 Md. 293, 28 L.R.A. 812, 31 Atl. 961; *Hess v. Muir*, 65 Md. 599, 5 Atl. 540, 6 Atl. 673. In order to answer that description it is not necessary that the use, as to every natural oyster bar, shall be open to the public generally, but the right may be validly restricted to the citizens of the county within whose territory the fishery is located. The principle was stated and applied in *Webster v. Susquehanna Pole Line Co.* 112 Md. 429, 76 Atl. 254, 21 Ann. Cas. 357, that a public use need not be available to the whole public, and that it may be confined to the inhabitants of a designated locality, provided L.R.A.1915E.

it is exercisable in common, and is not limited to particular individuals.

The remaining question to be considered relates to the defense of former adjudication. In our opinion the principle upon which such a defense must depend is not applicable to the case presented. This is a statutory proceeding to determine the desirability of property for public use, according to a prescribed standard, as a preliminary to its acquisition for the public by condemnation. An adjudication as to the leasable character of certain oyster grounds under the act of 1906 could not justify a denial by the court of the state's power to condemn such property for public purposes under a later enactment. The legislative judgment as to the expediency of such an appropriation cannot be thus controlled by judicial action. The courts have undoubtedly authority to decide whether the use for which private property is proposed to be taken under the power of eminent domain is public in its nature, but when this inquiry is answered in the affirmative, the question as to the propriety of exercising the power is committed exclusively to the discretion of the legislature. *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361; *Arnsperger v. Crawford*, 101 Md. 252, 70 L.R.A. 497, 61 Atl. 413; *New Central Coal Co. v. George's Creek Coal & I. Co.* 37 Md. 560; 15 Cyc. 629. By the judgment of the circuit court for Somerset county rendered in 1908, it was simply declared that the ground under consideration was barren bottom, and the only effect of the decree of this court in the equity proceeding to invalidate that finding was to dismiss the bill of complaint on the theory that the charge of fraud had not been sustained. *Cox v. Bennett*, 123 Md. 361, 91 Atl. 141. It would be giving the doctrine of *res judicata* a very anomalous application to hold that it can prevent the exercise by a judicial tribunal of a special statutory jurisdiction to reopen an inquiry previously made, under authority similarly conferred, although ample security is afforded to every vested interest. It has already been observed that the legislature could have directed the condemnation of the leased oyster lots for public use without a prior inquiry by a court proceeding as to the special character of the ground, and notwithstanding a previous adjudication that they were leasable. There is hence no possible prejudice to the lessee in the fact that a preliminary investigation, in which he has an opportunity to be heard, has been provided for the ascertainment of the actual condition of the property to be acquired. The theory of estoppel by for-

mer judgment was therefore properly rejected.

The various questions raised by the record have now been considered, and we agree with the court below as to all of the rulings.

Judgment affirmed, with costs.

KANSAS SUPREME COURT.

AMELIA EVERLY, Appt.,

v.

J. E. ADAMS et al.

(95 Kan. 305, 147 Pac. 1134.)

Municipal corporations — failure to enforce ordinances — liability.

1. A city is not liable in a civil action for damages for failure of its officers to enforce governmental ordinances enacted in the interest of the public welfare.

Same — cattle at large — injury — liability.

2. The principle of law just stated applies to the case of a woman who was injured on her own premises by a vicious cow which she was attempting to drive away, and which the city officers knew was running at large, contrary to an ordinance prohibiting cattle from running at large within the city limits.

(April 10, 1915.)

Note. — Liability of municipality for failure to enforce ordinance in relation to animals.

Generally, as to liability of municipal corporation for failure to prevent improper conduct in or use of the streets, including the question of liability for damage by animals at large in the streets, see notes to *Van Cleef v. Chicago*, 23 L.R.A. (N.S.) 636, and *Goodwin v. Reidsville*, 42 L.R.A. (N.S.) 862.

And as to distinction generally between public and private functions of municipal corporations in respect to liability for negligence, see notes to *Barron v. Detroit*, 19 L.R.A. 452, and *Dickinson v. Boston*, 1 L.R.A. (N.S.) 665. Various other concrete aspects of this subject are treated in notes that may be found by consulting Index to L.R.A. Notes, "Municipal Corporations," subdivision "Liability for damages."

As to liability of municipality for a failure to enforce health ordinances, see note to *Hull v. Roxboro*, 12 L.R.A. (N.S.) 638. Attention is called in this connection to the statement of the general rule in this note as follows: "It is well recognized that, when there are granted to or imposed upon a city, by its charter, powers, and duties to be exercised and performed exclusively for public governmental purposes, they are legislative and discretionary, and the municipality is exempt from liability for an L.R.A. 1915E.

A PPEAL by plaintiff from a judgment of the District Court for Allen County sustaining a demurrer to a petition filed to recover damages for injuries inflicted by a vicious cow which was negligently allowed to run at large contrary to the provisions of an ordinance of the defendant city. Affirmed.

The facts are stated in the opinion.

Mr. C. S. Ritter, for appellant:

A city of the second class is liable to one of its inhabitants who suffers damage by reason of the act of an animal running at large on the streets of such city, to the same extent and in the manner that the owner of the animal is, where the city has knowingly permitted the animal to run at large on its streets.

Joyce, Nuisances, § 192; *Strouse v. Leipf*, 101 Ala. 433, 23 L.R.A. 625, 46 Am. St. Rep. 122, 14 So. 667; *Hewes v. McNamara*, 106 Mass. 281; *Coggswell v. Baldwin*, 15 Vt. 404, 40 Am. Dec. 686; 2 Cyc. 376, e; *Powers v. Kindt*, 13 Kan. 74; *Harris v. Carstens Packing Co.* 43 Wash. 647, 6 L.R.A. (N.S.) 1164, 86 Pac. 1125; *People v. Detroit White Lead Works*, 82 Mich. 471, 9 L.R.A. 722, 46 N. W. 735; *Spir v. Brooklyn*, 139 N. Y. 6, 21 L.R.A. 641, 36 Am. St. Rep. 664, 34 N. E. 727; *Cochrane v. Frostburg*, 81 Md. 54, 27 L.R.A. 728, 49 Am. St. Rep. 479, 31 Atl. 703; *Pittsburgh v. Grier*, 22 Pa. 67, 60 Am. Dec. 65; *Barrows*

injury resulting from the failure to exercise them, or from their improper or negligent exercise. In accordance with this general rule, it is generally conceded that a municipality is not liable for a failure to enforce an ordinance affecting the health or comfort of its inhabitants, since in such cases it acts in a public capacity."

And in 28 Cyc. 1289, it is said on the general question of the liability of a municipality for failure to enact or enforce ordinances in the interest of the public welfare: "In applying the principle that where a municipality is acting in its governmental capacity, it cannot be held civilly liable for any act or omission, it is held that there is no liability for a failure to pass ordinances, even though they would, if passed, preserve the public health or otherwise promote the public good; or for any omission to enforce such ordinances or to see that they are properly observed by its citizens or those who may be resident within the corporate limits, or for injury occurring while the operation of an ordinance is suspended under the action of the municipality."

The decisions fully support the conclusion reached in *EVERLY v. ADAMS*, that a municipality is not liable for failure of its officers to enforce an ordinance prohibiting or regulating the running at large of animals within the city limits, since the municipality in the enactment and enforcement of the ordinance is exercising governmental powers.

v. Sycamore, 150 Ill. 588, 25 L.R.A. 535, 41 Am. St. Rep. 400, 37 N. E. 1096; Burlington v. Stockwell, 5 Kan. App. 569, 47 Pac. 988.

Messrs. H. A. Ewing, S. A. Gard, and G. R. Gard, for appellees:

A city cannot be held liable for an injury to a third person which might have been prevented by the ordinary diligence of its police; or if the negligence of the police to enforce an ordinance contributed to the injury.

Joyce, Nuisances, § 354; Arnold v. Stanford, 113 Ky. 852, 69 S. W. 726; Anderson v. East, 117 Ind. 126, 2 L.R.A. 712, 10 Am. St. Rep. 35, 19 N. E. 726; Dill. Mun. Corp: 4th ed. § 975; Edson v. Olathe, 81 Kan. 332, 36 L.R.A. (N.S.) 861, 105 Pac. 521; Peters v. Lindsborg, 40 Kan. 654, 20 Pac. 490; LaClef v. Concordia, 41 Kan. 323, 13 Am. St. Rep. 285, 21 Pac. 272; Caldwell v. Prunelle, 57 Kan. 511, 46 Pac. 949; Freeman v. Chanute, 63 Kan. 573, 66 Pac. 647; Anderson v. Shawnee County, 91 Kan. 363, 137 Pac. 799.

Burch, J., delivered the opinion of the court:

The action was one for damages for personal injuries inflicted upon the plaintiff by a vicious cow which the officers of the city knowingly permitted to run at large contrary to the provisions of an ordinance of the city. The city interposed a demurrer

to the petition, which was sustained, and the plaintiff appeals.

The fact that the city had passed an ordinance prohibiting cattle, including milch cows, from running at large within the corporate limits, and providing a penalty for its violation, was duly pleaded, and it was alleged that it was the duty of the city to enforce the ordinance. The cow was described as being vicious toward human beings and a menace to the peace and security of the inhabitants of the city, but it was alleged that she roamed at will without restraint about the streets, alleys, and public places, with the full knowledge and consent of the officers and agents of the city. Being attracted by some growing corn on the plaintiff's premises, the cow left the streets and public grounds of the city, entered upon the plaintiff's land, and trespassed upon the growing corn. When the plaintiff undertook to drive the cow away, it attacked her in a savage manner, knocked her down, and gored and trampled her severely.

The demurrer was properly sustained.

The subject of cattle running at large within the corporate limits was not one involving the interests of the city in its private, proprietary capacity, but was one appealing to its governmental functions, exercisable in the interest of the general public welfare. The distinction between quasi private power and governmental power possessed by municipal corporations is funda-

In Addington v. Littleton, 50 Colo. 623, 34 L.R.A. (N.S.) 1012, 115 Pac. 896, Ann. Cas. 1912C, 753, it was held that a municipal corporation was not liable in damages to one injured through failure of its officers to obey an ordinance making it their duty to prevent dogs from running at large on the street. The court said: "The duty imposed by the ordinance upon the marshal and police officers to take up or kill vicious dogs found running at large in the street was imposed under the governmental powers of the town, and not in its private corporate capacity. This being so, it is not liable for the failure of its officers to enforce the ordinance."

And in Levy v. New York, 1 Sandf. 465, it was held that a municipality was not liable for damages for personal injury for failure of its officers to enforce an ordinance prohibiting, under penalty, swine from running at large on the street. There would be no end, it was said, to claims against the city and state if such an action as this were well founded; and the city was said to stand in this respect upon the same footing within its own jurisdiction as the state government does in respect to the state at large.

A similar conclusion was reached in Rivers v. Augusta, 65 Ga. 376, 38 Am. Rep. 787, which is sufficiently set out in EVERLY v. ADAMS.

In Pearce v. Lancaster, 1 Ky. L. Rep. 412 L.R.A.1915E.

(abstract), where one whose horse was frightened by goats in a city sued the city for damages under an ordinance subjecting the owners of unruly or dangerous animals to a fine for permitting them to go at large, it was held that, "the trustees having passed the ordinance in question, it was no part of their duty to keep the streets freed from such animals, and while this may have been the duty of the marshal, having knowledge of the vicious propensities of such animals, yet without such knowledge, at least, the city could not be made liable, nor can the goats be regarded as an obstruction to travel within the rule requiring a city to keep its streets free from obstructions to travel."

In Smith v. Selingsgrove, 199 Pa. 615, 49 Atl. 213, and Kelley v. Milwaukee, 18 Wis. 83, among possibly other cases, it was held that a municipality was not liable for damages for failure to pass an ordinance prohibiting animals from running at large within the city limits.

An opposite conclusion was reached in Cochrane v. Frostburg, 81 Md. 54, 27 L.R.A. 728, 48 Am. St. Rep. 479, 31 Atl. 703, cited in EVERLY v. ADAMS, but the point of distinction seems to be that in the latter case the cattle had been permitted to run at large, until, by reason of their number and continued presence in the street, they had become a nuisance.

R. E. H.

mental in the law of this state. If the city had failed to pass an ordinance regulating the running at large of cattle in the corporate limits, it would not have been liable to the plaintiff because the power not exercised was legislative, discretionary, and purely public in character. In such cases the city, as a governmental agency of the state, enjoys the same immunity from suit which the state would enjoy if it omitted to enact a needed public welfare law. However, the city did pass an ordinance the sufficiency of which was not questioned, and the breach of duty alleged was failure to enforce the ordinance. The enforcement of ordinances is an executive function. In the case of governmental ordinances the function is exercised by the police force and those responsible for the policing of the city. The executive function partakes, in any case, of the same quality as the legislative function. If an ordinance be ministerial in character, the city will be liable for the failure of its officers to execute the ordinance the same as a private individual would be. If, however, the ordinance be one enacted pursuant to the city's governmental power, the city is not liable in damages for the nonfeasance or for the misfeasance of its officers in executing it. Although elected or appointed by the city, paid by the city, and subject to discharge by the city, its officers and public officials, and not agents of the corporation, for whose neglect or misconduct the city can be held responsible in a civil action according to the doctrine of *respondet superior*. Even although the conduct of the city officers be in conscious disregard of the terms of an ordinance, and they have reason to anticipate that injury will result to somebody, the remedy is not by way of an action for damages against the city. Until the legislature changes the theory of our municipal institutions and creates a duty on the part of a municipality to open its treasury for the reimbursement of persons who suffer from misconduct on the part of its executive officers in the discharge of governmental functions, the courts are closed to actions prosecuted for that purpose.

An exception exists with reference to maintaining public streets and ways in a condition of safety for public travel. This duty is regarded as having been imposed directly upon the city. Being so imposed the duty is ministerial in character, and the city is responsible for negligence in discharging it. In this case, however, the cow was not endangering travel on a street when the plaintiff was injured. The plaintiff was not using any street at that time, and she suffered no injury in consequence of any defect or danger existing in any street. In L.R.A.1915E.

this connection it may be observed that the liability of a city for the condition of its streets extends to structural defects, obstructions, want of repair, and the like, making travel upon the street dangerous. It does not extend to improper and unreasonable uses of the highway, contrary to governmental ordinances enacted for the convenience and safety of the traveling public, and the city is not liable for breaches of such ordinances, although committed with the knowledge or even the participation of its officers. For example, if the mayor of a city, its commissioner of streets, and its chief of police were to act as starter, judge, and timekeeper of an automobile race on its principal street at a time when the street is crowded with people, the victims of the unlawful enterprise would have no right of action against the city. It has been so held in numerous cases involving coasting, bicycle riding, horse racing, and other forbidden conduct.

The plaintiff says the cow was a great nuisance. Granted. The ordinance contemplated so much. But the use of the opprobrious term does not change the facts or the law applicable to the facts. The nuisance, such as it was, was neither created nor authorized by the city, much less created or authorized in virtue of any power granted to it or any duty imposed upon it. The existence of the nuisance was not the result of any corporate act. The corporate act forbade the nuisance. The passage of the ordinance was an exercise of the powers of sovereignty by an agent of the Sovereign, exhibited in the discharge of a political governmental duty owed to the public at large. The execution of the ordinance devolved upon agents of the Sovereign, and the city enjoys the same immunity from liability for their negligence as the Sovereign itself. This has been held in numerous cases involving disease-spreading agencies, like privies and hogpens, fire-spreading agencies, fireworks, discharge of cannon, wild animal exhibitions, shooting galleries, and other highly dangerous agencies recognized and classified as nuisances.

From the time the first modest volume was given to the public until the present, Dillon on Municipal Corporations has been regarded as high authority by both the bar and the bench. The subject under consideration was carefully revised by the author in the final edition of his great work, completed shortly before his death. In §§ 1626-1629, 1655, and 1656, of vol. 4 of the 5th edition, the principles governing the present controversy are stated, and the decided cases from which those principles were deduced are collated to the year 1911. The

views there expressed have been approved by this court many times throughout a long series of years, and the legislature has taken no action in the direction of supplanting them. They form a portion of the settled law of this state and sustain the action of the trial court in its ruling on the demurrer.

The supreme court of the state of Maryland holds different views. Corporate liability has been affirmed in a coasting case, a bicycle riding case, and in a cow case, which doubtless prompted the plaintiff's suit. *Cochrane v. Frostburg*, 81 Md. 54, 27 L.R.A. 728, 48 Am. St. Rep. 479, 31 Atl. 703. The principle there applied was that a municipal corporation is bound to exercise powers granted to it by the enactment of proper ordinances for the promotion of the public welfare. Having power to enact an ordinance to prevent cattle from running at large within the city limits, a city is liable if it fails to exercise the power, to a person gored by cattle running at large. In the bicycle riding case (*Hagerstown v. Klotz*, 93 Md. 437, 54 L.R.A. 940, 86 Am. St. Rep. 437, 49 Atl. 836), the principle was extended, and it was held, logically enough, that the corporate duty is not discharged by the passage of ordinances in the interest of the public welfare. The city can relieve itself from civil liability in damages only by a vigorous attempt to enforce its ordinances.

A cow case in harmony with the rule established by the great weight of authority is that of *Rivers v. Augusta*, 65 Ga. 376, 38 Am. Rep. 787, the syllabus of which reads as follows: "A municipal corporation is not liable for damages resulting from a failure on the part of its council to perform, or an improper performance of, those powers and duties which are legislative or judicial in their character. For damages resulting from neglecting to perform, or negligence in the performance of, those duties which are purely ministerial, it would be liable. There is no sound distinction as to such liability between a failure to pass an ordinance in the first instance and its repeal or suspension after being passed. Therefore, where a city council passed an ordinance forbidding the running at large of cattle in its streets, but subsequently suspended its operation indefinitely, on the ground, among others, that the growth of weeds and grass was too luxuriant for comfort, health, and good appearance, one who was gored by a cow running at large in the street would not have a cause of action against the city. Nor would the principle be altered by the L.R.A.1915E.

fact that the owner paid a municipal tax on the cow."

The judgment of the District Court is affirmed.

NEW MEXICO SUPREME COURT.

JOSE RAFAEL LOVATO et al., Appts.,

v.

T. B. CATRON et al.

(— N. M. —, 148 Pac. 490.)

Trust — execution — termination of authority.

1. Where beneficiaries, having an interest in a trust fund, are induced, by alleged fraudulent representations, to assign their respective interests in the fund, and the assignee presents the respective assignments to the trustee, who, without knowledge of the alleged fraud, pays to the assignee the full amount due the beneficiaries respectively, the trust is thereby fully executed, and the trustee has no further interest in the fund, and cannot maintain a suit in equity, for and on behalf of the beneficiaries, to cancel the assignments and compel the assignee to account to the beneficiaries for the true amount due.

Action — several causes — joinder.

2. In such case, the causes of action being several, and there being no ground for equitable interference in behalf of the bene-

Headnotes by PARKER, J.

Note.— *Right of trustee to redress fraud practised on the beneficiary of the trust.*

It will be observed that in *LOVATO v. CATRON* the question was whether a trustee who has paid over the trust fund to an assignee of the *cestui que trust* upon an assignment good in law, but fraudulent in the inducement, may recover the fund, and it was held that he may not do so even though the assignee had mutilated the assignment in changing the consideration. The reason is that there is no fraud against the trustee. The opinion of the court seems convincing of the correctness of its judgment.

No other case of this kind has been found, but there have been some cases touching the right of a trustee to hesitate to pay over trust funds on the assignment of the beneficiary, where the trustee entertains a doubt whether the assignor is being fairly dealt with.

In *Hannah v. Hodgson*, 30 Beav. 19, 7 Jur. N. S. 1092, 9 Week. Rep. 729, it was held that where the equitable interest in a trust estate is purchased from a father and children, and the purchaser pays the whole purchase money to the father, if the purchaser comes into a court of equity to compel a conveyance from the trustee, who has

ficiaries jointly, they cannot maintain a joint suit in equity for the redress of their alleged grievances.

(March 10, 1915.)

APPEAL by plaintiffs from a judgment of the District Court for Santa Fé County dismissing a suit brought to cancel certain assignments alleged to have been fraudulently obtained by defendants, and to compel them to account to plaintiffs for money obtained from them. Affirmed.

The facts are stated in the opinion.

Mr. Francis C. Wilson, for appellants:

The substituted trustee, who is the legal owner and entitled to the possession of the funds, was deprived of said possession by fraud practised upon himself and his *cestui que trust*, and as such legal owner, he could pursue the funds into the hands of strangers without joining his beneficiaries in the action.

Re Straut, 126 N. Y. 201, 27 N. E. 259; Barton Bros. v. Martin, 60 Mo. App. 351; Chouteau v. Boughton, 100 Mo. 406, 13 S. W. 877; Carey v. Brown, 92 U. S. 171, 23 L. ed. 469; Horsley v. Fawcett, 11 Beav. 569; Jackson County v. Derrick, 117 Ala. 364, 23 So. 198; 1 Perry, Tr. 6th ed. § 401.

It is the duty of the trustee, in the distribution of trust funds, to see that money reaches the persons entitled to the same.

Perry, Tr. 6th ed. §§ 926, 929; Linington v. Strong, 107 Ill. 302; Labbe v. Corbett, 69 Tex. 509, 6 S. W. 808; Erickson v. Fisher, 51 Minn. 300, 53 N. W. 638; Reynell v.

Sprye, 1 De G. M. & G. 710, 21 L. J. Ch. N. S. 633; Warder, B. & G. Co. v. Whitish, 77 Wis. 430, 46 N. W. 540; Watson v. Atwood, 25 Conn. 313; Firestone v. Werner, 1 Ind. App. 293, 27 N. E. 623.

The assignments or contracts of sale were void.

United States v. Gomez, 23 How. 326, 16 L. ed. 552; Stimpson v. West Chester R. Co. 4 How. 380, 11 L. ed. 1020.

Messrs. E. R. Wright and J. H. Crist, for appellee Renehan:

A trustee must use the same care, skill, diligence, and prudence in his management of the trust and his dealings with the trust property which a man of ordinary care, skill, and prudence would use in his own transactions and with his own property under like circumstances; and he is answerable for all losses, deficiencies, and injuries which are occasioned by his affirmative or negative violation of this obligation.

3 Pom. Eq. Jur. § 1070; Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546; Ashby v. Blackwell, 2 Eden, 299, 1 Amb. 503; Eaves v. Hickson, 30 Beav. 136, 7 Jur. N. S. 1297, 5 L. T. N. S. 598, 10 Week. Rep. 29; Sporle v. Barnaby, 10 Jur. N. S. 1142, 11 L. T. N. S. 412, 13 Week. Rep. 151; Haydel v. Hurck, 5 Mo. App. 267; Perry, Tr. § 926; Bostock v. Floyer, L. R. 1 Eq. 26, 35 Beav. 603, 35 L. J. Ch. N. S. 23, 11 Jur. N. S. 962, 13 L. T. N. S. 489, 14 Week. Rep. 120; Sloman v. Bank of England, 14 Sim. 475, 14 L. J. Ch. N. S. 226, 9 Jur. 243; Harrison v. Pryse, Barnard. Ch. 324; Ex parte

refused it, the burden of proof of the straightforwardness of the transaction rests upon the purchaser, and a conveyance will not be decreed until he shows that, as against the children, he is entitled to the relief demanded.

So, where immediately upon a son attaining majority and the appointment by the father to him of a trust fund subject to the father's life interest, the trustees were asked to turn over the trust fund to the father and son jointly, and they had good reason to suppose that the son was largely under the father's influence, it was held that they were entitled to their costs for applying to the court for instructions, although the court ordered them to make the transfer. King v. King, 1 De G. & J. 663, 27 L. J. Ch. N. S. 29, 4 Jur. N. S. 721, 6 Week. Rep. 85.

But mere suggestions or suspicions raised by a trustee that an appointment was not made bona fide for the benefit of the appointee will not enable him to refuse to transfer the trust fund to the appointee. Campbell v. Home, 1 Younge & C. Ch. Cas. 664, where the court, while refusing the trustee his costs, did not charge him with costs.

And where a trustee made no effort to

discover whether, as between a daughter and her father, she was to receive her fair share, and no difficulty in ascertaining the truth of the matter was suggested, the trustee, refusing to transfer the fund to them, was ordered to pay the costs. Firmin v. Pulhan, 2 De G. & S. 99, 12 Jur. 410.

It may be noted that in Roberts v. Yancey, 94 Ky. 243, 42 Am. St. Rep. 357, 21 S. W. 1047, it was held that a trustee holding property for the life of the *cestui que trust*, when sued, together with such *cestui que trust*, by the latter's judgment creditor, may show that the judgment was void as founded upon a note to the *cestui que trust* which had been assigned by the payee to the judgment creditor upon an assignment void for champerty.

For right of third persons to take advantage of champerty in an assignment, see the note to Prosky v. Clark, 35 L.R.A. (N.S.) 516.

Beddoes v. Pugh, 26 Beav. 407, is sufficiently dealt with in LOVATO v. CATRON, but it may be stated that the court in the Beddoes Case apparently was of the opinion that the trust deed in question would not have been declared invalid even upon a suit by the trustee who had executed it.

B. B. B.

Jolliffe, 8 Beav. 168, 14 L. J. Ch. N. S. 134, 10 Jur. 813.

The bill contains no ground of equitable relief.

Thomas v. Council Bluffs Canning Co. 34 C. C. A. 428, 92 Fed. 422; 1 Enc. Pl. & Pr. 98.

Until rescinded the assignments are valid. Bispham, Eq. 4th ed. § 472.

Parker, J., delivered the opinion of the court:

This is a suit in equity brought by a trustee for the benefit of a number of beneficiaries. A demurrer was interposed to the complaint, and sustained by the court, and, the plaintiffs electing to stand upon the complaint, a judgment of dismissal was entered, from which this appeal had been taken.

The allegations of the complaint are to the effect that certain persons named in the complaint were beneficiaries of a certain express trust, of which the plaintiff was trustee. The trust arose out of the fact that the beneficiaries were the owners of certain fractional interests in a certain land grant, which had been partitioned and their respective interests set off to them; that they constituted one George Hill Howard their trustee, with power to sell and convey their respective interests, which was done, and the trustee took back a mortgage upon the property as security for the payment of the purchase price; that thereafter, the trustee having died, the present plaintiff was substituted as such trustee; that, the whole of said land grant having been sold, the money was thereby provided to pay off the said mortgage, and was paid to the present plaintiff, as such substituted trustee, for the use and benefit of the said beneficiaries. The complaint then proceeds to charge that the defendants, Renehan and Catron, combined and confederated to cheat and defraud the plaintiffs, and obtained assignments from some of them by misrepresentations of their respective interests in the funds so provided to pay off the said mortgage; that the defendant Renehan, by means of the same false and fraudulent representations, obtained directly from others of the said beneficiaries assignments of their respective interests in the said fund; that the defendant Renehan obtained from a certain one of said beneficiaries a certain other interest in said fund, by means of the same false and fraudulent representations; that, after the defendant Renehan had thus obtained the assignments of the larger portion of the said beneficiaries, he presented them to the plaintiff, as such trustee, who, without knowledge of the alleged fraudulent and false representations, alleged L.R.A.1915E.

to have been the inducement for the execution of the said assignments, paid over to the said defendant Renehan the amounts due respectively to the beneficiaries, from whom he held such assignments.

The prayer of the complaint is that the assignments shall be declared to be null and void and of no binding effect whatsoever, and that the defendants, Catron and Renehan, be required to account to the plaintiffs for the amount which they obtained by the means set out in the complaint.

There is an allegation in the complaint to the effect that the defendant Renehan, after securing the various assignments from the beneficiaries, and before presenting the same to the trustee for payment, and without the knowledge or authority of either the beneficiaries or the trustee, raised the respective amounts of consideration to be paid to each beneficiary above that originally mentioned in the respective assignments, and presented the same, thus altered, to the trustee for payment. But it is nowhere alleged or intimated that either the beneficiaries or the trustee were deceived or defrauded thereby. The beneficiaries had already assigned their respective interests absolutely to the defendant Renehan for a certain specified sum to each, and it was immaterial, as to them, whether the assignments recited a consideration of \$1 or \$1,000. In any event, they could recover the amount agreed upon; no more, no less. As to the trustee, there is no fact alleged showing that he was deceived by these alterations, or that any liability to his beneficiaries was thereby created. None could be created under the circumstances. If they executed the assignments under such circumstances as to make a valid contract, the trustee was in no way concerned as to what they were to receive, nor was his obligation to them in any way increased or changed. All that was required of him was to pay all the money due the beneficiaries, respectively, to the defendant Renehan. When this was done, his duty was performed, and his obligations ceased. This is not like a case of forgery. In such case no order for the money is given. Here an absolute order for the money is given, and the amount to be turned over to the beneficiary is a matter which concerns him alone. We regard the allegation, therefore, as irrelevant and immaterial.

The sum and substance of the complaint, then, is that the defendant Renehan, by falsely pretending that a certain sum was due each of the beneficiaries out of a fund in the hands of a trustee, induced the beneficiaries to assign their respective claims upon the fund to him for such amounts, respectively, as he so represented to be due

them. The trustee thereupon files this complaint for and on behalf of the beneficiaries, praying that the assignments be held null and void, and that the defendants be made to account to the respective beneficiaries for the money thus fraudulently obtained from them.

1. The complaint is based upon the doctrine of the right to follow trust funds into the hands of persons wrongfully obtaining possession of the same. It is apparent that the complaint cannot be maintained. The doctrine of the following trust funds had no application to the funds in this case. The argument by counsel for appellants, in support of the application of the doctrine, is founded upon a statement in 2 Perry on Trusts, § 929, where it is said: "So the trustee must see to the genuineness of the authority of the agent to whom he pays or transfers the property, for if there is forgery or fraud, or want of authority, in the person to whom the property is transferred, the trustee will be responsible."

Therefore it is argued, if these assignments were fraudulently obtained, the trustee is still liable to the beneficiaries, the trust has not been executed, and the trustee may follow and recover the fund. Counsel overlooks, however, the distinction between contracts which are void, and those which are only voidable, by reason of fraud. This is the distinction between fraud in the factum and fraud in the inducement. In the former case the contract is void by reason of the fraud; in the latter case it is voidable, only, for the fraud. It is in the former sense, evidently, that the author uses the term "fraud." Thus, the same author, in § 926 of the same work, says: "If the trustee has notice of an assignment by the *cestui que trust*, he cannot safely pay to the assignor either principal or interest, although the assignment is in the nature of a mortgage only, for notice to the trustee of the assignment is equivalent to taking possession by the assignee under a mortgage. Even if the deed is fraudulent and voidable, the trustee cannot pay to the assignor until it is avoided. On the other hand, it is said that the trustee may safely pay to the assignee, until the deed is impeached, especially if the assignee has the power of signing receipts. *Beddoes v. Pugh*, 26 Beav. 407."

In the case cited, *Pugh* had been made trustee of certain property by a deed executed by his father and himself for the benefit of his sisters and brothers. One of his sisters sought to compel him to carry out the trust. He defended on the ground that his concurrence in the transaction, which resulted in the trust instrument, had been improperly obtained, and that the effect

of the trust instrument was a fraud on the original power and wholly void. The master of the rolls said: "But, in my opinion, it is not necessary for me to decide that question at present. The question before me is whether the deed is *ipso facto*, upon the face of it and with the surrounding circumstances, void, because if it be not, so long as it stands, the *cestui que trust* under it are entitled to call on this court to carry its provisions into effect for their benefit; they being in no respect tainted with any conduct which can disqualify them from receiving any benefit intended to be secured to them by its provisions. My opinion is that it is not void on the face of it, and that until this deed has been declared to be void, and ordered to be delivered up to be canceled, this court must act on its provisions. I also think that a declaration of the invalidity of the deed could only, if at all, be made in a suit regularly instituted for that purpose by *William Buckley Pugh*; and that, even if it were my opinion that, in a suit properly instituted for that purpose, such a decree would be made, it would not be competent to this court to make such a decree or order on behalf of a defendant in the present suit."

As to the distinction between fraud in the inducement and fraud in the factum, see 1 Page on Contracts, § 63, where it is said: "The commonest form of fraud in the factum exists where an instrument in writing is drawn up and signed by one party under a false belief as to its contents, due to the fraud of the adversary party. In such case the contract is generally held to be void. Hence such a contract need not be rescinded, and the party seeking to avoid liability need not return what he has received thereunder. Thus, substituting a quitclaim deed for a mortgage, or a deed for a power to collect rents, omission to read to mortgagor a clause assuming a mortgage, or inserting without the knowledge of the adversary party a clause making a certain pledge collateral security for all debts owing, instead of for the debt in question, a false statement as to the covenants in a written lease, or the amount of goods specified in a written order, or the manner of payment, each makes such instruments void. Whether fraud in the factum exists in the particular case is a question of fact."

In § 64 the author said: "If the party who has been induced to execute a written contract by a fraudulent representation as to its contents seeks to avoid liability thereunder, it is clear that he has never in fact assented to the contract as written."

In § 87 the author says: "Fraud in the inducement exists where the defrauded party understands the identity of the adversary

party, the consideration, the subject-matter, and the terms of the contract, and he is willing to enter into the contract in question; but his willingness so to enter is caused by a fraudulent misrepresentation of the adversary party as to a material fact."

In § 133 the author says: "As affecting the validity of the contract, fraud in the inducement renders the contract voidable, not void,"—citing many cases, among which is *Och v. Missouri, K. & T. R. Co.* 130 Mo. 27, 36 L.R.A. 442, 31 S. W. 962.

It follows, upon the facts pleaded, that the trustee has no longer any interest in the fund; the trust has been executed, so far as he is concerned; and he is an improper plaintiff in this case. The sole causes of action remaining, upon the alleged facts, are possessed by the beneficiaries in severalty.

2. The causes of action of the beneficiaries being several, and there being no room for the application of the equitable jurisdiction to avoid a multiplicity of suits, the beneficiaries cannot maintain a suit of this character jointly.

The District Court correctly sustained the demurrer, and its judgment will be affirmed; and it is so ordered.

Roberts, Ch. J., concurs. Hanna, J., did not participate.

Petition for rehearing denied May 15, 1915.

KANSAS SUPREME COURT.

S. P. HAMILTON, Appt.,
v.

F. J. McKENNA.

J. F. RESSELL, Appt.,
v.

SAME et al.

(95 Kan. 207, 147 Pac. 1126.)

Appeal — amount in issue.

1. A pleading charged that the operator of a mutual telephone company refused the

Headnotes by WEST, J.

Note. — Charging one with refusal to pay his debts.

This note is supplemental to the note attached to *Nichols v. Daily Reporter Co.* 3 L.R.A.(N.S.) 339, and like that note is limited to cases where the charge of refusal to pay a debt imputes dishonesty, and not merely inability.

Many cases within the scope of the present note will be found in the note to *Stan-* L.R.A.1915E.

plaintiff, who was a member of the company, the services due a member, unless he would pay an excessive and unauthorized charge, which refusal damaged the plaintiff in his business in the sum of \$1,000. It appeared, however, from all the allegations, that the amount in controversy did not exceed \$100, exclusive of costs. Held, that a cause of action was stated, but not for an appealable amount.

Damages — duty to mitigate.

2. The rule that one seeking to hold another for damages must use reasonable efforts to mitigate such damages, followed.

Slander — request to pay debt.

3. A statement made to the plaintiff in the presence of others, "All I want you to do is to pay your honest debts," held not slanderous.

Appeal — slander.

4. An action for damages for slander is appealable, regardless of the sum claimed.

(Dawson, West, and Marshall, JJ., dissent.)

(April 10, 1915.)

A PPEALS by plaintiffs from orders of the District Court for Anderson County sustaining demurrers to the amended petitions filed to recover damages for defendants' refusal to furnish telephone service to plaintiffs. Modified.

The facts are stated in the opinion.

Messrs. R. H. Bennett, R. E. Cullison, and C. F. Richardson, for appellants:

It is necessary for the pleader to specify distinctly the ground of objection relied upon, and a ground not so specified is waived.

Mayberry v. Kelly, 1 Kan. 116; *Herriff v. Finley*, 91 Kan. 322, 137 Pac. 800.

The question whether several causes of action are stated in a petition must be raised by motion.

Ellsworth v. Rossiter, 46 Kan. 237, 26 Pac. 674; *Tootle v. Wells*, 39 Kan. 454, 18 Pac. 692; *Shrigley v. Black*, 59 Kan. 487, 53 Pac. 477.

Where a misjoinder of causes of action appears on the face of a petition, the question must be raised by a demurrer specifying that particular objection.

Lyons v. Berlau, 67 Kan. 426, 73 Pac. 52; *Woodman v. Davis*, 32 Kan. 344, 4 Pac.

nard v. Wilcox & G. Sewing Mach. Co. 42 L.R.A.(N.S.) 515, on imputing to one not in business nonpayment of debts or want of credit, as libel and slander, and are not repeated here.

A newspaper article stating that one transferred his property to avoid the payment of a debt represents him as a dishonest or dishonorable man, guilty of such disgraceful conduct as would bring him into public contempt, and is libelous *per se*.

262; *Simpson v. Greeley*, 8 Kan. 586; *Hurd v. Simpson*, 47 Kan. 372, 27 Pac. 961.

Indefiniteness or informality in a pleading cannot be reached by demurrer.

Burnette v. Elliott, 72 Kan. 624, 84 Pac. 374.

All that plaintiff needs to do in stating a cause of action is to state the facts of his case, and if such facts would entitle him to recover in any form of action, either in law or in equity, he will be entitled to recover under such statement.

Deisher v. Stein, 34 Kan. 39, 7 Pac. 608; *Wonsettler v. Lee*, 40 Kan. 367, 19 Pac. 862.

The demurrer will be overruled, if the facts stated, when all are taken together as true, constitute a cause of action, whether well pleaded or not.

Bowersox v. Hall, 73 Kan. 99, 84 Pac. 557; *Upham v. Head*, 74 Kan. 17, 85 Pac. 1017, 20 Am. Neg. Rep. 348; *La Harpe v. Greer*, 74 Kan. 74, 85 Pac. 1015; *Johnson v.*

Brown, 74 Kan. 346, 86 Pac. 503; *Western Massachusetts Ins. Co. v. Duffey*, 2 Kan. 347; *Stewart v. Balderston*, 10 Kan. 147; *Crowther v. Elliott*, 7 Kan. 235; *Park v. Tinkham*, 9 Kan. 615.

The facts stated in a petition are taken as true for the purpose of determining the legal effect.

Voss v. Bachop, 5 Kan. 67; *Jacobs v. Vaill*, 67 Kan. 107, 72 Pac. 530; *Stinson v. Wooster*, 83 Kan. 753, 112 Pac. 610.

If the required facts constituting the cause of action are stated in appropriate terms, the pleading is not demurrable.

Rhea v. Williams, 80 Kan. 698, 103 Pac. 119; *Mathes v. Shaw Oil Co.* 85 Kan. 162, 116 Pac. 244; *Topeka v. Tuttle*, 5 Kan. 311.

Messrs. Charles W. Garrison, Manford Schoonover, and Noah L. Bowman, for appellees:

Plaintiffs were not parties to the agreement or persons with whom the defendants contracted, and they had no right to ask

Todd v. Every Evening Printing Co. 6 Penn. (Del.) 233, 66 Atl. 97.

A letter to a bank requesting that it again present certain drafts to a debtor, stating: "The account is long past due, and if Mr. Ferdon's intentions were honest and sincere he would have remitted a long time ago, since he has sold out of business and ought to have the means received from the sale. We have no confidence in his representations to you about coming here to Mobile in a week. It is not necessary that he come here to pay; he can pay you just as well as paying us if he had any honesty or sincerity of purpose to pay," was held libelous *per se*, in *Ferdon v. Dickens*, 161 Ala. 181, 49 So. 888. And the court held that this was not a privileged publication as being a mere instruction from a principal to an agent to institute attachment proceedings against a debtor who the creditor had probable cause for believing had left or was about to leave the state for the purpose of defrauding his creditors, and so simply a suggestion by the principal to his agent of a manifest reason for having no confidence in the promises of the debtor. The court stated: "If this had been a letter by a creditor to his attorney or agent informing him of a state of facts which justified the issuance of an attachment, with instructions to sue, we are not prepared to say that it would not be privileged. But the letter was only written by the creditor to a bank—not to any particular person or agent, but to a bank—for the purpose of having it either to collect the draft, or, upon failure, to turn it over to a justice of the peace with instructions to sue the defendant, and, for aught that appears, not to sue by attachment, but by a personal action of summons and complaint."

A large yellow poster placed by a collector of debts conspicuously in several parts of the city where plaintiff lived, ad-

vertising accounts for sale and stating that plaintiff owed a certain amount for a dry goods bill, was held libelous *per se* in *Green v. Minnes*, 22 Ont. Rep. 177, the evidence showing that she owed a much less amount than stated. *Armour, Ch. J.*, in the course of his opinion, said: "The poster was striking in its color and unusual in its character; it advertised accounts for sale by the Canadian Collecting Company, a sale unlikely to be made by a collecting company until the means of collection had proved abortive; it did not show to whom the accounts were due; nor on whose account they were to be sold, nor when nor where the sale was to be effected; it showed the quality of the debtors and the quality of goods supplied to them, and offered a reward for information that would lead to the conviction of any person destroying it. We think that reasonable men reading this poster would understand from it that the debtors referred to therein were persons from whom the accounts which they were therein alleged to owe could not be collected by process of law, and were insolvent or dishonest debtors. Being so understood by reasonable men, this poster would have the effect of bringing discredit upon the debtors mentioned therein, and of lowering them in the estimation of their neighbors, and would be consequently libelous. If this had been a criminal prosecution there would have been nothing to justify the publication of this poster, even had it been shown that the debtors therein mentioned were indebted as therein set forth, for it could not have been shown that its publication was for the public benefit. But in a civil action, in order to justify the publication of this poster, it would be necessary to show only its truth and that the debtors therein named were indebted as therein set forth. In this case it was quite clear from the evidence that the plaintiff . . . was in-

or receive the service being given under that contract, unless defendants were willing to extend the terms of the contract to them.

9 Cyc. 372; *Reeves & Co. v. State Bank*, 63 Kan. 789, 86 Pac. 995; *Burton v. Larkin*, 36 Kan. 246, 59 Am. Rep. 541, 13 Pac. 398.

Paying honest debts is what all honorable men are striving to do, and telling one that that is all he is wanted to do is not slander.

Harrison v. Manship, 120 Ind. 43, 22 N. E. 87; *Hinesley v. Sheets*, 18 Ind. App. 612, 63 Am. St. Rep. 357, 48 N. E. 802; *Posnett v. Marble*, 62 Vt. 481, 11 L.R.A. 162, 22 Am. St. Rep. 126, 20 Atl. 813; *Hayes v. Press Co.* 127 Pa. 642, 5 L.R.A. 643, 14 Am. St. Rep. 874, 18 Atl. 331; *Schreiber v. Gunby*, 81 Kan. 459, 106 Pac. 276; *Dever v. Montgomery*, 89 Kan. 637, 132 Pac. 183.

West, J., delivered the opinion of the court:

The only question presented by this ap-

pealed is whether or not the amended petition (both cases being treated as one) states a cause of action; the plaintiff having appealed from an order sustaining a demurrer thereto.

debted to the defendants . . . in the sum of \$24.33, and in no other or greater sum, and that she was not indebted to them in the sum of \$59.35, as in the poster set forth. . . . When persons resort to this very reprehensible method of collecting accounts and publish posters such as that published in this case, we think that they cannot complain if they are held to strict proof of the truth of the matters published therein, and, failing in such proof, if they are held liable to suffer the consequences of such publication."

Street, J., said: "I entirely concur in the remarks of the chief justice as to the reprehensible nature of the means employed by the defendants for the collection of the debt due to Minnes & Burns from the female plaintiff. It is a matter of surprise to find in the evidence a statement that a number of traders and business men had deliberately resolved to descend to such a device. The publication complained of by the plaintiffs is clearly of a character which a jury might properly hold to be libelous; it is clearly not a matter of public interest or concern, and whether true or false, it is therefore a matter for which the defendants might have been indicted. It is, I think, a matter in which a plea of justification should not be taken to be proved unless the proof go to the full extent of the libel."

A blank rating in the publication of a mercantile agency, with the accompanying explanation thereof, is libelous *per se* as to one so rated without justification, where, among the subscribers to the publication, and to the knowledge of the publishers thereof, the commonly accepted meaning of such rating is that the person rated blank is worthless as to his financial conditions, untrustworthy as to his character, and entirely unworthy of credit in any commercial transaction. *DeWitt v. Scarlett*, 113 Md. 47, 77 Atl. 271. L.R.A.1915E.

peal is whether or not the amended petition (both cases being treated as one) states a cause of action; the plaintiff having appealed from an order sustaining a demurrer thereto.

In substance the pleading alleges that in Colony there was a mutual telephone company operating as a joint-stock concern for the purpose of rendering service to anyone in the vicinity who would purchase stock therein. The plaintiff was a stockholder, but, upon removing temporarily from Colony, he transferred his stock to another company. The defendant owned and operated an independent system and maintained a switch board and had connected with this system a number of patrons using his telephones. That the defendant proposed to take over the switch board of the mutual company and all their business and perform all their services himself, leaving the mutual company to conduct the business pertaining to this organization and the ex-

But see *Kingsbury v. Bradstreet Co.* 116 N. Y. 211, 22 N. E. 365; *Denney v. Northwestern Credit Assn.* 25 L.R.A.(N.S.) 1021, and cases in note thereto on giving one an indefinite rating or refusal to give any rating in a mercantile agency as libel, from which cases it appears that, in the absence of any averment of latent defamatory meaning in a blank rating, such rating is not libelous *per se*.

A boarding house is not such an inconsequential business that it will not be libelous *per se* for a mercantile agency to place the name of the keeper thereof on his delinquent list falsely, where such delinquent list is in effect a blacklist and imputes that one whose name is thereon is unworthy of credit. *Patterson v. Evans*, 153 Mo. App. 684, 134 S. W. 1030.

In *Barr v. Musselburgh Merchants' Assn.* [1912] S. C. 174, court of sessions, cited in *Mews* 1912, Eng. Case Law Dig. p. 121, it was held that the publication of a name in the blacklist of a local association of traders, which was issued to its members, was defamatory, but that the defendants were privileged in issuing the list, and so the action was dismissed, there being no averment of facts inferring malice.

For other cases on blacklisting as libel, see cases in the earlier note and cases in notes to *Weston v. Barnicoat*, 49 L.R.A. 612, and *Woodhouse v. Powles*, 8 L.R.A.(N.S.) 783, on blacklisting dealer as libel.

Words spoken of one in his relations as a tradesman, to one with whom he was about to trade, "Don't trust that damned rogue, he will never pay you a farthing. Have you sold King some barley? You mind and have the money for it before it goes out of the wagon, or you will never have it," are libelous, and not a privileged communication, where the information was unsolicited. *King v. Watts*, 8 Car. & P. 614. But the court added that the com-

tension of its system and the control of its relation with its own members. That this proposition was accepted, and the switch board was removed to the defendant's place of business, after which he undertook to perform towards the members of the mutual company all the obligations of that company. The mutual company undertook to furnish its members telephone services at cost, each member to contribute 25 cents a month, the price regularly charged his patrons by the defendant being \$1 a month. That, upon returning to Colony, the plaintiff tried to purchase stock in the mutual company, but was prevented by intimidation and other improper influence of the defendant upon the officers of the company, and was thereby rendered unable to procure telephone services for his home or office, unless he accepted the telephone of the defendant and paid the price demanded by him. That prior to January, 1912, he installed one of the defendant's instruments in his house and paid \$1 a month therefor. That he had become an owner of certain stock in the mutual company entitled to all the rights of a member. That he so advised the defendant and demanded that connection be made with his office to operate his office and home telephones as mutual telephones, which the defendant refused to do, and refused to allow any service to the plaintiff, as a member of the mutual company. Plaintiff's office telephone was connected with one of the rural lines running into the city, over which the defendant agreed to furnish free services and all telephone connection with the members, and the plaintiff demanded that his instrument be so connected, which the defendant refused to do. That, after making the agreement between the mutual company and the defendant, the only switch board in Colony used in connection with these companies

was the one operated by the defendant, and the plaintiff had no means of connection except through these boards. That in March, 1913, it was agreed that the plaintiff should pay the defendant \$1 a month for his office telephone, upon condition that, if it should finally be determined that he was entitled to the rights of a member of the mutual company, the defendant should repay him the excess over the charge required of members. Whereupon the office telephone was connected. That after the state Utilities Commission had settled a certain controversy between the patrons of the mutual line and the defendant, including the rights of the plaintiff, as a member of the mutual company, it was ordered by the commission that the plaintiff's home telephone be placed upon the list at 25 cents a month. That afterwards the defendant presented a bill for \$5.40. The plaintiff demanded the return of \$12 overcharge, which left still due the plaintiff \$6.60, which the defendant refused, and he has since refused to switch the office phone or allow the plaintiff to use it. That because of business transactions by the plaintiff, his office phone was a matter of pressing necessity, and to be deprived of its use was a continuing injury, and that by reason of the defendant's refusal to allow plaintiff to use his office telephone during January and February, 1912, and since November 7, 1912, he had been damaged in the sum of \$500, and, by reason of the excess charge, the defendant was indebted to him in the sum of \$6.60, with interest.

The defendant argues that, if all the matters in controversy were settled by the Utilities Commission, nothing was left but the overcharge. But such is not the allegation. There is no attempt to allege what controversy was thus settled, except the plaintiff's rights as a member of the mutual company, which was "one of the matters

munication would have been privileged if the information had been requested and what was said was said without malice.

But words spoken of one stating that he was an unprincipled man and had borrowed money which the lender could not get back are not slanderous *per se*, although the information was given voluntarily, where they were not spoken in relation to such person's business. *Storey v. Challands*, 8 Car. & P. 234. The court added that, even with a showing of special damage, the words would not have been actionable had the communication been a confidential one to one who had asked for information.

And words falsely spoken of a horse trader and dealer in blooded stock, to the effect that he had not paid a bet laid on a certain horse race, and a request that that fact be reported to the steward of the jockey club, not being by way of such person's trade or business, are not slanderous L.R.A.1915E.

per se. *Smith v. Willoughby*, 15 Times L. R. 314.

And publication that a professional wrestler refused to pay his room rent was held in *Brown v. Independent Pub. Co.* 48 Mont. 374, 138 Pac. 258, not to be libelous *per se*, as it was not connected with any legitimate business relation.

It is not libelous *per se* to accuse one of doing what the law approves. So it is not libelous to publish of a debtor that he pleaded the statute of limitations in an action on a claim. *Hollenbeck v. Hall*, 103 Iowa, 214, 39 L.R.A. 734, 64 Am. St. Rep. 175, 72 N. W. 518; *Bennett v. Williamson*, 4 Sandf. 60.

Or that, to get rid of a just claim in court for liquors, a saloon keeper set up as a defense the existing prohibitory liquor law. *Homer v. Engelhardt*, 117 Mass. 539.

J. H. B.

heard and determined by said board; and it was the decision of said board that the plaintiff at all times from the 1st of January, 1912, was a member of said Mutual Telephone Company and entitled to all the rights, privileges, and benefits accruing to the members of said company, including their rights under the arrangements hereinbefore referred to with said defendant." It is therefore for his damages suffered by having these rights withheld that he sues.

It is also urged that, by paying the excessive and unauthorized charges, the plaintiff could have had the services; and hence his damages cannot exceed such excess. It was his duty upon refusal to accord his rights either to bring proceedings to compel recognition of such rights, or else to mitigate the damages by submitting to the exaction in case he intended to hold the defendant responsible for such damages. *Holly v. Neodesha*, 88 Kan. 102, 113, 127 Pac. 616; *Atkinson v. Kirkpatrick*, 90 Kan. 515, 519, 135 Pac. 579; *Maddux v. Western U. Teleg. Co.* 92 Kan. 619, 141 Pac. 585. It seems clear from the pleading that, had the unauthorized charge been paid as demanded, the requested services would have been rendered, and that hence the only actual damages shown to have been suffered consist of the unauthorized overcharge. The pleading thus far states a good cause of action for this sum, but no construction could bring the damages up to \$100; and therefore, if this were all the charge, it could not be considered, for the reason that the amount involved is less than the sum necessary to make an action appealable. Civil Code, § 566 (Gen. Stat. 1909, § 6161).

It is also charged that in November, 1912, the defendant, in the presence and hearing of a number of persons at Colony, maliciously and falsely, for the purpose and with the intention of bringing the plaintiff into public disrepute, and for the purpose of injuring his good name and of destroying the confidence which plaintiff's neighbors and friends had reposed in him as an honest and upright citizen, said in substance, "All I want you to do is to pay your honest debts," meaning thereby maliciously to state and insinuate, and expecting to be understood, and for the purpose of being understood, by the parties present, as stating that the plaintiff would not pay his honest debts, thereby injuring the plaintiff's good name and reputation, causing him humiliation and mental anguish, to his damage in the sum of \$1,000. One may with perfect innocence be unable to pay his honest debts, and the expression of a desire that he pay them does not impute depravity of nature or wilful misconduct. There is nothing set out to show that the language

was so spoken, inflicted, or emphasized as to carry the meaning that the plaintiff was, or led the hearers to believe or understand that he was, a mere repudiator of his honest debts.

While there are cases holding that words innocent on their face may be so used as to be slanderous in fact (*Grubb v. Elder*, 67 Kan. 316, 72 Pac. 790; *Martin v. The Pica-yune* (Martin v. Nicholson Pub. Co.) 115 La. 979, 4 L.R.A. (N.S.) 861, 40 So. 376; *Julian v. Kansas City Star Co.* 209 Mo. 35, 107 S. W. 496), the majority of the court are of the opinion that the language charged is not slanderous, and that nothing in the petition renders its use slanderous, and hence that no cause of action was stated by this portion of the pleading, but under § 566, Civil Code, the action is appealable.

There is another allegation that, by reason of the defendant's refusal to connect plaintiff's office with the rural line and perform for him the services which the defendant had agreed to perform for the members of the mutual company and patrons of the rural line, plaintiff has been damaged in the additional sum of \$100. This appears to be a repetition, however, of the general cause of action for failure to give the plaintiff the telephone services he was entitled to, and does not appear to add anything thereto.

It follows, therefore, that the judgment in No. 19422 is modified as already indicated.

No. 19423 includes no count for slander, and in that case the appeal is dismissed.

Johnston, Ch. J., and Burch, Mason, and Porter, JJ., concur.

Dawson, J., dissenting:

The words were slanderous, and the petition was good as against a demurrer. *Henicke v. Griffith*, 29 Kan. 516; *Hess v. Sparks*, 44 Kan. 465, 21 Am. St. Rep. 300, 24 Pac. 979; *State v. Grinstead*, 62 Kan. 593, 64 Pac. 49, 14 Am. Crim. Rep. 209; *Grubb v. Elder*, 67 Kan. 316, 72 Pac. 790; *Bashford v. Wells*, 78 Kan. 295, 18 L.R.A. (N.S.) 580, 96 Pac. 663, 16 Ann. Cas. 310; *Cooper v. Seaverns*, 81 Kan. 267, 25 L.R.A. (N.S.) 517, 135 Am. St. Rep. 359, 105 Pac. 509; *Gano v. Cunningham*, 88 Kan. 300, 128 Pac. 372; *Neosho County v. Spearman*, 89 Kan. 106, 130 Pac. 677; *Broek v. Francis*, 89 Kan. 463, 473, 45 L.R.A. (N.S.) 756, 131 Pac. 1179; *Roberts v. Pendleton*, 92 Kan. 847, 142 Pac. 289; *Martin v. The Pica-yune* (Martin v. Nicholson Pub. Co.) 115 La. 979, 4 L.R.A. (N.S.) 861, 40 So. 376; *Julian v. Kansas City Star Co.* 209 Mo. 35, 107 S. W. 496; *Hutchins v. Page*, 75 N. H. 215, 31 L.R.A. (N.S.) 132, 72 Atl. 689; *Hayes v.*

Press Co. 127 Pa. 642, 5 L.R.A. 643, 14 Am. St. Rep. 874, 18 Atl. 331; 1 Odgers, Libel & Slander, 1st Am. ed. 95.

I therefore dissent.

West, J.:

I join in this dissent.

Marshall, J., concurs in the dissent.

MINNESOTA SUPREME COURT.

CHARLES LAMONT, Appt.,

v.

ED STAVANAUGH,

and

CITY OF WATERVILLE, Resp't.

(— Minn. —, 152 N. W. 720.)

Municipal corporation — assault by officer — liability.

1. A city is not liable for injuries received by a person on its streets in an assault by a police officer, although such officer is known to the officials appointing him to be a man of vicious propensities and violent temper.

Same — effect of failure to require bond.

2. The failure to require a bond of such police officer does not make the city liable for such assault.

(May 14, 1915.)

Headnotes by BUNN, J.

Note. — Municipal liability for torts of police officers.

This note is supplementary to notes to Gillmor v. Salt Lake City, 12 L.R.A. (N.S.) 537, and Sehy v. Salt Lake City, 42 L.R.A. (N.S.) 915.

As to the liability of a municipality for the negligence or other tort of the keeper or inmate of a municipal prison, see notes to Jackson v. Owingsville, 25 L.R.A. (N.S.) 180, and Nichols v. Fountain, 52 L.R.A. (N.S.) 942.

In Mollnow v. Rafter, 152 N. Y. Supp. 110, a taxpayer's action to restrain the payment by the city of a judgment recovered against a police officer for the use of unnecessary force in making an arrest, it is held that a city not being liable for acts of police officers in the discharge of their public duties, the payment of such a judgment would be a gift to an individual within a constitutional prohibition, and it would not be an equitable claim within a statute requiring a city to pay claims equitably payable by the city though not constituting obligations legally binding on it.

The action of a chief of police in arresting a person for violation of the state law, and placing him in the city lockup, which was in a filthy condition, was without the authority, express or implied, of the L.R.A. 1915E.

A PPEAL by plaintiff from an order of the District Court for Le Sueur County, sustaining a demurrer to a complaint filed to recover damages for an alleged wrongful and unlawful assault on plaintiff by the defendant police officer. Affirmed.

The facts are stated in the opinion.

Messrs. Moonan & Moonan, for appellant:

The respondent is liable when it maintains upon its streets a person of vicious habits and propensities.

Dean v. St. Paul Union Depot Co. 41 Minn. 360, 5 L.R.A. 442, 16 Am. St. Rep. 703, 43 N. W. 54, 8 Am. Neg. Cas. 441.

It was the duty of the respondent to require Stavanaugh to give a proper bond to safeguard the public, in view of its knowledge of this propensity and danger to the public; failure to do so created a liability.

The respondent city is liable for the misfeasance and wrongful acts of its officer Stavanaugh.

Stanley v. Davenport, 54 Iowa, 463, 37 Am. Rep. 216, 2 N. W. 1064, 6 N. W. 706; Shinnick v. Marshalltown, 137 Iowa, 72, 114 N. W. 542.

Messrs. M. R. Everett and S. B. Willson, for respondent:

The alleged negligence of the police officer or of the other city officers or employees of the city does not create a corporate liability as against the city.

Bryant v. St. Paul, 33 Minn. 289, 53 Am. Rep. 31, 23 N. W. 220; Grube v. St. Paul,

city, and created no liability on its part. Hobbs v. Washington, 168 N. C. 293, 84 S. E. 391.

Allegations showing merely a wrongful assault upon, and imprisonment of, a plaintiff by officers of a municipality, do not present a valid case against the municipality. Swanson v. Nacogdoches, — Tex. Civ. App. —, 161 S. W. 83.

To the same effect as LAMONT v. STAVANAUGH, upon the question as to the effect of the failure of a city to require a bond of its police officer upon its liability for his torts, is Looney v. Sioux City, 163 Iowa, 604, 51 L.R.A. (N.S.) 546, 145 N. W. 287, holding that failure of a superintendent of police to take the bond from a police officer authorized by ordinance before permitting him to exercise the duties of his office does not render the municipality liable for a tort committed by such officer in the performance of his duties, since it is in the exercise of a governmental function.

Many other phases of the subject of the municipal liability as affected by the question whether the municipality acts in the exercise of a public or a private function are treated in notes cited in the Index to L.R.A. Notes, under the title "Municipal Corporations," subtitle "Liability for Damages."

R. L. S.

34 Minn. 402, 26 N. W. 228; Snider v. St. Paul, 51 Minn. 466, 18 L.R.A. 151, 53 N. W. 763; Ihk v. Duluth, 58 Minn. 182, 59 N. W. 960; Boye v. Lea, 74 Minn. 230, 76 N. W. 1131; Miller v. Minneapolis, 75 Minn. 131, 77 N. W. 788, 5 Am. Neg. Rep. 183; Lerch v. Duluth, 88 Minn. 295, 92 N. W. 1116; Viebahn v. Crow Wing County, 96 Minn. 276, 3 L.R.A.(N.S.) 1126, 104 N. W. 1089; Elliott, Mun. Corp. § 302; Claussen v. Luverne, 103 Minn. 491, 15 L.R.A.(N.S.) 698, 115 N. W. 643, 14 Ann. Cas. 673; Gullikson v. McDonald, 62 Minn. 278, 64 N. W. 812; Royce v. Salt Lake City, 15 Utah, 401, 49 Pac. 290; Calwell v. Boone, 51 Iowa, 687, 33 Am. Rep. 154, 2 N. W. 614; Odell v. Schroeder, 58 Ill. 353; Curran v. Boston, 151 Mass. 505, 8 L.R.A. 243, 21 Am. St. Rep. 465, 24 N. E. 781; Peters v. Lindsborg, 40 Kan. 654, 20 Pac. 490; Culver v. Streator, 130 Ill. 238, 6 L.R.A. 270, 22 N. E. 810; Pollock v. Louisville, 13 Bush, 221, 26 Am. Rep. 260; Cook v. Macon, 54 Ga. 468; Moffitt v. Asheville, 103 N. C. 237, 14 Am. St. Rep. 810, 9 S. E. 695; Coley v. Statesville, 121 N. C. 316, 28 S. E. 482; Rusher v. Dallas, 83 Tex. 152, 18 S. W. 333; McIlhenney v. Wilmington, 127 N. C. 146, 50 L.R.A. 470, 37 S. E. 187; Craig v. Charleston, 180 Ill. 154, 54 N. E. 184; Gray v. Griffin, 111 Ga. 361, 51 L.R.A. 131, 36 S. E. 792; Chicago v. Turner, 80 Ill. 419; Wilcox v. Rochester, 190 N. Y. 137, 17 L.R.A.(N.S.) 741, 82 N. E. 1119, 13 Ann. Cas. 759; 4 Dill. Mun. Corp. 5th ed. § 1656 (1975); Simpson v. Whatcom, 33 Wash. 392, 63 L.R.A. 815, 99 Am. St. Rep. 951, 74 Pac. 577; Woodhull v. New York, 150 N. Y. 450, 44 N. E. 1038; Evans v. Kankakee, 231 Ill. 223, 13 L.R.A.(N.S.) 1190, 83 N. E. 223; Dyer v. Portland, 111 Me. 119, 88 Atl. 398; Clark v. Chicago, 159 Ill. App. 20; Wilks v. Caruthersville, 162 Mo. App. 492, 142 S. W. 800; Schultz v. Milwaukee, 49 Wis. 254, 35 Am. Rep. 779, 5 N. W. 342; Attaway v. Cartersville, 68 Ga. 740; Kansas City v. Lemen, 6 C. C. A. 627, 12 U. S. App. 640, 57 Fed. 905; Laurel v. Blue, 1 Ind. App. 128, 27 N. E. 301; Calwell v. Boone, 51 Iowa, 687, 33 Am. Rep. 154, 2 N. W. 614; Schigley v. Waseca, 106 Minn. 94, 19 L.R.A.(N.S.) 689, 118 N. W. 259; Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332.

The respondent is not liable because of the failure of its administrative officials to exact and demand a bond from the policeman.

5 Thomp. Neg. § 5818; Snider v. St. Paul, 51 Minn. 466, 18 L.R.A. 151, 53 N. W. 763; Kreger v. Bismarck Twp. 59 Minn. 3, 60 N. W. 675.
L.R.A.1915E.

Bunn, J., delivered the opinion of the court:

Appeal by plaintiff from an order sustaining a general demurrer of defendant city to the complaint.

The facts alleged in the pleading demurred to are in substance as follows:

Waterville is a city with a population of over 1,200. On April 16, 1914, defendant Stavanaugh wrongfully, unlawfully, and without provocation violently assaulted plaintiff while the latter was standing on a public street in the city, and repeatedly struck him with a policeman's club, causing severe injuries. Stavanaugh is a man of "savage and vicious propensities, who frequently during the last three years has assaulted, beaten, and bruised different persons, and violently attacked and beaten divers and sundry persons, including this plaintiff, without provocation, reason, or cause therefore, but solely on account of and by reason of his vicious and savage propensities and violent temper." Defendant city, its servants, agents, and employees, were well acquainted with the "violent and savage propensities" of Stavanaugh long prior to and at the time they furnished him with a policeman's club and invested him with authority to carry it and be upon the public streets. The city neglected to require any bond of Stavanaugh for the faithful performance of his duties, and permitted him to be on the streets in the performance of his duties for the city without his giving any security or bond, though well knowing that Stavanaugh was insolvent and a money judgment against him worthless. After alleging that plaintiff suffered damages to the extent of \$5,000 through the assault by Stavanaugh, and that due notice of plaintiff's claim had been given to the city, the complaint concludes with a demand for judgment in that sum against both of the defendants.

Does this complaint state a cause of action as against the defendant city? Plaintiff claims there is a liability because: (1) By putting a man of vicious propensities and violent temper on its streets as a police officer the city violated its duty to keep its streets in a reasonably safe condition for public use and free from nuisance; (2) in view of its knowledge of Stavanaugh's propensities and the danger to the public, the city was negligent in not requiring a bond.

The liability of a city for injuries resulting from defects or dangerous conditions in its streets is a firmly established, if illogical, exception to the rule that a mu-

nicipality is not liable in damages for negligence in performing its governmental functions, unless such liability has been imposed by statute. *Ackeret v. Minneapolis*, 129 Minn. 190, L.R.A.1915D, 1111, 151 N. W. 976, and cases cited. It cannot be questioned that a city is liable for the negligence of its officials in creating or permitting to exist dangerous conditions in its streets and sidewalks. But we are unable to apply this doctrine to such a danger as the complaint in this case shows,—a policeman who is possessed of vicious propensities. That the city acts in its governmental, and not in its proprietary, capacity in appointing its officers, there can be no doubt. It would seem that its nonliability for negligence or other torts on the part of such officers is too well settled in this state to admit of argument. *Gullikson v. McDonald*, 62 Minn. 278, 64 N. W. 812; *Lerch v. Duluth*, 88 Minn. 295, 92 N. W. 1116; *Claussen v. Luverne*, 103 Minn. 491, 15 L.R.A.(N.S.) 698, 14 Ann. Cas. 673, 115 N. W. 643. It does not alter the rule that the mayor or city officials charged with the appointment of police officers are negligent in making an appointment or knowingly appoint a dangerous man. The case of *Dean v. St. Paul Union Depot Co.* 41 Minn. 360, 5 L.R.A. 442, 16 Am. St. Rep. 703, 43 N. W. 54, 8 Am. Neg. Cas. 441, strongly relied on by plaintiff, is not in point. A wholly different rule applies to individuals and private corporations. They are liable for the torts of their servants committed within the scope of their authority, while a municipal corporation is not, save in excepted cases. We are unable to hold that the presence of Stavanaugh on the streets of Waterville, armed with a policeman's club, constituted a defective condition of the streets or a danger therein which would impose a liability on the city, even though the official who placed him there knew of his vicious propensities. While there is a lack of authority in this state as to the liability on the exact facts pleaded here, there is no lack of authority elsewhere, and it is all against the liability. *Rusher v. Dallas*, 83 Tex. 152, 18 S. W. 333; *McIlhenney v. Wilmington*, 127 N. C. 146, 37 S. E. 187, 50 L.R.A. 470; *Craig v. Charleston*, 180 Ill. 154, 54 N. E. 184.

There is no force in the contention that the failure to require Stavanaugh to give a bond makes the city liable for injuries caused by him.

Our conclusion is that the complaint fails to state a cause of action against the defendant city, and that the demurrer was rightly sustained.

Order affirmed.
L.R.A.1915E.

NORTH CAROLINA SUPREME COURT.

W. H. EDWARDS

v.

ADOLPHUS H. YEARBY, Appt.

(168 N. C. 663, 85 S. E. 19.)

Descent — Inheritance from adopted child.

A statute establishing the relation of parent and child between a child and one adopting it, and entitling the child to inherit from the parent, does not give the adopting parent a right to inherit from the child in preference to its natural parent.

(April 22, 1915.)

APPEAL by defendant from a judgment of the Superior Court for Durham County in plaintiff's favor in an action brought to determine title to an interest in a city lot. Affirmed.

Statement by Hoke, J.:

Civil action heard on case agreed. From the facts presented it appeared that W. Y. Edwards, an infant of five years, died in Durham seised and possessed of one-third interest in a certain lot in said city, without leaving brother or sister, and the property is claimed by plaintiff, W. H. Edwards, the legitimate and natural father of the deceased child, and by the defendant, who was the adopted father, and also the natural uncle, of the child. In reference to the title to this one-third interest and how the same was acquired by the deceased child, the facts further show that "Sarah Yearby, a widow, owned the land in controversy in fee, and died intestate, leaving as her sole heirs at law W. M. Yearby, Ora Yearby, and A. H. Yearby, the defendant. Ora Yearby married the plaintiff, W. H. Edwards, in 1901. Of this union two children were born, to wit, William Y. Edwards and Ruth L. Edwards. In March, 1907, the plaintiff, W. H. Edwards, and his wife, finding that they could not live together happily as man and wife, entered into a contract of separation. The plaintiff, W. H. Edwards, conveyed certain property to W. M. Yearby, trustee, for the support of his wife, Ora Y. Edwards, and his two infant children, William Y. Edwards and Ruth L. Edwards. Soon thereafter Ora Y. Edwards died intestate, leaving as her sole heirs at law her two children, William

Note. — As to descent and distribution of property of adopted child, see note to *Baker v. Clowser*, 43 L.R.A.(N.S.) 1056.

For other notes as to effect of adoption upon descent and distribution, see Index to L.R.A. Notes, "Descent and Distribution," subtitle, "Effect of Adoption."

Y. Edwards and Ruth L. Edwards. Shortly after this Ruth L. Edwards died. In May, 1907, W. M. Yearby duly adopted William Y. Edwards with the consent of the plaintiff, who was duly made a party to said proceedings, and William Y. Edwards was taken to the home of W. M. Yearby and cared for by him, and was thereafter known as William Yearby; that on 20 May, 1907, the same day of the adoption, W. H. Edwards conveyed to William Y. Edwards all of his interest in the land in controversy. Some time after the adoption of said William Y. Edwards the said child died seized of a one-third undivided interest in the land in controversy, leaving his adopted father, W. M. Yearby, and his natural father, W. H. Edwards, the plaintiff. The question therefore to be determined is whether the one-third undivided interest in said land descends to the adopted father, W. M. Yearby, or to the natural father, W. H. Edwards."

There was judgment for plaintiff, and defendant excepted and appealed.

Messrs. Bryant & Brogden, for appellant:

The rights of the parent by adoption are the same as those of a natural parent.

Citizens' Street R. Co. v. Willooby, 15 Ind. App. 312, 43 N. E. 1058; 1 Cyc. 930; Carpenter v. Buffalo General Electric Co. 213 N. Y. 101, 106 N. E. 1026.

Defendant had the right to inherit from the adopted child in preference to its natural parent.

Re Jobson, 164 Cal. 312, 43 L.R.A. (N.S.) 1062, 128 Pac. 938; Re Newman, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887; Re Walworth, 85 Vt. 322, 37 L.R.A. (N.S.) 849, 82 Atl. 7, Ann. Cas. 1914C, 1223; Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321; Fosburgh v. Rogers, 114 Mo. 122, 19 L.R.A. 201, 21 S. W. 82; Waldoborough v. Friendship, 87 Me. 211, 32 Atl. 880; Humphries v. Davis, 100 Ind. 275, 50 Am. Rep. 788.

Messrs. Baggett & Baggett and Sykes & Sheppard, for appellee:

The adopting parents are not entitled to succeed to the estate of the adopted child, but upon the death of an adopted child unmarried and without descendants, its estate, in the absence of statutes to the contrary, vests in its natural parents to the exclusion of its adopting parents.

Re Namaau 3 Haw. 484; Com. v. Powel, 16 W. N. C. 297; 20 Cent. L. J. 343; Upson v. Noble, 35 Ohio St. 656; White v. Dotter, 73 Ark. 130, 83 S. W. 1052; Rodgers, Dom. Rel. § 463; Reinders v. Koppelman, 68 Mo. 494, 30 Am. Rep. 802; Hill v. Nye, 17 Hun. 457; Coleman v. Swick, 120 Ill. App. 381; Hole v. Robbins, L.R.A. 1915E.

53 Wis. 514, 10 N. W. 617; Barnhizer v. Ferrell, 47 Ind. 335; Com. v. Nancrede, 32 Pa. 389; Schafer v. Eneu, 54 Pa. 304; Murphy v. Portrum, 95 Tenn. 605, 30 L.R.A. 263, 32 S. W. 633; Heidecamp v. Jersey City H. & P. Street R. Co. 69 N. J. L. 284, 101 Am. St. Rep. 707, 55 Atl. 239.

Hoke, J., delivered the opinion of the court:

Our statutes (Revisal, chap. 2) provides for the adoption of infant children for life or a lesser term, and in § 177 the effect of such adoption is stated as follows: "Such order" of adoption, "when made, shall have the effect forthwith to establish the relation of parent and child between the petitioner and the child during the minority or for the life of such child, according to the prayer of the petition, with all the duties, powers and rights belonging to the relationship of parent and child, and in case the adoption be for the life of the child, and the petitioner die intestate, such order shall have the further effect to enable such child to inherit the real estate and entitle it to the personal estate of the petitioner in the same manner and to the same extent such child would have been entitled to if such child had been the actual child of the person adopting it: Provided, such child shall not so inherit and be so entitled to the personal estate, if the petitioner specially set forth in his petition such to be his desire and intention: Provided further, for proper cause shown in said petition the court may decree that the name of such child may be changed to that of the petitioner."

From a perusal of the section it appears that, while the proceedings, during the minority or for the life of the child, "establish the relation of parent and child between the two with all the duties, powers, and rights belonging to such relationship," when the statute professes and undertakes to deal with the question of the devolution and transfer of property by descent or distribution, it confers the hereditary qualities on the child only, and not on the adopted parent. "It shall enable the child to inherit the real estate and to take the personal property" as if the actual child of the person adopting it. Our general statute on descents of real property, founded on and, to a great extent, embodying the principles of the common law, would give this property to the natural father (Revisal, chap. 30, rule 6); and, this present law of adoption having in express terms conferred the right of inheritance only on the child, it should, by correct interpretation, be confined to that, and create no other interference with the general law than the statute itself declares. Black, Constr. & Interpreta-

tion of Laws, p. 146; Lewis's Sutherland Stat. Constr. 2d ed. § 491.

Speaking to the position and the general policy upon which it is properly made to rest, Rodgers on Domestic Relations, § 463, says: "As statutes conferring the rights, duties, and liabilities of natural children upon those adopted thereunder are in derogation of the common law, they must not be construed to enlarge or confer any rights not clearly given. Upon principle, therefore, it is clear that an adopting parent could not inherit from an adopted child unless this be clearly authorized by the statute. Indeed, out of an abundance of caution, the statutes on the subject in some states expressly provide that the adopting parent shall not inherit from the child adopted. This is done to prevent designing persons from getting the estate of a child through the process of adoption. It would be to the interest, from a financial standpoint, of a quasi parent who has adopted a child being an heir to a fortune, large or small, and who has no descendants who could take the inheritance in preference to a parent, to bring about the death of the child for the purpose of succeeding to the inheritance. Under such a condition of things, the quasi parent might neglect the child in sickness, or otherwise be the means, directly or indirectly, of bringing about the death of the adopted child. For these and like reasons, the doctrine of ascent of property from an adopted child to its new parents is not, and should not be, favored in law."

The question does not seem to have been hitherto presented to this court, and there is some variety of ruling on the subject in other jurisdictions, owing largely to differing phraseology of their statutes; but the view we adopt is supported, we think, by correct principles of interpretation, and is in accord with many authoritative decisions elsewhere construing laws which more nearly resemble our own, many of them expressed in terms much more favorable than ours towards the rights of the adopted father. *Heidecamp v. Jersey City*, H. & P. Street R. Co. 69 N. J. L. 284, 101 Am. St. Rep. 707, 55 Atl. 239; *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802; *Upton v. Noble*, 35 Ohio St. 655; *White v. Dotter*, 73 Ark. 130, 83 S. W. 1052; *Hole v. Robbins*, 53 Wis. 514, 10 N. W. 617; 20 Cent. L. J. 343; *Re Namaau*, 3 Haw. 484.

In the state of Massachusetts, while the adopted father is allowed to inherit to a certain extent, their statute, amended for the purpose in 1876, explicitly provides that "the adopted parents and their kindred in L.R.A.1915E.

blood may now inherit from the adopted child such property as the child has acquired by gift or inheritance from the adopted parent or kindred of such parent."

And the same principle which now prevails, by decision, in Indiana, has been thus far confined to such property as the child acquired from the adopted parent or the kindred of such parent. *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788. In the case of *Re Jobson*, 164 Cal. 312, 43 L.R.A. (N.S.) 1062, 128 Pac. 938, holding that the natural father does not inherit, the California statute (Civ. Code, § 228) provides that on adoption the child shall be regarded and treated in all respects as the child of the parent adopting him, and thereafter the adopting parent and the child "shall sustain towards each other the legal relation of parent and child, and have all the rights . . . of that relation." This without further or specific provision on the right of inheriting property, and in that case two of the judges dissented in favor of the natural father.

And in *Warren v. Prescott*, 84 Me. 483, 17 L.R.A. 435, 30 Am. St. Rep. 370, 24 Atl. 948, the statute (Rev. Stat. chap. 67, § 35) provided that, in adoption, "the child becomes, to all intents and purposes, the child of his adopters, the same as if born in lawful wedlock," with two exceptions, which were held not to make in favor of the natural parent.

But we do not consider it necessary or desirable to pursue the many and various cases bearing directly or indirectly on the question presented. Much of the apparent conflict, as stated, will be found to arise from the differing laws applicable, and we think it safe to rest our decision on the provisions of our own statute, which, by correct interpretation, confers the right of inheritance on the adopted child, and not on the adopted father.

For the reasons suggested in the citation from *Rodgers*, supra, there is doubt if any change in our law on the subject is to be desired; certainly not beyond the modification as it prevails in the legislation of Massachusetts and in the state of Indiana, as construed by the later decisions. But, if it is otherwise, the changes required must be referred to the general assembly, for this question of the devolution of property by descent and distribution is one coming entirely within its province. *Re Garland*, 160 N. C. 555, 76 S. E. 486; *Hodges v. Lipscomb*, 128 N. C. 57, 38 S. E. 281.

There is no error, and the judgment in plaintiff's favor must be affirmed.

OKLAHOMA SUPREME COURT.
(Division No. 1.)

EDWARD COODY, Plff. in Err.,
v.

D. R. COODY et al.

(39 Okla. 719, 136 Pac. 754.)

Pleading — demurrer — ground.

1. Where the two defendants in an action file separate demurrers to a petition, charging (1) a misjoinder of causes of action, (2) that the petition failed to state facts sufficient to constitute a cause of action against the demurrant, and the court sustains the demurrer generally, and the record being silent as to the ground or grounds of the decision, it will be presumed that the demurrer was sustained upon the latter ground.

Same — duplicity.

2. The test of whether there is more than one cause of action stated or attempted to be stated in a petition in a suit in equity is whether there is more than one primary right sought to be enforced, or one subject of controversy presented for adjudication. If there is, the pleading is demurrable.

Same — general demurrer — partial validity.

3. Where a general demurrer is filed to a petition as a whole, if any paragraph of the pleading is good and states a cause of action, a demurrer should be overruled.

Deed — intoxication — effect.

4. A deed, executed by a person so destitute of reason as not to know the nature or consequences of his act, though his incompetency be produced by intoxication, is voidable and may be avoided by himself, though the intoxication was voluntary and not produced by the circumvention of the other party.

Cancellation — mortgage — failure to return consideration — effect.

5. In a suit in equity brought by a Cherokee Indian, immediately upon attaining his majority, to cancel certain leases and a mortgage given by him during minority on his allotted lands, a petition which charged that all of the money paid him on account thereof during his minority had been spent and squandered prior to attaining his majority sufficiently excused the failure of an offer to return the consideration received.

(November 18, 1913.)

ERROR to the District Court for Washington County to review a judgment

Headnotes by SHARP, C.

Note. — For validity of contract made with intoxicated person, see notes to Wright v. Waller, 54 L.R.A. 440; Kuhlman v. Wieben, 2 L.R.A.(N.S.) 666; Miller v. Sterringer, 25 L.R.A.(N.S.) 596; and Matz v. Martinson, L.R.A.1915B, 1121. L.R.A.1915E.

sustaining a demurrer to the amended petition in a suit for the cancelation of certain instruments. Reversed.

The facts are stated in the Commissioner's opinion.

Mr. Haskell B. Talley, for plaintiff in error:

Where equity assumes jurisdiction for one purpose in regard to the subject-matter of the suit, it will retain jurisdiction for all purposes and give complete relief, the parties being the same.

Seibert v. Thompson, 8 Kan. 65; Burress v. Diem, 23 Okla. 776, 101 Pac. 1116; United States ex rel. Creek Nation v. Rea-Read Mill & Elevator Co. 171 Fed. 514.

The question of misjoinder of parties defendant is not raised by demurrer.

Winfield Town Co. v. Maris, 11 Kan. 147; Stiles v. Guthrie, 3 Okla. 26, 41 Pac. 383; Weber v. Dillon, 7 Okla. 568, 54 Pac. 897; Martin v. Clay, 8 Okla. 46, 56 Pac. 716; Choctaw, O. & G. R. Co. v. Burgess, 21 Okla. 653, 97 Pac. 276; Horr v. Herrington, 22 Okla. 590, 20 L.R.A.(N.S.) 47, 132 Am. St. Rep. 648, 98 Pac. 443.

The second amended petition sufficiently charged that the defendants obtained the instruments in question by fraud or undue influence.

Conley v. Nailor, 118 U. S. 127, 30 L. ed. 112, 6 Sup. Ct. Rep. 1001; Parramore v. Taylor, 11 Gratt. 239; Stohr v. Stohr, 148 Cal. 180, 82 Pac. 777; Meyer v. Fishburn, 65 Neb. 626, 91 N. W. 534; Kelly v. Perault, 5 Idaho, 221, 48 Pac. 45; Adair v. Craig, 135 Ala. 332, 33 So. 902; Griffith v. Bergeson, 115 Iowa, 279, 88 N. W. 451; German Sav. & L. Soc. v. De Lashmuth, 83 Fed. 33; Ryan v. Ryan, 174 Mo. 279, 73 S. W. 495; Beach v. Wilton, 244 Ill. 413, 91 N. E. 496; Highley v. Metzger, 186 Ill. 253, 57 N. E. 810; Walker v. Shepard, 210 Ill. 100, 71 N. E. 425; 2 Pom. Eq. Jur. §§ 875, 876, 955, 956; Cooper v. Ft. Smith & W. R. Co. 23 Okla. 139, 99 Pac. 786; Spangler v. Yarborough, 23 Okla. 806, 138 Am. St. Rep. 856, 101 Pac. 1107; Howe v. Martin, 23 Okla. 561, 138 Am. St. Rep. 840, 102 Pac. 128.

The instruments are vitiated by reason of the fact that the plaintiff in error was intoxicated at the time of the execution of each of them.

Moore v. Adams, 26 Okla. 48, 108 Pac. 393; Miller v. Sterringer, 66 W. Va. 169, 25 L.R.A.(N.S.) 596, 66 S. E. 229; Spoonheim v. Spoonheim, 14 N. D. 380, 104 N. W. 847; Gaffney v. Cline, 19 Okla. 197, 91 Pac. 855; Calloway v. Witherspoon, 40 N. C. (5 Ired. Eq.) 128; Ridgeway v. Herbert, 150 Mo. 606, 73 Am. St. Rep. 464, 51 S. W. 1040.

It was not necessary that the plaintiff

below, as a condition precedent to entering a court of equity, restore, or offer to restore, the consideration received.

Clark v. O'Toole, 20 Okla. 319, 94 Pac. 547; International Land Co. v. Marshall, 22 Okla. 693, 19 L.R.A. (N.S.) 1056, 98 Pac. 951; St. Louis & S. F. R. Co. v. Richards, 23 Okla. 256, 23 L.R.A. (N.S.) 1032, 102 Pac. 92; Blakemore v. Johnson, 24 Okla. 544, 103 Pac. 554; Moore v. Adams, 26 Okla. 48, 108 Pac. 393; Bragdon v. McShea, 26 Okla. 35, 107 Pac. 916; Alfrey v. Colbert, 93 C. C. A. 517, 168 Fed. 231.

Messrs. P. J. Carey and W. C. Franklin, for defendants in error:

The several causes of action were improperly joined.

Haskell County Bank v. Bank of Santa Fé, 51 Kan. 39, 32 Pac. 624; Hoyer v. Raymond, 25 Kan. 865; Aylesbury Mercantile Co. v. Fitch, 22 Okla. 475, 23 L.R.A. (N.S.) 573, 99 Pac. 1089.

The facts set out in the second amended petition are not sufficient to constitute fraud or undue influence.

Dowell v. Chicago, R. I. & P. R. Co. 83 Kan. 562, 112 Pac. 136; Wegerer v. Jordan, 10 Cal. App. 362, 101 Pac. 1066; Stohr v. Stohr, 148 Cal. 180, 82 Pac. 777.

It was necessary that the plaintiff below, as a condition precedent to entering a court of equity, restore or offer to restore, the consideration received.

Kelley v. Owens, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797; Bohall v. Diller, 41 Cal. 533.

Sharp, C., filed the following opinion:

On September 13, 1909, plaintiff in error, plaintiff below, brought suit in the district court of Washington county against defendants in error, defendants below, seeking the cancelation of certain leases, a mortgage, and a deed on lands in said county theretofore owned by him. It appears from the petition: That plaintiff was a one-fourth blood Cherokee citizen, and the lands covered by the instruments sought to be canceled constituted his allotment of lands in the Cherokee Nation. That at all times prior to August 31, 1909, plaintiff was a minor, under the age of twenty-one years, and was poorly educated, being scarcely able to read and write the English language, and totally ignorant and inexperienced in business affairs. That he had executed instruments affecting said lands as follows: Oil and gas lease during the month of January, 1909, to the defendant D. R. Coody; mortgage to defendant O'Keiffe during the month of March, 1909; oil and gas mining lease also to the defendant O'Keiffe during the same month; oil and gas mining lease during the month of May, 1909, to the defendant O'Keiffe; L.R.A.1915E.

and warranty deed August 31, 1909, to the defendant O'Keiffe. That during the month of March, 1909, the oil and gas lease, executed to defendant Coody, was by him assigned to the defendant O'Keiffe, and that all of said instruments had been recorded in the office of the register of deeds for Washington county. That the total consideration received by him on account of the said several instruments did not exceed the sum of \$400, \$75 of which was paid at the time of the execution of the warranty deed.

Various grounds for setting aside the said instruments are charged in the amended petition, among which are: (1) Legal disability of infancy at the time of the execution of said instruments, except that of August 31, 1909; (2) that, at the time all of said instruments were executed, plaintiff was under the influence of intoxicants and wholly unable to transact business and understand the nature of the instruments signed; (3) undue influence practised upon him by a kinsman and confidential adviser, the defendant D. R. Coody; (4) conspiracy to defraud; (5) duress; (6) inadequacy of consideration. To the petition as amended the defendants filed their separate demurrers, each upon the same grounds, namely: (1) That the petition did not state facts sufficient to constitute a cause of action against the demurring defendant; (2) that several causes of action were improperly joined.

These demurrers were sustained, but upon what ground the journal entry does not show. Had the court sustained them upon the ground of misjoinder of causes of action, it would have been its duty to so state at the time in order to afford plaintiff an opportunity to move to be allowed to file separate petitions, each to include such of said causes of action as might have been joined, and had them each docketed pursuant to § 4743, Rev. Laws 1910. Weber v. Dillon, 7 Okla. 568, 54 Pac. 894; Goldsborough v. Hewitt, 23 Okla. 66, 138 Am. St. Rep. 795, 99 Pac. 907; Owen v. Tulsa, 27 Okla. 264, 111 Pac. 320. As the court made no such indication, and counsel were therefore afforded no opportunity, it is but fair to presume that the court sustained the demurrer upon the ground that the petition failed to state a cause of action.

In passing, however, we may say that it has been said upon high authority (Abbott, Trial Brief, Pleadings, pp. 739, 740) that the test of whether there is more than one cause of action stated or attempted to be stated in a petition in a suit in equity is whether there is more than one primary right sought to be enforced, or one subject of controversy presented for adjudication. If there is, the pleading is demurrable. Our

statute (§ 4738, Rev. Laws 1910) provides for the uniting of several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, where they all arise out of one of the classes therein named. Under this provision of the statute, claims affecting several defendants, such as might have been brought within the compass of a single suit in equity, may be regarded as one cause of action; and in such suits, therefore, equitable rules as to the joinder of parties defendant are still applicable.

The second ground of demurrer being general, no attempt being made to specify distinctly the grounds of objection urged to the petition, if there is one paragraph in the petition which states a cause of action, such demurrer must be overruled. *Hanenk-ratt v. Hamil*, 10 Okla. 219, 61 Pac. 1030; *Berry v. Geiser Mfg. Co.* 15 Okla. 364, 85 Pac. 699; *Cockrell v. Schmitt*, 20 Okla. 207, 129 Am. St. Rep. 737, 97 Pac. 521; *Emmerson v. Botkin*, 26 Okla. 218, 29 L.R.A. (N.S.) 786, 138 Am. St. Rep. 953, 100 Pac. 531. The amended petition charges that the defendants, acting together, wrongfully conspired to cheat and defraud plaintiff of his land, and that the said deed of August 31, 1909, was the final consummation of a scheme theretofore entered into by said defendants at and during the time said leases and the said mortgage were taken, and that, at the time all of said instruments were made, the plaintiff was under the influence of intoxicants and wholly unable to transact business and understand the nature of the instruments by him signed.

Without passing upon the sufficiency of the petition as to the other grounds upon which relief was sought, we think the court erred in sustaining the defendants' demurrers, for if, at the time the deed of August 31, 1909, was executed, plaintiff was so under the influence of intoxicants as to be wholly unable to transact business and to understand the nature of the deed which he signed, he may plead his disability from such drunkenness in an action to cancel the deed. Intoxication which is absolute and complete, so that the party is for the time entirely deprived of the use of his reason and is wholly unable to comprehend the nature of the transaction and of his own acts, is a sufficient ground for setting aside or granting other appropriate affirmative relief against a conveyance or contract made while in that condition, even in the absence of fraud, procurement, or undue advantage by the other party. *Pom. Eq. Jur.* § 949. The following texts announce the rule applicable to the question presented by the demurrer: *Story, Contr.* p. 15: "Drunkenness must be such as to incapacitate the party

from the proper exercise of his judgment and prevent him from understanding his contract." *Clark, Contr.* pp. 274, 275: "A contract made by a person while he is so drunk as to be incapable of understanding its nature and effect is voidable, . . . [but his intoxication] must be so excessive as to render him incapable of knowing what he is doing." In *Bishop on Contracts*, §§ 980, 981, it is said: "Intoxication so deep as to take away the agreeing mind, in other words, to disqualify the mind to comprehend the subject of the contract and its nature and probable consequences, impairs such contract, if made while it lasts, the same as insanity. . . . To have this effect, it must render the party *non compos mentis* for the occasion." *Anson, Contr.* p. 150: "The contract of a . . . drunken person is voidable, at his option, if it can be shown that at the time of making the contract he was absolutely incapable of understanding what he was doing." 1 *Benjamin, Sales*, § 30: "A drunkard, when in a state of complete intoxication, so as not to know what he is doing, has no capacity to contract." In 1 *Pothier, Obligations*, 49: "It is evident that drunkenness, when it goes so far as absolutely to destroy the reason, renders a person in this state, so long as it continues, incapable of contracting, since it renders him incapable of consent." 11 *Am. & Eng. Enc. Law*, 773: "An express contract, entered into when the obligor is in a state of intoxication, so as to deprive him of the exercise of his understanding, is voidable."

The early law, as well as the modern rule of decision, with the reason for the change, is perhaps nowhere better expressed than in *Cameron-Barkley Co. v. Thornton Light & P. Co.* 138 N. C. 365, 107 Am. St. Rep. 532, 50 S. E. 695, from which we quote at length. "The question presented for our consideration arises upon an exception to the charge of the court regarding the drunkenness of the plaintiff's agent and its sufficiency to avoid the contract. It is held by some authorities to be a principle of the common law that every contract which a man *non compos mentis* makes is avoidable, and yet shall not be avoided by himself, because it is a maxim in law that no man of full age shall be, in any plea to be pleaded by himself, received by the law to stultify himself and to set up his own disability in avoidance of his acts. *Beverley's Case*, 4 Coke, 123b, 2 Co. Inst. 14, Reg. Brev. 267, *Fitzgh. Nat. Brev.* 532, 16 Eng. Rul. Cas. 702. And Coke, as appears in his *Institutes*, was of the same opinion: 'As for a drunkard who is *voluntarius demon*, he hath (as hath been said) no privilege thereby, but what hurt or ill soever he doth, his drunkenness

doth aggravate it.' Co. Litt. 247a. But Blackstone observes that this doctrine sprang from loose authorities, and he evidently agrees with Fitzherbert, who rejects the maxim as being contrary to reason. 2 Bl. Com. 291. Whatever was the true principle of the common law as anciently understood, there can be no doubt that since the reign of Edward III., if not since the time of Edward I., it has been settled according to the dictates of good sense and common justice that a contract made by a person so destitute of reason as not to know the nature and consequences of his contract, though his incompetence be produced by intoxication, is void, and even though his condition was caused by his voluntary act, and not procured through the circumvention of the other party. Mere imbecility of mind is not sufficient as a ground for avoiding the contract when there is not an essential privation of the reasoning faculties or an incapacity of understanding. 2 Kent, Com. 451. This court has adopted Coke's definition that a person has sufficient mental capacity to make a contract if he knows what he is about. Doe ex dem. Moffit v. Witherspoon, 32 N. C. (10 Ired. L.) 185; Paine v. Roberts, 82 N. C. 451. And it has been held not error to charge that the measure of capacity is the ability to understand the nature of the act in which he is engaged and its full extent and effect. Cornelius v. Cornelius, 52 N. C. (7 Jones, L.) 593. The doctrine that a party may plead his own disability to defeat the alleged contract arises out of the very nature of a contract, which requires that the minds of the parties should meet to a common intent, and, if one of them has not 'the agreeing mind,' the contract cannot be formed. In Hawkins v. Bone, 4 Fost. & F. 311, Chief Baron Pollock said: 'But the law of England is that a man is not liable on a contract alleged to have been made by him in a state in which he was not really capable of contracting. A contract involves a mutual agreement of two minds, and if a man has no mind to agree, he cannot make a valid contract;' and the question at last is whether he was wholly incapable of any reflection or deliberate act, so that in fact he was unconscious of the nature of the particular transaction. It is not necessary that he should be able to act wisely or discreetly, nor to effect a good bargain, but he must at least know what he is doing. So far as the legal incapacity is concerned, it can make no difference from what cause it proceeded, whether from the party's own imprudence or misconduct, or otherwise. It is the state and condition of the mind itself that the law regards, and not the causes that produced it. If from any cause his reason has been dethroned, his L.R.A.1915E.

disability to contract is complete. Bliss v. Connecticut & P. River R. Co. 24 Vt. 424. The master of the rolls (Sir William Grant) in Cook v. Clayworth, 18 Ves. Jr. 15, said: 'As to that extreme state of intoxication that deprives a man of his reason, I apprehend that, even at law, it would invalidate a deed obtained from him while in that condition.' Lord Ellenborough in Pitt v. Smith, 3 Campb. 33, thus states the doctrine: 'You have alleged that there was an agreement between the parties, and this allegation you must prove, as it is put in issue by the plea of not guilty; but there was no agreement between the parties if the defendant was intoxicated in the manner supposed when he signed this paper. He had not an agreeing mind. Intoxication is good evidence upon a plea of *non est factum* to a deed, of *non concessit* to a grant, and of *non assumpsit* to a promise.' The authorities sustaining the view of the law we have stated and adopted are quite numerous. Clark, Contr. 2d ed. p. 186; Parsons, Contr. 9th ed. p. 444; Matthews v. Baxter, L. R. 8 Exch. 132, 42 L. J. Exch. N. S. 73, 28 L. T. N. S. 169, 21 Week. Rep. 389; Webster v. Woodford, 3 Day, 90; Van Wyck v. Brasher, 81 N. Y. 260; Bursinger v. Bank of Watertown, 67 Wis. 75, 58 Am. Rep. 848, 30 N. W. 290; Bush v. Breinig, 113 Pa. 310, 57 Am. Rep. 469, 6 Atl. 86; Bates v. Ball, 72 Ill. 108; Wright v. Fisher, 65 Mich. 275, 8 Am. St. Rep. 886, 32 N. W. 605; 14 Cyc. 1103; 17 Am. & Eng. Enc. Law, 2d ed. 399. It was held in King v. Bryant, 3 N. C. (2 Hayw.) 394, that if a man was so drunk at the time of signing a bond that he did not know what he was doing, and while in that condition he was induced to sign the instrument, it was a fraud upon him which vitiated the bond, even in an action at law upon it; and to the same effect is the decision of the court in Gore v. Gibson, 13 Mees. & W. 623, opinion of Parke, B. In the latter case, Pollock, C. B., said: 'Although formerly it was considered that a man should be liable upon a contract made by him when in a state of intoxication, on the ground that he should not be allowed to stultify himself, the result of the modern authorities is that no contract made by a person in that state, when he does not know the consequences of his act, is binding upon him. That doctrine appears to me to be in accordance with reason and justice.'

The rule is also well stated and the authorities reviewed in Wright v. Waller, 127 Ala. 557, 54 L.R.A. 440, 29 So. 57.

The notes in these two cases contain citations of decisions of many of the courts, both American and English, and from which we may epitomize as follows: The rule formerly was that intoxication was no excuse

and created no privilege or plea in avoidance of a contract; but it is now settled, according to the dictates of good sense and common justice, that a contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetence be produced by intoxication, is voidable and may be avoided by himself, though the intoxication was voluntary, and not produced by circumvention of the other party. This language is repeated with approval in *Bush v. Breinig*, 113 Pa. 310, 57 Am. Rep. 469, 6 Atl. 86; *Fowler v. Meadow Brook Water Co.* 208 Pa. 473, 57 Atl. 959. And such is the rule announced by the authorities of the present time: *Donelson v. Posey*, 13 Ala. 752; *Phelan v. Gardner*, 43 Cal. 306; *Hale v. Stery*, 7 Colo. App. 165, 42 Pac. 598; *Mattair v. Card*, 18 Fla. 762; *Bates v. Ball*, 72 Ill. 109; *Joest v. Williams*, 42 Ind. 565, 13 Am. Rep. 377; *Mansfield v. Watson*, 2 Iowa, 111; *Carpenter v. Rogers*, 61 Mich. 384, 1 Am. St. Rep. 595, 28 N. W. 156; *Cavender v. Waddingham*, 5 Mo. App. 457; *Longhead v. B. F. Combs & B. Commission Co.* 64 Mo. App. 559; *Johnson v. Phifer*, 6 Neb. 401; *French v. French*, 8 Ohio, 214, 31 Am. Dec. 441; *Birdsong v. Birdsong*, 2 Head, 289; *Barrett v. Buxton*, 2 Aik. (Vt.) 167, 16 Am. Dec. 691; *Conant v. Jackson*, 16 Vt. 336; *Bursinger v. Bank of Watertown*, 67 Wis. 75, 58 Am. Rep. 848, 30 N. W. 290. From the foregoing cases, and upon principle, the failure of the amended petition to charge that plaintiff's intoxication was designedly brought about or caused by defendants is immaterial. It is the existence at the time of the necessary degree of intoxication which controls, and not by whom or by what means the intoxication was brought about.

As already observed, the several instruments were each made during the year 1909, the deed on August 31st. Plaintiff's suit was instituted September 13, 1909, or only two weeks after the execution of the warranty deed. It is insisted on the part of defendants in error that, before plaintiff could bring his suit, it was a necessary condition precedent to entering a court of equity that he restore or offer to restore the consideration received. The petition charges that all of the money paid him during his minority he had spent and squandered, but, as to the \$75 paid him on the date that he attained his majority, this he offered to return to the defendants. The petition, in the latter particular, is not attacked. Was it necessary, therefore, to offer to return the consideration paid him during infancy, but which money had been dissipated? In *Blakemore v. Johnson*, 24 Okla. 544, 103 Pac. 554, attention was called to the conflict of authorities upon this subject, and it L.R.A.1915E.

was there held that the rule which seemed to be the most generally followed by the courts was that an infant is not to be defeated in his effort to disaffirm and avoid his contracts by his inability to return the consideration received by him. See also *Stevens v. Elliott*, 30 Okla. 41, 118 Pac. 407; *Gill v. Haggerty*, 32 Okla. 407, 122 Pac. 641; *Tirey v. Darneal*, 37 Okla. 611, 132 Pac. 1087; *Tirey v. Darneal*, 37 Okla. 606, 133 Pac. 614; *Colbert v. Alfrey*, 93 C. C. A. 517, 168 Fed. 231; *MacGreal v. Taylor*, 167 U. S. 688, 42 L. ed. 326, 17 Sup. Ct. Rep. 961.

Nor is the present case influenced by the fact that the several instruments executed by plaintiff, affecting his allotted land, were made since the passage of the act of Congress of May 27, 1908 (35 Stat. at L. 312, chap. 199), removing restrictions upon alienation or encumbrance of allotted lands of members of the Five Civilized Tribes, "enrolled as . . . mixed-blood Indians, having less than half Indian blood, including minors," as, according to the rule announced in *Blakemore v. Johnson*, *supra*, even though the instruments executed during infancy were voidable, and not void, an offer to restore the consideration, it having been squandered and spent, was unnecessary. While the plaintiff's amended petition is loosely drawn, and it may well be doubted if, independent of the allegation of inability to contract on account of intoxication, it states a cause of action, yet in this regard we deem it sufficient and conclude that the court erred in sustaining defendants' separate demurrers.

The judgment of the trial court should be reversed, and the cause remanded, with leave to amend, if desired.

Per Curiam:

Adopted in whole.

WISCONSIN SUPREME COURT.

IRENE MORRISON, Resp't.,
v.

WILLIAM MACLAREN et al.
and

GRANT U. FISHER et al., Appts.

(160 Wis. 621, 152 N. W. 475.)

State — department of agriculture —
liability for injury to patron of fair.

1. A state board of agriculture is, while

Note. — Conducting state fair or exposition as exercise of governmental or private function respecting liability for injury to patron.

The general subject of liability of one

holding a fair, engaged in the discharge of a governmental function, and is not liable to patrons for injury by one employed to give an exhibition such as an aeroplane flight, to attract people to the grounds and entertain them while there.

Agriculture — authority of state board — aeroplane exhibition.

2. A state board of agriculture organized to promote the interests of agricultural, dairying, horticulture, manufactures, and the domestic arts has authority to give exhibitions such as aeroplane flights, in connection with fairs, to attract people to the fairs and entertain them while there.

Officer — individual liability for official act.

3. Members of a state board of agriculture are not personally liable for injury to a

patron of a fair by the fall of an aeroplane for the flight of which they had contracted as part of the entertainment of the exhibition, if they merely made the contract, leaving the control and management of the flight to the aviator, and he is found to be guilty of no negligence in handling the machine.

(Barnes, J., dissents.)

(May 4, 1915.)

A PPEAL by defendants Fisher et al. from a judgment of the Circuit Court of Milwaukee County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Reversed.

maintaining place of amusement to which public are invited, for safety of patrons, is treated in notes to *Williams v. Mineral City Park Asso.* 1 L.R.A. (N.S.) 427; *Higgins v. Franklin County Agri. Soc.* 3 L.R.A. (N.S.) 1132; *Blakeley v. White Star Line*, 19 L.R.A. (N.S.) 772; *Wodnik v. Luna Park Amusement Co.* 42 L.R.A. (N.S.) 1070; and *Johnson v. Hot Springs Land and Improv. Co.* L.R.A.1915 post, —. It will be observed that the above notes contain a number of cases wherein a patron has sought to hold liable for negligence a state fair association or agricultural society, assumed or conceded to be acting in a private capacity, and the precise question presented in the present note did not arise in those cases.

As to nature of incorporated institutions belonging to the state, see note to *State ex rel. Little v. University of Kansas*, 29 L.R.A. 378; see also individual cases, 29 L.R.A. 798; 30 L.R.A. 747; 34 L.R.A. 150; 40 L.R.A. 677; 43 L.R.A. 703; 44 L.R.A. 364; 45 L.R.A. 675, and 47 L.R.A. 577.

As to liability of state for injury in state building, see note to *Riddoch v. State*, 42 L.R.A. (N.S.) 251.

As to liability of eleemosynary institution maintained by state, for personal tort of agent or servant, see note to *Leavell v. Western Kentucky Asylum*, 4 L.R.A. (N.S.) 269.

For school district, as agency of the state, not liable for tort, see notes to *Freel v. Crawfordsville*, 37 L.R.A. 301, and *Wiest v. School Dist.* 49 L.R.A. (N.S.) 1026.

As to immunity from suit of state institutions not of a political or governmental character, see note to *Hopkins v. Clemson Agri. College*, 35 L.R.A. (N.S.) 243.

Performance of governmental function.

It seems to be well settled that when the state board of agriculture is an agency of the state in the exercise of governmental functions, it is not liable, under the common law, for injuries claimed to have been sustained as a result of its negligence. *Minear v. State Bd. of Agri.* 259 Ill. 549, 102 N. E. 1082, Ann. Cas. 1914B, 1200. L.R.A.1915E.

In the above case an act creating the Illinois State Agricultural Society gave the board sole control of the affairs of the department of agriculture and of all state fairs. It further provided that money appropriated from time to time for the department of agriculture should be paid to the state board of agriculture to be expended in such manner as, in the opinion of said board, would best advance the interest of agriculture, horticulture, manufacturing, and domestic arts in the state; that the board should have power to contract, and be contracted with, to purchase, hold, or sell property, and to sue and be sued in all courts or places, but the state was not to be liable for any of its debts or contracts; that the board should make annual reports to the governor of the transactions of the department of agriculture. Consequently, where a patron of the state fair was injured by the collapse of elevated seats or bleachers, it was held that the state board of agriculture was an agency of the state, and not liable to an individual for personal injury caused by its alleged negligence. As to the contention that the statute expressly made the state board of agriculture liable in actions of this character by conferring upon it the right to sue and be sued, the court said that the provision that the state board of agriculture might sue and be sued was not intended to impose any new liability, but had reference only to obligations incurred by contract in the management of the department of agriculture.

And, as stated in *Zoeller v. State Bd. of Agri.* — Ky. —, 173 S. W. 1143, it is an elementary principle of the law, however, that the state cannot be sued without its consent; neither can the state be sued for the negligence or malicious acts of any servant of any agencies of the state which perform governmental functions, nor can such agencies be sued for torts of its servants. The question for determination in this class of cases is whether or not the state board of agriculture, in conducting a state fair, exercises a governmental function: if it does, it is then not liable for the torts of its officers, agents, or employees. If it does

Statement by Kerwin, J.:

This is an action brought against the defendants, as members of the state board of agriculture, to recover for personal injuries sustained by the plaintiff while attending the state fair. It is alleged in the complaint that, as such board, it was the duty of the defendants to exercise sole control of the affairs of the department of agriculture and of state fairs, and make such by-laws, rules, and regulations in relation to the management of the business of such department and state fairs as should from time to time be determined; that in 1910, between the 12th and 16th of September, at West Allis, Milwaukee county, Wisconsin, the defendants, as such board, held a fair, and that at such fair there were exhibited

products of agriculture, dairying, horticulture, manufactures, and domestic arts, and that said defendants, as such board, provided in connection with such fair, as a special attraction for patrons, an exhibition of flying by an aeroplane, and that such fair and grounds were under the sole direction and control of the defendants, as such board; that said fair was widely advertised, and the public invited to attend the performances and the exhibition of flying by the aeroplane; that the defendants, as such board, made a contract with Wright Brothers for giving the exhibition; that by the terms of said contract it was provided that the defendants, as such board, were to furnish the infield of the race track free from obstructions, and to assume all liabilities

not exercise a governmental function, then it is liable for the torts of its officers and agents. It is further stated in this case that the state board of agriculture is not a corporation for a pecuniary profit, and no person connected with it has any pecuniary interest in it. It is a corporation having the right to sue and be sued, and is empowered to conduct a state fair, and to charge an admission fee for all the patrons of the fair; but the statute provides that all its funds shall be expended exclusively for the purpose of conducting the fair, and for no other purpose. If any profits are derived from the sale of privileges upon its grounds and for the admissions over and above the necessary expenses of holding the fair, this money must be used in maintaining the grounds and paying the expenses of other fairs to be held, and the legislative power of the state board can at any time require the state board of agriculture to cover into the treasury of the state any funds which it has in its hands, arising from any of the ways above mentioned. The state is the sole owner of all the property of the board. It was held in this case that the state board of agriculture was an agency of the state and, notwithstanding its power to sue and be sued, could not be held liable for injury to an infant received while upon one of the public ways of the fair grounds with her father and mother, by being run down by a horse ridden by a mounted musician, which broke away from under control. The court stated that the fact that an admission fee was charged did not conclusively establish that in conducting the fair the state board of agriculture was acting in a private, and not a governmental, capacity.

So, in *MORRISON v. MACLAREN*, the court states that it is clear from the provisions of the statute that the board, when organized, is a corporate entity with power to contract and sue and be sued, and that the holding of the state fair, including the giving of the aeroplane exhibition, was the carrying on of a governmental function of the state, from which the board of agriculture derived no pecuniary profit. Consequently, in this case the board was held not

liable for injury to a patron at the fair by an aviator, in its corporate capacity; nor were the members individually liable where there was no misfeasance on their part.

A California statute creates the state agricultural society, a state institution. The state board of agriculture provided for therein is "charged with the exclusive management and control of the state agricultural society, as a state institution." Its objects, states the court in *Melvin v. State*, 121 Cal. 16, 53 Pac. 416, are public and educational. They aim to improve agricultural and kindred industries, to disseminate information calculated to educate and benefit the industrial classes, and to advance by such means the material interests of the state. The board is but the agency through which the sovereign authority of the state is carried out. The state appropriates its money, and the society receives it in aid of the benign objects in view. The state receives no pecuniary return. The court further states that under the authority given to the board to provide for an annual fair, etc., to alter the constitution, and to make needful rules, etc., the authority to provide for an admission fee may be implied. It does not follow, however, that the society is organized for gain. It exists for the sole purpose of promoting the public interest in the business of agriculture and kindred objects. It is an agency of the government, and in no sense an organization for pecuniary profit to the state; consequently it was held that the negligence of officers in providing an unsafe seat, whereby a patron of the fair was injured by its collapse, was a tort committed in the performance of a public duty, and not upon a contract entered into by the state with the person receiving the injury, and the state was not liable therefor.

It seems, states the court in *Haines v. State Bd. of Agri.* 184 Ill. App. 191, that quasi corporations, such as counties, towns, school districts, hospitals, and other such institutions of like character, cannot be held responsible in damages for the negligence of their officers or employees, unless by statutory enactment. They have long

to the general public resulting from accident occurring on the infield; that at such fair grounds there was a large grand stand, which faced the infield and two race tracks; that the defendants, without authority from said board, negligently took charge of, permitted, and directed that said aeroplane should be caused to rise, not from the infield, but from the 1-mile track directly in front of the grand stand, which was exceedingly dangerous to those in attendance; that on the 16th of September, 1910, the plaintiff was in attendance at said fair, and paid the requisite fee for entrance, and also purchased a ticket for admission to the grand stand; that it was the duty of the defendants as such board, and the defendants personally, to furnish the public, including the plaintiff, with a safe place for viewing the exhibitions and attractions, and particularly the flight of the aeroplane, and to engage competent operators to guide it, and to take such suitable and sufficient pre-

cautions necessary to prevent plaintiff from being in a position of peril at such time and place of falling of said machine; that, contrary to the contract between said board and Wright Brothers, and at the direction and permission of the defendants, said Wright Brothers attempted to give an exhibition flight in said aeroplane by causing it to rise from the 1-mile track directly in front of the grand stand, which defendants well knew was dangerous to spectators and onlookers; that when said aeroplane had traveled only a short distance, suddenly, because of lack of control over it, it was caused to descend in front of the grand stand, and upon the plaintiff, seriously injuring her.

The answer put in issue the material allegations of the complaint, after admitting that William MacLaren, Grant U. Fisher, C. H. Everett, George Wylie, George C. Cox, F. A. Cannon, George McKerrow, Charles L. Hill, John L. Herbst, James J. Nelson, Ed.

been held as involuntary organizations, and as agencies of the state for the performance of duties for which they are organized. The same principle of law applies to the department of agriculture. It is not a corporation for profit or special benefit to any particular individual. The board of agriculture, in theory of law, has no individual interest in the appropriation for profit of the department; it is simply the agent of the state, charged with the responsibility of administering the affairs of the department of agriculture. While it is true it receives appropriations made for the benefit of the said department, and it is equally true that there is a sum of money arising from the admission fees and concessions at the annual state fair, yet these various sums are accounted for, and are used for the sole and only purpose of defraying the expenses of the agricultural department and advancing the interests of agriculture, horticulture, manufacturing, and domestic arts. Every dollar received must be accounted for and reported to the governor of the state. This department, therefore, is one branch or arm of the state government. It was brought into existence by the legislature of the state; it is supported by the provisions of the laws of the state; its servants and agents are but representing a department of the state in the discharge of their duties under the statute; and the state has power to abolish this department, while the board of agriculture has no power to either recreate or destroy. It can serve the public only in the way pointed out by statute. Consequently, the state board of agriculture was in this case held not liable to a patron of the state fair who had paid an admission fee, for injury by collapse of the seats or bleachers.

Under a statute later than that governing *Lane v. Minnesota Agri. Soc.* *infra*, the Minnesota State Agricultural Society was L.R.A.1915E.

made a state department. Consequently, in *Berman v. Minnesota State Agri. Soc.* 93 Minn. 125, 100 N. W. 732, an action to recover for the wrongful arrest of a person visiting the fair grounds, by the servant of the Minnesota State Agricultural Society, it was held that the association was not the subject of a claim for damages, but the relief for such a wrong could be redressed only by the legislature.

So, following *Berman v. Minnesota State Agri. Soc.* *supra*, the state agricultural society, as a department of the state government, and its officers and board of managers, as public officials, were, in *Berman v. Cosgrove*, 95 Minn. 353, 104 N. W. 534, held exempt from liability to a person for false imprisonment while a visitor at the state fair.

So, in *Hern v. Iowa State Agri. Soc.* 91 Iowa, 97, 24 L.R.A. 656, 58 N. W. 1092, an action for a wrongful arrest, false imprisonment, and assault and battery, it was held that the state agricultural society was not a corporation for pecuniary profit, but was an arm or agency of the state, organized for the promotion of the public good, and for the advancement of the agricultural interests of the state, and as such could not be held liable for the wilful and illegal acts of its agent, as in case of wilful arrest and assault.

Arrest and detention by an agent or officers of a state agricultural society, which are not made for any of the causes for which power of arrest is given, by statute, to the society, are not within the scope of their powers, so as to charge the society with liability. *Ibid*.

Acting in private capacity.

In *Lane v. Minnesota State Agri. Soc.* 62 Minn. 175, 29 L.R.A. 708, 64 N. W. 382, the

Nordman, and L. E. Scott, together with David Wedgwood, constituted the board of agriculture of the state of Wisconsin by virtue of their appointment by the governor of said state and due qualification. The answer also set up contributory negligence on the part of the plaintiff.

On the trial a verdict was directed in favor of all of the defendants except the appellants here.

The jury returned the following verdict:

"(1) Was it negligence to make the flight with the aeroplane from the place where it was attempted on September 16, 1910? Answer: Yes.

"(2) If you answer the first question, 'Yes,' was such negligence the proximate cause of the plaintiff's injury? Answer: Yes.

"(3) Did either of the defendants Fisher, Everett, Wylie, McKerrow, Nordman, participate in the starting of the aeroplane on the race track? Answer: Yes.

"(4) If you answer question 3, 'Yes,' then name those so participating. Answer: Grant U. Fisher, C. H. Everett, George Wylie, George McKerrow, Ed. Nordman.

"(5) Did either of the defendants Fisher, Everett, Wylie, McKerrow, Nordman, consent to the starting of the aeroplane on the race track? Answer: Yes.

"(6) If you answer question 5, 'Yes,' then name those who so consented. Answer: Grant U. Fisher, C. H. Everett, George Wylie, George McKerrow, Ed. Nordman.

"(7) If you have answered question No. 4 by naming some of the defendants, then answer: Ought said named defendants, in the exercise of ordinary care, to have anticipated that because of the ascent of Hoxey from the race track some such injury as occurred to the plaintiff was likely to happen? Answer: Yes.

"(8) If you have answered question No. 6 by naming some of the defendants, then answer: Ought the said defendants, in the

court, upon a careful and exhaustive examination of the previous legislation on the subject, held that while the interest of the state, and its recognition of the prescribed duties of its officers and servants in certain respects, made the state agricultural society a quasi public corporation, yet that its ultimate control of the emolument and revenues was so far private and beneficial to the association that it was liable for an injury through its negligence to a person engaged in a trial of speed which it authorized and provided for as one of the entertainments of the exhibition. But see *Berman v. Minnesota State Agri. Soc.* supra.

An agricultural board was not involved in *Arnold v. State*, 163 App. Div. 253, 148 N. Y. Supp. 479. There the state owned the tracks, invited the people to attend, charged an admission fee, which gave the right of entry to any part of the grounds except the grand stand, and made money out of the races. The court held that it was not acting in a governmental capacity, but as the proprietor of a race track, and it was therefore liable, where, as a consequence of its negligence, spectators were injured when an automobile during the race left the track. The state fair commissioners, said the court, were the officers and agents of the state, and what they did and what was done under their direction was done by the state, the same in effect as if they had been the agents of an individual or the officers of a private corporation that owned the track and gave the exhibition, charging an entry fee to the drivers and an admission fee to the spectators. The holding of the fair was state work, done by its direction pursuant to statute. It was the act of the state as much as building the barge canal or erecting the state capitol. It was a business enterprise to some extent, although not exclusively, and revenue was expected to be derived therefrom, and was in fact derived therefrom. L.R.A.1915E.

Nothing used for the fair except exhibits was owned or contributed by individuals or corporations. The track belonged to the state, the fence was built by the state, the fair was held by the state, the danger was created by the state, the invitation to attend was issued by the state, and the negligence was the negligence of the state. While the state, being a sovereign, cannot be sued by a subject without its consent, by one of its own statutes passed as an act of justice to its subjects, it has expressly assumed liability for damages caused by "a wrongful act, neglect, or default" on its part, and has authorized the board of claims to hear and determine all claims founded on its negligence, which, necessarily, means the negligence of its own officers while acting within the apparent scope of their powers, or while engaged in conducting its business. While the commissioners were not authorized to be negligent, any more than the officers of a corporation are so authorized, still they had the capacity to be negligent, and if, in holding a fair for the state, they were negligent, it was the negligence of the state, just as the negligence of officers of a corporation is the negligence of such corporation. The court further stated that even if the manager of the race was not the agent of the commission as claimed by the plaintiffs, but was an independent contractor as claimed by the state, it would not change the result, for it was an independent and actionable act of negligence to permit such a race to be held on such a track owned by the state, without reasonable precautions to protect those who had been invited by the state to witness the exhibition, and had paid the state for the privilege. The court was of the opinion, however, that the manager was not an independent contractor within the meaning of the law.

J. D. C.

exercise of ordinary care, to have anticipated that because of the ascent of Hoxey from the race track some such injury as occurred to the plaintiff was likely to happen? Answer: Yes.

"(9) Was Hoxey's manner of controlling the aeroplane the sole proximate cause of the injury to the plaintiff? Answer: No.

"(10) Was Hoxey's manner of controlling the aeroplane a proximate cause of the plaintiff's injury? Answer: No.

"(11) Did Hoxey at the time he attempted to make the ascent handle his aeroplane in a negligent manner? Answer: No.

"(12) If you answer the last question, 'Yes,' was his so handling the aeroplane a proximate cause of the plaintiff's injury? Answer:

"(13) Did the plaintiff assume the risk attendant upon a flight of the aeroplane in the manner in which it occurred? Answer: No.

"(14) Did any want of ordinary care upon the part of the plaintiff proximately contribute to her injury? Answer: No.

"(15) What sum will reasonably compensate the plaintiff for the injuries she sustained? Answer: \$3,000."

Judgment was ordered on the verdict in favor of the plaintiff against the defendants appealing. Judgment was entered accordingly, from which this appeal was taken.

Mr. George B. Luhman, with Messrs. Glicksman, Gold, & Corrigan, for appellants:

There was no evidence of any negligence or other actionable conduct or omission of duty on the part of any of the defendants.

State Journal Printing Co. v. Madison, 148 Wis. 396, 134 N. W. 909; Service v. Shoneman, 196 Pa. 63, 69 L.R.A. 792, 79 Am. St. Rep. 689, 46 Atl. 292, 8 Am. Neg. Rep. 130; Geuder, P. & F. Co. v. Milwaukee, 147 Wis. 491, 133 N. W. 835.

The evidence establishes that no possible act or conduct on the part of any of the defendants had any relation by way of proximate cause to the injury to the plaintiff.

Barton v. Pepin County Agri. Soc. 83 Wis. 19, 52 N. W. 1129.

A private corporation giving an exhibition on its own grounds, to which the public has been invited, is not liable for injury to a member of the public.

Hart v. Washington Park Club, 157 Ill. 9, 29 L.R.A. 492, 48 Am. St. Rep. 298, 41 N. E. 620; Hallyburton v. Burke County Fair Asso. 119 N. C. 526, 38 L.R.A. 156, 26 S. E. 114; Sebeck v. Plattdeutsche Volkfest Verein, 64 N. J. L. 624, 50 L.R.A. 199, 81 Am. St. Rep. 512, 46 Atl. 631, 8 Am. Neg. Rep. 84; King v. Ringling, 145 Mo. App. 285, 130 S. W. 482; Reisman v. Public Serv-
L.R.A.1915E.

ice Corp. 82 N. J. L. 464, 38 L.R.A.(N.S.) 922, 81 Atl. 838; Noggle v. Carlisle & Mt. H. R. Co. 215 Pa. 357, 64 Atl. 547.

Plaintiff voluntarily assumed all the risk attendant upon the aeroplane flight in the manner in which it was being made.

Crane v. Kansas City Baseball & Exhibition Co. 168 Mo. App. 301, 153 S. W. 1076; Sebeck v. Plattdeutsche Volkfest Verein, 64 N. J. L. 624, 50 L.R.A. 199, 81 Am. St. Rep. 512, 46 Atl. 631, 8 Am. Neg. Rep. 84; Frost v. Josselyn, 180 Mass. 389, 62 N. E. 469; Scanlon v. Wedger, 156 Mass. 462, 16 L.R.A. 395, 31 N. E. 642; Lumaden v. L. A. Thompson Scenic R. Co. 130 App. Div. 209, 114 N. Y. Supp. 421.

Even if the defendants, as members of the state board of agriculture, were guilty of some neglect or omission of duty, they would not be subject to action therefor at the suit of a private individual.

Minear v. State Bd. of Agri. 259 Ill. 549, 102 N. E. 1082, Ann. Cas. 1914B, 1290; Berman v. Minnesota State Agri. Soc. 93 Minn. 125, 100 N. W. 732; Hern v. Iowa State Agri. Soc. 91 Iowa, 97, 24 L.R.A. 655, 58 N. E. 1092; Hayes v. Oshkosh, 33 Wis. 314, 14 Am. Rep. 760; Folk v. Milwaukee, 108 Wis. 359, 84 N. W. 420, 9 Am. Neg. Rep. 207; Druecker v. Salomon, 21 Wis. 622, 94 Am. Dec. 571; Worden v. Witt, 4 Idaho, 404, 95 Am. St. Rep. 70, 39 Pac. 1114; Williams v. Dean, 134 Iowa, 216, 11 L.R.A.(N.S.) 410, 111 N. W. 931; Templeton v. Beard, 159 N. C. 63, 74 S. E. 735; Brown v. West, 75 N. H. 463, 76 Atl. 169; Bright v. Murphy, 105 La. 795, 30 So. 145; Cooley, Torts, 2d ed. pp. 381, 446, 449, 450; Lampert v. Laclede Gaslight Co. 14 Mo. App. 376; Bassett v. Fish, 75 N. Y. 303; Young v. Edgefield Dist. Road Comrs. 2 Nott & M'C. 537; Mechem, Pub. Off. 1890 ed. §§ 612-615; Walsh v. New York & B. Bridge, 96 N. Y. 427; Donovan v. Alpin, 85 N. Y. 185; 39 Am. Rep. 649; Green v. Kennedy, 46 Barb. 16; Alamango v. Albany County, 25 Hun, 551; Stihnett v. Sherman, — Tex. Civ. App. —, 43 S. W. 847; Browne v. Bentonville, 94 Ark. 80, 126 S. W. 93; Smith v. Sewerage Comrs. 146 Ky. 562, 38 L.R.A.(N.S.) 151, 143 S. W. 3; Hodgdon v. Moulton, 207 Mass. 445, 93 N. E. 656; Gray v. Batesville, 74 Ark. 519, 86 S. W. 295; Proctor v. Stone, 158 Mass. 564, 33 N. E. 704; Atwater v. Canandaigua, 124 N. Y. 602, 27 N. E. 385.

The action of the state board of agriculture in holding the fair and in providing the various exhibitions to attract and interest the public is in discharge of a governmental function.

Minear v. State Bd. of Agri. 259 Ill. 549, 102 N. E. 1082, Ann. Cas. 1914B, 1290; Berman v. Minnesota State Agri. Soc. 73 Minn.

125, 100 N. W. 732; *Berman v. Cosgrove*, 95 Minn. 353, 104 N. W. 534; *Hern v. Iowa State Agri. Soc.* 91 Iowa, 97, 24 L.R.A. 635, 58 N. W. 1092; *Melvin v. State*, 121 Cal. 16, 53 Pac. 416; *State ex rel. Custer County Agri. Soc. & L. S. Exch. v. Robinson*, 35 Neb. 401, 17 L.R.A. 383, 58 N. W. 213.

In holding the state fair, including the giving of all exhibitions, the state board of agriculture was discharging simply governmental functions, for the reason that it could not in its activities derive therefrom any special benefit or advantage, and that it undertook thereby nothing for the pecuniary benefit or advantage of its own members.

Bernstein v. Milwaukee, 158 Wis. 576, L.R.A.1915C, 435, 149 N. W. 382, 8 N. C. C. A. 624; *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *Higgins v. Superior*, 134 Wis. 264, 13 L.R.A.(N.S.) 994, 114 N. W. 490; *Engel v. Milwaukee*, 158 Wis. 480, 149 N. W. 141; *Manske v. Milwaukee*, 123 Wis. 172, 101 N. W. 377, 17 Am. Neg. Rep. 388; *Folk v. Milwaukee*, 108 Wis. 359, 84 N. W. 420, 9 Am. Neg. Rep. 207; *Kuehn v. Milwaukee*, 92 Wis. 263, 65 N. W. 1030; *Liermann v. Milwaukee*, 132 Wis. 628, 13 L.R.A. (N.S.) 253, 113 N. W. 65; *Bruhnke v. La Crosse*, 155 Wis. 485, 50 L.R.A.(N.S.) 1147, 144 N. W. 1100; *Evans v. Sheboygan*, 153 Wis. 287, 45 L.R.A.(N.S.) 98, 141 N. W. 265; *Kempster v. Milwaukee*, 103 Wis. 421, 79 N. W. 411; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Finch v. Board of Education*, 30 Ohio St. 37, 27 Am. Rep. 414; *Maximilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468; 1 Dill. Mun. Corp. §§ 66 (39).

Messrs. J. O. Carbys and Houghton, Neelen, & Houghton, for respondent:

Persons who provide places of amusement for the public must exercise ordinary care to keep the premises in a reasonably safe condition for the public, who are invitees.

Cooley, Torts, 3d ed. 1258; 29 Cyc. 1442; *Thompson v. Lowell, L. & H. Street R. Co.* 170 Mass. 577, 40 L.R.A. 345, 64 Am. St. Rep. 323, 49 N. E. 913; *Richmond & M. R. Co. v. Moore*, 94 Va. 493, 37 L.R.A. 258, 27 S. E. 70; *Williams v. Mineral City Park Asso.* 128 Iowa, 32, 1 L.R.A.(N.S.) 427, 111 Am. St. Rep. 184, 102 N. W. 783, 5 Ann. Cas. 924, 18 Am. Neg. Rep. 57; *Blakeley v. White Star Line*, 154 Mich. 635, 19 L.R.A. (N.S.) 772, 129 Am. St. Rep. 496, 118 N. W. 482; *Wells v. Minneapolis Baseball & Athletic Asso.* 122 Minn. 327, 46 L.R.A. (N.S.) 606, 142 N. W. 706, Ann. Cas. 1914D, 922; *Dietze v. Riverview Park Co.* 181 Ill. App. 357; *Crane v. Kansas City Baseball & Exhibition Co.* 168 Mo. App. 301, L.R.A.1915E.

153 S. W. 1076; *Redmond v. National Horse Show Asso.* 78 Misc. 383, 138 N. Y. Supp. 364; *Parker v. Cushman*, 117 C. C. A. 71, 3 N. C. C. A. 92, 195 Fed. 715; *Brown v. Batchellor*, 29 R. I. 116, 69 Atl. 295; *Stair v. Kane*, 84 C. C. A. 126, 156 Fed. 100; *Schofield v. Wood*, 170 Mass. 415, 49 N. E. 636; *Thornton v. Maine State Agri. Soc.* 97 Me. 108, 94 Am. St. Rep. 486, 53 Atl. 979, 13 Am. Neg. Rep. 302; *Wodnik v. Luna Park Amusement Co.* 42 L.R.A.(N.S.) 1070, and note, 69 Wash. 638, 125 Pac. 941; *Higgins v. Franklin County Agri. Soc.* 3 L.R.A. (N.S.) 1132, and note, 100 Me. 565, 62 Atl. 708, 19 Am. Neg. Rep. 257.

Defendants were responsible for this negligence if they participated in it or consented to it, and are liable.

Shearm. & Redf. Neg. §§ 312, 313; *McQuillin*, Mun. Corp. §§ 536, 537; *Dill. Mun. Corp.* 3d ed. note to ¶ 237; *Robinson v. Rohr*, 73 Wis. 436, 2 L.R.A. 366, 9 Am. St. Rep. 810, 40 N. W. 668; *Whart. Neg.* 284; *Lowe v. Conroy*, 120 Wis. 151, 66 L.R.A. 907, 102 Am. St. Rep. 983, 97 N. W. 942, 1 Ann. Cas. 341; *Williams v. Dean*, 134 Iowa, 216, 11 L.R.A.(N.S.) 410, 111 N. W. 931; *Kempster v. Milwaukee*, 103 Wis. 421, 79 N. W. 411; *Bennett v. Whitney*, 94 N. Y. 302; *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713; *Hover v. Barkhoof*, 44 N. Y. 113; *Amy v. The Supervisors (Amy v. Barkholder)* 11 Wall. 136, 20 L. ed. 101; 29 Cyc. 1442, 1443; *Gutschenritter v. Whitmore*, 158 Iowa, 252, 139 N. W. 567; *Howley v. Scott*, 123 Minn. 159, 51 L.R.A. (N.S.) 137, 143 N. W. 257; *Little v. Madison*, 49 Wis. 605, 35 Am. Rep. 793, 6 N. W. 249; *Batdorff v. Oregon City*, 53 Or. 402, 100 Pac. 937, 18 Ann. Cas. 287; *Tholkes v. Decock*, 125 Minn. 507, 52 L.R.A. (N.S.) 142, 147 N. W. 648; *Moynihan v. Todd*, 188 Mass. 301, 108 Am. St. Rep. 473, 74 N. E. 367.

By hiring an independent contractor to give an exhibition of a character likely to jeopardize spectators, the owner of an amusement park is not relieved from his duty to exercise ordinary care to provide a safe place for the giving of the exhibition, and a safe place for the spectators to witness it.

Thompson v. Lowell, L. & H. Street R. Co. 170 Mass. 577, 40 L.R.A. 345, 64 Am. St. Rep. 323, 49 N. E. 913; *Sebeck v. Plattdeutsche Volkfest Verein*, 64 N. J. L. 624, 50 L.R.A. 199, 81 Am. St. Rep. 512, 46 Atl. 631, 8 Am. Neg. Rep. 84; *Wodnik v. Luna Park Amusement Co.* 69 Wash. 638, 42 L.R.A.(N.S.) 1070, 125 Pac. 941; *Hollis v. Kansas City, Missouri, Retail Merchants' Asso.* 205 Mo. 508, 14 L.R.A.(N.S.) 284, 103 S. W. 32; *Note to Greene v. Seattle Athletic Club*, 32 L.R.A.(N.S.) 713; *Texas State*

Fair v. Marti, 30 Tex. Civ. App. 132, 69 S. W. 432, 12 Am. Neg. Rep. 199; Thornton v. Maine State Agri. Soc. 97 Me. 108, 94 Am. St. Rep. 488, 53 Atl. 979, 13 Am. Neg. Rep. 302; Hawver v. Whalen, 14 L.R.A. 828, and note, 49 Ohio St. 69, 29 N. E. 1049; Conradt v. Clauve, 93 Ind. 476, 47 Am. Rep. 388; notes to Williams v. Mineral City Park Asso. 1 L.R.A.(N.S.) 431; Anderson v. Fleming, 66 L.R.A. 162; and Central Coal & I. Co. v. Grider, 65 L.R.A. 478.

The state board of agriculture, in giving the aviation exhibition, was acting *ultra vires*, and hence was not discharging simply a governmental function.

Morrison v. Lawrence, 98 Mass. 219; Smith v. Rochester, 76 N. Y. 506; Love v. Raleigh, 116 N. C. 296, 28 L.R.A. 192, 21 S. E. 503; Blankenship v. Sherman, 33 Tex. Civ. App. 507, 76 S. W. 805; Dill. Mun. Corp. § 149; McQuillin, Mun. Corp. § 364.

It was not discharging a governmental function, but was discharging a private or corporate function, as distinguished therefrom.

Hayes v. Oshkosh, 33 Wis. 314, 14 Am. Rep. 760; Engel v. Milwaukee, 158 Wis. 480, 149 N. W. 141; Durkee v. Kenosha, 59 Wis. 123, 48 Am. Rep. 480, 17 N. W. 677; Piper v. Madison, 140 Wis. 314, 25 L.R.A.(N.S.) 239, 133 Am. St. Rep. 1078, 122 N. W. 730; Kempster v. Milwaukee, 103 Wis. 421, 79 N. W. 411; McQuillin, Mun. Corp. §§ 2673-2688; Dill. Mun. Corp. § 981; Shearm. & Redf. Neg. § 285; Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Parnaby v. Lancaster Canal Co. 11 Ad. & El. 223, 3 Nev. & P. 523, 3 Perry & D. 162, 9 L. J. Exch. N. S. 338; Scott v. Manchester, 1 Hurlst. & N. 59, 26 L. J. Exch. N. S. 132, 2 Hurlst. & N. 204, 26 L. J. Exch. N. S. 406, 3 Jur. N. S. 590, 5 Week. Rep. 598; Coe v. Wise, 5 Best & S. 440; Cowley v. Sunderland, 6 Hurlst. & N. 565, 30 L. J. Exch. N. S. 127, 4 L. T. N. S. 720, 9 Week. Rep. 668; Mersey Docks & Harbour Bd. Trustees v. Gibbs, L. R. 1 H. L. 93, 11 H. L. Cas. 686, 35 L. J. Exch. N. S. 225, 12 Jur. N. S. 571, 14 L. T. N. S. 677, 14 Week. Rep. 872; Jones v. Mersey Docks & Harbour Bd. Trustees, 11 H. L. Cas. 443, 22 Eng. Rul. Cas. 378; Pittsburgh v. Grier, 22 Pa. 54, 60 Am. Dec. 65; Bailey v. New York, 3 Hill, 531, 38 Am. Dec. 669; O'Donnell v. North Attleborough, 212 Mass. 243, 98 N. E. 1084; Duggan v. Peabody, 187 Mass. 349, 73 N. E. 206, 17 Am. Neg. Rep. 559; Smith v. Cumberland County Agri. Soc. 163 N. C. 346, 79 S. E. 362, Ann. Cas. 1915B, 544; Logan v. Agricultural Soc. 156 Mich. 537, 121 N. W. 485; Burke v. Staté, 64 Misc. 558, 119 N. Y. Supp. 1089; Phillips v. Wisconsin State Agri. Soc. 60 Wis. 401, 19 N. W. 377; Lane v. Minnesota State Agri. Soc. 62 Minn. 175, 29 L.R.A. 708, L.R.A.1915E.

64 N. W. 382; Mulcairns v. Janesville, 67 Wis. 24, 29 N. W. 565; Scott v. University of Michigan Athletic Asso. 152 Mich. 684, 17 L.R.A.(N.S.) 234, 125 Am. St. Rep. 423, 116 N. W. 624, 15 Ann. Cas. 515.

Kerwin, J., delivered the opinion of the court:

Two main questions arise upon this appeal: (1) Whether the board is liable in its corporate capacity; and (2) whether appellants are individually liable.

1. The Wisconsin state board of agriculture is organized under §§ 1456-1458b, Stat., inclusive. The object of the statute is the establishment of a department of agriculture, which is to be managed by this board, to promote the interests of agriculture, dairying, horticulture, manufacturing, and the domestic arts. The board is to be appointed by the governor, and shall consist of one member from each congressional district and two from the state at large for a term of three years from the 1st day of January in the year of their appointment, and vacancies shall be filled by the governor. The members of the board shall be allowed only their actual expenses, but, in case the members are chosen superintendents of departments, any such superintendents may be allowed not to exceed \$5 per day and reasonable expenses while necessarily engaged in such work; the time to be devoted to such services to be fixed by majority vote of the board. The statute further provides for the holding of an annual meeting, the election of a president and vice president and some person not a member as secretary, and that the state treasurer shall be *ex officio* treasurer of the board; that the board may occupy such rooms in the Capitol as may be assigned for that purpose by the superintendent of public property, shall have sole control of the affairs of the department of agriculture and state fairs and fair grounds, and make such by-laws, rules, and regulations in relation to the management of the business and state fairs as they shall from time to time determine; that whatever money shall be appropriated or otherwise received by said board shall be paid to the state treasurer and disbursed by him.

It seems clear from the provisions of the statute that the board, when organized, is a corporate entity with power to contract, sue, and be sued. Tongue v. State Bd. of Agri. 55 Or. 61, 105 Pac. 250; Kent County Agri. Soc. v. Houseman, 81 Mich. 609, 46 N. W. 16; 1 Dill. Mun. Corp. 4th ed. p. 74, §§ 42, 43, 54. State ex rel. Priest v. University of Wisconsin, 54 Wis. 159, 11 N. W. 472. It is a public corporation provided for by the statute and organized for purely public

purposes as an arm or agency of the state, to carry on a function impressed with a public purpose for the benefit of the people of the state. It is plain, therefore, that the board of agriculture, as a public corporation, made the contract for giving the aeroplane exhibition. The proceedings of the board and the contract made clearly show this.

The giving of the state fair and exhibitions is done by the state through this agency in the discharge of a governmental function to promote the general welfare of the people of the whole state, and no private or local interests are subserved. No benefit is derived by the board in a proprietary capacity, but the benefits are for the governmental and sovereign purposes of the state. Under the statutes of the state appropriations are made by the state to defray the expenses of carrying on fairs, and the revenues derived are applied to reduce or defray, so far as they go, the expense of carrying on the governmental function. Numerous statutes passed from time to time show appropriations and provisions made by the state for the state board of agriculture. Laws of 1897, chap. 351; Laws of 1901, chap. 355; Laws of 1903, chap. 227; Laws of 1905, chap. 418; Laws of 1907, chap. 460; Laws of 1909, chap. 392. Various other appropriations have been made by the state for this department dating back to 1852.

The weight of authority is to the effect that the giving of a state fair under statutes similar to ours is a governmental function. *Miner v. State Bd. of Agri.* 259 Ill. 549, 102 N. E. 1082, Ann. Cas. 1914B, 1290; *Berman v. Minnesota State Agri. Soc.* 93 Minn. 125, 100 N. W. 732; *Berman v. Cosgrove*, 95 Minn. 353, 104 N. W. 534; *Hern v. Iowa State Agri. Soc.* 91 Iowa, 97, 24 L.R.A. 655, 58 N. W. 1092; *Melvin v. State*, 121 Cal. 16, 53 Pac. 416.

The authorities are also to the effect that exhibitions in connection with fairs which afford entertainment to the public are proper exhibits and within the scope of attractions contemplated by the statute as properly belonging to a state fair, because necessary to make the fair a success; and the board has a reasonable, sound discretion in determining what exhibitions shall be given. *Miner v. State Bd. of Agri.* 259 Ill. 549, 102 N. E. 1082, Ann. Cas. 1914B, 1290.

In *Berman v. Minnesota State Agri. Soc.* 93 Minn. 125, 100 N. W. 732, it is said: "On first impression the giving of exhibitions, as trials of speed, etc., would not seem to be an ordinary function of state government; but it cannot be questioned that the exhibition of the arts and products of the commonwealth has a direct tendency

to enhance its agricultural, mechanical, and material interests, and is to the highest degree of practical utility in the development and progress of the state; and it may be said with reason and propriety that lawful amusements and attractions provided for by the management are not useless, nor without advantage to secure these general purposes, but calculated to subserve the main objects contemplated by the act. This would undoubtedly be the unanimous judgment of the people of this state, as it has been in most, if not all, the members of our Federal Union. Institutions of this character have been recognized as an arm or agency of the state, organized for the promoting of the public interest."

It is contended, however, by counsel for respondent, that the giving of the aeroplane exhibition was *ultra vires* and beyond the scope of the authority of the board, because such exhibition had nothing to do with "agriculture, dairying, horticulture, manufactures, or domestic arts," but was given solely for entertainment of patrons present at the fair. But such entertainments, legitimate and educational in their nature, and which attract patrons and swell the attendance at fairs, are not beyond the scope of authority of the board to provide for and exhibit. In fact, it may be said that entertainments calculated to attract the public are or may be necessary to the successful carrying on of a fair, and so the board has broad discretion in determining what exhibitions may be given.

The giving of the aviation exhibition at the time in question was not only entertaining and attractive and contributed to the success of the fair, but was instructive as well, and, we think, was clearly within the scope of the authority of the board as tending to disseminate information calculated to educate and benefit the people of the state, and thereby advance its material interests. The holding of the state fair, including the giving of the aeroplane exhibition, was the carrying on of a governmental function of the state from which the board derived no pecuniary profit.

Counsel for respondent cites us to authorities respecting the acts of municipal corporations, and also some cases respecting agricultural societies, as supporting their position that the board is liable for the negligence of its officers and agents. There is perhaps some lack of harmony in the utterances of the courts upon the subject, but we think a careful examination of the cases will show that they turn upon the question of whether the undertaking involved a wholly governmental function without pecuniary profit in any degree to the corporation or agency, or whether, though the undertaking

may partake of a governmental function, it also embraces a private or proprietary interest. Many examples of this nature will be found in operations of municipal corporations where the acts performed, though in their nature governmental, also involve private or proprietary interests of the municipality. 1 Dill. Mun. Corp. 4th ed. § 66; *Piper v. Madison*, 140 Wis. 311, 25 L.R.A. (N.S.) 239, 133 Am. St. Rep. 1078, 122 N. W. 730; *Mulcairns v. Janesville*, 67 Wis. 24, 29 N. W. 565.

As said in respondent's brief, the same agency may have a two fold function. Part may be governmental in its nature, and part private in its nature. For example, in *Scott v. University of Michigan Athletic Asso.* 152 Mich. 684, 17 L.R.A. (N.S.) 234, 125 Am. St. Rep. 423, 116 N. W. 624, 15 Ann. Cas. 515, it was held that, while it is a governmental function to run a university, when a department of the university ran a football game for profit, a corporate or private function was being exercised. And in many of the cases cited by respondent involving actions against agricultural associations it will be seen that such associations were organized under statutes which confer private, as well as public, functions; but under our statutes applicable to the present suit there is no private or proprietary right whatever conferred upon the board. All the revenues derived belong to the state, and are under control of the state treasurer.

Counsel for respondent relies upon *Arnold v. State*, 163 App. Div. 253, 148 N. Y. Supp. 479, and *Platt v. Erie County Agri. Soc.* 164 App. Div. 99, 149 N. Y. Supp. 520. In the former case the injury was occasioned by an automobile race, and in the latter by an aeroplane flight. It appears that the New York statute which applies to these cases provides that the state shall be liable for injuries caused by the negligence of its agents, and so the rule that when a board is engaged in carrying on a governmental agency it is not liable for negligence is modified by statute in New York so far as applicable to these cases at least. In the instant case the board was carrying on a purely governmental function in giving the fair with an aeroplane exhibition; therefore was not liable for the negligence of its members, agents, or officers. *Apfelbacher v. State*, 160 Wis. 563, 152 N. W. 144; *Bernstein v. Milwaukee*, 158 Wis. 576, L.R.A.1915C, 435, 149 N. W. 382, 8 N. C. C. A. 624; *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *Higgins v. Superior*, 134 Wis. 264, 13 L.R.A. (N.S.) 994, 114 N. W. 490; *Engel v. Milwaukee*, 158 Wis. 480, 149 N. W. 141; *Manske v. Milwaukee*, 123 Wis. 172, 101 N. W. 377, 17 Am. Neg. Rep. 388; *Folk v. Milwaukee*, 108 Wis. 359, 84 N. W. L.R.A.1915E.

420, 9 Am. Neg. Rep. 207; *Kuehn v. Milwaukee*, 92 Wis. 263, 65 N. W. 1030; *Liermann v. Milwaukee*, 132 Wis. 628, 13 L.R.A. (N.S.) 253, 113 N. W. 65; *Bruhnke v. La Crosse*, 155 Wis. 485, 50 L.R.A. (N.S.) 1147, 144 N. W. 1100; *Evans v. Sheboygan*, 153 Wis. 287, 45 L.R.A. (N.S.) 98, 141 N. W. 265; *Kempster v. Milwaukee*, 103 Wis. 421, 79 N. W. 411; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Finch v. Board of Education*, 30 Ohio St. 37, 27 Am. Rep. 414; *Maximilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468.

2. The public corporation not being liable for the reasons before stated, the members constituting it cannot be charged with liability unless it be shown that they were guilty of such misconduct in the discharge of their duties as would render them liable as individuals. *Lowe v. Conroy*, 120 Wis. 151, 66 L.R.A. 907, 102 Am. St. Rep. 983, 97 N. W. 942, 1 Ann. Cas. 341; *Williams v. Dean*, 134 Iowa, 216, 11 L.R.A. (N.S.) 410, 111 N. W. 931; *Templeton v. Beard*, 159 N. C. 63, 74 S. E. 735; *Lampert v. Laclede Gaslight Co.* 14 Mo. App. 376; *Mechem*, Pub. Off. 1890 ed. §§ 612-615.

The official proceedings of the board put in evidence show that the fair was held by the board as a public corporation. A resolution was duly passed providing for the giving of an aeroplane exhibition in connection with the fair. A contract was made on the 30th day of May, 1910, between the Wright Brothers, of Dayton, Ohio, of the first part, and the Wisconsin state board of agriculture, of the second part. The contract was signed on the part of the board by its president and secretary, and provided specifically for the flights to be made and the amount to be paid therefor, and provided that "the party of the second part agrees to furnish the entire infield of the race track, free from all obstructions, and in as level and flat condition as is possible." The first party agreed to furnish the aeroplane fully equipped and in charge of a competent aviator. The aeroplane fully equipped, in charge of a competent aviator, was furnished, and the board prepared the infield in accordance with the agreement. There were two race tracks, a half-mile track in the center and a mile track on the outside. The infield was in the half-mile track. It is without dispute that the aviator furnished to give the exhibition was one of the best known. The five appellants who were held liable below violated no duty to the plaintiff nor to the public respecting the performance of the contract between the board and Wright Brothers, nor did they assume to direct the aviator in making the flights,

and, so far as the evidence shows, had no knowledge whatever of aviation. Moreover, each had his own duties to perform, which did not include control and management of making the flights or directing from what place the ascent should be made. The whole matter of making the flights was properly left to the aviator. While the infield was prepared for the aeroplane exhibition, the contract did not provide that the ascent should be made from the infield. The exhibition was left wholly to the aviator, and he made the ascent from the mile track in front of the grand stand or bleachers. Three successful flights were made on Tuesday, Wednesday, and Thursday; the aviator starting on the mile track, and making the descent upon the infield on the space cleared. On Tuesday, Wednesday, and Thursday the machine was started at the south end of the south bleachers, and started in a northerly direction, the wind being from the north, but on Friday the wind shifted, and was blowing from the south, and the aviator started the machine in a southerly direction. It rose about 30 feet, and finally settled down at a point near the southerly end of the grand stand, and struck the plaintiff. Just what caused the aeroplane to descend at the time and place of injury is not clear from the evidence.

The jury found that there was no negligence on the part of the aviator in handling the machine. The aviator, Hoxey, was one of the celebrated aviators of Wright Brothers' concern. It is difficult to see how any of the defendants could be guilty of negligence if Hoxey was not. He had full charge and control of the machine, and selected the place to start, and, of course, the defendants, who knew nothing about the art, would not attempt to dictate to him how to handle the machine. The defendants were charged with no duty to advise or control the handling or management of this machine. The charge of negligence is that the defendants permitted and directed that the aeroplane should be caused to rise, not from the infield, but from the mile track in front of the grand stand, which was exceedingly dangerous. The aviator stated that the danger was in alighting, and so he wanted the infield kept clear for that purpose, but he stated that the mile track was the best place to start the machine. There is no evidence that defendants or any of them directed or controlled in any way the operations of Hoxey in handling the machine. The mere fact that some of the defendants were present and witnessed the flights, and failed to object to the ascent from the mile track, did not constitute actionable negligence on their part. They L.R.A.1915E.

were charged with no duty to control the management of the machine or direct that it be started from the infield. There is not a particle of evidence of any misfeasance on the part of the defendants; hence they cannot be held individually liable. *Bassett v. Fish*, 75 N. Y. 303; *Young v. Edgefield Dist. Road Comrs.* 2 Nott & M'C. 537; *Walsh v. New York & B. Bridge*, 98 N. Y. 427; *Brown v. West*, 75 N. H. 463, 76 Atl. 169; *Donovan v. McAlpin*, 85 N. Y. 185, 39 Am. Rep. 649; *Bright v. Murphy*, 105 La. 795, 30 So. 145.

We are of opinion that, upon the undisputed evidence, no case was made against the appellants.

The judgment is reversed, and the cause remanded, with instructions to dismiss the complaint.

Barnes, J., dissents.

KANSAS SUPREME COURT.

STEVE CLARK

v.

E. I. DU PONT DE NEMOURS POWDER COMPANY, Appt.

(94 Kan. 268, 146 Pac. 320.)

Explosives — negligence in leaving exposed.

1. It is gross negligence for an agent of a powder company, after shooting an oil well with solidified glycerin, to leave a quart of that explosive lying near the well; and the act of a workman, unskilled in the use of such substances, in removing the dangerous article and placing it in a stone fence of a near-by graveyard to prevent injury to himself and his fellow workmen, does not amount to an unrelated, intervening, and efficient cause, so as to excuse the powder company from its liability for damages to children who afterwards find the solidified glycerin and are injured by it.

Same — care in custody.

2. The owner of so inherently dangerous a commodity as solidified glycerin is required to exert the highest degree of care to keep it in close custody to prevent its doing mischief, and that duty never ceases; and such owner is liable for all the natural and probable consequences which flow from any breach of that duty.

Headnotes by DAWSON, J.

Note. — Intervening act of third person as affecting proximate cause in case of injury by explosives.

As to storage of explosives as nuisance, see notes to *Henderson v. Sullivan*, 16 L.R.A.(N.S.) 691, and *State ex rel. Hop-*

Proximate cause — rules.

3. The rules heretofore announced by this court for the determination of proximate cause adhered to.

(February 6, 1915.)

APPEAL by defendant from a judgment of the District Court for Chautauqua County in plaintiff's favor, in an action brought to recover damages for injuries to plaintiff's minor sons by the explosion of solidified glycerin alleged to have been negligently left on a certain farm. Affirmed.

The facts are stated in the opinion.

Messrs. J. E. Brooks, A. H. Skidmore, and S. L. Walker, for appellant:

The acts of defendant did nothing more

than to furnish the condition, or give rise to the occasion by which the injuries were made possible, and the acts of Joe McDowell, which intervened, were distinct, successive, and wholly unrelated to the acts or omissions of the defendant, and such cause was the proximate and efficient cause of the injuries, and defendant is not liable.

Missouri P. R. Co. v. Columbia, 65 Kan. 391, 58 L.R.A. 399, 69 Pac. 338; Home Oil & Gas Co. v. Dabney, 79 Kan. 829, 102 Pac. 488; Barnett v. United Kansas Portland Cement Co. 91 Kan. 723, 139 Pac. 484; South Side Pass R. Co. v. Trich, 117 Pa. 390, 2 Am. St. Rep. 672, 11 Atl. 627; Herr v. Lebanon, 149 Pa. 222, 16 L.R.A. 106, 34 Am. St. Rep. 603, 24 Atl. 207; Goodlander Mill Co. v. Standard Oil Co. 27 L.R.A. 583,

kins v. Excelsior Powder Mfg. Co. L.R.A. 1915A, 615.

And generally as to negligence in the manufacture and storage of gunpowder, nitroglycerin, dynamite, and other explosives, see note to Judson v. Giant Powder Co. 29 L.R.A. 718.

As to liability for injury to children from explosives left accessible to them, see notes in 14 L.R.A.(N.S.) 586; 24 L.R.A.(N.S.) 1257; and 42 L.R.A.(N.S.) 840. Reference is made to these notes for other cases discussing the question of proximate cause of injuries to children from explosives, where the alleged intervening act was not that of a third person, but of the plaintiff himself, or where there was at least participation in the act by the plaintiff. In the cases in the note where the intervening act was that of a child, this fact does not appear materially to affect the decision. And the note does not cover cases turning on the question whether the intervening act of a child may break the causal connection between the defendant's negligence and the injury. This question, however, is discussed in a note to United States Natural Gas Co. v. Hicks, 23 L.R.A.(N.S.) 249.

The note does not include cases passing upon the question of liability from explosions of natural gas; nor on the question of the liability of the seller of explosives for injury to purchasers or other persons.

While there appears to be but little disagreement as to the principles governing the question of proximate cause, the greatest difficulty is often found in applying those principles to particular facts; and it is the aim of this note to indicate the conclusions to which the courts have come under particular facts existing in that class of cases represented by CLARK v. E. I. DU PONT DE NEMOURS POWDER CO.

In an action against the owner of a plant used for the manufacture of mixed feed, for damage caused to the adjoining property of the plaintiff by a fire resulting from an explosion of inflammable dust allowed to accumulate in the plant, it was said in Quaker Oats Co. v. Grice, 115 C. C. A. 343, 195 Fed. 441, that "if premises L.R.A.1915E.

are allowed to become unsafe because they are filled with dust which would explode on the application of spark or flame, and the exercise of reasonable care would have prevented the premises from becoming thus unsafe, the person whose neglect brought about such a dangerous condition would not be excused because the actual spark which fired the train was produced by some intruder undertaking to light his pipe."

In Cincinnati, N. O. & T. P. R. Co. v. Padgett, 158 Ky. 301, 164 S. W. 971, it was held that the act of the foreman of a railroad construction crew in burning rags in a bucket used for carrying pitch, for the purpose of driving away mosquitos, and throwing the bucket out of the car onto the ground near by, when the pitch in the bottom of the bucket ignited, was not such an intervening act as to relieve the construction company from liability for an injury to the plaintiff, an employee, caused by an explosion, after the bucket was thrown from the car, of a stick of dynamite which had negligently been allowed by the company to become concealed in the pitch, and of which the foreman was ignorant.

So, where the defendant was negligent in the storage of explosive fuse caps in a tool house on a city lot, so that they were accessible to children, and boys having entered the tool house took the caps and threw them on the ground outside of the house, and the plaintiff's six-year-old son, in playing about the premises, found one of the caps and was injured by its explosion, while he was playing with it, it was held in Vills v. Cloquet, 119 Minn. 277, 138 N. W. 33, that the act of the boys in removing the caps from the house and scattering them on the ground was not such an intervening independent cause as to excuse the defendant from liability for negligence in the storage of the explosive. The principle was said to be that where several concurring acts or conditions, one of them a wrongful act or omission, produce an injury, such wrongful act or omission is to be regarded as the proximate cause of the injury, if it be one which might reasonably have been anticipated from such act or omission, and

11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 400; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; St. Louis & S. F. R. Co. v. Justice, 80 Kan. 10, 101 Pac. 469; Atchison, T. & S. F. R. Co. v. Calhoun, 213 U. S. 7, 53 L. ed. 674, 29 Sup. Ct. Rep. 321; Nickey v. Steuder, 164 Ind. 189, 73 N. E. 117; McGahan v. Indianapolis Natural Gas Co. 140 Ind. 335, 29 L.R.A. 355, 49 Am. St. Rep. 199, 37 N. E. 601; Carter v. Towne, 103 Mass. 507; Jennings v. Davis, 109 C. C. A. 451, 187 Fed. 703; Finkbeiner v. Solomon, 225 Pa. 333, 24 L.R.A.(N.S.) 1257, 74 Atl. 171; Pittsburg Reduction Co. v. Horton, 87 Ark. 576, 18 L.R.A.(N.S.) 905, 113 S. W. 647; Thompson v. Louisville & N. R. Co. 91 Ala. 496, 11 L.R.A. 146, 8 So. 406; Seale v. Gulf, C. & S. F. R. Co.

65 Tex. 274, 57 Am. Rep. 602; Missouri, K. & T. R. Co. v. Byrne, 40 C. C. A. 402, 100 Fed. 359; Bostwick v. Minneapolis & P. R. Co. 2 N. D. 440, 51 N. W. 781; Clark v. Wilmington & W. R. Co. 109 N. C. 430, 14 L.R.A. 749, 14 S. E. 43; Washington v. Baltimore & O. R. Co. 17 W. Va. 190; Louisville & N. R. Co. v. Quick, 125 Ala. 553, 28 So. 14; Henry v. Cleveland, C. C. & St. L. R. Co. 67 Fed. 429; Harton v. Forest City Teleph. Co. 146 N. C. 429, 14 L.R.A.(N.S.) 956, 59 S. E. 1022, 14 Ann. Cas. 390; 29 Cyc. 499; Marsh v. Giles, 211 Pa. 17, 60 Atl. 315; Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1, 4 Am. Reg. Rep. 490; Tutein v. Hurley, 98 Mass. 211, 93 Am. Dec. 154; Holmes v. Delaware & H. Co. 128 App. Div.

which would not have occurred without it. The negligence of the defendant, it was said, in leaving the caps where it did, was not a remote cause; at least it was a question for the jury, and properly submitted to it.

But the negligence of the city, if any, in leaving explosive caps in a tool chest on a vacant lot, so that the chest was broken into and some of the caps removed, was held in Afflick v. Bates, 21 R. I. 281, 79 Am. St. Rep. 801, 43 Atl. 539, not to be the proximate cause of an injury to the plaintiff, a nine-year-old boy, who, while playing near by with his brother, aged eleven, was injured by an explosion of one of the caps picked up near the chest by his brother and given to another boy, who exploded it by striking it with a stone. Assuming that the city was negligent, the court said that the act of the boy in exploding the cap was the proximate cause of the injury, intervening between the negligence of the city and the injury of the plaintiff, and breaking the causal connection between them.

And the negligence of the agents of a town in leaving dynamite in an unlocked and unguarded tool chest within the limits of a highway, in violation of police regulations, was held in Horan v. Watertown, 217 Mass. 185, 104 N. E. 464, not to be the proximate cause of an accident to the plaintiff, a minor, through an explosion of the dynamite caused by the act of the plaintiff's companions, from seven to fourteen years of age, who, while playing near the highway, took the dynamite out of the chest and threw it upon a bonfire, which they had built in the field. The rule laid down was that where the original negligence of the defendant is followed by the independent act of third persons which directly results in injuries to the plaintiff, the defendant's earlier negligence may be found to be the direct and proximate cause of the injury, if, according to human experience and in the natural and ordinary course of events, the defendant ought to have seen that the intervening act was likely to happen; but that if this is not the case, if the intervening act, which was the immediate cause of the injury, was one which it was not in-
L.R.A.1915E.

cumbent upon the defendant to have anticipated, as reasonably likely to happen, even though a high degree of caution would have shown him that it was possible, then he owed no duty to the plaintiff to anticipate such further acts; the chain of causation is broken, and the original negligence cannot be said to have been the proximate cause of the injury. And the court said that in this instance, while the dynamite was left in such a way that a thief might not find it difficult to steal it, it could not be said that the defendant was bound to anticipate that this might be done, and to guard against the consequences which might follow if a thief should steal the dynamite and so use it as to do injury to others; that still less was there reason to anticipate a series of thefts under the circumstances shown in this case, or to believe that such thefts would be committed in daylight in so public a place, or that at such a place and at such a time a gathering of boys, after some of them had stolen the dynamite, should engage in the dangerous sport shown by the testimony.

Negligence, if any, on the part of one selling a barn for removal from the premises, in leaving dynamite caps stored on a dark beam therein, was held in Finkbeiner v. Solomon, 225 Pa. 333, 24 L.R.A.(N.S.) 1257, 74 Atl. 170, not to be the proximate cause of injury to a child of the purchaser while playing with them, after they had been found and delivered to him by another small boy.

But in Mathis v. Granger Brick & Tile Co. — Wash. —, 149 Pac. 3, it was held that the proximity of the negligence of the defendant in leaving dynamite caps in such a place that they were likely to fall into irresponsible hands, and the injury to the plaintiff, a boy, eleven year old, from an explosion of one of the caps which he had found while, in ignorance of its nature, he was trying to pick the substance out of it, was not broken by the act of the plaintiff's mother in removing the cap from his pocket, and without knowing what it was, laid it aside, where the plaintiff could again obtain possession.

24, 112 N. Y. Supp. 421; Mayfield Water & Light Co. v. Webb, 129 Ky. 395, 18 L.R.A. (N.S.) 179, 130 Am. St. Rep. 469, 111 S. W. 712; Galveston, H. & S. A. R. Co. v. Chambers, 73 Tex. 296, 11 S. W. 279; Pollard v. Oklahoma City R. Co. 36 Okla. 96, 128 Pac. 300, Ann. Cas. 1915A, 140, 4 N. C. C. A. 349.

Messrs. Pennel & Webster, J. A. Ferrell, and W. H. Sproul, for appellee:

The proximate cause of the injuries complained of was the leaving of the solidified glycerin at the oil well where the men were working, and not the carrying of the glycerin by Joe McDowell to the place where it was found by the boys, in order to place it out of danger to himself and others.

Etna F. Ins. Co. v. Boon, 95 U. S. 117,

It was held in *Pollard v. Oklahoma City R. Co.* 36 Okla. 96, 128 Pac. 300, Ann. Cas. 1915A, 140, 4 N. C. C. A. 349, that the negligence, if any, of a railroad company in leaving from a spoonful to a pint of blasting powder which it was using in the excavation of a cut, in each powder can, when it was thrown away on or near the railroad right of way, was not the proximate cause of an injury to a boy thirteen years old caused by an explosion of a quantity of powder which another boy fourteen years old had gathered from the cans, where the older boy during a period of five or six weeks had collected about half a can full of the powder and secreted it for more than three weeks before the accident, near his father's house, and his parents knew of and objected to his handling the powder, but did not take it from him, and the injury occurred by the boys' taking the powder to a nearby creek and attempting to explode it. The negligent acts of the boy who collected the powder, and those of his father or mother and of the boy who was injured, were said not to be such concurrent or contemporaneous acts of negligence as would make the company liable, but they were the independent acts of intelligent, responsible beings, of such degree and character as would break the chain of sequence, and thereby insulate the company's original negligence to such an extent as would make it the remote, and not the proximate, cause of the injury.

It was held in *Pittsburg Reduction Co. v. Horton*, 87 Ark. 576, 18 L.R.A. (N.S.) 905, 113 S. W. 647, that acquiescence by a parent in the use by his child as playthings of dynamite caps, which he had found, where they were negligently left by the agent of a mining company, destroyed the latter's responsibility for injury to another child to whom they were traded by the child finding them, and who was injured by their explosion. The conduct of the parent, it was said, broke the causal connection between the original negligent act of the company and the subsequent injury caused by the explosion, a new agency was established, and the possession L.R.A.1915E.

24 L. ed. 395; *Taylor v. Baldwin*, 78 Cal. 517, 21 Pac. 124; *Townsend v. Wathen*, 9 East, 277, 9 Revised Rep. 553; *Atchison, T. & S. F. R. Co. v. Parry*, 67 Kan. 519, 73 Pac. 105; *Quigley v. Delaware & H. Canal Co.* 142 Pa. 388, 24 Am. St. Rep. 504, 21 Atl. 827; *Gibney v. State*, 137 N. Y. 1, 19 L.R.A. 365, 33 Am. St. Rep. 690, 33 N. E. 142; *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 13 L.R.A. 190, 29 Am. St. Rep. 553, 28 N. E. 172; *Page v. Bucksport*, 64 Me. 53, 18 Am. Rep. 239; *McDonald v. Snelling*, 14 Allen, 294, 92 Am. Dec. 768; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Weiser v. Holzman*, 33 Wash. 87, 99 Am. St. Rep. 932, 73 Pac. 797; *Scott v. Shepherd*, 2 W. Bl. 892, 3 Wils. K. B. 403, 1 Smith, Lead. Cas. 9th ed. 737; *Clark v.*

of the caps was thereafter referable to the permission of the child's parents, and not to the original taking. See also *Carter v. Towne*, 103 Mass. 507, as to effect of parent's acquiescence or consent to the handling by a nine-year-old child of gunpowder, as relieving one who sold the powder to the child of liability for injuries received by him from its explosion.

In *Fanning v. White*, 148 N. C. 541, 62 S. E. 734, the court, assuming that, under the circumstances shown in the case, there was negligence on the part of the defendant, who was engaged in construction work on a railroad, in storing a large quantity of dynamite in an old shanty on the railroad right of way, held that the act of the plaintiff's companion in exploding the dynamite by shooting into the shanty, in ignorance of the presence of the explosive, was the proximate cause of the injury to the plaintiff from the explosion, and not the negligence of the defendant.

And where workmen employed by the defendant were housed in a building belonging to the plaintiff, and about 100 feet from such building the defendant kept gasoline in an unlocked storehouse, to which the laborers had access for the purpose of filling torches used to give light to work in a tunnel, and the laborers also helped themselves to the gasoline, with the defendant's knowledge but contrary to its orders, to kindle fires in the building occupied by them, the court in *Bellino v. Columbus Constr. Co.* 188 Mass. 430, 74 N. E. 684, 18 Am. Neg. Rep. 473, assuming that the defendant was negligent in so keeping the gasoline in an unlocked storehouse, held that the burning of the plaintiff's building and goods by an explosion of the gasoline, as a laborer was kindling the fire, was not such a natural and probable result as would necessitate a finding that the defendant was liable for the damage.

In *Standard Oil Co. v. Wakefield*, 102 Va. 824, 66 L.R.A. 792, 47 S. E. 830, where an employee of a city was killed by an explosion due to a defective valve in a tank car furnished by the shipper, while the employee was assisting in the unloading of the

Chambers, L. R. 3 Q. B. Div. 327, 47 L. J. Q. B. N. S. 427, 38 L. T. N. S. 454, 26 Week. Rep. 613, 19 Eng. Rul. Cas. 28; Dixon v. Bell, 5 Maule & S. 198, 1 Starkie, 287, 17 Revised Rep. 308, 19 Eng. Rul. Cas. 26; Burk v. Creamery Package Mfg. Co. 126 Iowa, 730, 106 Am. St. Rep. 377, 102 N. W. 793, 18 Am. Neg. Rep. 62; Skinn v. Reutter, 135 Mich. 57, 63 L.R.A. 743, 106 Am. St. Rep. 384, 97 N. W. 152, 15 Am. Neg. Rep. 86; Craft v. Parker, W. & Co. 96 Mich. 245, 21 L.R.A. 139, 55 N. W. 812; Brown v. Marshall, 47 Mich. 576, 41 Am. Rep. 728, 11 N. W. 392; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; The Nitro-glycerine Case, 15 Wall. 524, 21 L. ed. 206; Griggs v. Fleckenstein, 14 Minn. 81, Gil. 62, 100 Am. Dec. 199, 1 Am. Neg.

Cas. 311; Filer v. Smith, 96 Mich. 355, 35 Am. St. Rep. 603, 55 N. W. 1002; Lynch v. Nurdin, L. R. 1 Q. B. 29, 4 Perry & D. 672, 10 L. J. Q. B. N. S. 73, 5 Jur. 797; Illidge v. Goodwin, 5 Car. & P. 190; Sullivan v. Creed [1904] 2 I. R. 317; Harriman v. Pittsburgh, C. & St. L. R. Co. 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451; Lowery v. Manhattan R. Co. 99 N. Y. 158, 52 Am. Rep. 12, 1 N. E. 608; Lane v. Atlantic Works, 111 Mass. 136; Kleebauer v. Western Fuse & Explosives Co. 6 Cal. Unrep. 933, 60 L.R.A. 377, 69 Pac. 246; Olson v. Gill Home Invest. Co. 58 Wash. 151, 27 L.R.A.(N.S.) 884, 108 Pac. 140; Nelson v. McLellan, 31 Wash. 208, 60 L.R.A. 793, 96 Am. St. Rep. 902, 71 Pac. 747, 13 Am. Neg. Rep. 627; Akin v. Brad-

car which contained gas naphtha, it was held that the act of the city in attempting to unload the car was not such an intervening and efficient cause as excused the shipper from liability for the injury resulting from its negligence in the use of the defective car.

But negligence in omitting to have a proper valve in the outlet of a tank car was held in Goodlander Mill Co. v. Standard Oil Co. 27 L.R.A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 400, not to be the proximate cause which would render the shipper liable for the destruction of a mill a few feet from the railroad track at the point of destination, resulting from the act of the consignee's agents in opening the outlet of the tank upon which they were unable to prevent the oil from flowing down into the furnace room of the mill and catching fire.

Where the servants of a railroad company negligently placed and left on a railroad track at a place which had been used as a crossing, an unexploded signal torpedo, which was picked up by a boy nine years of age and carried by him into the crowd of boys near by and exploded while the boys, in ignorance of its explosive character, were attempting to open it, it was held in Harriman v. Pittsburgh, C. & St. L. R. Co. 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451, that the proximate cause of the injury to the plaintiff from the explosion was the negligence of the railroad company, the causal connection between the injury and the negligent act not being broken by the intervening act of the boy who carried the torpedo from the place where it was found and attempted to open it. The court said that the defendant, by its negligent act and omission in placing and leaving the torpedo where it was found and picked up by the boy, rendered the plaintiff's injury possible and probable, and that the danger of injuries resulting from someone picking up and handling an instrument of this kind left upon the track, at the place and under the circumstances stated, would have been reasonably anticipated by a person of ordinary care and prudence; L.R.A.1915E.

that the act of the boy who picked up the torpedo was but a contributing condition which defendant's servants ought to have anticipated as a probable consequence of their negligent act or omission, while their negligence remained the culpable and direct cause of the injury sustained by the plaintiff.

But in Holmes v. Delaware & H. Co. 128 App. Div. 24, 112 N. Y. Supp. 421, the court held that the negligence of a railway company, assuming that under the circumstances it was negligence on the part of the company to leave on its tracks an unexploded torpedo used in signaling trains, was not the proximate cause of an injury to the plaintiff, a boy sixteen years old, who, with his brother twenty years old, was walking upon the tracks, where the brother found the torpedo, detached it, and handed it to the plaintiff, who was injured by its explosion while trying to open it with a stone. A subsequent judgment for the defendant was affirmed in 198 N. Y. 530, 92 N. E. 1086.

In Moore v. Jefferson City Light, Heat & P. Co. 163 Mo. App. 266, 146 S. W. 825, where an employee of the defendant negligently placed dynamite, caps and fuse, left over from his day's work, under the plaintiff's porch, and the next day the dynamite was exploded by the shooting of Roman candles near the porch by the plaintiff's little boy, it was held that the defendant's negligence, and not the act of the boy in shooting the candles, was the proximate cause of the injury resulting from the explosion. As applicable to the case the rule was quoted that, "where the negligence of the defendant and the act of a third person concurred to produce the injury complained of, so that it would not have happened in the absence of either, the negligence was the proximate cause of the injury." The court said, also, that the defendant was in no condition to complain of the fact that it was left to the jury to determine the question whether the act of the servant was the natural and proximate cause of the injury, because, under the undisputed evidence, the act of the servant was the natural and

ley Engineering & Machinery Co. 48 Wash. 97, 14 L.R.A. (N.S.) 586, 92 Pac. 903; Mize v. Rocky Mountain Bell Teleph. Co. 38 Mont. 521, 129 Am. St. Rep. 659, 100 Pac. 971, 16 Ann. Cas. 1189; 29 Cyc. 495; McDermott v. Hannibal & St. J. R. Co. 87 Mo. 285; Brehn v. Great Western R. Co. 34 Barb. 256; Willis v. Province Teleg. Pub. Co. 20 R. I. 285, 38 Atl. 947; McDonald v. Snelling, 14 Allen, 290, 92 Am. Dec. 768; Wiley v. West Jersey R. Co. 44 N. J. L. 247; District of Columbia v. Dempsey, 13 App. D. C. 533; Williams v. Koehler, 41 App. Div. 426, 58 N. Y. Supp. 863; Mattson v. Minnesota & N. W. R. Co. 95 Minn. 477, 70 L.R.A. 503, 111 Am. St. Rep. 483, 104 N. W. 443, 5 Ann. Cas. 500, 18 Am. Neg. Rep. 511.

The question of proximate cause is a question to be decided by the jury.

Atchison, T. & S. F. R. Co. v. Parry, 67 Kan. 515, 73 Pac. 105; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 474, 24 L. ed. 259; Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 660, 21 L. ed. 745, 748; Union P. R. Co. v. McDonald, 152 U. S. 262, 270, 284, 38 L. ed. 434, 439, 443, 14 Sup. Ct. Rep. 619; Union P. R. Co. v. Callaghan, 6 C. C. A. 205, 12 U. S. App. 541, 56 Fed. 988; Pastene v. Adams, 49 Cal. 87; Birsch v. Citizens' Electric Co. 36 Mont. 574, 93 Pac. 940; Juntti v. Oliver Iron Min. Co.

proximate cause of the injury, and the court should have so instructed the jury.

Where the plaintiff, while in the defendant's office, was injured by an explosion of dynamite by a third person, it was held in *Laidlaw v. Sage*, 158 N. Y. 73, 44 L.R.A. 216, 52 N. E. 679, that the explosion, and not the act of the defendant in drawing the plaintiff in front of him to act as a shield when the explosion was impending, was the proximate cause of the plaintiff's injuries, which were not shown to have been increased by such act.

In *Stone v. Boston & A. R. Co.* 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1, 4 Am. Neg. Rep. 490, from which the court quotes in *CLARK v. E. I. DU PONT DE NEMOURS POWDER CO.*, it was held that negligence of a railroad company in storing oil upon a station platform, and in permitting it to remain there in violation of statute, was not the proximate cause of damage by a fire which was started by the careless dropping of a match by a teamster who came to the platform to deliver goods, and who was in no sense a servant, agent, or guest of the railroad company.

In *Laidlaw v. Sage* and *Stone v. Boston & A. R. Co.* supra, the court considered that the question was not one for the jury, but that as matter of law the defendant's negligence could not be said to be the proximate cause of the plaintiff's injuries.

Where during the night a thief entered a cabin of a boat, used for transporting

119 Minn. 518, 42 L.R.A. (N.S.) 840, 138 N. W. 673; *Hall v. New York Teleph. Co.* 159 App. Div. 53, 144 N. Y. Supp. 322; *Weakas v. McDowell Constr. Co.* 153 Ky. 691, 156 S. W. 127; *Victor v. Smilanich*, 54 Colo. 479, 131 Pac. 392; *Sandeen v. Tschider*, 123 C. C. A. 456, 205 Fed. 252; *Vills v. Cloquet*, 119 Minn. 277, 138 N. W. 33; *Little v. James McCord Co.* — Tex. Civ. App. —, 161 S. W. 835; *Loughlin v. Pennsylvania R. Co.* 240 Pa. 174, 97 Atl. 294.

Dawson, J., delivered the opinion of the court:

This is an appeal from an award of \$1,632.75 as damages for expenses and loss of services to the appellee on account of injuries received by his two minor sons through an explosion of solidified glycerin which was the property of the appellant. The circumstances leading up to the unfortunate occurrence which gave rise to this lawsuit may be briefly stated: On November 25, 1909, one L. H. Small was engaged in drilling an oil well upon the farm of J. McDowell in Chautauqua county near the home of Steve Clark, the appellee. The appellant, E. I. Du Pont de Nemours Powder Company, is a New Jersey corporation, authorized to do business in Kansas and engaged in the business of manufacture and

petroleum, by breaking the lock, and, by bringing a lighted match in contact with explosive gas, caused an explosion which destroyed the boat and also another boat near by, it was held in *Soffeld v. Sommers*, 9 Ben. 526, Fed. Cas. No. 13,157, that the owner of the latter boat could not recover damages from the owner of the boat on which the explosion occurred, although the boat had been left without a watchman on board. To sustain the recovery, the court said, it must be held that the natural result of the absence of a watchman was the presence of the thief, that the natural result of the presence of a thief was the presence of a lighted match, and that a lighted match in that locality would naturally result in an explosion, "But the presence of a thief with a lighted match cannot be said to be the natural result of an absence of watch. Between the act of omission charged upon the defendant, and the explosion, there intervened an independent human agency, the presence of which has no natural relation to any act of the defendant, and for which he is not therefore responsible. The unlawful act of the thief, whose presence was neither caused nor procured by the defendant, not the omission of the defendant to maintain a watch, was the immediate cause of the explosion, and an explosion resulted from the act of the thief by reason of the accidental circumstance that, unknown to anyone, explosive gas had passed into the cabin. The dam-

sale of exploding powders, nitroglycerin, solidified glycerin, and shooting of oil and gas wells with nitroglycerin, solidified glycerin, and other powerful explosives of the nature of dynamite. On said date the agent of the appellant, one Van Gray, came from Bartlesville, Oklahoma, to shoot the well with solidified glycerin, and after this was done he carelessly left near the well about a quart of solidified glycerin. One Joe McDowell, a son of the owner of the farm, and who was in the employ of the contractor who was boring the well, saw the explosive lying near, and, fearing that it would cause injury to himself or his fellow workmen, who were still busy about the well, took charge of it and carried it home with him at the dinner hour. His mother protested against keeping this dangerous article about the premises, and he immediately took the solidified glycerin to an abandoned graveyard on the McDowell farm at some considerable distance from his home. The graveyard was quite small, containing only three or four bodies, and was surrounded by a stone fence. It had not been used as a burial ground for many years. Young McDowell climbed the stone fence and placed the dynamite in a crevice therein near the ground, and laid another stone in front of the recess in the fence partially covering the explosive. Neither

the powder company nor its agent, Van Gray, ever gave the nitroglycerin any further concern, and it remained in the stone fence of the old graveyard for over two years and until December 23, 1911, when it was found by the children of the appellee and two other boys who were passing that way. One of the sons of the appellee climbed over the stone fence and found the nitroglycerin and handed it to the boys on the outside. They did not know its nature, and, after handling it to some extent, they left it at the graveyard. That evening one of the boys, Fred Clark, spoke to his uncle about it and described it to him, and the uncle ventured the opinion that it was some sort of tallow, and not dynamite. The next morning, Sunday, the two Clark boys and another boy were out hunting and returned to the graveyard, and one of them picked up the article and hit it on a rock for the purpose of breaking off a piece to take home. This caused the explosion. The father grounds his action upon actual damages on account of expenditures for medical and surgical services, medicine, and drugs, for his own service, and that of his wife and hired help in nursing and caring for his sons, and for the loss of the services of his sons for five months of each year until they are twenty-one years of age.

age of which the libellant complains arose from a combination of circumstances, and must be considered to have been accidental, so far as the defendant is concerned."

And where, owing to the negligent derailment of a car containing gasoline, transported by the defendant, gasoline escaped into the street, and the gas generated therefrom was exploded by the lighting of a match by a third party, and the plaintiff was injured by the explosion, it was held in *Watson v. Kentucky & I. Bridge & R. Co.* 137 Ky. 619, 126 S. W. 146, 129 S. W. 341, that if the lighting of the match was through negligence or inadvertence merely, the defendant would be liable, while it would not be liable if the match were lighted by the third party maliciously or with the intent to cause the explosion. The court said that if the presence in the street of the great volume of loose gas that arose from the escaping gasoline was caused by the negligence of the railroad company, it seemed that the probable consequences of its coming in contact with fire and causing an explosion was too plain a proposition to admit of doubt; that, indeed, it was most probable that someone would strike a match to light a cigar or for other purposes in the midst of the gas, and, therefore, that the act of one lighting and throwing a match under such circumstances could not be said to be the efficient cause of the explosion, such act of itself not producing the explosion, L.R.A.1915E.

nor being able to do so without the assistance and contribution resulting from the primary negligence on the part of the railroad company in furnishing the presence of the gas in the street; but if, on the other hand, the act of the third party in lighting the match and throwing it into the gas was malicious and done for the purpose of causing the explosion, the railroad company would not be responsible, for while its negligence might have been the efficient cause of the presence of the gas in the street, and it should have understood enough of the consequences thereof to have foreseen that an explosion was likely to result from the inadvertent or negligent lighting of a match, by some person who was ignorant of the presence of the gas or of the effect of lighting or throwing a match into it, it could not have foreseen or deemed it probable that one would maliciously or wantonly do such an act for the evil purpose of producing the explosion. The mere fact that the intervening act was unforeseen would not, it was said, relieve the railroad company, which was guilty of the primary negligence, from liability; but if the intervening agency was something so unexpected or extraordinary that it could not or ought not to have been anticipated, the company would not be liable, and certainly it was not bound to anticipate the criminal acts of others by which damage was inflicted, and hence was not liable therefor. R. E. H.

Appellant assigns error on various grounds, but they are all argued together and are conceded to be substantially the same or relating to the same principle, and may be considered as one question.

What was the proximate cause of the injury to plaintiff's sons?

There can be no doubt of the negligence of the powder company and its agent, Van Gray, in carelessly leaving by the oil well an article so inherently dangerous as solidified glycerin. The highest degree of care is required of all responsible persons having ownership or control of dangerous explosives such as dynamite and firearms. The utmost prudence and caution should be exercised to see that so dangerous an instrumentality does not work mischief to persons or property. The degree of care must be commensurate with the dangerous character of the commodity, and the duty to exercise this highest degree of care in keeping close custody of an article like dynamite never ceases.

In *Mattson v. Minnesota & N. W. R. Co.* 95 Minn. 477, 70 L.R.A. 503, 111 Am. St. Rep. 483, 104 N. W. 443, 5 Ann. Cas. 498, 18 Am. Neg. Rep. 511, it was said: "The degree of care required of persons having the possession and control of dangerous explosives, such as dynamite, is of the highest. The utmost caution must be used to the end that harm may not come to others in coming in contact with them." Syl. ¶ 2.

This principle is virtually admitted by appellant and its counsel; but in an exhaustive and scholarly brief they attempt to show that the negligence of the agent was not the proximate cause of the damage, and that there was an independent and efficient intervening agency growing out of the act of the young man McDowell, who, to save himself and his fellow workmen from danger, carried the dynamite first to his home and then hid it in the abandoned graveyard; and that the acts of McDowell in removing the solidified glycerin from the place where he found it and in taking it home and hiding it in the old graveyard, where it was found by the children of appellee, innocent though young McDowell's acts might be, were the proximate cause of the damages which ensued.

The doctrine of remote and proximate cause is well established, and the difficulty in this case does not arise from a dispute as to the principle, but as to its application. In 1 *Cooley on Torts*, 3d ed. 99, it is said: "If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the L.R.A.1915E.

last or proximate cause, and refuse to trace it to that which was more remote. The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety. To the proximate cause we may usually trace consequences with some degree of assurance; but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile."

Our attention is directed to many cases, including former decisions of this court, where the principle laid down by Judge Cooley is recognized. *Missouri P. R. Co. v. Columbia*, 65 Kan. 390, 58 L.R.A. 399, 69 Pac. 338; *Home Oil & Gas Co. v. Dabney*, 79 Kan. 820, 102 Pac. 488; *Barnett v. United Kansas Portland Cement Co.* 91 Kan. 719, 139 Pac. 484; *St. Louis & S. F. R. Co. v. Justice*, 80 Kan. 10, 101 Pac. 469; *Rodgers v. Missouri P. R. Co.* 75 Kan. 222, 10 L.R.A.(N.S.) 658, 121 Am. St. Rep. 416, 88 Pac. 885, 12 Ann. Cas. 441; *Atchison, T. & S. F. R. Co. v. Parry*, 67 Kan. 515, 78 Pac. 105.

Running through all the precedents in analogous cases, the test appears to be: Is the injury or damage the natural and probable consequence of the original negligence? The mere intrusion of an intervening agency does not always excuse the original wrongdoer. On this subject the supreme court of Massachusetts has spoken with such accuracy and precision that its ideas are settled law. Thus in *Stone v. Boston & A. R. Co.* 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1, 4 Am. Neg. Rep. 490, it was said:

"It cannot, however, be considered that in all cases the intervention even of a responsible and intelligent human being will absolutely exonerate a preceding wrongdoer. Many instances to the contrary have occurred, and these are usually cases where it has been found that it was the duty of the original wrongdoer to anticipate and provide against such intervention, because such intervention was a thing likely to happen in the ordinary course of events. Such was the case of *Lane v. Atlantic Works*, 111 Mass. 136, where it was found by the jury that the meddling of young boys with a loaded truck left in a public street was an act which the defendants ought to have apprehended and provided against, and the verdict for the plaintiffs was allowed to stand. In the carefully expressed opinion by Mr. Justice Colt, the court say: 'In actions of this description, the defendant is liable for the natural and probable conse-

quences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise.' According to this statement of the law, the questions in the present case are: Was the starting of the fire by Casserly the natural and probable consequence of the defendant's negligent act in leaving the oil upon the platform? According to the usual experience of mankind, ought this result to have been apprehended? The question is not whether it was a possible consequence, but whether it was probable, that is, likely to occur, according to the usual experience of mankind. That this is the true test of responsibility applicable to a case like this has been held in very many cases, according to which a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience. One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable. A high degree of caution might, and perhaps would, guard against injurious consequences which are merely possible; but it is not negligence, in a legal sense, to omit to do so.

"There may not always have been entire consistency in the application of this doctrine, but, in addition to cases of boys meddling with things left in a public street, courts have also held it competent for a jury to find that the injury was probable, although brought about by a new agency, when heavy articles left near an opening in the floor of an unfinished building, or in the deck of a vessel, were accidentally jostled so that they fell upon persons below (*McCauley v. Norcross*, 155 Mass. 584, 30 N. E. 464; *The Joseph B. Thomas* [D. C.] 81 Fed. 578); when sheep, allowed to escape from a pasture and stray away in a region frequented by bears, were killed by the bears (*Gilman v. Noyes*, 57 N. H. 627); L.R.A.1915E.

and when a candle or match was lighted by a person in search of a gas leak, with a view to stop the escape of gas (*Koelsch v. Philadelphia Co.* 152 Pa. 355, 18 L.R.A. 759, 34 Am. St. Rep. 653, 25 Atl. 522); and in other cases not necessary to be specially referred to. In all of these cases, the real ground of decision has been that the result was or might be found to be probable, according to common experience.

"Without dwelling upon other authorities in detail, we will mention some of those in which substantially this view of the law has been stated. *Davidson v. Nichols*, 11 Allen, 514; *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768; *Tutein v. Hurley*, 98 Mass. 211, 93 Am. Dec. 154; *Hoadley v. Northern Transp. Co.* 115 Mass. 304, 15 Am. Rep. 106; *Hill v. Winsor*, 118 Mass. 251; *Derry v. Flitner*, 118 Mass. 131; *Freeman v. Mercantile Mut. Acci. Asso.* 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013; *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566, and cases there cited; *Cosulich v. Standard Oil Co.* 122 N. Y. 118, 19 Am. St. Rep. 475, 25 N. E. 259; *Rhodes v. Dunbar*, 57 Pa. 274, 98 Am. Dec. 221; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 653; *Behling v. Southwest Pennsylvania Pipe Lines*, 160 Pa. 359, 40 Am. St. Rep. 724, 28 Atl. 777; *Goodlander Mill Co. v. Standard Oil Co.* 27 L.R.A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 400, 405, 406; *Haile v. Texas & P. R. Co.* 23 L.R.A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557; *Clark v. Chambers, L. R.* 3 Q. B. Div. 327, 47 L. J. Q. B. N. S. 427, 38 L. T. N. S. 454, 26 Week. Rep. 613, 19 Eng. Rul. Cas. 28; *Whart. Neg.* 2d ed. §§ 74, 76, 78, 138-145, 155, 955; *Cooley, Torts*, 69, 70; *Addison, Torts*, 40; *Pollock, Torts*, 388; *Mayne, Damages*, 39, 47, 48." 171 Mass. 540-542.

Our attention is directed by counsel for appellant to many cases where, on account of an independent intervening agency, the original wrongdoer was excused. *Goodlander Mill Co. v. Standard Oil Co.* 27 L.R.A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 400; *Carter v. Towne*, 103 Mass. 507; *Nickey v. Steuder*, 164 Ind. 189, 73 N. E. 117; *Cole v. German Sav. & L. Soc.* 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113, 14 Am. Neg. Rep. 676; *Burt v. Advertiser Newspaper Co.* 154 Mass. 238, 13 L.R.A. 97, 28 N. E. 1; *Jennings v. Davis*, 109 C. C. A. 451, 187 Fed. 703, 713; *Finkbeiner v. Solomon*, 225 Pa. 333, 24 L.R.A. (N.S.) 1257, 74 Atl. 170; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451; *Hartton v. Forest City Teleph. Co.* 146 N. C. 429, 14 L.R.A.(N.S.) 956, 59 S. E. 1022, 14

Ann. Cas. 390; Pollard v. Oklahoma City R. Co. 36 Okla. 96, 128 Pac. 300, Ann. Cas. 1915A, 140, 4 N. C. C. A. 349.

On the other hand, counsel for appellee cite and quote from an impressive list of authorities, beginning with the well-known Squib Case, decided in 1770, and closing with the last expression of this court on analogous cases where the original cause was held to be the principal and proximate cause, and where the intermediate incidents did not avoid the consequences arising from the acts or delicts of the original wrongdoer.

We do not think the facts in the Squib Case (Scott v. Shepherd, 2 W. Bl. 892) are quite the same as here. In that case the burning squib was thrown by the original wrongdoer on the market stand of Yates, who instinctively and immediately picked it up and threw it on the stand of Willis, and Willis immediately threw it upon the stand of Ryal, and Ryal immediately and in self-defense threw it away from him so that it struck the eye of the plaintiff, Scott, and put out his eye. In that case the intervening agents had no time for reflection. But part of the opinion in that case is pertinent here: "That the natural and probable consequence of the act done by the defendant was injury to somebody, and therefore the act was illegal at common law. . . . Being therefore unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate. . . . The defendant . . . is the person who, in the present case, gave the mischievous faculty to the squib. That mischievous faculty remained in it till the explosion. No new power of doing mischief was communicated to it by Willis or Ryal. It is like the case of a mad ox turned loose in a crowd. The person who turns him loose is answerable in trespass for whatever mischief he may do. The intermediate acts of Willis and Ryal will not purge the original tort in the defendant. But he who does the first wrong is answerable for all the consequential damages." Page 893.

Here we reach the crux of the matter. No new power of doing mischief was communicated to the solidified glycerin by the acts of young McDowell. The power of doing mischief was inherent in the glycerin all the time. That some terrible accident was likely to happen in letting it out of the close custody of someone skilled in its use was not only natural and probable, but almost inevitable. McDowell had no skill or experience in handling the dangerous article. He did the best he could to prevent the damage impending on account of Van Gray's negligence. That he attempted to prevent its doing damage, but failed on ac-
L.R.A.1915E.

count of lack of sufficient knowledge to dispose of it effectively, does not amount to an unrelated and efficient agency to shift the proximate cause from the delict of the powder company to a new proximate cause of his own making.

It may be said, however, that this is mere argument. If so, then the question clearly resolves itself into one of fact for the jury; and this is in harmony with the authorities.

In Atchison, T. & S. F. R. Co. v. Parry, 67 Kan. 515, 73 Pac. 105, it was said: "Negligence, to be the proximate cause of an injury, must be such that a person of ordinary caution and prudence would have foreseen that some injury would likely result therefrom, not that the specific injury would result. The question whether negligence is the proximate cause of an injury is ordinarily one of fact for the jury." Syl. par. 2.

In that case, a passenger on the train became seriously ill, and the conductor called the depot master at Newton, who, with the assistance of the porter, removed the sick man from the train, and the conductor told the depot master to care for him. About four hours afterward, the sick man was run over and killed about 5 miles from Newton. The railway company insisted that, even if there was culpable negligence, it was not the proximate cause of the injury. In its opinion the court said: "At most, the question whether the negligence of the depot master was the proximate cause is one upon which the minds of different parties might reasonably disagree; and such being the case, and the whole matter having been submitted to the jury under proper instructions, and they having found that it was, we may not disregard these findings of fact. We are of the opinion that, upon both questions, there was sufficient evidence to go to the jury and to sustain the general finding in favor of the defendant in error." p. 520.

Another good case holding that the determination of proximate cause is a question for the jury, and which also contains a strong and logical analogy to the case at bar, is Filson v. Pacific Exp. Co. 84 Kan. 614, 114 Pac. 863, where the syllabus reads:

"The owner of an express package failed to call at the express office for it, and the agent of the express company placed it in the company's office, which was located in a railroad depot consisting of a frame building, the doors and windows of which were locked. The depot had been used for years for depositing freight and express matter. It was entered during the night by a burglar breaking the glass of one of the windows, and the package with its contents

was stolen. The package was a canvas-covered telescope containing moving-picture films. It weighed 55 pounds and was valued at \$600, and the value was marked on the outside of the package in plain figures. In an action to recover against the company for its loss, it was conceded that the liability of the company was that of a warehouseman. Held, that it was a question for the jury to determine from all the evidence and circumstances whether the express company failed to exercise ordinary care, and whether such failure was the proximate cause of the loss." Syl. ¶ 2.

In the opinion Mr. Justice Porter said: "Whether persons in the exercise of ordinary care would have left it there over night, in a building which could be easily entered by burglars and which the evidence shows had been burglarized at least once before, to the knowledge of the express agent, was, under all the circumstances, a question for the jury. It was also for the jury to determine whether the negligence of the company was the proximate cause of the loss. It was the proximate cause if the loss by burglary was the natural and probable consequence of the failure of the company to exercise ordinary care; that is, if it might have been foreseen by ordinary forecast." p. 618.

In the still later case (*Barnett v. United Kansas Portland Cement Co.* 91 Kan. 719, 139 Pac. 484) the same proposition was adhered to, although two dissenting justices urged that the determination of the jury as to which was the remote and which the proximate cause is not necessarily conclusive. If that be a qualification of the general rule, it takes nothing from the strength of appellee's position in this case, for the trial court was satisfied that the negligence of the appellant was the proximate cause of the injury, and so are we.

Among other cases examined in arriving at these conclusions, the following may be noted: *Quigley v. Delaware & H. Canal Co.* 142 Pa. 388, 24 Am. St. Rep. 504, 21 Atl. 827; *Page v. Bucksport*, 64 Me. 51, 18 Am. Rep. 239; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Dixon v. Bell*, 5 Maule & S. 198, 1 Starkie, 287, 17 Revised Rep. 308, 19 Eng. Rul. Cas. 26; *Skinn v. Reutter*, 135 Mich. 57, 63 L.R.A. 743, 106 Am. St. Rep. 384, 97 N. W. 152, 15 Am. Neg. Rep. 86; *Filer v. Smith*, 96 Mich. 347, 35 Am. St. Rep. 603, 55 N. W. 1002; *Lynch v. Nurdin*, L. R. 1 Q. B. 29, 4 Perry & D. 672, 10 L. J. Q. B. N. S. 73, 5 Jur. 797; *Illidge v. Goodwin*, 5 Car. & P. 190; *Lowery v. Manhattan R. Co.* 99 N. Y. 158, 52 Am. Rep. 12, 1 N. E. 608; *Lane v. Atlantic Works*, 111 Mass. 136; *Kleebauer v. Western Fuse & Explosives Co.* 138 Cal. 497, 60 L.R.A. 377, 94 Am. St. Rep. 62, 71 Pac. L.R.A. 1915E.

617, 13 Am. Neg. Rep. 475; *Olson v. Gill Home Invest. Co.* 58 Wash. 161, 27 L.R.A. (N.S.) 884, 108 Pac. 140; *District of Columbia v. Dempsey*, 13 App. D. C. 533; *Williams v. Koehler*, 41 App. Div. 426, 58 N. Y. Supp. 863; *Iamurri v. Saginaw City Gas Co.* 148 Mich. 27, 111 N. W. 884; *Villa v. Cloquet*, 119 Minn. 277, 138 N. W. 33; *Eberhardt v. Glasgow Mut. Teleph. Asso.* 91 Kan. 763, 139 Pac. 416; *Broseghini v. Sheridan Coal Co.* 92 Kan. 113, 139 Pac. 1025.

The other errors assigned are all incidental to the main question. The fact that the boys were hunting on Sunday, or that they might be trespassers, does not affect the case. The jury found that they were not trespassing; but the damage did not arise from the trespass nor the Sabbath breaking, nor did they contribute in the slightest degree to the accident and its consequences.

No substantial error appearing in the record, the judgment is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

PRUSSIAN NATIONAL INSURANCE COMPANY v.

A. C. LAWRENCE, Doing Business as Samuel Cooper & Company.

(221 Fed. 931.)

Insurance — place for valuing personality.

In valuing, under a policy providing that the insurer shall not be liable beyond the actual cash value of the property, with proper deduction for depreciation, however caused, bar fixtures located where prohibition was adopted after the policy was issued, their value is not limited to their worth at such place, but must be ascertained at the nearest fair market, subject to deduction for transportation.

(February 2, 1915.)

Note. — Insurance: considerations of time and place in determining value of personal property for purpose of fire insurance.

This note deals with considerations of time and place in determining the amount of loss of personality covered by open policies, and does not cover the amount recoverable under valued policies, since under the latter the amount recoverable is fixed by the contract.

Generally.

It is generally held that the market value of the insured property at the time and

CROSS APPEALS from a judgment of the District Court of the United States for the Southern District of West Virginia, Benjamin F. Keller, Judge, setting aside an award of arbitrators allowed to plaintiff for his loss under a fire insurance policy; defendant appealing from the judgment setting aside the award, and plaintiff appealing from so much of the judgment as failed to find actual fraud in the award. Affirmed.

The facts are stated in the opinion.

Argued before Knapp and Woods, Circuit Judges, and Waddill, District Judge.

Messrs. E. S. Bock and T. C. Townsend for defendant.

Messrs. Cato & Bledsoe, for plaintiff:

Plaintiff was entitled to the fair cash value of the lost property in an ordinarily

fair market therefor, less the cost of transportation to the place of use.

Laurent v. Chatham F. Ins. Co. 1 Hall, 45; Fisher v. Crescent Ins. Co. 33 Fed. 544.

The proof is direct and positive of an actual fraudulent agreement with the defendant as to the amount of the award against it before Storm's qualification as appraiser, and a deliberate and premeditated prejudgment in fraud of the plaintiff's rights.

Bradshaw v. Agricultural Ins. Co. 137 N. Y. 137, 32 N. E. 1055; Insurance Co. of N. A. v. Hegewald, 161 Ind. 631, 66 N. E. 902; Kiernan v. Dutchess County Mut. Ins. Co. 150 N. Y. 190, 44 N. E. 698; Kaiser v. Hamburg-Bremen F. Ins. Co. 59 App. Div. 525, 69 N. Y. Supp. 344; Glover v. Rochester German Ins. Co. 11 Wash. 143, 39

place of loss, within the amount insured, is the measure of damages in an action on a policy of fire insurance covering personal property. Western Assur. Co. v. Studebaker Bros. Mfg. Co. 124 Ind. 176, 23 N. E. 1138; State Ins. Co. v. Taylor, 14 Colo. 499, 20 Am. St. Rep. 281, 24 Pac. 333; Grubbs v. North Carolina Home Ins. Co. 108 N. C. 472, 23 Am. St. Rep. 62, 13 S. E. 236; Fowler v. Old North State Ins. Co. 74 N. C. 89; Boyd v. Royal Ins. Co. 111 N. C. 372, 16 S. E. 389.

And in Dakin v. Queen City F. Ins. Co. 59 Or. 269, 117 Pac. 419, the value of insured goods at the time of their destruction was held to afford the measure of indemnity for loss.

And in Hoffman v. Western M. & F. Ins. Co. 1 La. Ann. 216, it was held that one whose goods are insured by a fire policy is entitled to recover the fair market value at the date of the fire, of the goods totally destroyed, and as to the goods damaged, the difference between the value at the date of the fire, of the goods in their damaged state and like goods undamaged.

In McIntyre v. Liverpool, L. & G. Ins. Co. 131 Mo. App. 88, 110 S. W. 604, it was held that if goods are totally destroyed, the insurer is liable to the full amount insured unless the goods have depreciated in value since the issuance of the policy, in which event the depreciation should be deducted, and that if the goods are not totally destroyed, the measure of damages would be the difference between the reasonable value prior to the fire and their value immediately thereafter.

Under a policy insuring whisky and providing that the cost value of property destroyed or damaged should in no case exceed what would be the cost to the insured, at the time of the fire, of replacing the same, it was held that the insured was entitled to recover the market value of the whisky at the time of the fire, but that this was not to be fixed at the high local value caused by the scarcity of corn in the section where the insured lived, it appearing that he was near a railroad and that the other markets of the country were open

to him. Fisher v. Crescent Ins. Co. 33 Fed. 544.

In Georgia Co-op. Fire Asso. v. Lanier, 1 Ga. App. 186, 57 S. E. 910, it was held that, in arriving at the amount of a loss under an open policy covering merchandise, the jury should find the actual value of the property at the date of the fire, and that they are bound to take as a starting point in their investigation the sum estimated as the value by the agent at the time of issuing the policy.

It has been held that there is nothing in the policy of the law which abridges the right of the parties to a contract of insurance to stipulate in regard to the mode and manner of restricting or valuing a loss, or as to the time which shall be the period of the valuation of the property, and that a provision in a policy covering mowers and reapers, that the loss or damage shall be estimated according to the true and actual cash value of the property at the time the same occurs, is valid. Commonwealth Ins. Co. v. Sennett, 37 Pa. 205, 78 Am. Dec. 418.

And under such policy what the property was worth at the time of the fire is the measure of its value and it must be ascertained by testimony, as is done in every case where the value is not fixed; and it was held that the fact that the property was constructed under a patent was of no importance. Ibid.

It has been held that the term "actual cash value" as used in a policy covering a stock of goods means the sum of money the goods would have brought if sold for cash at the market price at the time and place of loss. Mack v. Lancashire Ins. Co. 2 McCrary, 211, 4 Fed. 59.

In another case the expressions "market value" and "actual cash value" were held to have practically the same meaning, and in an action on a policy providing that the insurer should not be liable beyond the actual cash value of the property at the time of loss, it was held not erroneous to instruct the jury that they might find for the insured the fair market value of the articles destroyed. Manchester F. Ins. Co.

Pac. 380; *Mason v. Fire Asso. of Philadelphia*, 23 S. D. 431, 122 N. W. 423; *Hall v. Western Assur. Co.* 133 Ala. 637, 32 So. 257; 4 *Minor's Inst.* 152.

Waddill, District Judge, delivered the opinion of the court:

This is an appeal from a decree of the United States district court for the southern district of West Virginia, entered on the 17th day of June, 1914, in a cause in equity wherein the appellee was plaintiff, and the appellant defendant, from which appellant appealed, and the appellee assigned cross error. The following are the material facts in the case:

The appellee on the 28th of May, 1909, was engaged in the saloon business in the

city of Charleston, at No. 812 Kanawha street, and on that day entered into a contract of insurance with the appellant, the Prussian National Insurance Company, whereby said company insured appellee against all direct loss or damage by fire to the saloon fixtures, cigar stand, furniture, and fixtures of every description contained in said building, in the sum of not to exceed \$2,500, for the term of one year; that on the 21st of April, 1910, the building was totally destroyed by fire, and the property covered by the policy of insurance largely destroyed and damaged; that pursuant to the provisions of the policy, the insurer and insured agreed on two arbitrators with a view of settling the loss occasioned by said fire, the insured naming W.

v. Simmons, 12 Tex. Civ. App. 607, 35 S. W. 722.

In *Mendez v. North British & M. Ins. Co.* 5 Porto Rico Fed. Rep. 263, it was held that under a policy covering furniture and other contents of a house for a specified sum, the sum named was the limit of the liability, and not the measure of the liability, and that a recovery could be had only for the reasonable cash value of the property destroyed according to the market value at that time, and that the cost of the property or the cost of replacing it could not be substituted for the actual cash market value.

And in a case where a policy insuring a stock of goods provided that the insurer should not be liable beyond the actual cash value of the property at the time the loss occurred, it was held error to instruct the jury to find for the insured the amount expressed in the policy. *Westchester F. Ins. Co. v. Wagner*, 10 Tex. Civ. App. 398, 30 S. W. 959.

In *Slack v. Milwaukee-Mechanics' Ins. Co.* 186 Ill. App. 565, where a fire policy limited the insurer's liability to the actual cash value of the property at the time of loss, to be ascertained with proper deductions for depreciations, however caused, the insured was held not entitled to recover the cost price of the articles when new, it appearing that they had been used for one or more years.

In *German Ins. Co. v. Everett*, — Tex. Civ. App. —, 36 S. W. 125, under a policy covering secondhand furniture and providing that the damages should be estimated according to the cash value of the property at the time of the fire, it was held that the insured might recover what it would cost him in cash after the loss to purchase property of like kind and quality to that destroyed.

And under a like provision in *Framers' Mercantile Co. v. Farmers' Ins. Co.* 161 Iowa, 5, 141 N. W. 447, it was held that the measure of damages was what it would cost the insured to replace the property destroyed, and that this was to be ascertained by determining what the fair and

reasonable market value of the property was uninjured and its fair and reasonable market value in its damaged condition.

Where the charter and by-laws of a company insuring merchandise provide that the directors shall determine the sum to be insured, not exceeding one half the value of the personalty, and that in case of loss the insured shall deliver an account of the property lost and the value thereof at the time of the loss, and by another clause the directors are required to proceed and determine the amount of the loss, a representation by the insured at the time of his application as to the value of the property is not conclusive on the insurer, but it may show the actual amount of the goods which the insured had on hand at the time of loss, and it is liable only for one half of their value. *Atwood v. Union Mut. F. Ins. Co.* 28 N. H. 234.

As affecting amount of manufacturer's recovery.

Under a policy providing that the insurer should not be liable beyond the actual cash value of the property at the time any loss or damage occurred, and that the loss or damage should be estimated according to such actual cash value, that it should in no event exceed "what it would then cost the insured to repair or replace the same with material of like kind and quality," where the insured property destroyed consisted partly of manufactured straw hats it has been held that the insured is entitled to recover the actual cash value of such goods, which is the price at which they were contracted to be sold, and that he is not limited to the cost of manufacture, straw hats not being an ordinary staple, but their value depending upon style and finish and their production in time for the summer market, and it being conceded that the insured could not repair his factory or obtain another in which he could reproduce the hats lost in time for the season's trade, or go upon the market and replace them by purchase, and it being impossible under these facts to apply the clause respecting

A. Barron, and the insurer Frederick Storm, and, likewise pursuant to the provisions of said policy, the arbitrators selected one James H. Thompson to act as umpire respecting the matters about which they might differ; that the arbitrators ascertained the sound value of the property destroyed and damaged to have been \$3,211.88, and the salvage \$205, leaving the net sound value of the property insured, destroyed by fire, \$3,006.88. After the sound value of the property had been agreed on, the question arose as to the amount of depreciation in the property; the said Storm insisting that because, between the date of the insurance and the time of the fire, the sale of liquor had been prohibited in the state of West Virginia, and that on the last-

named date only so-called soft drinks could be sold in said bar, that said bar and saloon fixtures and furniture, taking into account the wear and tear during the time the same had been used, had depreciated in value over two thirds, and the property under such circumstances was only worth \$1,000; that the arbitrator named by the appellee refused to assent to this reduction, and thereupon appellant's arbitrator, Storm, succeeded in securing the umpire Thompson to act with him, and the two made an award of \$1,000 as covering the loss under said policy.

Appellee insists that both Storm and Thompson were improper persons to have been appointed, and that they acted in bad faith in what they did, and on that ac-

repair and replacement. *Phillips v. Home Ins. Co.* 128 App. Div. 528, 112 N. Y. Supp. 769.

And under a provision the same as that involved in the preceding case the measure of a manufacturer's cost of replacing whisky and like products whose manufacture occupies considerable time and whose value increases with age is not the cost of the raw material, of which a like product may be made, and of the labor required to make it, but it is the cost of immediately replacing the article by a like product in the most expensive way, by purchase or otherwise, and he is entitled to the actual cash value at the time of the fire, although a profit or loss results to him. *Mechanics' Ins. Co. v. C. A. Hoover Distilling Co.* 31 L.R.A.(N.S.) 873, 105 C. C. A. 128, 182 Fed. 590.

And in another case involving a like provision it was held that in case of loss of whisky of different inspections the insured was not restricted to the simple cost of reproducing the whisky, it appearing that aging was an important element entering into the value of whisky, but he was held entitled to have it replaced as of the date of the loss with the same material of like kind and quality, it being held that the cash value of the particular brand of whisky in the wholesale market on the date it was destroyed was the measure of damages. *Frick v. United Firemen's Ins. Co.* 218 Pa. 409, 67 Atl. 743.

In *Mitchell v. St. Paul German F. Ins. Co.* 92 Mich. 594, 52 N. W. 1017, where a policy on lumber, pickets, laths, and shingles manufactured by the insured provided that the insurer should not be liable beyond the actual cash value of the property at the time any loss or damage occurred, and that the loss or damage should be ascertained according to such actual value, and that in no event should it exceed what it would "then" cost the insured to repair or replace the same with material of like kind and quality, it was held that, although the insured was the owner of standing timber from which he could take a quantity of timber, and manufacture it at a mill which he L.R.A.1915E.

operated, sufficient to replace the property destroyed, his damages were not limited to the amount it would cost to so replace the property, but that he was entitled to recover the market value of the property at the time of the fire. The court said: "We think the word 'then' is significant, and must be given weight in determining the true intent and meaning of the contract. If the defendant's theory of construction be adopted, the word 'then' must be dropped out, and the contract construed as intending to give to the insurance company the benefit of the time it would take the insured to replace it or reproduce it; that is, if the insured had the means of replacing or reproducing the burned lumber, having timber from which to manufacture lumber and the mill to manufacture it with, then an estimate should be made of that cost as the measure of damages, though it might take six months or a year to replace or reproduce it. In this sense the words 'replace' and 'reproduce' would be synonymous; but the contract cannot be construed in that way without doing violence to the language employed. Clearly, it means just what it says, 'what it would then cost the insured to replace it,' and not what it would cost the insured to cut from his own stumpage, manufacture lumber at his own mill, and replace, after the delay of cutting, hauling, sawing, piling in the yards, etc."

And upon like reasoning, where a policy issued to a manufacturer of goods contained the same provision as that involved in the preceding case, it was held that a recovery might be had for the market value of the goods at the time and place of loss and that the insured was not limited to the cost of manufacture, the transportation charges, cost of storage, etc., up to the time of loss. *Hartford F. Ins. Co. v. Cannon*, 19 Tex. Civ. App. 305, 46 S. W. 851.

In *Standard Sewing Mach. Co. v. Royal Ins. Co.* 201 Pa. 645, 51 Atl. 354, where a policy issued to a sewing machine company provided that the insurer should not be liable beyond the actual cash value of the property at the time any loss or damage occurred, and that the loss or damage should

count, as well as because of the improper method of arriving at the basis of the appellee's loss, their award should be vacated, set aside, and annulled. The appellant insisted that the arbitrators were proper persons, that the award was arrived at in a correct and just method, and asked that the same be enforced, and with its answer tendered \$1,000, the amount of the award.

The court below by its decree of the 17th of June, 1914, from which this appeal is taken, waiving the question of the incompetency and unfitness of the arbitrator and umpire, set aside the award because of the erroneous principle upon which the value of the property was determined, that is, by ascertaining the loss at only what the property was claimed to be worth at Charleston,

be ascertained or estimated according to such actual cash value, with proper deductions for depreciation, however caused, and that it should in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality, it was held that the actual cash value of the property at the time of the fire was the measure of damages, but that the amount could not exceed what it would cost the insured to replace the property, so that this would exclude the market value of the property as a measure of damages, and would permit the insured to recover only what it would cost him, the manufacturer, to produce it. The court said: "Under the clause of the policy just quoted, the loss could 'in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality.' The court failed to give due weight to this provision of the policy. The actual cash value of the property at the time of the fire was the measure of damages, but it could not exceed what it would cost the insured to replace it. This would exclude the market value of the property as a measure of damages, and would permit the plaintiff to recover only what it would cost him, the insured, who was the manufacturer, to replace it. The language of the policy is plain and unambiguous, and the court should have interpreted it and given the jury the measure of damages."

Where insured property is subject to rapid changes in value.

It has been held that the time the insured property is actually destroyed, and not that at which the fire starts, governs in determining the extent of the insurer's liability under a policy on cotton fixing such liability at the actual cash value of the property insured at the time the loss occurs, although the fire in question was a continuing one and the property was a marketable commodity, the value of which enhances as portions of the supply are destroyed. *Liverpool, L. & G. Ins. Co. v. L.R.A.1916E.*

where from local causes its value had become at least temporarily greatly depreciated, from which action the insurance company appealed, because of the setting aside of the award, and the insured assigned as cross error the failure of the court to pass upon the disqualification of the arbitrator and umpire.

We do not, in our view of the case, find it necessary to review the action of the lower court in its failure to pass upon the qualifications of those who made the award, since the award itself was set aside, and we shall therefore consider alone its conclusions in the former respect, which present for our determination what is the correct criterion of damage for loss of the property under the insurance policy. The

McFadden, 27 L.R.A.(N.S.) 1095, 95 C. O. A. 429, 170 Fed. 179, affirming 162 Fed. 783.

And it was held in this case that the value of cotton destroyed by fire after the stock exchange was opened on a certain day might be determined from the actual sales made during that day on the market. *Ibid.*

Wholesaler's stock.

Under a policy insuring a wholesaler's stock of goods and providing that the insurer should not be liable beyond the actual cash value of the property at the time any loss or damage occurs, but that the liability should in no event exceed what it would then cost the assured to repair or replace the same with material of like kind and quality, it has been held that the value is to be determined by what it would cost to replace the goods from the markets where such goods were usually manufactured or could be purchased within a reasonable time, and that the limitation was not intended to mean what it would cost to replace the goods immediately upon their destruction, and that the insured was not, because the goods could not be immediately replaced in the place where they were insured, entitled to recover what they could have been sold for there to dealers at wholesale. *Texas Moline Plow Co. v. Niagara F. Ins. Co. 39 Tex. Civ. App. 168, 87 S. W. 192.*

In *Virginia F. & M. Ins. Co. v. Cannon, 18 Tex. Civ. App. 588, 45 S. W. 945*, where there was a loss of a large quantity of bagging for which no market was shown at the time and place of loss for such quantity, evidence to show the market values in the quantities in which there was a sale for it; prices obtained before and after the loss; prices in other markets; and freight rates to be added or deducted; the cost of replacement, shown by the opinion of experts, together with all other evidence tending to show the value of the property,—was held proper for consideration by the jury in reaching their verdict, it being held that neither the market value in carload lots nor

provision of the policy is as follows: "The company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would cost the insured to repair or replace the same with material of like kind and quality. Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided."

The value of the property at the time of loss or damage manifestly means the price which such property would bring at a fair market, after fair and reasonable efforts had been made to find a purchaser who

the price conceded to jobbers in larger lots was controlling.

Recovery for loss of property not generally obtainable on market.

In *Gulf Compress Co. v. Insurance Co.* of Pa. 129 Tenn. 586, 167 S. W. 859, where recovery on a policy providing for liability according to the actual cash value at the time of the fire was sought for the loss of a valuable machine of a kind which was manufactured only upon special orders, it was held that an instruction was properly refused, that if the jury found that a similar machine could have been purchased in another state at or immediately after the fire for a certain sum plus the cost of dismantling, installing, and transportation, estimated at a certain amount, these amounts should be taken as the sum to which the insured was entitled in case a total loss was found, since such instruction was held to assume that a machine like that referred to could have been purchased at or immediately after the fire, for the sum named, as to which there was no evidence, there being merely testimony that such opportunity to buy was presented only at a date more than four months after the loss occurred.

And in this case the insurer was held to have no ground to complain of an instruction that if the purchase of the machine in the other state was one that could have been made only at a particular time, and not one that could have been made in the open market at any time, and that if the insured's offer to the insurer to accept that machine in settlement was meant merely as a matter of compromise, the jury might consider that in determining the value of a new press; and that, assuming there was a total loss, the test was what it would cost to procure another machine just as good as the one insured at the time of the fire. *Ibid.*

Competency and sufficiency of evidence relating to consideration of time and place.

"The cost of the property in the market L.R.A.1915E.

would give the highest price; a sum, however, not to exceed the amount of the insurance. This is the consensus of opinion, as shown by quite an array of authorities cited by the learned judge of the court below, as follows: *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329, 9 Am. St. Rep. 598; 18 N. E. 804; *Mack v. Lancashire Ins. Co.* (C. C.) 2 McCrary, 211, 4 Fed. 59; *National Bank v. New Bedford*, 175 Mass. 257, 56 N. E. 288; *Read v. Rahm*, 65 Cal. 343, 4 Pac. 111; *State v. Central P. R. Co.* 10 Nev. 47 (in which the court said that the cash value of an article is measured by the amount of cash into which it can be converted); *Sanford v. Peck*, 63 Conn. 486, 27 Atl. 1057; *Manchester F. Ins. Co. v. Simmons*, 12 Tex. Civ. App. 607, 35 S. W. 722; *Hughes v. Western U. Teleg. Co.* 114 N. C.

may be shown as one of the elements, but not the test of its value when destroyed, and on the other hand it is competent for the insurer to prove that there was a deterioration in the value of the goods after the purchase and before the loss, which, if not resulting merely from temporary depression in the market, will tend to establish the value at the time of the fire." *Grubbs v. North Carolina Home Ins. Co.* 108 N. O. 472, 23 Am. St. Rep. 62, 13 S. E. 236.

There is no error in allowing an insured to testify to the price paid at a distant city for a safe which was destroyed, and the transportation charges upon it, where an opportunity for cross-examination is given, a safe not being subject to deterioration by ordinary use, as are articles of merchandise, unless it has been supplanted by an improved one or its price lessened by competition. *Dakin v. Queen City F. Ins. Co.* 59 Or. 269, 117 Pac. 419.

And in an action to recover for a loss under a policy covering drug store fixtures upon the insured's showing that the property had not deteriorated in value, he may prove its condition and value some years before by the one who then owned it, and by the mechanic who made the property. *Johnston v. Farmers' F. Ins. Co.* 106 Mich. 96, 64 N. W. 5.

It has been held that the price for which the owner of second hand furniture offered to sell the property shortly before the fire is competent to be considered by the jury in arriving at the amount of loss; and it cannot be assumed in the absence of proof that the offer was dictated by pressing circumstances. *Joy v. Security F. Ins. Co.* 83 Iowa, 12, 48 N. W. 1049.

And where a policy on a stock of goods provides that the insurer shall not be liable beyond the actual cash value of the property at the time a loss occurs, evidence of the value of the different items is admissible as tending to establish the measure of damages agreed upon. *Erb v. German-American Ins. Co.* 98 Iowa, 606, 40 L.R.A. 845, 67 N. W. 583.

70, 41 Am. St. Rep. 782, 19 S. E. 100; German Ins. Co. v. Norris, 11 Tex. Civ. App. 250, 32 S. W. 727; Com. v. Edgerton Coal Co. 164 Pa. 284, 30 Atl. 125, 129; 4 Cooley, Briefs on Ins. 3099,—to which, as well as to his opinion, we especially refer as sustaining our conclusion.

The district court adopted the method stated for the assessment of the damage, and held that while, as to fixed property, the value would have to be arrived at at its place of location, that as to movable property it should be ascertained at the nearest fair market for the same, subject to a deduction for the cost of transporting the property, if found necessary and advisable to remove it. With this ruling of the lower court we are in entire accord. There would seem to be no just reason why the value

of personal property insured should be ascertained at a place where from local causes or peculiar conditions it had become greatly depreciated, when by its removal, if of a kind safely removable, to a reasonably convenient market, its fair value could be procured. That this was what should have been done in this case is manifest from the fact that the portion of the property saved was removed to Cincinnati, Ohio, because a good market for property of the kind existed there, and it saved value properly ascertained. Moreover, we are by no means prepared to agree that the value placed upon this property by one arbitrator and the umpire was its fair value, even at Charleston.

It follows, from what has been said, that the action of the lower court should be affirmed, at the cost of the appellant.

But evidence of what an insured horse sold for in another state eighteen months previously, when he was not in as good condition, is not admissible to show his value at the time of loss. Gere v. Council Bluffs Ins. Co. 67 Iowa, 272, 23 N. W. 137, 25 N. W. 159.

And in an action on a policy covering household furniture, and providing that the loss should be estimated according to the cash value of the property at the time of the fire, neither the values fixed by the agent at the time of the issuance of the policy, nor the amount stated in the policy, can be introduced to show the value of the property at the time of loss, unless it can be shown by extraneous evidence that the amount of the insurance was the value of the property when the policies were issued, and that such values had remained unchanged up to the time of the fire, or unless the relation of values at the time of the loss to the values at the time the insurance was effected is shown. German Ins. Co. v. Everett, — Tex. Civ. App. —, 36 S. W. 125.

And in an action on a policy on dry lumber, evidence of contracts between the insured and another for lumber to be manufactured and shipped from another state in the future is inadmissible to prove the extent of loss. Western Assur. Co. v. Studebaker Bros. Mfg. Co. 124 Ind. 176, 23 N. E. 1138. The court said: "The value of the lumber destroyed must be determined by its market value at the time and place destroyed, by showing what articles of the same character were worth at the time in the market at South Bend. If the evidence showed the lumber destroyed to be clear, first-class poplar lumber, of certain dimensions, and dry, then it was proper to show what clear, first-class poplar lumber, dry and of the same dimensions, was worth in the market of South Bend at the time of the fire. If there was no market for it there, and there was another market nearby, then it might probably be proper to show what it was worth in the nearest market, and the cost of transportation; or L.R.A.1915E.

if none was in the market at that place, then probably it might be proper to show what such lumber was worth in the nearest market to South Bend where it could be purchased, and to prove the expense of transportation; but the price which must govern is the market price in South Bend at the time it was destroyed. To establish this fact it would not be proper to introduce a contract whereby A purchased of B lumber, even of the same character, to be delivered at South Bend, at the time the loss occurred. A may have purchased the lumber at more or less than the market price, and certainly it would not be proper to introduce a contract between two individuals showing a purchase of lumber of a different character, to be delivered at a different time, and if not proper to introduce a contract between two other parties not parties to the suit, it would not be to introduce a contract for the purchase of other lumber by the appellee. The price at which lumber had been sold by special contract might have been inquired into under certain circumstances on the cross-examination of a witness who had testified as to the market value, to test his knowledge, but such contract is not proper to go in evidence to prove the market value of lumber, and the court very properly excluded the contracts offered in evidence."

Where a policy undertakes to pay the value of the insured property at the time and place of loss, and there was no evidence that the stock of millinery insured was of the same value at the time and place of loss as when an invoice had been made in another place about nine months before the fire, or evidence tending to show the comparative values, evidence of the value of the goods at the time and place of making such invoice is inadmissible. Lundvick v. Westchester F. Ins. 128 Iowa, 376, 104 N. W. 429.

And in *Marchesseau v. Merchants' Ins. Co.* 1 Rob. (La.) 438, the court, in an action on a policy covering a stock of goods, held invoices of the goods which were purchased

in France some eight or ten months previously to the commencement of the risk not the true criteria of value.

In a case involving a loss of personal property belonging to a city, the insured did not sustain the burden of establishing the value of such personalty, where the only evidence upon the point was the testimony of the mayor, who, without specifying or detailing the nature of the property, testified that it had cost between two and three hundred dollars when new, and that it had been in the buildings destroyed about six months, in use by smallpox patients, and that he did not know what it was worth when consumed. *De Soto v. American Guaranty Fund Mut. F. Ins. Co.* 102 Mo. App. 1, 74 S. W. 1.

And testimony of the insured giving only the original cost price of the furniture destroyed, where the property has been in use several years, falls short of establishing its value for the purpose of a recovery. *Germier v. Springfield F. & M. Ins. Co.* 109 La. 341, 33 So. 361.

In *German Ins. Co. v. Norris*, 11 Tex. Civ. App. 250, 32 S. W. 727, where a policy on household furniture provided that the loss should be estimated "according to the cash value of the property at the time of the fire," the evidence was held sufficient to sustain a finding that the property was of a value exceeding the face of the policy, where the plaintiff was allowed to testify without objection, that the property was worth at the time it was destroyed the sums stated in exhibits attached to his petition, and an amount in excess of the face of the policy.

Miscellaneous.

In case of a partial loss of personalty situated in one country, the rule, in an action on a policy issued in another country, for determining the amount of recovery, is to estimate the loss at the place where it occurred in the currency of that country, and then find the equivalent in the country where suit is brought by determining the actual intrinsic value of the currency of that country as compared with that of the other, thus computing the value according to the real par of exchange, and this is the rule, although the policy contains a clause giving the insurer the right to replace the property destroyed by other property of like kind and equal value. *Burgess v. Alliance Ins. Co.* 10 Allen, 221.

An instruction is fair, and not subject to the objection that it precludes a consideration of testimony showing the depreciation in value occasioned by the age and manner of handling the goods before the fire, where the jury are told by it that, in determining the loss of a stock of millinery, they should consider the kind of property lost or damaged, its age and condition, the length of time it has been kept in stock, and the manner in which it has been kept, handled, and packed, and are also told to consider the invoices in evidence.

and the difference between the invoice price and the reasonable market value of the goods at the place of loss immediately before the fire, and all other facts and circumstances showing the real loss sustained. *Lundvick v. Westchester F. Ins. Co.* supra. J. T. W.

ARKANSAS SUPREME COURT.

M. F. DICKINSON, State Auditor, et al.,
Appts.,
v.

JO JOHNSON.

(— Ark. —, 176 S. W. 116.)

Legislature — creation of committee — joint resolution.

1. A committee to exist beyond the adjournment of the legislature for the investigation of public institutions and auditing of their accounts cannot be appointed by the legislature by joint resolutions, where the Constitution provides that no law shall be passed except by bill, since the creation of a committee to endure beyond the termination of the legislative session requires the enactment of a law.

Appropriation — payment out of contingent fund.

2. The legislature cannot pay the expenses of a committee created to investigate state institutions and audit their accounts, which is to endure beyond its adjournment, out of the contingent fund of the legislature, where the Constitution provides that no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, the purpose of which shall be distinctly stated in the bill.

(Kirby, J., dissents.)

(April 19, 1915.)

APPEAL by defendants from a decree of the Chancery Court for Pulaski County in plaintiff's favor, in an action brought to enjoin defendants from issuing and paying any warrants for expenses incurred under certain concurrent resolutions of the legislature. Affirmed.

Note. — *Power of legislature or branch thereof to appoint a committee to sit after close of session.*

This note supplements the note to *Ex parte Caldwell*, 10 L.R.A. (N.S.) 172, where the earlier cases upon the above question are gathered.

It has been held in a subsequent case that a committee could derive no power to act after the final adjournment of the general assembly from a joint resolution of both houses of the legislature providing for the

Statement by Wood, J.:

The last legislature, by concurrent resolutions, authorized the appointment, by the presiding officers of both houses, of two joint committees for the purpose of investigating certain state departments and institutions. One of the resolutions provided for the appointment of a special committee to investigate the state charitable institutions, and "to make a thorough investigation of the state hospital for nervous diseases and a thorough auditing of the accounts." The other resolution authorized the appointment of a committee "to investigate and examine the books, accounts, and files of the several departments of the state government and of the state institutions." The resolutions empowered the committees to take testimony, employ auditors of account, etc.

Just before the adjournment of the legislature, concurrent resolutions were passed by a *viva voce* vote, which were duly enrolled and signed by the governor. One of these resolutions provided that a committee, consisting of certain members of the committee already appointed, should constitute a committee "to continue the work of auditing the several departments of the state government and of the different institutions of the state" (naming them), and authorized the committee to continue the work until the same was completed, and granted the committee power to "recommend a uniform system of accounting for the different state institutions." The resolution provided for the printing of 500 copies of their report, and "that the said committee shall for their work receive the same *per diem* allowed to members of the general assembly, and the expenses of the said committee and the expert accountants, auditors, and stenographers employed by them, and printing and postage, shall be paid out

of the contingent expenses of the general assembly, upon vouchers issued by the secretary of senate directed to the auditor, who shall draw his warrant on the treasurer, who shall pay the same." It further provided that when the work of the committee was completed it should make final report to the governor.

The other joint resolution had a similar provision, constituting the special committee that was appointed to investigate the state charitable institutions a special committee to investigate and audit the accounts of the state hospital for nervous diseases, and provided that it be likewise constituted a committee to continue their work until the investigation and auditing was completed; also allowing the members of the committee the same *per diem* as allowed to members of the general assembly, and providing "that the expenses of said committee in the use of expert accountants, stenographers, and for printing and postage shall be paid out of the" contingent expenses of the said committee, "and shall be paid by vouchers issued by the secretary of senate, directed to the auditor, who shall draw his warrant on the treasurer, who shall pay the same."

These committees continued their sittings after the legislature adjourned, incurring expenses for witnesses, expert accountants, and *per diem* of the members of the committees. Appellee, Jo Johnson, for himself and all other taxpayers of the state, instituted this suit in the Pulaski chancery court, setting up in his complaint the above facts, and praying that the auditor be enjoined from issuing, and the treasurer be enjoined from paying, any warrants for expenses incurred under the concurrent resolutions. Appellants filed a general demurrer to the complaint. The court overruled the demurrer, and entered a decree granting the

appointment of a committee composed of three members of each house with full power to investigate charges of corruption existing in the government of a city and county, and giving the committee power to compel the production of books and the attendance of witnesses, and directing it to report its findings to the general assembly if in session, and, if not, to the governor for transmission to the succeeding general assembly, with recommendations for future legislation. State ex rel. Rulison v. Gayman, 31 Ohio C. C. 59, the court said: "The right to investigate and gather information in the manner here proposed exists, if at all, as an incident of, and by implication from, the power to legislate conferred by the Constitution. An act duly passed by the general assembly is a complete exercise of the power to legislate; but a resolution to investigate for the purpose of further legislation, passed by the same body, is the exercise of a right incident to that power, L.R.A.1915E.

and if the power itself be surrendered the incidental right goes with it. When the general assembly adjourned *sine die*, its purpose to use the information in aid of legislation could no longer be carried out; and while it could order the information to be transmitted to its successor, it could not form or express a purpose for, nor impose its own upon, its successor. The latter would use the information as it saw fit, without regard to the intention of the former. It is the same as if no purpose were expressed, and the result is, that an investigation is proposed, without any legislative purpose or any other acknowledged purpose, with authority in the committee to roam over the entire field of governmental functions and report its discoveries to the next general assembly, fresh from the people, who alone have power to instruct. Such power to investigate is not conferred by the Constitution in express terms nor by implication."

J. T. W.

prayer of the appellee, and this appeal has been duly prosecuted.

Messrs. William L. Moose, John P. Streepey, Elmer J. Lundy, and L. E. Sawyer, for appellants:

The legislature has the power by concurrent resolution to continue the work of investigation by committees appointed by the presiding officers after the adjournment *sine die*.

Re Davis, 58 Kan. 368, 49 Pac. 160; Ex parte Caldwell, 61 W. Va. 49, 10 L.R.A. (N.S.) 172, 55 S. E. 910, 11 Ann. Cas. 646; Cushing, Law & Pr. of Legislative Assemblies, 737; Commercial & F. Bank v. Worth, 117 N. C. 146, 30 L.R.A. 261, 23 S. E. 160; Tipton v. Parker, 71 Ark. 196, 74 S. W. 298; Branham v. Lange, 16 Ind. 497; Swann v. Buck, 40 Miss. 268.

The expense of this committee is a contingent expense authorized by the general assembly of 1915, and general assemblies are the judges of what are their contingent expenses.

Tipton v. Parker, 71 Ark. 193, 74 S. W. 298.

Mr. Jo Johnson in *propria persona*.

Wood, J., delivered the opinion of the court:

The first question is: Did the general assembly have power, by concurrent resolution, to continue its committees for the purposes expressed in the resolutions after the adjournment *sine die*?

For the purpose of obtaining information looking to the enactment of laws to meet the requirements of government, the appointment of committees by either branch of the legislature, or by the concurrent action of both branches, is absolutely necessary for the efficient discharge of legislative functions, and is recognized under our systems of government, both state and national. Ordronaux, Const. Legislation, p. 373.

When such resolutions are constitutionally adopted concerning a subject-matter within the proper sphere for such resolutions, they may have the force and effect of a law. Our own Constitution has recognized concurrent resolutions as one form in which the legislature may express its will, and when it is expressed in the manner prescribed, and concerning those matters within the legitimate scope of concurrent resolutions, such resolutions may have the force and effect of law. Yet they were not regarded by the framers of our Constitution as of the same dignity and importance as a bill. The same solemnity and strictness is not required for the adoption of resolutions as is to be observed in the pas-

sage of bills, except when the resolutions are disapproved by the governor. Ark. Const. art. 6, § 16. Concurrent resolutions are necessary, but have the force and effect of law only within the limited sphere incident to work or legislation which the legislature may complete before its final adjournment.

In Congress a joint resolution is regarded as a bill. See Cushing, Law & Pr. of Legislative Assemblies, p. 93. And in many of the states joint resolutions are recognized as equivalent to laws enacted by bill. See State ex rel. Peyton v. Cunningham, 18 Ann. Cas. 707, case note. But such is not the case under our Constitution. Article 5, § 19, provides: "The style of the laws of the state of Arkansas shall be: 'Be it enacted by the general assembly of the state of Arkansas.'"

Section 21 provides: "No law shall be passed except by bill."

And § 22 provides: "Every bill shall be read at length on three different days in each house, unless the rules be suspended by two thirds of the house, when the same may be read a second or third time on the same day; and no bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the persons voting for and against the same be entered on the journal, and a majority of each house be recorded thereon as voting in its favor."

Thus a clear distinction is made between bills and concurrent resolutions. The one cannot take the place of the other. All laws must be passed by bill. Concurrent resolutions cannot be used to enact laws.

Now, an investigation into the management of the various institutions of the state and the departments of the state government is at all times a legitimate function of the legislature. When the legislature of 1915 assembled, it was a matter of common knowledge that the state treasury was depleted, the state heavily indebted, and there were charges of mismanagement on the part of those having control of the state charitable institutions. Under these circumstances it was peculiarly appropriate that the legislature, in the interest of economy and honesty in all the departments of government and the management of its state charitable institutions, should institute an investigation to ascertain the facts as a basis for any remedial legislation that it might deem necessary.

As the only efficient method of making the investigation and procuring the information desired, the general assembly, by concurrent resolution, appointed its committees, and these committees reported that they were not able to complete their work

and make report before the time for the expiration of the session under the Constitution. The committees were the agencies of the general assembly which created them, and so long as the legislature was in session it had full control over them. When it became apparent near the close of the session that the committees would not have time to make the investigation and procure the information contemplated for the purposes of any present legislation, it was not only within the power of the legislature, but was a proper exercise of that power, for it to continue the work of the investigation for the information of the governor and the people generally, and as a guide for any future legislation that might be necessary. But this continuation of reappointment of the committees for the important work outlined for them after the adjournment of the legislature was not a proper subject-matter for concurrent resolution. It could only be done by a bill enacting a law to that effect.

Under our Constitution - the legislature has no power, by concurrent resolution, to appoint committees or to continue committees already appointed for the purpose of making investigations after the legislature has adjourned. The principle controlling this question was announced by the court in *Tipton v. Parker*, 71 Ark. 193, 196, 74 S. W. 298. There the question was as to whether the senate had authority to direct a committee to make certain investigations after the adjournment of the legislature, and report its findings to the governor. In that case we said: "The committee, being the mere agency of the body which appointed it, dies when the body itself dies, unless it is continued by law; and it is not within the power of either house of the general assembly to separately enact a law or pass a resolution having the force and effect of a law. To do this requires a majority of each house voting in its favor. Const. 1874, art. 5, § 23. The only legitimate office, power, or duty of a committee of the senate, in the absence of a law prescribing other functions and duties, is to furnish the senate which appointed it with information, and to aid it in the discharge of its duties."

It was there distinctly ruled that the committee dies when the body creating it dies, unless the committee is continued by law. The court, by the language used in that case, did not mean to hold or indicate, even by indirection, that a committee of the legislature could be continued by a concurrent resolution beyond the adjournment (*sine die*) of the legislature. While the writer is the only member of the present court who participated in that decision, yet L.R.A.1915E.

the majority of us concur in the view, therein expressed, that to continue or appoint a committee whose work of investigation is to go on beyond the session of the body which created it requires the enactment of a law by bill, passed in the manner prescribed by the Constitution. The principle announced in *Tipton v. Parker*, supra, and here reiterated, is not only sound, but it is supported by the weight of authority in this country having Constitutions similar to our own. See *State ex rel. Peyton v. Cunningham*, 18 Ann. Cas. 705, and authorities cited in note.

In jurisdictions where the Constitution expressly recognizes joint resolutions as equivalent to laws enacted by bill, such resolutions, when duly passed under the Constitution, are given the force and effect of laws. Such is the case under the Constitution of the United States and some of the states. As a fair illustration of this may be mentioned *Olds v. State Land Office*, 134 Mich. 442, 86 N. W. 956, 96 N. W. 508. There the Constitution provides: "Every bill and joint resolution shall be read three times in each house before the final passage thereof. No bill or joint resolution shall become a law without the concurrence of a majority of all the members elected to each house."

Of course, under such constitutional provision a concurrent resolution, when constitutionally passed, becomes a law the same as a law enacted by bill. But, as we have already observed, under a Constitution like ours, a concurrent resolution duly passed is not a law, and cannot be used as a substitute for a bill. *Mullan v. State*, 114 Cal. 578, 587, 34 L.R.A. 262, 46 Pac. 670; *Collier & C. Lithographing Co. v. Henderson*, 18 Colo. 259, 32 Pac. 417; *Boyers v. Crane*, 1 W. Va. 176; *May v. Rice*, 91 Ind. 546. See also *Burritt v. State Contract Comrs.* 120 Ill. 322, 11 N. E. 180.

Counsel for appellants rely upon the case of *Re Davis*, 58 Kan. 368, 49 Pac. 160. There a committee was appointed under a concurrent resolution to investigate certain charges of bribery. The resolution itself did not expressly provide for the committee to continue its investigation after the adjournment of the legislature creating it. The supreme court said: "The concurrent resolution under which the committee claims the right to act contains no direction on the subject, and, if the question were to be determined solely on the resolution itself, it would follow that the committee is without power to proceed. But . . . [in the act making appropriations for miscellaneous purposes, the 95th paragraph] reads as follows: 'There is hereby appropriated \$3,000 to pay expenses of com-

mittees, officers, clerks, stenographers, witnesses, and other necessary expenses incurred in an investigation for bribery, as recited in senate resolution, . . . or so much thereof as may be necessary."

Then, after reciting other provisions of the act, the supreme court continues: "This act was approved March 15th, and appears as chapter 11 of the Laws of 1897. The clause quoted lacks much of being clear or explicit, but it seems to contemplate a session of the committee after the 15th of May, rather than before, and evidences an intent on the part of the two houses that the committee should sit after final adjournment."

Thus it appears that the supreme court of Kansas upheld the right of the committee to proceed with the investigation after adjournment of the legislature, not on any authority contained in the concurrent resolution, but on the authority of an act in which the legislature manifested its intention to have the investigation continued after final adjournment of the legislature. In the instant case the legislature attempted to do by concurrent resolution that which they had no power to do, but which they did have the power to do by an act, as was done in *Re Davis*, supra.

II. Our conclusion on the first proposition makes it unnecessary for the decision to discuss the question as to whether the expenses incurred by the committees could be paid out of the contingent expenses of the legislature. But, on account of the importance of the question, we will consider this, as it affords an additional reason for affirming the decree of the chancery court. This question is likewise ruled by *Tipton v. Parker*, 71 Ark. 193, 196, 74 S. W. 298, where we said: "The expenses of this senate committee were not incident to any legislation originating in the senate, and could not properly be classed as contingent expenses of that body."

The same doctrine applies here to the expenses of these committees. They were not incident to any legislation originating in the general assembly of 1915, and could not be classed as contingent expenses of that body. When the legislature of 1915 adjourned *sine die*, there could be no future contingent expenses of that legislature, except those that were necessary to enroll and put in shape for publication the laws that had been already enacted. It would be a contradiction in terms to say that there could be contingent expenses of a legislature after that legislature had ceased to exist. The act making appropriations for contingent expenses of the legislature nowhere makes appropriation, as was said in *Re Davis*, supra, for the payment of ex-

penses of committees that had been continued for the purpose of making certain investigations. Article 5, § 29, of the Constitution provides: "No money shall be drawn from the treasury except in pursuance of specific appropriation made by law, the purpose of which shall be distinctly stated in the bill."

Even if the legislature, by concurrent resolution, could have continued its committees after final adjournment, it could not, by resolution under the above provision of the Constitution, appropriate the money necessary for the payment of the expenses of such committees out of the funds appropriated to pay the contingent expenses of the legislature. To do this would have required a bill making the specific appropriation. *May v. Rice*, 91 Ind. 546. See also *Reynolds v. Blue*, 47 Ala. 711.

It follows that the decree of the Pulaski Chancery Court is correct, and it is therefore affirmed.

Smith, J., concurs in the judgment.

Kirby, J., dissents.

MONTANA SUPREME COURT.

JOSEPH F. CONWAY, JR., by Guardian
ad Litem, Resp't.,
v.

MONIDAH TRUST et al., Appts.,

(47 Mont. 269, 132 Pac. 26.)

Pleading — complaint — negativing negligence — infant.

1. Alleging that a seven-year-old child ran into a shaft to his injury, without showing that he was at the time exercising ordinary care and circumspection, does not render demurrable a complaint seeking damages for the injury.

Note. — Private action for violation of statute not expressly conferring it.

I. Introduction, 501.

II. The rise of a cause of action out of the violation of a statute, 502.

III. Ground of action for injury due to violation of statute, 506.

IV. The purpose of the violated statute, 510.

V. Beneficiaries of violated statutes, 512.

VI. Causal relation to injuries of violations of statutes, 516.

VII. Contributing negligence of persons injured by violations of statutes, 520.

VIII. Assumption of risk in cases of violated statutes, 526.

Same — allegation of care — sufficiency.

2. Contributory negligence on the part of a seven-year-old infant who fell down an unguarded shaft to his injury is sufficiently negated by alleging his age, that he did not know of the shaft, and was engrossed in a childish pursuit in the dark, while using due care and prudence, and without contributory fault and carelessness on his part.

Negligence — unsafe property — injury to trespassing child.

3. Noncompliance with a statute imposing a penalty for failure to cover or fence a shaft renders the owner liable for injury to a child injured by falling down the shaft while playing on the property, although he was a trespasser in so doing.

Same — failure to protect shaft — “any such shaft.”

4. Liability is not confined to shafts sunk after the passage of a statute imposing a penalty upon everyone who sinks a shaft and fails to cover or fence it, by a provision that the owner of any property shall

be deemed to be within the provisions of the statute “if he permits any such shaft” to remain unprotected for more than ten days.

Evidence — of municipal boundary — sufficiency.

5. The location of the boundaries of a city at the time of an accident is not established by testimony that witness knew them at the time of the trial, receiving his information from an ordinance which did not, and could not, fix the boundaries without further proceedings.

(April 15, 1913.)

APPEAL by defendants from a judgment of the District Court for Silver Bow County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Reversed.

The facts are stated in the opinion.

IX. Actions against railroads for neglecting statutory duties.

- a. The duty to signal approach of trains to highway crossings, 533.
- b. Duties at crossings, 535.
- c. Duty of blocking frogs, switches, and crossings, 537.
- d. Duty to equip rolling stock with safety hand- and foot-holds, 537.
- e. Duties at stations, 538.
- f. Limitations on speed, 538.
- g. Headlights at night, 538.
- h. Duty to fence tracks, 539.
- i. Duty to build and maintain cattle guards, 539.
- j. Duty to construct culverts, 539.

X. Actions based on violation of statutes requiring spark arresters on engines, 539.

XI. Actions based on violation of statutes regulating use of motor vehicles, 540.

XII. Actions based on violation of navigation laws, 541.

XIII. Actions for violation of statutes relating to buildings.

- a. Neglect to guard elevators and their shafts, well-holes and other floor openings, 541.
- b. Duty to equip buildings with fire-escapes, 544.
- c. Duty to light halls and stairways, 545.

XIV. Actions for violation of factory acts, 547.

XV. Actions for violation of statutes prohibiting child labor, 554.

XVI. Actions for violation of statutes regulating mining, 557.

XVII. Actions for violation of statutes regulating sales of commodities inimical to public welfare, 560.

XVIII. Action for violating statute designed to promote safety of sea-bathers, 561.

XIX. Action for violating statute regulating the harvesting of ice, 561.

XX. Actions for violating penal statutes, 561.

XXI. Conclusion, 562.

I. Introduction.

This note is a continuation of the note to Wolf v. Smith, 9 L.R.A. (N.S.) 338. It therefore embraces only cases of the kind that were therein included, and is subject to the same limitations.

The primary note did not include cases of private actions for violations of municipal ordinances, which ordinarily, the power to ordain being granted, differ not in principle from statutes, because such cases had previously been presented in the note to Sluder v. St. Louis Transit Co. 5 L.R.A. (N.S.) 187, and they are not included in this supplement, chiefly for the same reason, and the desirability of treating them separately, when the occasion shall arise, in a supplement to that note. A slight justification for this course will be found upon referring to the case of Peterson v. Standard Oil Co. 55 Or. 511, 106 Pac. 337, Ann. Cas. 1912A, 625, in which the failure to perform a duty imposed by statute was held to be negligence *per se*, and actionable when an injury followed as the proximate result to a person within the protection of the statute, who was free from contributory fault. The court in deciding that case was “not prepared to say” and refused to “express an opinion” as to whether or not the violation of a municipal ordinance was more than evidence of negligence. Conceding, without deciding, that it had become the settled law of Oregon that it was nothing more in virtue of an earlier decision, the court could “see no ground

Mr. James E. Murray, for appellants: Plaintiff must show that defendants owed him a legal duty. It is not sufficient to show that the defendants owed a duty to the state or some third party, but the duty must be one which is owed directly to the party complaining.

Bishop, Non-Contract Law, § 446; Kinkead, Torts, § 6, pp. 9, 10; O'Leary v. Brooks Elevator Co. 7 N. D. 554, 41 L.R.A. 677, 75 N. W. 919, 4 Am. Neg. Rep. 451; Driscoll v. Clark, 32 Mont. 172, 80 Pac. 1, 373; Buckley v. Gray, 110 Cal. 339, 31 L.R.A. 862, 52 Am. St. Rep. 88, 42 Pac. 900; Beinhorn v. Griswold, 27 Mont. 79, 59 L.R.A. 771, 94 Am. St. Rep. 818, 69 Pac. 557; 1 Thomp. Neg. § 3; Bottum v. Hawks, 84 Vt. 370, 35 L.R.A.(N.S.) 440, 79 Atl.

858, Ann. Cas. 1913B, 1025, 3 N. C. C. A. 186.

An owner of land is not liable to a person going upon the land without invitation for his own convenience or pleasure, for damages due to the dangerous conditions of the premises.

Beinhorn v. Griswold, 27 Mont. 79, 59 L.R.A. 771, 94 Am. St. Rep. 818, 69 Pac. 557; Driscoll v. Clark, 32 Mont. 172, 80 Pac. 1, 373; 2 Elliott, Railroads, § 711, p. 23; 1 Thomp. Neg. §§ 12, 1196.

A statute enacted for the benefit of the public at large does not create a civil liability unless expressly provided in the statute itself.

Holverson v. St. Louis & Suburban R. Co. 157 Mo. 216, 50 L.R.A. 850, 57 S. W.

either in logic or morals for applying the same rule to a case involving the violation of a general statute of the state."

It may be interesting to note here, parenthetically, that afterwards the court held that there was no real ground for the alluded-to distinction, and that the violation of an authorized and legally ordained municipal ordinance, equally with that of a general statute, would constitute negligence *per se*. Morgan v. Bross, 64 Or. 63, 129 Pac. 118.

Since the publication of the primary note there have been published in this series several notes closely related to the subject in hand. In the order of their appearance, these notes were:

(1) The note to Lenahan v. Pittston Coal Min. Co. 12 L.R.A.(N.S.) 461, entitled, "may one employing child under statutory age rely on contributory negligence or assumption of risk to defeat liability for personal injury sustained by the latter?"

(2) The note to Barclay v. Puget Sound Lumber Co. 16 L.R.A.(N.S.) 140, on common practice as the measure of master's duty to guard machinery.

(3) The note to New York C. & H. R. Co. v. Price, 16 L.R.A.(N.S.) 1103, on the duty of railroad company to fence tracks against children.

(4) The note to Rich v. Asheville Electric Co. 30 L.R.A.(N.S.) 428, on liability of street railway company to employees for failure to perform statutory duty to provide vestibules on cars.

(5) The note to Menut v. Boston & M. R. Co. 30 L.R.A.(N.S.) 1196, on duty of railroad company to fence tracks against persons.

(6) The note to Walsh v. Schmidt, 34 L.R.A.(N.S.) 798, subdivision X, "Statutory Provisions," (l. c. 808) on the liability of landlord for injury to tenants from defects in premises.

(7) The note to Lindsay v. Cecchi, 35 L.R.A.(N.S.) 699, on operating without a license automobile on highway.

(8) The note to Lepard v. Michigan C. R. Co. 40 L.R.A.(N.S.) 1105, on the right of employee to rely on statute requiring L.R.A.1915E.

signal to be given by train approaching crossing.

(9) The notes to Atlantic Coast Line R. Co. v. Wier, 41 L.R.A.(N.S.) 307, and Conroy v. Mather, 52 L.R.A.(N.S.) 801, on operating without a license automobile on highway.

The reader is recommended to consult these notes in association with this one.

II. The rise of a cause of action out of the violation of a statute.

In the cases that have appeared since the publication of the primary note, as in those cited in it, the courts have reaffirmed and consistently adhered to the general principle that the violation of or neglect to obey a statute enacted for the benefit of others, when it is the proximate cause of an injury the statute was designed to prevent, to one within the protection of the statute who is free from contributory negligence himself, affords the injured person a right of action against the delinquent, notwithstanding the statute does not in express words give such a right of action.

Ala.—Southern R. Co. v. Williams, 143 Ala. 212, 38 So. 1013; Sloss-Sheffield Steel & I. Co. v. Sharpe, 161 Ala. 432, 50 So. 52; Billingsley v. Nashville, C. & St. L. R. Co. 177 Ala. 342, 58 So. 433.

Colo.—Richardson v. El Paso Consol. Gold Min. Co. 51 Colo. 440, 118 Pac. 982.

Del.—Shockley v. McCullough, 2 Boyce (Del.) 504, 82 Atl. 144.

Ga.—Southern R. Co. v. Combs, 124 Ga. 1004, 53 S. E. 508; Dozier v. Central of Georgia R. Co. 12 Ga. App. 753, 78 S. E. 469.

Ill.—Kellyville Coal Co. v. Strine, 217 Ill. 516, 75 N. E. 375; Joseph Taylor Coal Co. v. Dawes, 220 Ill. 145, 77 N. E. 131; Elgin, J. & E. R. Co. v. Hoadley, 220 Ill. 462, 77 N. E. 151; Athens Min. Co. v. Carnduff, 221 Ill. 354, 77 N. E. 571, 20 Am. Neg. Rep. 38; Henry v. Cleveland, C. C. & St. L. R. Co. 236 Ill. 219, 86 N. E. 231; Brunnworth v. Kerens-Donnewald Coal Co. 260 Ill. 202, 103 N. E. 178; Madison Coal Co. v. Hayes, 116 Ill. App. 94, affirmed in 215

770; *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L.R.A. 755, 56 Am. St. Rep. 543, 36 S. W. 659; *Riddick v. The Governor*, 1 Mo. 147; *Flanagan v. Sanders*, 138 Mich. 253, 101 N. W. 581; *Frontier Steam Laundry Co. v. Connolly*, 72 Neb. 767, 68 L.R.A. 425, 101 N. W. 995, 17 Am. Neg. Rep. 596; *Toomey v. Southern P. R. Co.* 86 Cal. 374, 10 L.R.A. 139, 24 Pac. 1074; *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502; *Zimmerman v. Baur*, 11 Ind. App. 607, 39 N. E. 301; *Nottage v. Sawmill Phoenix*, 133 Fed. 979; *Moore v. Gadsen*, 93 N. Y. 12; *Beehler v. Daniels*, 19 R. I. 49, 31 Atl. 582; *Osterholm v. Boston & M. Consol. Copper & S. Min. Co.* 40 Mont. 528, 107 Pac. 499.

It was incumbent on plaintiff to show

Ill. 625, 74 N. E. 755; *American Car & Foundry Co. v. Armentraut*, 116 Ill. App. 121, affirmed in 214 Ill. 509, 73 N. E. 766; *Jefferson Theatre Program Co. v. Crejczyk*, 125 Ill. App. 1; *Illinois Southern R. Co. v. Hayer*, 128 Ill. App. 315, affirmed in 225 Ill. 613, 80 N. E. 316; *Ingraham v. Harmon*, 133 Ill. App. 82, affirmed in 229 Ill. 168, 82 N. E. 256; *Maplewood Coal Co. v. Graham*, 134 Ill. App. 277; *Butters v. Chicago, B. & Q. R. Co.* 157 Ill. App. 369; *Cowen v. Story & C. Piano Co.* 170 Ill. App. 92.

Ind.—*Monteith v. Kokomo Wood Enameling Co.* 159 Ind. 149, 58 L.R.A. 944, 64 N. E. 610; *Davis v. Mercer Lumber Co.* 164 Ind. 414, 73 N. E. 899; *M. S. Huey Co. v. Johnston*, 164 Ind. 489, 73 N. E. 996; *Robertson v. Ford*, 164 Ind. 538, 74 N. E. 1; *Greenawaldt v. Lake Shore & M. S. R. Co.* — Ind. —, 73 N. E. 910; *Cleveland, C. C. & St. L. R. Co. v. Tauer*, 176 Ind. 621, 39 L.R.A. (N.S.) 20, 96 N. E. 758; *Tucker & D. Mfg. Co. v. Staley*, 40 Ind. App. 63, 80 N. E. 975; *United States Cement Co. v. Cooper*, — Ind. App. —, 82 N. E. 981; *Evansville Hoop & Stove Co. v. Bailey*, 43 Ind. App. 153, 84 N. E. 549; *Pittsburgh, C. C. & St. L. R. Co. v. Reed*, 44 Ind. App. 635, 88 N. E. 1080; *Indiana Union Traction Co. v. Myers*, 47 Ind. App. 646, 93 N. E. 888; *Toledo, St. L. & W. R. Co. v. Lander*, 48 Ind. App. 56, 95 N. E. 319; *Cole v. Searfoss*, 49 Ind. App. 334, 97 N. E. 345.

Iowa.—*Bromberg v. Evans Laundry Co.* 134 Iowa, 38, 111 N. W. 417, 13 Ann. Cas. 33.

Kan.—*Fowler Packing Co. v. Enzenperger*, 77 Kan. 406, 15 L.R.A. (N.S.) 784, 94 Pac. 995; *Kansas Buff Brick & Mfg. Co. v. Stark*, 77 Kan. 648, 95 Pac. 1047.

Ky.—*Cincinnati, N. O. & T. P. R. Co. v. Champ*, 31 Ky. L. Rep. 1054, 104 S. W. 988.

Mich.—*Sterling v. Union Carbide Co.* 142 Mich. 284, 105 N. W. 755; *Swick v. Aetna Portland Cement Co.* 147 Mich. 454, 111 N. W. 110; *Braasch v. Michigan Stove Co.* 147 Mich. 676, 111 N. W. 197; *Synaszewski v. Schmidt*, 153 Mich. 438, 116 N. W. 1107.

Minn.—*Rosse v. St. Paul & D. R. Co.* 68 L.R.A. 1915E.

some facts or circumstances to excuse his apparently heedless and reckless act in "running into the shaft."

Badovinac v. Northern P. R. Co. 39 Mont. 454, 104 Pac. 543; *Gates v. Northern P. R. Co.* 37 Mont. 103, 94 Pac. 751; *Montague v. Hanson*, 38 Mont. 376, 99 Pac. 1063; *Poor v. Madison River Power Co.* 38 Mont. 341, 99 Pac. 947; *Orient Ins. Co. v. Northern P. R. Co.* 31 Mont. 502, 78 Pac. 1036; *Anderson v. Bransford*, 39 Utah, 256, 116 Pac. 1023.

Section 8535 of the statute applies only to shafts that may be hereafter sunk, and not to mining claims that already contained shafts or drifts at the time of its passage.

State ex rel. Anaconda Copper Min. Co. v. District Ct. 26 Mont. 396, 68 Pac. 570,

Minn. 216, 37 L.R.A. 591, 64 Am. St. Rep. 472, 71 N. W. 20, 2 Am. Neg. Rep. 730; *Mattes v. Great Northern R. Co.* 95 Minn. 386, 104 N. W. 234; *Ellington v. Great Northern R. Co.* 98 Minn. 176, 104 N. W. 827; *Anderson v. Settergren*, 100 Minn. 296, 111 N. W. 279; *Fitzgerald v. International Flax Twine Co.* 104 Minn. 138, 116 N. W. 475; *Callopy v. Atwood*, 105 Minn. 80, 18 L.R.A. (N.S.) 593, 117 N. W. 238; *Schaar v. Conforth*, 128 Minn. 460, 151 N. W. 275.

Miss.—*Louisville & N. R. Co. v. Crominarity*, 86 Miss. 464, 38 So. 633; *Illinois C. R. Co. v. Watson*, — Miss. —, 39 So. 69; *Hopson v. Kansas City, M. & B. R. Co.* 87 Miss. 789, 40 So. 872; *Southern R. Co. v. Murray*, 91 Miss. 546, 44 So. 785.

Mo.—*Stafford v. Adams*, 113 Mo. App. 717, 88 S. W. 1130; *Mulderig v. St. Louis, K. C. & C. R. Co.* 116 Mo. App. 655; *Nairn v. National Biscuit Co.* 120 Mo. App. 144, 96 S. W. 679; *Morgan v. C. Hager & Sons Hinge Mfg. Co.* 120 Mo. App. 590, 97 S. W. 638; *Millsap v. Beggs*, 122 Mo. App. 1, 97 S. W. 956.

N. J.—*Dix v. Union Ice Co.* 76 N. J. L. 178, 68 Atl. 1101; *Pesin v. Jugovich*, 85 N. J. L. 256, 88 Atl. 1101, 5 N. C. C. A. 324.

N. Y.—*Racine v. Morris*, 201 N. Y. 240, 94 N. E. 864; *Rooney v. Brogan Constr. Co.* 107 App. Div. 258, 95 N. Y. Supp. 1; *Johnson v. Onondaga Paper Co.* 112 App. Div. 667, 98 N. Y. Supp. 602; *Kenyon v. W. P. Sanford Mfg. Co.* 119 App. Div. 570, 103 N. Y. Supp. 1053; *Schramme v. Lewinson*, 126 App. Div. 279, 110 N. Y. Supp. 599; *Di Santo v. Brooklyn Chair Co.* 140 App. Div. 119, 125 N. Y. Supp. 8, affirmed in 205 N. Y. 538, 98 N. E. 1101; *Schindler v. Welz & Zerweck*, 145 App. Div. 532, 130 N. Y. Supp. 344; *Bornstein v. Faden*, 149 App. Div. 37, 133 N. Y. Supp. 608, affirmed in 208 N. Y. 605, 102 N. E. 1099; *Phelps v. Kaufman*, 152 App. Div. 457, 137 N. Y. Supp. 345; *Regling v. Lehmaier*, 50 Misc. 331, 98 N. Y. Supp. 642; *Lichtman v. Rose*, 110 N. Y. Supp. 935.

N. C.—*Starnes v. Albion Mfg. Co.* 147 N. C. 556, 17 L.R.A. (N.S.) 602, 61 S. E. 525, 15 Ann. Cas. 470.

69 Pac. 103; *State v. Estep*, 66 Kan. 416, 71 Pac. 857; *Summerman v. Knowles*, 33 N. J. L. 202; *Garvin v. State*, 13 Lea, 172; *State v. Fisher*, 53 Or. 38, 98 Pac. 713; *Smith v. Minor*, 1 N. J. L. 16; *Walker v. Giddings*, 103 Mich. 344, 61 N. W. 512; *United States v. Taylor*, 1 Hughes, 514, Fed. Cas. No. 16,438; *Moore v. Wildey Casualty Co.* 176 Mass. 418, 57 N. E. 673; *Ogden v. Glidden*, 9 Wis. 46; *Philadelphia v. River Front R. Co.* 133 Pa. 134, 19 Atl. 356; *State v. Govan*, 48 Ark. 81, 2 S. W. 347; *Warner Elevator Mfg. Co. v. Houston*, — Tex. Civ. App. —, 28 S. W. 505; *Giles v. Giles*, 22 Minn. 348; *Levering v. Shockey*, 100 Ind. 558; *State ex rel. Genn v. Stein*, 13 Neb. 529, 14 N. W. 481; *Stilz v. Indianapolis*, 81 Ind. 582; *State v. Bradford*, 36

Ga. 422; *Bullard v. Smith*, 28 Mont. 387, 72 Pac. 761.

Plaintiff failed to establish the corporate limits of the city.

28 Cyc. 198-213; *Story v. Maclay*, 4 Mont. 467, 5 Pac. 326; *Howie v. California Brewery*, 35 Mont. 264, 88 Pac. 1007; *Hamilton v. Mondiah Trust*, 39 Mont. 269, 102 Pac. 335.

The mere fact that plaintiff was a minor was not sufficient to give rise to the presumption that he was incapable of exercising care and prudence to avoid injury.

Gates v. Northern P. R. Co. 37 Mont. 103, 94 Pac. 751; *Pekin v. McMahon*, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484; *Stanwood v. Clancey*,

Or.—*Peterson v. Standard Oil Co.* 55 Or. 511, 106 Pac. 337, Ann. Cas. 1912A, 625; *Goodwin v. Rowe*, 67 Or. 1, 135 Pac. 171.

Pa.—*Lenahan v. Pittston Coal Min. Co.* 218 Pa. 311, 12 L.R.A.(N.S.) 461, 120 Am. St. Rep. 885, 67 Atl. 642; *Stehle v. Jaeger Automatic Mach. Co.* 220 Pa. 617, 69 Atl. 1116, 14 Ann. Cas. 122; *Drake v. Fenton*, 237 Pa. 8, 85 Atl. 14, Ann. Cas. 1914B, 517.

S. C.—*Martin v. Southern R. Co.* 77 S. C. 370, 122 Am. St. Rep. 574, 58 S. E. 3; *Drennan v. Southern R. Co.* 91 S. C. 507, 75 S. E. 45; *Easterling v. Atlantic Coast Line R. Co.* 91 S. C. 546, 75 S. E. 133.

Tex.—*St. Louis Southwestern R. Co. v. Kilman*, 39 Tex. Civ. App. 107, 86 S. W. 1050; *Galveston, H. & S. A. R. Co. v. Vollrath*, 40 Tex. Civ. App. 46, 89 S. W. 279; *Houston & T. C. R. Co. v. Burnett*, 49 Tex. Civ. App. 244, 108 S. W. 404; *El Paso & S. W. R. Co. v. Murtle*, 49 Tex. Civ. App. 273, 108 S. W. 998; *Ft. Worth & D. C. R. Co. v. Suter*, 54 Tex. Civ. App. 238, 118 S. W. 215; *Stirling v. Bettis Mfg. Co.* — Tex. Civ. App. —, 159 S. W. 916.

Wash.—*Hoveland & Hall Bros. Marine R. & Shipbuilding Co.* 41 Wash. 164, 82 Pac. 1090; *Erickson v. E. J. McNeeley & Co.* 41 Wash. 509, 84 Pac. 3; *Rector v. Bryant Lumber & Shingle Mill Co.* 41 Wash. 556, 84 Pac. 7; *Vosberg v. Michigan Lumber Co.* 45 Wash. 670, 89 Pac. 168; *Campbell v. Wheelihan-Weidauer Co.* 45 Wash. 675, 89 Pac. 161; *Noren v. Larson Lumber Co.* 46 Wash. 241, 89 Pac. 563; *Boyle v. Anderson & M. Lumber Co.* 46 Wash. 431, 90 Pac. 433; *Adams v. Peterman Mfg. Co.* 47 Wash. 484, 92 Pac. 339; *Barclay v. Puget Sound Lumber Co.* 48 Wash. 241, 16 L.R.A.(N.S.) 140, 93 Pac. 430; *Mazetti v. Armour & Co.* 75 Wash. 622, 48 L.R.A.(N.S.) 213, 135 Pac. 633.

Wis.—*Van de Bogart v. Marinette & M. Paper Co.* 132 Wis. 367, 112 N. W. 443; *Kujawa v. Chicago, M. & St. P. R. Co.* 135 Wis. 562, 116 N. W. 249; *Pizzo v. Wiemann*, 149 Wis. 235, 38 L.R.A.(N.S.) 678, 134 N. W. 899, Ann. Cas. 1913C, 803, 3 N. C. C. A. 149; *Jorgenson v. Chicago & N. W. R. Co.* 153 Wis. 108, 140 N. W. 1088.

U. S.—*Michigan Headlining & Hoop Co. L.R.A.1915E.*

v. Wheeler, 72 C. C. A. 71, 141 Fed. 61; *The Anna M. Fahy*, 83 C. O. A. 48, 153 Fed. 806; *Cooper v. Baltimore & O. R. Co.* 18 L.R.A.(N.S.) 715, 86 C. C. A. 272, 159 Fed. 82, 14 Ann. Cas. 693.

Can.—*Grand Trunk R. Co. v. Hainer*, 36 Can. S. C. 180; *Wabash R. Co. v. Misener*, 38 Can. S. C. 94; *Grand Trunk R. Co. v. Griffith*, 45 Can. S. C. 380, Ann. Cas. 1912B, 711, 1 N. C. C. A. 503; *Moore v. J. D. Moore Co.* 4 Ont. L. Rep. 167; *Fowell v. Grafton*, 20 Ont. L. Rep. 639; *Scott v. Canadian P. R. Co.* 19 Manitoba L. Rep. 165; *Daye v. W. H. McNeill Co.* 6 Terr. L. Rep. 23.

The omission of a duty imposed by a statute, when it is the proximate cause of injuring one in the class designed to be served, creates a liability to the injured person, if he was free from contributory negligence. *Steiert v. Coulter*, 54 Ind. App. 643, 102 N. E. 113, 103 N. E. 117, 4 N. C. C. A. 561.

As a general rule, a civil action is then maintainable by such person against him who disobeyed the statute. *Synszewski v. Schmidt*, 153 Mich. 438, 116 N. W. 1107.

If injury and damages flow directly from the violation of a statutory duty, as a natural and probable result of such violation, without the injured one's contributing negligence, the wrongdoer incurs a liability. *Cleveland, C. C. & St. L. R. Co. v. Tauer*, 176 Ind. 621, 39 L.R.A.(N.S.) 20, 96 N. E. 758.

Any act in violation of law, from which ensues an injury, is a breach of duty, deemed by the courts negligence, and for it lies a civil action for damages. *American Car & Foundry Co. v. Armentraut*, 116 Ill. App. 121, affirmed in 214 Ill. 509, 73 N. E. 766.

The violation of a statute is an act of negligence subjecting the offender to an action for an injury which it has occasioned. *St. Louis Southwestern R. Co. v. Wilkes*, — Tex. Civ. App. —, 159 S. W. 126.

Every person who violates a statute is a wrongdoer, and negligent in the eyes of the law; and any innocent person who is injured by such violation, if the violation

106 Me. 72, 26 L.R.A.(N.S.) 1213, 75 Atl. 293; 29 Cyc. 539.

Messrs. Breen & Jones for respondent.

Sanner, J., delivered the opinion of the court:

So far as germane to the questions involved in this appeal, the substantial allegations of the complaint are: That the defendant, a corporation, is the owner of the Tzarena lode mining claim, situate partly within and partly without the corporate limits of the city of Butte; that on July 19, 1911, there was, and for more than a year prior thereto had been, a certain shaft, about 45 feet deep, on this property, which the defendant had negligently permitted to remain "open, exposed, and un-

protected, without a substantial cover, or any cover whatever, being placed over the same, or without a tight fence, or any fence whatever, being placed around the same;" that said shaft "was approximately 8 feet long and 4 feet wide from the bottom thereof to within about 5 feet of the natural surface of the ground adjacent thereto, at which point the sides of the said shaft spread outwardly until the same reached the natural surface, forming a saucer or bowl-like depression," and around the edges of this depression, and for some distance on all sides thereof, there were wild flowers blooming; that near the Tzarena lode there were also odd and curious formations of rock which, with the flowers, formed an attraction for children; "that on the said

is the proximate cause of the injury, may in a proper case recover damages from the violator. *Prest-O-Lite Co. v. Skeel*, — Ind. —, 106 N. E. 365.

The violation of a statute prescribing an absolute duty for the benefit of a class of persons, which results in an injury to a person in the class, is negligence *per se*, and authorizes a recovery without proof of other negligence. *Elk Cotton Mills v. Grant*, 140 Ga. 727, 48 L.R.A.(N.S.) 656, 79 S. E. 836.

In general a statute, whether penal or not in character, which requires or forbids something for the benefit or protection of a person or class of persons, entitles, if it is disobeyed, any beneficiary who may be injured in consequence, to an action against the delinquent. *Melville v. Butte-Balaklava Copper Co.* 47 Mont. 1, 130 Pac. 441.

It is said to be a well-settled doctrine that if one upon whom a statute has imposed a duty fails to discharge that duty, and his failure results in an injury, he is liable in damages, irrespective of all questions of care and prudence on his part. *Prest-O-Lite Co. v. Skeel*, *supra*.

The legislature by statute may create a duty unknown to the common law, and a failure to obey such statute will afford an injured person to whom the duty was owing a cause of action. *Racine v. Morris*, 201 N. Y. 240, 94 N. E. 864.

Although an act is made a duty only by force of a statute, yet a failure to perform that duty is evidence which will sustain an action at common law. *Shell v. Missouri P. R. Co.* 132 Mo. App. 528, 112 S. W. 39.

The supreme court of Missouri afterwards held it had no jurisdiction to review this case on appeal (*vide*, 202 Mo. 339, 100 S. W. 617).

Whosoever is under a duty, whether by statute or at common law, is, in either case, liable for neglecting that duty to the injury of another. The liability for an injury due to the neglect of a duty, whether imposed by a statute or the common law, grows out of and is created by the duty. L.R.A.1915E.

Poole v. American Linseed Co. 119 App. Div. 136, 103 N. Y. Supp. 1047.

When a duty is imposed by statute for the benefit of the public regarded as composed of individual persons, each person specially injured by a breach of the statutory duty is entitled to his action to recover his compensatory damages, and it is not essential that the right of action shall have been expressly conferred by the statute, but it follows from the creation of the duty and its breach directly resulting in the injury. The duty and the right are correlative. *Clements v. Potomac Electric Power Co.* 26 App. D. C. 482; *Capital Traction Co. v. Apple*, 34 App. D. C. 567; *Ewing v. Chase*, 37 App. D. C. 53.

Whenever a statute imposes a duty for the benefit of a class of persons, and that duty is neglected to the injury of a person in the class, a liability for the injury follows in a civil action grounded upon such neglect, although the statute has not, in express terms, given a cause of action, and has prescribed a public penalty of fine or imprisonment for its infraction. *Hagle v. Laplante*, 20 Ont. L. Rep. 339.

Upon the second appeal of the primary case, of *Wolf v. Smith*, 149 Ala. 457, 9 L.R.A.(N.S.) 338, 42 So. 824, the court, after quoting from its former opinion to the effect that the statute involved manifestly imposed the duty of keeping the articles and emollients mentioned for the benefit of persons employed by the owner or operator of a mine who might be injured while performing their duties as employees, and that, although no penalty was attached to a failure to comply with the requirements of the statute, still it was a general and well-established rule that the wrongdoer is liable in damages to a party injured by the violation of a statutory duty, added: We reaffirm the above, and further hold, in accordance with previous decisions of this court, that the duty being imposed by statute, proof of a failure to comply with its requirements is sufficient proof of negligence on the part of the person charged with such failure. 160 Ala. 644, 49 So. 395.

19th day of July, 1911, the plaintiff herein, a child of the age of seven years, who did not know of the existence of said shaft, at dusk of said day, was plucking wild flowers near the mouth of said shaft, and while so doing observed a cluster of wild flowers some distance from him, which he started on a run to obtain, and while so doing, and using due care and prudence, and without contributing fault and carelessness on his part, ran into the mouth of said shaft aforesaid, and was precipitated to the bottom thereof," sustaining the injuries for which recovery in this action is sought.

1. This complaint is attacked as insufficient because it alleges an affirmative act of the plaintiff, to wit, that he ran into the mouth of the shaft, as a proximate cause of

his injury, and does not contain sufficient allegations to negative contributory negligence. The general rule as settled in this state by the uniform course of decision is that where the complaint shows that a proximate cause of plaintiff's injury was the act of the plaintiff himself, it will be held insufficient unless it goes further and by appropriate allegations shows that the plaintiff was, at the time, exercising ordinary care and circumspection. *Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21, 4 Am. Neg. Cas. 820; *Nelson v. Helena*, 16 Mont. 21, 39 Pac. 905; *Hunter v. Montana C. R. Co.* 22 Mont. 534, 57 Pac. 140; *Cummings v. Helena & L. Smelting & Reduction Co.* 26 Mont. 434, 68 Pac. 852; *Ball v. Gussenhoven*, 29 Mont. 328, 74 Pac. 871; *Nord v. Boston &*

III. Ground of action for injury due to violation of statute.

In all cases where a private injury follows from the violation of a statute, the ground of the action which thereby accrues to the injured person is the negligence of the violator of the statute in failing to discharge a duty it imposed for the benefit of the injured one.

Whether a lack of ordinary care for the safety of another's person or property, which constitutes ordinary negligence, is measured by the standard recognized at common law, or by some other standard established by legislation, the failure to conform to the standard is negligent conduct, and, if an injury results, actionable negligence. *Sharkey v. Skilton*, 83 Conn. 503, 77 Atl. 950.

The breach of a legal duty, whether it was imposed by a statute enacted for the protection of others, or grew out of the common-law obligation to exercise ordinary care not to injure another, constitutes negligence, and renders the negligent one liable for a resulting injury. *Peterson v. Standard Oil Co.* 55 Or. 511, 106 Pac. 337, Ann. Cas. 1912A, 625.

The only distinction in cases of a breach of a legal duty which has resulted in an injury to another, where, upon one hand, the duty was imposed by a statute enacted for the benefit of others, or, upon the other, arose out of the common-law obligation to be ordinarily careful to avoid injuring others, is that in one case the violation of the statutory duty is itself proof of negligence, and in the other the negligence must be established on common-law principles by evidence. *Ibid.*

When the legislature enacts a statute forbidding a stated thing to be done, and making the doing of it a misdemeanor, a violation of such statute constitutes negligence *per se*. *Beaver v. Mason, E. & Co.* — Or —, 143 Pac. 1000.

Any act in violation of law is negligence *per se* in a common carrier. *Powers v. Norfolk Southern R. Co.* 166 N. C. 599, 82 S. E. 972, 6 N. C. C. A. 1032. L.R.A.1915E.

In general, if the undisputed testimony shows, or the jury can find upon conflicting testimony, that the plaintiff was free from contributory negligence, and was injured directly in consequence of the breach of the statutory duty, then negligence as a matter of law exists. *Clements v. Potomac Electric Power Co.* 26 App. D. C. 482.

The general rule that has been adopted in California is that the violation of any statutory duty prescribed for the benefit of private persons is *per se* sufficient to prove such a breach of duty as will sustain a private action for negligence by a person in the protected class, if the other elements of actionable negligence are present. *Cragg v. Los Angeles Trust Co.* 154 Cal. 663, 98 Pac. 1063, 16 Ann. Cas. 1061; *Fenn v. Clark*, 11 Cal. App. 79, 103 Pac. 944.

When a statute enacted for the protection of individuals has been violated to the direct injury of one of the persons for whose benefit it was made, the negligence of the violator is not debatable nor open to judicial inquiry. The violation of such a statute to the injury of one of its beneficiaries is *per se* negligence, that is, negligence is conclusively determined as a matter of law from the violation. *Schaar v. Comforth*, 128 Minn. 460, 151 N. W. 275.

Although in some jurisdictions it has been held that the violation of a statute is evidence, but not conclusive evidence, of negligence, in Delaware it is said to have been uniformly held that such a violation amounts to negligence as a matter of law, negligence *per se*, whether or not any positive or active negligence be proved. *Campbell v. Walker*, 2 Boyce (Del.) 41, 78 Atl. 601.

Whatever the law may be in other jurisdictions, said the court of civil appeals of Texas recently, it is settled in this state, by an unbroken line of decisions, that an act prohibited by positive law is negligence *per se*, where any person is injured as a proximate consequence of such act. *Stirling v. Bettis Mfg.-Co.* — Tex. Civ. App. —, 159 S. W. 915.

The decisions as to the legal effect of violating a statute were said by Anderson,

M. Consol. Copper & S. Min. Co. 30 Mont. 48, 75 Pac. 681; Birsch v. Citizens' Electric Co. 36 Mont. 574, 93 Pac. 940; Poor v. Madison River Power Co. 38 Mont. 361, 99 Pac. 947; Montague v. Hanson, 38 Mont. 376, 99 Pac. 1063; Badovinac v. Northern P. R. Co. 39 Mont. 454, 104 Pac. 543. Of course, this rule has reference only to acts of which negligence must be predicated in the absence of a countervailing explanation.

At what age a child becomes *sui juris*, so that negligence may be predicated of his acts, is a matter upon which authorities differ. By some it is held that a child of seven years of age is conclusively presumed incapable of contributory negligence. *Watson v. Southern R. Co.* 66 S. C. 47, 44 S. E. 375; *Taylor v. Delaware & H. Canal Co.*

113 Pa. 176, 57 Am. Rep. 446, 8 Atl. 43; *Chicago, St. L. & P. R. Co. v. Welsh*, 118 Ill. 572, 9 N. E. 197; *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 194, 58 Am. Rep. 387, 6 N. E. 310, 10 N. E. 70.

However that may be, the rule in this state is that contributory negligence is not to be inferred as a matter of law, even in the case of a much older child. *Mason v. Northern P. R. Co.* 45 Mont. 476, 124 Pac. 271. This being true, it follows that the rule invoked by appellant can have no application to the complaint at bar. But apart from this consideration, we think the averments of the age of the plaintiff; the fact that it was dusk; his ignorance of the existence of the shaft; the natural engrossment in his childish pursuit; and the gen-

J., in the course of the opinion of the court in *Watts v. Montgomery Traction Co.* 175 Ala. 102, 57 So. 471, to be not harmonious, some cases holding such violation not negligence *per se*, but competent evidence that may be a justification for a jury to find negligence as a fact, but that in Alabama it was settled and in accord with what is thought to be the weight of authority, that a violation of a statute is negligence *per se*, and that one proximately injured by such violation may recover for his injuries from the violator of the law.

Since the publication of the primary note on this subject, the number of cases has been greatly augmented in which the courts have declared unequivocally and positively that the failure to perform a duty imposed by statute is negligence *per se*, or, as some prefer to phrase it, negligence as a matter of law. *Kansas City, M. & B. R. Co. v. Flippo*, 138 Ala. 487, 35 So. 457; *Sloss-Sheffield Steel & I. Co. v. Sharpe*, 161 Ala. 432, 50 So. 52; *Weatherly v. Nashville, C. & St. L. R. Co.* 166 Ala. 575, 51 So. 959; *McElvane v. Central of Georgia R. Co.* 170 Ala. 525, 34 L.R.A.(N.S.) 715, 54 So. 489, 3 N. C. C. A. 340; *Richardson v. El Paso Consol. Gold Min. Co.* 51 Colo. 440, 118 Pac. 982; *Campbell v. Walker*, 2 Boyce (Del.) 41, 78 Atl. 601; *Lindsay v. Cecchi*, 3 Boyce (Del.) 133, 35 L.R.A.(N.S.) 699, 80 Atl. 523, 1 N. C. C. A. 88; *Shockley v. McCullough*, 2 Boyce (Del.) 504, 82 Atl. 144; *Elk Cotton Mills v. Grant*, 140 Ga. 727, 48 L.R.A.(N.S.) 656, 79 S. E. 836; *Kellyville Coal Co. v. Strine*, 217 Ill. 516, 75 N. E. 375; *Henrietta Coal Co. v. Martin*, 221 Ill. 460, 77 N. E. 902; *Brunnworth v. Kerens-Donnewald Coal Co.* 260 Ill. 202, 103 N. E. 178; *Jefferson Theatre Program Co. v. Crejczyk*, 125 Ill. App. 1; *Ingraham v. Harmon*, 133 Ill. App. 82, affirmed in 229 Ill. 168, 82 N. E. 256; *Latham v. Cleveland, C. C. & St. L. R. Co.* 179 Ill. App. 324; *Monteith v. Kokomo Wood Enameling Co.* 159 Ind. 149, 58 L.R.A. 944, 64 N. E. 610; *Davis v. Mercer Lumber Co.* 164 Ind. 414, 73 N. E. 899; *M. S. Huey Co. v. Johnston*, 164 Ind. 489, 73 N. E. 996; *Robertson v. Ford*, 164 Ind. 538, 74 N. E. 1; L.R.A.1915E.

Greenawaldt v. Lake Shore & M. S. R. Co. — Ind. —, 73 N. E. 910; *Cleveland, C. C. & St. L. R. Co. v. Tauer*, 176 Ind. 621, 39 L.R.A.(N.S.) 20, 96 N. E. 758; *Fox v. Barekman*, 178 Ind. 572, 99 N. E. 989; *Prest-O-Lite Co. v. Skeel*, — Ind. —, 106 N. E. 365; *Tucker & D. Mfg. Co. v. Staley*, 40 Ind. App. 63, 80 N. E. 975; *Evansville Hoop & Stove Co. v. Bailey*, 43 Ind. App. 153, 84 N. E. 549; *Pittsburgh, C. C. & St. L. R. Co. v. Reed*, 44 Ind. App. 635, 88 N. E. 1080; *United States Cement Co. v. Cooper*, — Ind. App. —, 82 N. E. 981; *Toledo, St. L. & W. R. Co. v. Lander*, 48 Ind. App. 56, 95 N. E. 319; *Chicago & E. I. R. Co. v. Coon*, 48 Ind. App. 675, 93 N. E. 561, 95 N. E. 596; *Cole v. Searfoss*, 49 Ind. App. 334, 97 N. E. 345; *Lake Shore & M. S. R. Co. v. Myers*, 52 Ind. App. 67, 98 N. E. 654, 100 N. E. 313; *Wabash R. Co. v. McNowen*, 53 Ind. App. 116, 99 N. E. 126, 100 N. E. 383; *Pittsburgh, C. C. & St. L. R. Co. v. Macy*, — Ind. App. —, 107 N. E. 486; *Illinois C. R. Co. v. Watson*, — Miss. —, 39 So. 69; *Brown v. Kansas City, C. & S. R. Co.* 166 Mo. App. 255, 148 S. W. 457; *Melville v. Butte-Balaklava Copper Co.* 47 Mont. 1, 130 Pac. 441; *Starnes v. Albion Mfg. Co.* 147 N. C. 556, 17 L.R.A.(N.S.) 602, 61 S. E. 525, 15 Ann. Cas. 470; *Peterson v. Standard Oil Co.* 55 Or. 511, 106 Pac. 337, Ann. Cas. 1912A, 625; *Morgan v. Bross*, 64 Or. 63, 129 Pac. 118; *Goodwin v. Rowe*, 67 Or. 1, 135 Pac. 171; *Dyson v. Southern R. Co.* 83 S. C. 354, 65 S. E. 344; *Lee v. Northwestern R. Co.* 84 S. C. 125, 65 S. E. 1031; *Clifford v. Southern R. Co.* 87 S. C. 324, 69 S. E. 513; *Drennan v. Southern R. Co.* 91 S. C. 507, 75 S. E. 45; *Easterling v. Atlantic Coast Line R. Co.* 91 S. C. 546, 75 S. E. 133; *Galveston, H. & S. A. R. Co. v. Vollrath*, 40 Tex. Civ. App. 46, 89 S. W. 279; *Johnson v. Texas & G. R. Co.* 45 Tex. Civ. App. 146, 100 S. W. 206; *El Paso & S. W. R. Co. v. Murtile*, 49 Tex. Civ. App. 273, 108 S. W. 998; *Ft. Worth & D. C. R. Co. v. Potteet*, 53 Tex. Civ. App. 44, 115 S. W. 883; *Ft. Worth & D. C. R. Co. v. Suter*, 54 Tex. Civ. App. 238, 118 S. W. 215; *Texas & P. R. Co. v. Hemphill*, — Tex. Civ. App. —, 125 S.

eral allegation that he was "using due care and prudence, and without contributing fault and carelessness on his part,"—are, as a matter of pleading, sufficient to negative contributory negligence and to avoid the rule. *Birsch v. Citizens' Electric Co.* 36 Mont. 574, 93 Pac. 940; *Poor v. Madison River Power Co.* 38 Mont. 361, 99 Pac. 947; *Evansville & T. H. R. Co. v. Crist*, 116 Ind. 446, 2 L.R.A. 450, 9 Am. St. Rep. 865, 19 N. E. 310; 1 *Thomp. Neg.* §§ 375, 377, 378.

2. Under the allegations of the complaint, the respondent was technically a mere trespasser upon the property of the appellant. *Egan v. Montana C. R. Co.* 24 Mont. 569, 63 Pac. 831; *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 1, 373. It is the undoubted rule at common law that the owner of real prop-

erty owes no duty to trespassers other than to refrain from intentional injury. Hence, no right of action would arise in the absence of statute, in favor of a trespasser who might suffer injury under the circumstances here pleaded (*Driscoll v. Clark*, supra); but every owner holds his property subject to reasonable control and regulation of the mode of keeping and use, as the legislature, under the police power vested in the state, may think necessary for the prevention of injury to the rights of others and the security of the public health and welfare. *Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450.

The question, then, is whether or not a trespasser upon private property may recover damages for injury suffered by him while so

W. 340; *Stirling v. Bettis Mfg. Co.* — Tex. Civ. App. —, 159 S. W. 915; *Rogers v. Rio Grande Western R. Co.* 32 Utah, 367, 125 Am. St. Rep. 876, 90 Pac. 1075; *Stokes v. Southern R. Co.* 104 Va. 817, 52 S. E. 855; *Erickson v. E. J. McNeeley & Co.* 41 Wash. 509, 84 Pac. 3; *Bowles v. Chesapeake & O. R. Co.* 61 W. Va. 272, 57 S. E. 131.

There have also been decided, since the primary note was written, many cases in which the courts have been content to pronounce the failure to perform a statutory duty simply negligence, without adding any qualifying words. *St. Louis, I. M. & S. R. Co. v. Tomlinson*, 78 Ark. 251, 94 S. W. 613; *Mammoth Vein Coal Co. v. Bubliss*, 83 Ark. 567, 104 S. W. 210; *Kansas City Southern R. Co. v. Drew*, 103 Ark. 374, 147 S. W. 50; *Eaton v. Southern P. Co.* 22 Cal. App. 461, 134 Pac. 801; *Sharkey v. Skilton*, 83 Conn. 503, 77 Atl. 950; *Cook v. Chicago, R. I. & P. R. Co.* 153 Ill. App. 596; *New York, C. & St. L. R. Co. v. Robbins*, 38 Ind. App. 172, 78 N. E. 804; *Pittsburgh, C. C. & St. L. R. Co. v. Terrell*, 177 Ind. 447, 42 L.R.A.(N.S.) 367, 95 N. E. 1109; *Bromberg v. Evans Laundry Co.* 134 Iowa, 38, 111 N. W. 417, 13 Ann. Cas. 33; *Sutton v. Des Moines Bakery Co.* 135 Iowa, 390, 112 N. W. 836; *Heise v. Chicago G. W. R. Co.* — Iowa, —, 114 N. W. 180; *Madison v. Olippinger*, 74 Kan. 700, 88 Pac. 260; *Fowler Packing Co. v. Enzenperger*, 77 Kan. 406, 15 L.R.A.(N.S.) 784, 94 Pac. 995; *Nashville, C. & St. L. R. Co. v. Higgins*, 29 Ky. L. Rep. 89, 92 S. W. 549; *Cincinnati, N. O. & T. P. R. Co. v. Champ*, 31 Ky. L. Rep. 1054, 104 S. W. 988; *Louisville & N. R. Co. v. Joshlin*, 33 Ky. L. Rep. 513, 110 S. W. 382; *Sterling v. Union Carbide Co.* 142 Mich. 284, 105 N. W. 755; *Swick v. Aetna Portland Cement Co.* 147 Mich. 454, 111 N. W. 110; *Anderson v. Settergren*, 100 Minn. 296, 111 N. W. 279; *Callopy v. Atwood*, 105 Minn. 80, 18 L.R.A.(N.S.) 593, 117 N. W. 238; *Louisville & N. R. Co. v. Crominarity*, 86 Miss. 464, 38 So. 633; *Stafford v. Adams*, 113 Mo. App. 717, 88 S. W. 1130; *Nairn v. National Biscuit Co.* 120 Mo. App. 144, 96 S. W. 679; *Mitchell v. St. Louis & S. F. R. Co.* 122 Mo. L.R.A.1915E.

App. 50, 97 S. W. 552; *Fagg v. Missouri & N. A. R. Co.* 185 Mo. App. 79, 170 S. W. 912; *Sprague v. Northern P. R. Co.* 40 Mont. 481, 107 Pac. 412; *Schramme v. Lewison*, 126 App. Div. 279, 110 N. Y. Supp. 599; *Faerber v. 969 Park Ave. Co.* 83 Misc. 645, 146 N. Y. Supp. 783; *Drake v. Fenton*, 237 Pa. 8, 85 Atl. 14, Ann. Cas. 1914B, 517; *Martin v. Southern R. Co.* 77 S. C. 370, 122 Am. St. Rep. 574, 58 S. E. 3; *Missouri, K. & T. R. Co. v. Malone*, — Tex. Civ. App. —, 110 S. W. 958; *St. Louis Southwestern R. Co. v. Wilkes*, — Tex. Civ. App. —, 159 S. W. 126; *Kujawa v. Chicago, M. & St. P. R. Co.* 135 Wis. 562, 116 N. W. 249; *The Anna M. Fahy*, 83 C. C. A. 48, 153 Fed. 866; *Chicago, M. & St. P. R. Co. v. Donaldson*, 85 C. C. A. 185, 157 Fed. 821; *Steel Car Forge Co. v. Chec*, 107 C. C. A. 192, 184 Fed. 868; *Fowell v. Grafton*, 20 Ont. L. Rep. 639; *Scott v. Canadian P. R. Co.* 19 Manitoba L. Rep. 165; *Pedlar v. Canadian Northern R. Co.* 20 Manitoba L. Rep. 265; *Daye v. W. H. McNeill Co.* 6 Terr. L. Rep. 23.

A considerable number of cases reported since the primary note was published speak of the neglect to obey a statutory duty as prima facie negligence. *Dozier v. Central of Georgia R. Co.* 12 Ga. App. 753, 78 S. E. 469; *H. Channon Co. v. Hahn*, 189 Ill. 28, 59 N. E. 522; *True & T. Co. v. Woda*, 201 Ill. 315, 66 N. E. 369; *United States Brewing Co. v. Stoltenberg*, 211 Ill. 531, 71 N. E. 1081, 17 Am. Neg. Rep. 193; *Grayhek v. Stern*, 154 Ill. App. 385; *Fowler Packing Co. v. Enzenperger*, 77 Kan. 406, 15 L.R.A.(N.S.) 784, 94 Pac. 995; *Kansas Buff Brick & Mfg. Co. v. Stark*, 77 Kan. 648, 95 Pac. 1047; *Southern R. Co. v. Murray*, 91 Miss. 546, 44 So. 785; *Stotler v. Chicago & A. R. Co.* 200 Mo. 107, 98 S. W. 509; *McNulty v. St. Louis & S. F. R. Co.* 203 Mo. 475, 101 S. W. 1082; *Morgan v. C. Hager & Sons Hinge Mfg. Co.* 120 Mo. App. 590, 97 S. W. 638; *Midgett v. St. Louis & S. F. R. Co.* 124 Mo. App. 540, 102 S. W. 56; *De Atley v. Northern P. R. Co.* 42 Mont. 224, 112 Pac. 76.

That cattle were killed at a railroad crossing is prima facie evidence, under the *Mis-*

trespassing, because of the property owner's failure to comply with § 8535, Revised Codes. This section is found in title 10 of part 1 of the Penal Code, under the heading: "Crimes Against the Public Health and Safety," and, so far as pertinent to this case, reads as follows: "Every person who sinks any shaft . . . or causes the same to be done, within the limits of any city or town or village in this state, or within 1 mile of the corporate limits of any city or town . . . and who shall fail to place a substantial cover over or tight fence around the same, is punishable by a fine not exceeding one thousand dollars (\$1,000). The owner of any property . . . shall be deemed to be within the provisions of this act if he permit any such shaft

. . . to remain open, exposed or unprotected upon his property . . . for a period of more than ten days. . . ." The contention is that this is a mere penal statute, providing its own express sanction, and, in the absence of appropriate language, gives rise to no civil responsibility whatever. In answer to this we remark that there is by this statute imposed a duty positive and absolute, where none existed before; and it is the well-settled rule that failure to observe such a duty is negligence *per se*. *Osterholm v. Boston & M. Consol. Copper & S. Min. Co.* 40 Mont. 508, 107 Pac. 499; *Neary v. Northern P. R. Co.* 41 Mont. 480, 110 Pac. 226; *Melville v. Butte Balaklava Copper Co.* 47 Mont. 1, 130 Pac. 441; note in 9 L.R.A.(N.S.) 339.

Mississippi statute (Code 1892, § 1808; Code 1906, § 1985), of want of care in the railroad company. *Southern R. Co. v. Murray*, 91 Miss. 546, 44 So. 785.

Additional cases, comparatively numerous, reported since the publication of the primary note, have held, as did many before, that the failure to discharge a duty imposed by statute affords evidence, more or less weighty according to the circumstances of the particular case, but never conclusive, upon which a finding of negligence may justifiably be based. *McKune v. Santa Clara Valley Mill & Lumber Co.* 110 Cal. 480, 42 Pac. 980; *Macon & B. R. Co. v. Parker*, 127 Ga. 471, 56 S. E. 616; *Moore v. Maine C. R. Co.* 106 Me. 297, 76 Atl. 871; *Jones v. Co-operative Asso.* 109 Me. 448, L.R.A.—, 84 Atl. 985; *Brunelle v. Lowell Electric Light Corp.* 188 Mass. 493, 74 N. E. 676; *Giacomo v. New York, N. H. & H. R. Co.* 196 Mass. 192, 81 N. E. 899; *Kelsall v. New York, N. H. & H. R. Co.* 196 Mass. 554, 82 N. E. 674; *Bourne v. Whitman*, 209 Mass. 155, 35 L.R.A.(N.S.) 701, 95 N. E. 404, 2 N. C. C. A. 318; *Corbs v. Michigan C. R. Co.* 144 Mich. 73, 107 N. W. 892; *Mattes v. Great Northern R. Co.* 95 Minn. 386, 104 N. W. 234, and on second appeal, 100 Minn. 34, 110 N. W. 98; *Ellington v. Great Northern R. Co.* 96 Minn. 176, 104 N. W. 827; *Kiernan v. Eidlitz*, 109 App. Div. 726, 96 N. Y. Supp. 387; *Regling v. Lehmaier*, 50 Misc. 331, 98 N. Y. Supp. 642; *Lichtman v. Rose*, 110 N. Y. Supp. 935; *Van de Bogart v. Marinette & M. Paper Co.* 132 Wis. 367, 112 N. W. 443; *Willette v. Rhinelander Paper Co.* 145 Wis. 537, 130 N. W. 853.

An illegal act in violation of law being proved negligence is presumed. *American Car & Foundry Co. v. Armentraut*, 116 Ill. App. 121, affirmed in 214 Ill. 509, 73 N. E. 766.

The omission to perform a duty imposed by statute may in some cases simply raise a presumption of negligence, which may be rebutted, or, in others, may, with other circumstances, authorize a jury to infer negligence. *Clements v. Potomac Electric Power Co.* 26 App. D. C. 482. L.R.A.1915E.

The violation of a statute by the defendant in a personal injury action, although not conclusive evidence of his negligence, is yet a fact to be considered by the jury in determining whether or not he was negligent. *Finnegan v. Winslow Skate Mfg. Co.* 189 Mass. 580, 76 N. E. 192, 19 Am. Neg. Rep. 279.

In an action for personal injuries, founded on a violation of a statute which does not in terms confer a right of action, and is silent concerning the effect of proof of its violation, such proof is evidence of negligence in the violator, but not conclusive evidence. It may be rebutted by proof tending to absolve the defendant. *Lee v. Sterling Silk Mfg. Co.* 115 App. Div. 589, 101 N. Y. Supp. 78. Upon a later appeal in this case (134 App. Div. 123, 118 N. Y. Supp. 852), the court adhered to its opinion.

In general, a violation of a duty imposed by statute is evidence of negligence justifying a jury in finding a verdict against the violator for damages, when an injury has occurred by such violation. *Shields v. Pugh*, 122 App. Div. 586, 107 N. Y. Supp. 604. This was reasserted on a second appeal in 127 App. Div. 941, 111 N. Y. Supp. 1144.

The failure of a railroad company to give the statutory crossing signals from a train nearing a highway is evidence of its negligence to be submitted to a jury in an action for running down one walking on the track near the crossing, at a point habitually used by pedestrians. *Powers v. Norfolk Southern R. Co.* 166 N. C. 599, 82 S. E. 972, 6 N. C. C. A. 1032.

The running of a railroad train at a higher speed across a highway than is allowed by statute is held in Maine to be simply evidence of negligence to go to the jury, rather than negligence *per se*. *Moore v. Maine C. R. Co.* 106 Me. 297, 76 Atl. 871.

In Massachusetts the rule appears to be the same as in Maine, that while the violation of law by a defendant is evidence of his negligence, it is not conclusive evidence, even when the illegal act contributed to the injury. *Brunelle v. Lowell Electric Light Corp.* 188 Mass. 493, 74 N. E. 676.

In the Melville Case, decided at the last term of this court, we said: "It is the general rule that, where a statute makes a requirement, or prohibits a thing, for the benefit of a person or class of persons, one injured by reason of a violation of it is entitled to maintain an action against him by whose disobedience he has suffered injury; and this is true whether the statute is penal in its character or not." To this declaration we still adhere as in accord with the express provisions of our Code. A failure to perform an act imposed by law as an absolute duty is an unlawful omission (Rev. Codes, § 5051); and any person suffering detriment by reason of it may recover damages (Rev. Codes, § 6040).

But it is urged that this principle cannot

apply in favor of one not within the purview of the statute by which the duty is imposed, and to this we assent; so that the remaining inquiry is: Does the duty imposed by § 8535 apply for the benefit of persons who may by chance be technical trespassers upon mining property? This question, both directly and in its analogies, has been before many courts with apparent diversity of result; but no real difficulty is encountered in extracting a consistent rule out of the apparent conflict of decision, when it is observed that the various statutes involved are interpreted according to substantially this classification: (a) Those imposing duties to or for the benefit of the municipality or to the public considered as an entity. From such statutes no private

The familiar expressions that the breach of a penal statute imposing certain stated duties upon some members of the community, and not expressly conferring a right of private action for its violation, is "negligence *per se*," or, "prima facie evidence of negligence," seemed to Garrison, J., of the New Jersey court of errors and appeals, when writing its opinion in a recent case, to postpone rather than to contribute to the elucidation of the subject, while the implication that proof of the breach of a public statute would support a private recovery was, in the esteem of that jurist, positively misleading. Evers v. Davis, 86 N. J. L. 196, 90 Atl. 677.

The cases holding the violation of a duty imposed by a mandatory statute to be only evidence of negligence, and not negligence *per se*, have been said not to meet the test of reason, and hence to be unsound. Elk Cotton Mills v. Grant, 140 Ga. 727, 48 L.R.A.(N.S.) 656, 79 S. E. 836.

To say that the neglect of a common-law or statutory duty, whereby an injury results to one to whom the duty is due, is some evidence of negligence upon which a liability may be based, is, according to the court in Poole v. American Linseed Co. 119 App. Div. 136, 103 N. Y. Supp. 1047, meaningless; it creates the liability. The liability grows out of the duty.

A theory respecting the function of a penal statute imposing some specific duty upon certain persons for the safety of other members of the community, when one of the latter has suffered an injury by the neglect of one of the former to perform his statutory duty, and has sued to obtain redress, has been expounded by the New Jersey court of errors and appeals in a recent case, substantially as follows: When the legislature by public statute has established a certain standard of conduct in order to prevent a danger it foresaw, it has in this regard forewarned the ordinary prudent man, and through him the defendant in a civil action, whose conduct must always coincide upon common-law principles. The danger therefore does not have to be proved by the plaintiff, since there is no longer room for

reasonable difference of opinion. The defendant through his common-law conscience is charged with knowledge of the danger, and acts or fails to act at his peril in case an injury ensues. Evers v. Davis, *supra*.

The language of some of the opinions which speak of the omission to perform a statutory duty as negligence, simply, without qualification, is often lacking in precision. Some of these cases may be said to go either too far or not far enough to be fully in accord with the current of authorities in their several jurisdictions. The other cases in their states characterize the failure to perform a statutory duty as, on the one hand, negligence *per se*, or as a matter of law, or, on the other, prima facie negligence, or evidence of negligence. To be quite sure of understanding what a court means by speaking of the failure to discharge a duty imposed by statute as negligence in general terms, one needs to know the rule in the jurisdiction deducible from the other decisions in point.

IV. The purpose of the violated statute.

To constitute actionable negligence in failing to perform a statutory duty, when an injury has followed, the injury must have been such a one as the statute purposed to prevent. This was the controlling principle in the decisions which immediately follow:

The neglect to obey the requirement of a statute expressly limited in application to coal mines and workmen in them gives no action to one employed and injured in the preliminary work of sinking the first shaft. Moore v. Dering Coal Co. 147 Ill. App. 95, affirmed in 242 Ill. 84, 89 N. E. 674.

The purpose of the Indiana statute (Acts 1891, p. 57, § 18, Burns's Anno. Stat. 1901, § 7478) requiring operators of coal mines to designate some one to open and close doors in the mines, being simply to keep the openings closed, as far as possible, to promote and not interfere with the circulation of air, and not to provide aid for drivers passing through the doorways, the violation of such statute affords no right of action to a driver of a car injured by

right of action arises. *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502; *Taylor v. Lake Shore & M. S. R. Co.* 45 Mich. 74, 40 Am. Rep. 457, 7 N. W. 728; *Frontier Steam Laundry Co. v. Connolly*, 72 Neb. 767, 68 L.R.A. 425, 101 N. W. 995, 17 Am. Neg. Rep. 596. (b) Those imposing duties to persons of a particular class. To have a right of action from such a statute one must clearly belong to the contemplated class. *Osterholm v. Boston & M. Consol. Copper & S. Min. Co.* 40 Mont. 508, 107 Pac. 499; *Toomey v. Southern P. R. Co.* 86 Cal. 374, 10 L.R.A. 139, 24 Pac. 1074; *Flanagan v. Sanders*, 138 Mich. 253, 101 N. W. 581. (c) Those imposing duties to the public, considered as a composite of individuals, in which case a right of action does arise

in one of the public when, and only when, he has sustained some special injury by reason of noncompliance. *Hayes v. Michigan C. R. Co.* 111 U. S. 239, 240, 28 L. ed. 414, 415, 4 Sup. Ct. Rep. 369; *Philadelphia, W. & B. R. Co. v. Stebbing*, 62 Md. 516, 517; *Sluder v. St. Louis Transit Co.* 189 Mo. 107, 5 L.R.A.(N.S.) 187, 88 S. W. 648; *Union P. R. Co. v. McDonald*, 152 U. S. 282, 38 L. ed. 443, 14 Sup. Ct. Rep. 619. It may be said, and perhaps correctly, that these are essentially restatements of the same thing, looked at from different angles (note in 9 L.R.A.(N.S.) 343); but that is unimportant. The important thing is that there are statutes such as we have mentioned under (c), and these statutes usually bear the aspect of police regula-

the lintel of a doorway too low to allow him to pass in safety while standing on the bumper and chain and endeavoring to keep the door open until clear, because the mine owner owed him no duty to obey the statute. *Indiana & C. Coal Co. v. Neal*, 166 Ind. 458, 77 N. E. 850, 9 Ann. Cas. 424.

The court so construed the statute because in it the reason for the requirement was given as "so that the driver or other person may not cause the doors to stand open," and that specification was to be presumed to state all the effects intended by the lawmaker.

The purpose of statutes which require railroad companies to ring bells and blow whistles as their trains approach highway crossings with intent to run over them is to give persons on the highway about to cross the railroad tracks warning that trains are coming, and their violation, therefore, affords travelers who need no warning because they plainly see a train coming no cause of action if they are injured by their own heedlessness. *Missouri P. R. Co. v. Trahern*, 77 Kan. 803, 91 Pac. 48; *Beagle v. Pere Marquette R. Co.* — Mich. —, 150 N. W. 345; *Hutchinson v. Missouri P. R. Co.* 195 Mo. 546, 93 S. W. 931; *Lee v. Northwestern R. Co.* 84 S. C. 125, 65 S. E. 1031; *Chesapeake & O. R. Co. v. Hall*, 109 Va. 296, 63 S. E. 1007; *Grand Trunk R. Co. v. Hainer*, 36 Can. S. O. 180.

Where the purpose of a statute requiring warning signals of the approach of a train to a public highway crossing is to conserve the safety of travelers on the highway, the railroad company owes no duty to people using a near-by private crossing to give the statutory signals from a train nearing the public crossing, and its failure to obey the statute is not negligence as to them. *Thacker v. Norfolk & W. R. Co.* 162 Ky. 337, 172 S. W. 658.

The purpose of a statute making it a misdemeanor to allow freight trains to stand longer than ten minutes across a street and block the roadway without an opening at least 30 feet wide, being to prevent obstructing travel, its violation, L.R.A.1915E.

when travel on the street is not thereby impeded, cannot be deemed negligence as respects a traveler injured by another train on a parallel track of which his view was cut off by the standing cars. *Denton v. Missouri, K. & T. R. Co.* 90 Kan. 51, 47 L.R.A.(N.S.) 820, 133 Pac. 558, Ann. Cas. 1915B, 639.

When the purpose of statutes which require railroads to build and maintain fences along their rights of way is to prevent live stock from getting on the tracks, they do not afford protection to persons. *Bischof v. Illinois Southern R. Co.* 232 Ill. 446, 83 N. E. 948, 13 Ann. Cas. 185; *Wabash R. Co. v. Gaull*, 116 Ill. App. 443; *Baltimore & O. S. W. R. Co. v. Bradford*, 20 Ind. App. 348, 67 Am. St. Rep. 252, 49 N. E. 388; *Menut v. Boston & M. R. Co.* 207 Mass. 12, 30 L.R.A.(N.S.) 1196, 92 N. E. 1032, 20 Ann. Cas. 1213; *Nixon v. Montana, W. & S. R. Co.* 50 Mont. 95, 145 Pac. 8; *New York C. & H. R. R. Co. v. Price*, 16 L.R.A.(N.S.) 1103, 86 C. C. A. 502, 159 Fed. 330.

If, however, such a statute was intended to prevent injuries to human beings, as well as to animals, it will afford protection to persons. *Roscoe v. St. Paul & D. R. Co.* 68 Minn. 216, 37 L.R.A. 591, 64 Am. St. Rep. 472, 71 N. W. 20, 2 Am. Neg. Rep. 730; *Mattes v. Great Northern R. Co.* 95 Minn. 386, 104 N. W. 234; *Ellington v. Great Northern R. Co.* 96 Minn. 176, 104 N. W. 827; *Tabb v. Grand Trunk R. Co.* 8 Ont. L. Rep. 203.

As respects a person injured by a hot cinder from a locomotive, blown into his eye, it is not negligence in a railroad company to have failed in its duty, under the Kentucky Statute of 1903 (§ 782), to equip locomotive smokestacks with spark arresters, since that statute was intended to prevent fire losses to property. *Cincinnati, N. O. & T. P. R. Co. v. Baxter*, 33 Ky. L. Rep. 305, 18 L.R.A.(N.S.) 241, 110 S. W. 246.

A statute of North Carolina (Rev. Stat. §§ 2615-3800) which requires vestibule fronts on passenger cars of street railways at certain seasons of the year was held, by a divided court, not to have been enacted

tions for the protection of the public relative to matters with which the public contact is commonly through individuals, and as to which the individuals are entitled to assume that the law has been observed. *South & North Ala. R. Co. v. Donovan*, 84 Ala. 141, 4 So. 142; *Jackson v. Kansas City, Ft. S. & M. R. Co.* 157 Mo. 621, 80 Am. St. Rep. 650, 58 S. W. 32.

In a case relied on by the appellants (*Frontier Steam Laundry Co. v. Connolly*, 72 Neb. 767, 68 L.R.A. 425, 101 N. W. 995, 17 Am. Neg. Rep. 596) the existence and meaning of such statutes is clearly recognized, as follows: "Wherever a statute or ordinance creates a duty or obligation, though it does not in express terms give a remedy, the remedy which is properly ap-

plicable to that obligation follows as an incident; but whether a liability arising from the breach of a duty prescribed by a statute or ordinance accrues for the benefit of an individual specially injured thereby, or whether such liability is exclusively of a public character, must depend upon the nature of the duty enjoined, and the benefits to be derived from its performance." The duty enjoined by § 8535 is such that non-compliance affects the public commonly through the person or property of the individual. The benefits to be derived from its performance inure to the public through the added safety assured to individual person and property, and can affect the public in no other way. That the failure to observe the requirements of such a statute

to prevent an accident to a conductor on an open car, whereby he was dislodged from the running board along the outside while collecting fares. *Rich v. Asheville Electric Co.* 152 N. C. 689, 30 L.R.A.(N.S.) 428, 68 S. E. 232.

The Missouri statute (Rev. Stat. 1899, chap. 91, art. 17, § 6435) requiring openings of all hatchways, elevators, and well holes upon all floors of every manufacturing, mechanical, mercantile, and public building to be protected by trap-doors, self-closing hatches, safety catches, or strong guard rails a yard high, which shall be kept closed save when in actual use, was not framed of purpose to protect a person employed to run an elevator, while actually operating it. *Latapie-Vignaux v. Askew Saddlery Co.* 193 Mo. 1, 91 S. W. 496.

A statute requiring those who cut ice on lakes and streams to set up about the openings they make danger signals and slight barriers of stretched ropes, chains, or laid rails a yard above the surface, insufficient to turn live stock, and easily broken, was never designed to change the law of negligence in such wise as to impose a liability when cattle wander unattended on the ice, and drown by falling into the openings. *Richards v. Waltz*, 153 Mich. 416, 117 N. W. 193.

V. Beneficiaries of violated statutes.

When the purpose of a statute is to protect individuals, he who violates it incurs a liability for injuries directly resulting from the violation to one for whose protection the statute was enacted. *Schaar v. Conforth*, 128 Minn. 460, 151 N. W. 275.

While the courts may and frequently do differ upon the question whether or not an injured individual was one of the persons designed to be benefited by a statute imposing stated duties,—that is, whether one complaining of the violation of a statute to his injury was within its protection,—they all agree that the failure to perform a statutory duty affords a right of action only to those to whom the duty was owed,—only to such as were intended to be served L.R.A.1915E.

by the statute. It is not enough for one who has suffered an injury to show that he sustained it because another failed to obey a statute and perform a duty which the statute imposed, and that if the statute had been obeyed and the duty had been performed, the injury probably, or even certainly, would not have happened, but he must go further, and show that the statute was enacted for his protection. *Louisville & N. R. Co. v. Holland*, 164 Ala. 73, 137 Am. St. Rep. 25, 51 So. 365; *Lacy-Buek Iron Co. v. Holmes*, 164 Ala. 96, 51 So. 236; *Southern R. Co. v. Cooper*, 173 Ala. 505, 55 So. 211; *Southern R. Co. v. Flynt*, 2 Ga. App. 162, 58 S. E. 374; *Georgia R. & Bkg. Co. v. Williams*, 3 Ga. App. 272, 59 S. E. 846; *Harden v. Georgia R. Co.* 3 Ga. App. 344, 59 S. E. 1122; *Southern R. Co. v. Wiley*, 9 Ga. App. 249, 71 S. E. 11; *Thompson v. Cleveland, C. C. & St. L. R. Co.* 226 Ill. 542, 9 L.R.A.(N.S.) 672, 80 N. E. 1054; *Bischof v. Illinois Southern R. Co.* 232 Ill. 446, 83 N. E. 948, 13 Ann. Cas. 185; *Wabash R. Co. v. Gaull*, 116 Ill. App. 443; *Janowicz v. Pittsburgh, H. W. & C. R. Co.* 124 Ill. App. 149; *Southern Coal & Min. Co. v. Hopp*, 133 Ill. App. 239; *Moore v. Dering Coal Co.* 147 Ill. App. 95, affirmed in 242 Ill. 84, 89 N. E. 674; *Indiana & C. Coal Co. v. Neal*, 166 Ind. 458, 77 N. E. 850, 9 Ann. Cas. 424; *Gibson v. Kansas City Packing Box Co.* 85 Kan. 346, 116 Pac. 502, Ann. Cas. 1912D, 1103; *Denton v. Missouri, K. & T. R. Co.* 90 Kan. 51, 47 L.R.A.(N.S.) 820, 133 Pac. 558, Ann. Cas. 1915B, 639; *Chesapeake & O. R. Co. v. Nipp*, 125 Ky. 49, 100 S. W. 246; *Cincinnati, N. O. & T. P. R. Co. v. Baxter*, 33 Ky. L. Rep. 305, 18 L.R.A.(N.S.) 241, 110 S. W. 248; *Menut v. Boston & M. R. Co.* 207 Mass. 12, 30 L.R.A.(N.S.) 1196, 92 N. E. 1032, 20 Ann. Cas. 1213; *Richards v. Waltz*, 153 Mich. 416, 117 N. W. 193; *Lepard v. Michigan C. R. Co.* 166 Mich. 373, 40 L.R.A.(N.S.) 1105, 130 N. W. 668; *Mellish v. Pere Marquette R. Co.* 167 Mich. 86, 132 N. W. 513; *Schutt v. Adair*, 99 Minn. 7, 108 N. W. 811, 20 Am. Neg. Rep. 598; *Anderson v. Settergren*, 100 Minn. 296, 111 N. W. 279; *Everett v. Great Northern R. Co.*

will, if the proximate cause of injury, support an action even by a trespasser, is sustained by an abundance of authority. *Richardson v. El Paso Consol. Gold Min. Co.* 51 Colo. 440, 118 Pac. 982; *Erb v. Morasch*, 8 Kan. App. 61, 54 Pac. 323; *Alabama & V. R. Co. v. Carter*, 77 Miss. 511, 27 So. 993; *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb. 90, 56 N. W. 796, 57 N. W. 522; *Keyser v. Chicago & G. T. R. Co.* 66 Mich. 390, 33 N. W. 867; *Meeks v. Southern P. R. Co.* 56 Cal. 513, 38 Am. Rep. 67; *South & North Ala. R. Co. v. Donovan*; *Hayes v. Michigan C. R. Co.*; *Jackson v. Kansas City, Ft. S. & M. R. Co.*—*supra*.

In further elucidation of our views of this phase of the present case we quote the language of the supreme court of Colorado

100 Minn. 309, 9 L.R.A.(N.S.) 703, 111 N. W. 281, 10 Ann. Cas. 294; *Welker v. Anheuser-Busch Brewing Asso.* 103 Minn. 189, 114 N. W. 745; *Latapie-Vignaux v. Askew Saddlery Co.* 193 Mo. 1, 91 S. W. 496; *Hutchinson v. Missouri P. R. Co.* 195 Mo. 546, 93 S. W. 931; *Glaser v. Rothschild*, 221 Mo. 180, 22 L.R.A.(N.S.) 1045, 120 S. W. 1, 17 Ann. Cas. 576; *Nixon v. Montana, W. & S. R. Co.* 50 Mont. 95, 145 Pac. 8; *Racine v. Morris*, 201 N. Y. 240, 94 N. E. 864; *Paltey v. Egan*, 122 App. Div. 512, 107 N. Y. Supp. 444; *Stirling v. Bettis Mfg. Co.*—Tex. Civ. App.—, 159 S. W. 915.

The failure to obey a statute requiring warning signals from railroad trains approaching crossings does not afford a right of action to persons injured on railroad tracks elsewhere than at the crossings, and is not, as to them, negligence *per se*. *Southern R. Co. v. Flynt*, 2 Ga. App. 162, 58 S. E. 374; *Harden v. Georgia R. Co.* 3 Ga. App. 344, 59 S. E. 1122; *Southern R. Co. v. Wiley*, 9 Ga. App. 249, 71 S. E. 11. See also note to *Hutto v. Southern R. Co.* post, —.

But a statute which simply requires railroad trains to signal by bell and whistle their approaches to a railroad crossing does not ordinarily limit the liability of a railroad company failing to give the statutory signals to injuries caused by actual collisions on the crossings. *Spears v. Atlantic Coast Line R. Co.* 92 S. C. 297, 75 S. E. 498.

The mere fact that a railroad company did not give the statutory warning signals by bell and whistle as a train approached a crossing will not enable a trespasser on the right of way to maintain an action for injuries not wantonly or wilfully inflicted. *Janowicz v. Pittsburgh, Ft. W. & C. R. Co.* 124 Ill. App. 149; *Chesapeake & O. R. Co. v. Nipp*, 125 Ky. 49, 100 S. W. 246.

A child playing in a lot beside a railroad right of way, and injured by a passing freight train while pursuing a plaything that had rolled upon the track, is not within the protection and benefit of the Massachusetts statute (Rev. Laws, chap. 111, § 120) requiring railroads to erect and maintain

from the *Richardson Case*, *supra*: "An open, unprotected shaft is a menace to life and limb. In the nighttime or in a storm persons may fall into it, or children may thoughtlessly approach too near the edge and be precipitated to the bottom. Reasonable provisions requiring an abandoned shaft to be so protected as to prevent such casualties come clearly within the police powers of the commonwealth. . . . It is contended that plaintiffs, as well as the deceased, were mere licensees, which did not entitle either of them to the use of the dump in the immediate vicinity of the shaft, which was about 110 feet from the house; that deceased was therefore a trespasser when upon the dump and at the shaft, or, if the license extended to the immediate

suitable fences on both sides of their tracks, and therefore the violation of such statute does not render the railroad liable for the injury. *New York C. & H. R. R. Co. v. Price*, 16 L.R.A.(N.S.) 1103, 86 C. C. A. 502, 159 Fed. 330.

In Montana, also, children are not within the purpose and protection of the statute of that state requiring fences along railroad tracks, and therefore a railroad company which has neglected to obey the statute does not thereby become liable for injuring or slaying a child upon its track who probably would have been prevented from running into danger had the statutory fences been erected and kept up. *Nixon v. Montana, W. & S. R. Co.* 50 Mont. 95, 145 Pac. 8.

Although the duty of a railroad company under the Illinois statute (*Hurd's Rev. Stat. chap. 114, § 62*), which requires it to erect and maintain along both sides of its tracks fences suitable and sufficient to prevent cattle, horses, hogs, sheep, and other live stock from getting on the tracks, is an absolute one, which, disobeyed, will render the company liable for an injury resulting to anyone within the class the law intended to protect, a child of tender years who strayed from the highway skirting an unfenced railroad, at a point not a crossing, and was injured by a passing train, is not within the protected class, and therefore cannot recover for the injury. *Bischof v. Illinois Southern R. Co.* 232 Ill. 446, 83 N. E. 948, 13 Ann. Cas. 185.

A like decision has been rendered in respect of a similar statute of Indiana. *Baltimore & O. S. W. R. Co. v. Bradford*, 20 Ind. App. 348, 67 Am. St. Rep. 252, 49 N. E. 388.

An injury to a fifteen-year-old boy through thrusting his hand too far into the hopper of a meat grinder he was operating as he stood alongside a table to which the machine was permanently attached, and fed to it the meat to be ground, does not fall within the terms of the Missouri Statute (Rev. Stat. 1909, § 6434), which provides that no minor or woman shall be required to clean any part of the mill, gear-

vicinity of the shaft, . . . the defendant violated none of its obligations growing out of the relationship of owner to licensee or trespasser. The proposition is wholly inapplicable. Plaintiffs' action is not based upon the ground of a failure on the part of defendant to fulfil any obligation which it owed them or the deceased because they occupied a house on the Australia claim, but upon the failure of the defendant to comply with a statutory requirement, the purpose of which was to protect the public from injury, which neglect, they claim, caused the death of their son. . . . To prevent injury to the public, including children, the general assembly has required abandoned shafts to be covered. This, as we have said, is a valid police regulation,

ing, nor machinery while it is in motion, in any factory, nor to work between the fixed or traversing parts of any machine. *Stegmann v. Gerber*, 146 Mo. App. 104, 123 S. W. 1041.

A person employed to run an elevator is not, while actually engaged in operating it, within the protection of the Missouri Statute (Rev. Stat. 1899, chap. 91, art. 17, § 6435), which requires all hatchways, elevators, and well-holes on all floors of every manufacturing, mechanical, mercantile, and public building to be protected by trap-doors, self-closing safety hatches, safety catches, or strong guard rails a yard high, which shall be kept closed save when in actual use. *Latapie-Vignaux v. Askew Sadlerly Co.* 193 Mo. 1, 91 S. W. 496.

In *Pittsburgh, C. C. & St. L. R. Co. v. Schepman*, 171 Ind. 71, 84 N. E. 988, the purpose of a statute forbidding railroad passenger trains to be made up by putting in the rear of a passenger coach a baggage, freight, merchandise, or lumber car, was conceded to be, chiefly, to diminish danger to passengers in cases of derailment or collision, by the piling up of heavily laden cars from the rear. In that case, however, a passenger in attempting to pass from a day coach to a combination baggage and smoking car in the rear was thrown by the lurching of the train from an open unvestibuled platform, and the court professed itself unable to perceive how the case would have been different had the rear coach been an ordinary passenger, instead of a combination car, even assuming the combination car to be classifiable as a baggage car within the meaning of the statute.

The Massachusetts statute requiring fences along the rights of way of railroads is held not to have been intended for the benefit of adult human beings who may wilfully or inadvertently get upon railroad tracks and suffer injury. *Menut v. Boston & M. R. Co.* 207 Mass. 12, 30 L.R.A. (N.S.) 1196, 92 N. E. 1032, 20 Ann. Cas. 1213.

But children, as well as animals, are held to be within the protection of the similar Minnesota Statute (Gen. Stat. 1894, § 2692). *Rosse v. St. Paul & D. R. Co.* 68 L.R.A. 1915E.

and the failure of the defendant to perform the duty imposed by statute renders it liable in this case if the death of the boy, in a substantial sense, was caused by its failure to comply with the statute."

3. It is contended by appellants that this case is not within the provisions of § 8535 of the Penal Code, because it was not shown that the Monidah Trust sank the shaft. The answer is found in the second portion of the section, *viz.*: "The owner . . . shall be deemed to be within the provisions of this act if he permit any such shaft . . . to remain open, exposed or unprotected upon his property . . . for a period of more than ten days." But it is urged that the words "any such shaft" restrict the application of the act to shafts

Minn. 216, 37 L.R.A. 591, 64 Am. St. Rep. 472, 71 N. W. 20, 2 Am. Neg. Rep. 730; *Mattes v. Great Northern R. Co.* 95 Minn. 386, 104 N. W. 234; on second appeal, 100 Minn. 34, 110 N. W. 98; *Ellington v. Great Northern R. Co.* 96 Minn. 176, 104 N. W. 827.

A child of nine years of age is within the protection of a statute requiring railway companies to fence their tracks in cities, so as to entail a liability for its death through the neglect of a railroad company to fence an opening to its tracks at a place commonly used as a by-way. *Tabb v. Grand Trunk R. Co.* 8 Ont. L. Rep. 203.

A statute requiring railroad companies to fence their rights of way against incursions of live stock has no application to travelers along adjacent highways, and therefore a failure to comply with it affords no right of action to one driving along a highway beside a railroad track, injured by his horses taking fright and plunging over an embankment built on the right of way along a ravine. *Wabash R. Co. v. Gaull*, 116 Ill. App. 443.

Notwithstanding a railroad company disobeyed a statute requiring the construction of cattle guards at highway crossings to prevent live stock from straying on its right of way, and in consequence of such violation some calves driven by their owner along the highway escaped and wandered a few yards along the track, pursued by their custodian in order to turn them back, and, notwithstanding also the railroad company at that juncture violated another statute by failing to give warning by bell and whistle of the approach to the crossing of a speeding train, and there followed a collision with one of the calves, and a consequent hurling of the stricken animal against its owner in such wise as to inflict an injury upon him necessitating the amputation of his leg, the railroad company was held, in *Thompson v. Cleveland, C. C. & St. L. R. Co.* 226 Ill. 542, 9 L.R.A. (N.S.) 672, 80 N. E. 1054, to be not liable for the man's injuries. The court excused it upon the ground that the violation of the cattle-guard statute was not the proximate

sunk after its passage. We cannot assent to this. As stated above, the section is a police regulation, and its plain meaning is that no person shall be allowed to have an unprotected shaft, either inside a city, town, or village, or outside of, and within a mile of, the corporate limits of a city or town, and this without regard to when or by whom it may have been sunk. Those who, when the section was enacted, found themselves in possession of unprotected shafts so situated, were given ten days' time to cover or inclose them; those who since the section was enacted, as the result of city or town extension, find themselves similarly possessed, are given a like time for the same purpose. The phrase "any such shaft" is descriptive of the nature and kind of shaft

(State v. Gemmell, 45 Mont. 210, 122 Pac. 268), and means an unprotected shaft that is situated as mentioned in the first part of the section. No other construction is possible in view of the history of the statute and its obvious purpose (Richardson v. El Paso Consol. Gold Min. Co. supra).

4. An issue was made in the pleadings as to whether the shaft in question was, at the time of the accident, within a mile of the corporate limits of Butte. One of the grounds of appellants' motion for nonsuit was as follows: "Sixth. For the reason that the plaintiff has wholly failed to show that the defendants' mining claim, the Tzar-ena mining claim, or the shaft thereon rather, was within . . . a mile of the corporate limits of the city of Butte, and

cause of the injury to the man, and that the signal statute only protected travelers on the highway crossing, or passengers, and the company owed no duty under it to one on its right of way as a mere licensee.

There is a difference of opinion among the courts in different jurisdictions as to whether or not the servants of railroad companies are beneficiaries of statutes imposing upon their masters duties for the safety of the public.

It is held in Alabama, for instance, that the statutes conserving public safety at specified places along a railway line do not include the servants of the railroad company. *Southern R. Co. v. Cooper*, 173 Ala. 505, 55 So. 211.

The statutes of that state, which require railroad companies to keep a lookout on trains moving through cities, to ring a bell or blow a whistle on leaving stations and stopping places, and otherwise regulate the operation of trains through populous districts, are intended to protect and conserve the safety of the public lawfully on the right of way, and not for the benefit of the railroad's own servants. *Louisville & N. R. Co. v. Holland*, 164 Ala. 73, 137 Am. St. Rep. 25, 51 So. 365; *Lacy-Buck Iron Co. v. Holmes*, 164 Ala. 96, 51 So. 236.

The United States circuit court of appeals for the sixth circuit has held that the servants of a railroad company who were at work on its tracks at and near a highway grade crossing were not in the class of persons for whose benefit and protection the Ohio state statute which requires railroad trains approaching such crossings to give warning signals by bell and whistle was enacted, and hence that the neglect of a railroad company to obey that statute afforded its injured servant no right of action. *Norfolk & W. R. Co. v. Gesswine*, 75 C. C. A. 214, 144 Fed. 56.

The Texas courts entertain a contrary opinion. The statute of that state which requires warning signals by bell and whistle as railroad trains draw near highway crossings is held to be as well for the benefit of servants of the railroads who may be lawfully on the tracks at and near crossings

in the discharge of their duties, as it is for other persons crossing or about to cross the railroad tracks on the highways. *Houston & T. C. R. Co. v. Burnett*, 49 Tex. Civ. App. 244, 108 S. W. 404.

The servants of a railroad company are within the class protected by the Ohio Statute (Act April 25, 1898, Rev. Stat. 1906, § 3365-18; 93 Ohio Laws, 342) requiring all angles in frogs, switches, and crossings of railroad tracks in yards where trains are made up to be blocked, and equally so whether they inadvertently step, or are involuntarily dragged by a moving engine, into an open frog, switch, or crossing. *Cooper v. Baltimore & O. R. Co.* 16 L.R.A. (N.S.) 715, 86 C. C. A. 272, 159 Fed. 82, 14 Ann. Cas. 693.

If the Texas Statute (Rev. Stat. 1895, art. 4507), which requires each locomotive approaching a grade crossing of two railway lines to come to a full stop before it reaches the crossing, is disobeyed, it affords a right of action to a train hand on a train moving over the crossing for an injury he sustains by the impact of another train on the cross line. *El Paso & S. W. R. Co. v. Murtle*, 49 Tex. Civ. App. 273, 108 S. W. 998.

The violation of the Canadian railway act (Can. Rev. Stat. 1906, chap. 37, § 264), which requires every railroad company to provide and cause to be used on all of its trains modern and efficient appliances and means to couple and uncouple cars and locomotives without the necessity of men going in between cars, is negligence affording a brakeman injured in attempting to disconnect cars an action for damages. *Scott v. Canadian P. R. Co.* 19 Manitoba L. Rep. 165, overruling 19 Manitoba L. Rep. 29.

The Missouri Statute (Acts 1891, p. 159, § 5; Rev. Stat. 1899, § 6435; Anno. Stat. 1906, p. 3218), providing that the openings of all hatchways, elevators, and well-holes upon every floor of manufacturing, mechanical, mercantile, and public buildings, shall be protected by good and sufficient trap-doors, self-closing hatches, safety catches, or strong guard rails at least 3 feet high,

for the reason that the plaintiff has wholly failed to establish the corporate limits of the city of Butte." We think the motion should have been granted on this ground. The only testimony bearing upon the proximity of the shaft to the city limits is that of McMahon, and nowhere does he say what the fact was at the time of the accident. He testifies entirely as of the date of trial, except that in one unresponsive answer he speaks as of the date of his survey, which was after the accident. Moreover, while in his direct examination he says, "I know where the boundaries of the city is near what is known as the Tzarena lode claim, No. 1092, and know the city limits in that vicinity," on his cross examination he nullifies this statement and the value of the

map he had made by the following declaration: "I got my information as to the corporate limits of the city of Butte from ordinance No. 642 on file in the office of the city clerk." Respondent asserts that it was not wrong, but praiseworthy, in the surveyor to secure the data for the running of his line from the city ordinance. That is not the point, and that is not what the witness said. Had there been proof by common reputation, as provided in subdivision 11 of § 7887, Revised Codes, or by other means not dependent upon ordinance 642, of the general location of the boundaries, there would then have been no harm in the fact that the surveyor, purposing to make a plat for use in evidence, consulted an ordinance to secure his detail data; but

respecting which all due diligence shall be used to keep them closed except when in actual use, is held to have been enacted for the benefit and protection of persons employed in the buildings mentioned, and not for those casually there, either by invitation or license (*Lamm, J., dubitans*). *Glaser v. Rothschild*, 221 Mo. 180, 22 L.R.A. (N.S.) 1045, 120 S. W. 1, 17 Ann. Cas. 576.

The failure of a manufacturer to obey the Kansas factory act (*Laws 1903, chap. 356, Gen. Stat. 1909, §§ 4676-4683*), requiring guards to dangerous machinery for the protection of workmen and others likely to be personally injured, gives no right of action to a father for the loss of his minor child's services through an injury by unguarded machinery. *Gibson v. Kansas City Packing Box Co.* 85 Kan. 346, 116 Pac. 502, Ann. Cas. 1912D, 1103.

The New York Building Code (§ 22), which requires excavations more than 10 feet deep on lots adjoining buildings to be guarded, and the adjoining structures to be shored up and protected from collapse, was enacted for the benefit of separate owners of contiguous land, and does not inure to the benefit of a tenant of the same owner of both lots. *Paltey v. Egan*, 122 App. Div. 512, 107 N. Y. Supp. 444.

Upon a second trial of the action the plaintiffs were defeated, and sought a reversal upon the ground the landlord violated his duty to them as tenants in causing by himself or his contractor their tenement to collapse: but the court held that they were concluded by trying the case on the theory of the landlord's negligence in violating his statutory duty (*vide* 132 App. Div. 254, 116 N. Y. Supp. 889). The court of appeals, however, in reviewing this decision (*vide* 200 N. Y. 83, 93 N. E. 267), reversed it, on the ground that, as the judgment rested upon a compulsory nonsuit, it could not stand if in any view of the case the plaintiffs had the right to go to the jury, and that the defendants were plainly under a duty so to conduct their operations upon the adjoining lot as to avoid injuring their tenants. It is noticeable that four of the judges who con-

curred in reversing took pains to say they thought the provisions of the Building Code inured to the benefit of anyone holding an estate in the premises.

VI. Causal relation to injuries of violations of statutes.

Like the cases cited in the primary note, those decided since it was published hold fast to the general abstract principle that the neglect to obey a statute commanding or forbidding something to be done or omitted for the benefit and protection of others never affords the sufferer of a coincident injury a right of action, unless such negligence was the proximate cause of the injury.

The distinction between criminality which was a cause, and criminality which was a mere condition of an injury for which a recovery is sought in a civil action, is well established in law. *Prest-O-Lite v. Skeel*, — Ind. —, 106 N. E. 365.

All the courts agree that, to be actionable, negligence in the performance of a statutory duty must be causally related to the attributed injury. *Louisville & N. R. Co. v. Christian Moerlein Brewing Co.* 150 Ala. 390, 43 So. 723; *Armstrong v. Sellers*, 182 Ala. 582, 62 So. 28; *St. Louis Southwestern R. Co. v. Conger*, 84 Ark. 421, 105 S. W. 1177; *Mead v. Ph. Zang Brewing Co.* 43 Colo. 1, 95 Pac. 284; *Carlock v. Denver & R. G. R. Co.* 55 Colo. 146, 133 Pac. 1103; *Campbell v. Walker*, 2 Boyce (Del.) 41, 78 Atl. 601; *Lindsay v. Cecchi*, 3 Boyce (Del.) 133, 35 L.R.A. (N.S.) 699, 80 Atl. 523, 1 N. C. O. A. 88; *Wade v. Louisville & N. R. Co.* 54 Fla. 277, 45 So. 472; *Thompson v. Cleveland, C. C. & St. L. R. Co.* 226 Ill. 542, 9 L.R.A. (N.S.) 672, 80 N. E. 1054; *Carterville & H. Coal Co. v. Moake*, 128 Ill. App. 133; *Ingraham v. Harmon*, 133 Ill. App. 82, affirmed in 229 Ill. 168, 82 N. E. 256; *Southern Coal & Min. Co. v. Hopp*, 133 Ill. App. 230; *Poietta v. Illinois Zinc Co.* 153 Ill. App. 506, affirmed in 257 Ill. 11, 100 N. E. 218; *Latham v. Cleveland, C. C. & St. L. R. Co.* 179 Ill. App. 324; *Indiana & C. Coal Co. v. Neal*, 166 Ind. 458, 77 N. E. 850, 9 Ann. Cas. 424; *Pittsburgh, C.*

we are given to understand by the statement of McMahon that what he knew about the matter was derived from the ordinance, and he gives no other source. The ordinance itself was introduced in evidence, and it is to be noted that instead of aiding the testimony of McMahon as a source of absolute information, it shows upon its face that it did not, and could not without further proceedings, fix the boundaries as described. To meet this, respondent bears strongly upon the statement of the witness that ordinance No. 642 "went into effect" and "became operative" during the Corby administration, some four or five years before the trial; but this was a mere incidental expression of opinion by a person not shown to be qualified, upon a subject not susceptible of

opinion evidence. An attempt is made to show that appellants supplied this deficiency through their witness Hobart, also a civil engineer, who said: "I examined the mining claim known as the Tzarena mining claim situated in the southwest of the city, and also examined the shaft over there which now has a fence around it." This statement, besides being ambiguous and apropos to a mere general location, does not pretend to advise us concerning the proximity of the shaft to the corporate limits of Butte, and it will not support the inference sought to be drawn from it.

5. Since this case must be reversed, it is unnecessary to enlarge upon the other assignments of alleged error. Suffice it to say that we see no fault in the other rulings

C. & St. L. R. Co. v. Schepman, 171 Ind. 71, 84 N. E. 988; Cleveland, C. C. & St. L. R. Co. v. Lauer, 176 Ind. 621, 39 L.R.A. (N.S.) 20, 96 N. E. 758; Missouri P. R. Co. v. Trahern, 77 Kan. 803, 91 Pac. 48; Cincinnati, N. O. & T. P. R. Co. v. Baxter, 33 Ky. L. Rep. 305, 18 L.R.A. (N.S.) 241, 110 S. W. 248; Conway v. Louisville & N. R. Co. 135 Ky. 229, 119 S. W. 206, 122 S. W. 136; Laborde v. Louisiana R. & Nav. Co. 121 La. 47, 46 So. 97; Farrell v. B. F. Sturtevant Co. 194 Mass. 431, 80 N. E. 469; Bourne v. Whitman, 209 Mass. 155, 35 L.R.A. (N.S.) 701, 95 N. E. 404, 2 N. C. C. A. 318; Anderson v. Settergren, 100 Minn. 296, 111 N. W. 279; Illinois C. R. Co. v. Watson, — Miss. —, 30 So. 69; Hutchinson v. Missouri P. R. Co. 195 Mo. 546, 93 S. W. 931; Rowen v. Chicago, G. W. R. Co. 198 Mo. 654, 96 S. W. 1009; Jackson v. Butler, 240 Mo. 342, 155 S. W. 1071; Fore v. Chicago & A. R. Co. 114 Mo. App. 551, 89 S. W. 1034; Midgett v. St. Louis & S. F. R. Co. 124 Mo. App. 540, 102 S. W. 56; Melville v. Butte-Balaklava Copper Co. 47 Mont. 1, 130 Pac. 441; Conroy v. Acken, 110 App. Div. 48, 96 N. Y. Supp. 530, affirmed in 185 N. Y. 566, 77 N. E. 1184; Burns v. Delaware & H. Co. 110 App. Div. 592, 96 N. Y. Supp. 509; Schindler v. Welz & Zerweck, 145 App. Div. 532, 130 N. Y. Supp. 344; Schmidt v. Printing Business, 56 Misc. 130, 100 N. Y. Supp. 443; Horn v. Breakstone, 75 Misc. 343, 133 N. Y. Supp. 285; Rich v. Asheville Electric Co. 152 N. C. 689, 30 L.R.A. (N.S.) 428, 68 S. E. 232; Turbyfill v. Atlanta & C. Air Line R. Co. 83 S. C. 325, 65 S. E. 278; Lee v. Northwestern R. Co. 84 S. C. 125, 65 S. E. 1031; Galveston, H. & S. A. R. Co. v. Vollrath, 40 Tex. Civ. App. 46, 89 S. W. 279; International & G. N. R. Co. v. Edwards, 100 Tex. 22, 93 S. W. 106; Texas & P. R. Co. v. Hemphill, — Tex. Civ. App. —, 125 S. W. 340; St. Louis Southwestern R. Co. v. Wilkes, — Tex. Civ. App. —, 159 S. W. 126; Rogers v. Rio Grande Western R. Co. 32 Utah, 367, 125 Am. St. Rep. 876, 90 Pac. 1075; Stokes v. Southern R. Co. 104 Va. 817, 52 S. E. 855; Norfolk & W. R. Co. v. Gee, 104 Va. 806, 3 L.R.A. (N.S.) 111, 52 S. E. 572; Chesapeake & O. R. Co. v. Hall, 109 Va. 296, 63 S. E. 1007; Corbin v. Grand Trunk R. Co. 78 Vt. 458, 63 Atl. 138; Steel Car Forge Co. v. Ohec, 107 C. C. A. 192, 184 Fed. 808.

peake & O. R. Co. v. Hall, 109 Va. 296, 63 S. E. 1007; Corbin v. Grand Trunk R. Co. 78 Vt. 458, 63 Atl. 138; Steel Car Forge Co. v. Ohec, 107 C. C. A. 192, 184 Fed. 808.

A violation of a penal statute is *per se* negligence, but to be actionable such violation must have been the proximate cause of an injury. Prest-O-Lite Co. v. Skeel, — Ind. —, 106 N. E. 365.

To entitle an injured person to recover of a defendant proved to have violated a statute, or to have failed to perform a statutory duty in association with the injury, he must establish, first, that he was one of the class of persons for whose benefit the statute was enacted, and, second, that his injury was the proximate result of such violation and neglect. Anderson v. Settergren, 100 Minn. 296, 111 N. W. 279.

The Vermont supreme court has stated the doctrine of proximate cause in respect of statutory negligence, in a case where the plaintiff was injured in the attempt to climb between the cars of a railroad train obstructing a highway crossing, thus: "Assuming the correctness of the plaintiff's position as regards the unlawfulness of the obstruction, it does not follow that the maintenance of the obstruction was a negligent act as regards the plaintiff. The disregard of a statutory requirement is not necessarily negligence in the juridical sense. Negligence is a shortage of legal duty that causes injury. The fact that an act is in violation of law does not dispense with an inquiry as to the relation which that act sustains to the injury complained of. If it is not an efficient cause of the injury, there is no liability." Corbin v. Grand Trunk R. Co. 78 Vt. 458, 63 Atl. 138.

Although the violation of a statute may be conclusive evidence of the violator's negligence, it must be conceded that the violation was the proximate cause, or at least contributed to cause the injury which concurred with such violation. Syneszewski v. Schmidt, 153 Mich. 438, 116 N. W. 1107.

And by an act of negligence contributing to produce an injury the law means one that is a direct and proximate cause of such

complained of, as they are presented by this record.

The discussion contained in the first part of this opinion settles adversely to appellants the contention that the evidence establishes contributory negligence as a matter of law. We are not prepared to say that, even if plaintiff had been an adult, the evidence would have shown contributory negligence so as to take the case from the jury; and certainly it did not do so as to this infant plaintiff. So, too, we think the evidence was sufficient to establish the damages with as much certainty as is requisite in this class of cases. As to whether it justi-

fied the amount awarded by the jury, we express no opinion.

Because of respondent's failure to submit sufficient proof that the shaft into which he fell was, at the time of the accident, within 1 mile of the corporate limits of the city of Butte as alleged, the judgment and order appealed from are reversed, and the cause is remanded for a new trial.

Brantly, Ch. J., and Holloway, JJ., concur.

Petition for rehearing denied May 17, 1913.

injury. *Lee v. Northwestern R. Co.* 84 S. C. 125, 65 S. E. 1031.

To afford one injured an action grounded on the violation of a statute, such violation must have been the proximate cause of the injury; but, usually, what is a proximate cause in such cases, is a question rather of fact than of law. *Ingraham v. Harmon*, 133 Ill. App. 82, affirmed in 229 Ill. 168, 82 N. E. 256; *United States Cement Co. v. Cooper*, — Ind. App. —, 82 N. E. 981.

The failure of a railroad company to meet the requirements of a statute commanding it to keep its right of way at road crossings sufficiently smooth and level to allow safe and speedy travel across will not afford a traveler at the crossing a right of action for an injury there sustained, unless it is shown that such failure was the proximate cause of the injury. *Norfolk & W. R. Co. v. Gee*, 104 Va. 806, 3 L.R.A. (N.S.) 111, 52 S. E. 572.

The failure of a railroad company to obey a statute which requires locomotives and trains to give warning by bell and whistle of their approach to highway crossings is conceded to be negligence, but it does not necessarily afford one injured at a crossing an action for damages. It must still be established that the failure to give the statutory signals was the proximate cause of the injury. *Louisville & N. R. Co. v. Mertz*, — Ala. —, 40 So. 60; *Louisville & N. R. Co. v. Christian Moerlein Brewing Co.* 150 Ala. 390, 43 So. 723; *St. Louis Southwestern R. Co. v. Conger*, 84 Ark. 421, 105 S. W. 1177; *Latham v. Cleveland, C. C. & St. L. R. Co.* 179 Ill. App. 324; *Conway v. Louisville & N. R. Co.* 135 Ky. 229, 119 S. W. 206; *Fore v. Chicago & A. R. Co.* 114 Mo. App. 551, 89 S. W. 1034; *Midgett v. St. Louis & S. F. R. Co.* 124 Mo. App. 540, 102 S. W. 56; *Texas & P. R. Co. v. Hemphill*, — Tex. Civ. App. —, 125 S. W. 340; *Texas & P. R. Co. v. Marrujo*, — Tex. Civ. App. —, 172 S. W. 588; *Rogers v. Rio Grande Western R. Co.* 32 Utah, 367, 125 Am. St. Rep. 876, 90 Pac. 1075; *Stokes v. Southern R. Co.* 104 Va. 817, 52 S. E. 855.

In South Carolina a failure to give the statutory signals when a railroad train approaches a crossing raises a presumption that an injury to a person on the crossing

was proximately caused or contributed to by disobeying the statute. *Lee v. Northwestern R. Co.* 84 S. C. 125, 65 S. E. 1031.

It has, however, been held in one case in South Carolina that, notwithstanding the presumption of negligence in a railroad company, which arises from a failure to give the statutory warning signals as a train approaches a highway crossing,—a presumption sufficient to prevent a nonsuit,—it is reversible error for a trial court to instruct the jury on the trial of an action for damages on account of a death at a railroad highway crossing, that it was unnecessary in behalf of the plaintiff to prove that the failure to give the statutory signals was the proximate cause of the homicide, and that it was sufficient if such failure was a contributing cause. *Turbyfill v. Atlanta & C. Air Line R. Co.* 83 S. C. 325, 65 S. E. 278.

There is the same presumption that the omission of the statutory warning signals as a railroad train approaches a highway crossing in Missouri is the proximate cause of an injury that occurs on the crossing, and the railroad company must rebut this presumption by countervailing proof. *Brown v. Kansas City, C. & S. R. Co.* 166 Mo. App. 255, 148 S. W. 457.

A statute of Missouri (Rev. Stat. 1899, § 1102, enacted in 1881) so changed the previous law as to make proof of a failure to ring the locomotive bell required by the general statute when a railroad train is approaching a highway crossing prima facie evidence of negligence in a railroad company, and that such failure caused the death or injury of a person killed or hurt by the impact of the train on the crossing, and thus cast upon the railroad company the burden of proof that the neglect to ring the bell did not cause the death or injury; and consequently an instruction to a trial jury, that the plaintiff was bound to prove facts supporting his case by a preponderance of evidence, constituted reversible error. *McNulty v. St. Louis & S. F. R. Co.* 203 Mo. 475, 101 S. W. 1082.

When a railroad company has violated the Massachusetts statute (Rev. Laws, chap. 111, § 188) requiring warning signals by bell and whistle from trains approaching

NEW YORK COURT OF APPEALS.

ANNA L. AMBERG, Admr., etc., of William Amberg, Deceased, Resp.,
v.

CHARLES H. KINLEY, Appt.

(214 N. Y. 531, 108 N. E. 830.)

Master and servant — absence of fire escapes — death of employee — Liability.

1. An employer who fails to equip his building with fire escapes as required by statute is liable for the death of an employee due to such failure, regardless of the question of his negligence in other respects.

highway crossings, and a traveler on the highway is injured by such train, the burden is on the railroad company to prove that the failure to obey the statute neither caused nor lent aid to the injury. *Kelsall v. New York, N. H. & H. R. Co.* 196 Mass. 554, 82 N. E. 674.

Evidence that the warning signals by bell and whistle required by the Massachusetts Statute (Rev. Laws, chap. 111, § 188) were not given by a train approaching a highway crossing when a traveler was there injured authorizes the jury to find that the violation of the statute helped to cause the injury. *Ibid.*

When a railroad train by its mere approach to a highway crossing serves to frighten a horse upon a road parallel to the track, so that its rider, unable to control the brute, is carried by it to the crossing, and is there struck and injured by the train, the failure of the railroad company to give the statutory signal warnings as the train came toward the crossing cannot be deemed the proximate cause of the injuries. *Conway v. Louisville & N. R. Co.* 135 Ky. 229, 119 S. W. 206, 122 S. W. 136.

The failure of a railroad company to obey a statute which requires railroad trains to give warning signals on approaching highways crossings cannot be deemed the proximate cause of an injury to one who had driven safely across the railroad track in a buggy, and was kicked by his horse afterwards, when, in apprehension of the animal's taking fright, he had got down to hold the brute, which had become restive from the noise of the rushing train behind. *Laborde v. Louisiana R. & Nav. Co.* 121 La. 47, 46 So. 97.

Neither can an injury to travelers about to cross a railroad track in a wagon which is overturned before the track is reached, in consequence of their horses taking fright at an approaching train noisily emitting steam, be regarded as the proximate effect of the neglect of the railroad company to blow the warning whistle which the statute required, as the train drew near the crossing. *Texas & P. R. Co. v. Hemphill*, — Tex. Civ. App. —, 125 S. W. 340.

When a railroad company has erected and maintains at a farm crossing a substantial gate sufficient, if closed, to turn stock from

Fire escapes — drying shed as factory.

2. A three-story shed connected with a tannery and used for drying hides, in which employees work, is within the operation of a statute requiring fire escapes on factories, and providing that such terms shall be construed to include any mill, workshop or other manufacturing or business establishment where one or more persons are employed at labor.

Same — three-story building.

3. A building consisting of two stories above the ground, which is also used as a floor for purposes of the business, is three stories in height within the meaning of a statute requiring fire escapes on buildings three stories high.

the track, the fact that it does not conform to the statutory requirements cannot be deemed the proximate cause of injury or death of horses escaping through the open gate in the nighttime, to the railroad track, in consequence of the act of some unknown and irresponsible person in leaving the gate open. *Rowen v. Chicago G. W. R. Co.* 198 Mo. 654, 96 S. W. 1009.

The violation of a statute forbidding railroad companies in making up passenger trains to put in the rear of a passenger coach a baggage, freight, merchandise, or lumber car cannot be regarded as the proximate cause of an injury to a passenger thrown by the lurching of the train from an open unvestibuled platform while attempting to pass from a day coach to a combination baggage and smoking car on the train. *Pittsburgh, C. C. & St. L. R. Co. v. Schepman*, 171 Ind. 71, 84 N. E. 988.

An injury to a street car conductor by falling from the running board of an open car while attempting to disengage and raise a side curtain in order to collect fares cannot be deemed the proximate result of a violation by the street railway company of a statute (N. C. Rev. Stat. §§ 2615, 3800) requiring vestibule fronts to be used on passenger cars of street railways at the time when the accident occurred. *Rich v. Asheville Electric Co.* 152 N. C. 689, 30 L.R.A. (N.S.) 428, 68 S. E. 232.

Clark, Ch. J., dissented in this case, taking the ground that the injury could not have occurred had the street railway company obeyed the statute, because, in his esteem, the closed cars of the winter season, with inside aisles, are alone capable of having vestibules; therefore, he argued, the violation of the statute was a proximate cause. He assumed that the statute was enacted for the benefit of conductors as well as motormen.

To entitle a workman in a mine to recover for injuries sustained against a mine owner, based upon the latter's violation of a statute enacted for the safety and protection of the class to which the former belongs, there must be established a causal connection between the violation of the statute and the injury suffered. *Carterville & H. Coal Co. v. Moake*, 128 Ill. App. 133.

An injury to a workman in a mine by

Evidence — cause of death — sufficiency.

4. That absence of fire escapes on a building was the cause of the death of an employee by fire may be found from evidence that a few minutes before the fire he started with a truck load of hides which he was to hang up on the third floor, and that after the fire his body was found near the truck under the place where his duty called him, while there was no adequate means of escape from the third floor after the fire started.

Appeal — absence of evidence — reversal.

5. Failure to place in evidence the notice of accident required by the employers' liability act, in an action to recover damages for a death occurring within its provisions, does not require reversal of a judgment in favor of plaintiff, if defendant acknowl-

the explosion of a keg of powder accidentally ignited by another is not the consequence of the failure of the mine owner to conform to the requirements of a statute prescribing ways and means to be adopted to secure currents of fresh air for ventilation. *Ibid.*

The failure to put a mark indicative of danger on a rock in a mine, as required by statute, cannot be deemed the proximate cause of the death of a mine worker engaged in producing the fall of a loose rock known to be dangerous, and killed while standing directly beneath it as he knocked down the supporting prop. *Paietta v. Illinois Zinc Co.* 153 Ill. App. 506, affirmed in 257 Ill. 11, 100 N. E. 218.

The failure of a building contractor to comply with a statute (Mass. Rev. Laws, chap. 104, § 44) requiring the laying and maintaining of close plank floorings on first and second floors before adding a third story to a building under construction, although a violation of law contributing to make more hazardous the conditions under which construction work was done, was not the cause of an accident to a workman engaged in setting up a derrick, which, slipping, knocked him down to fall to death through the lower floors, and hence did not entail liability upon the contractor. *Farrell v. B. F. Sturtevant Co.* 194 Mass. 431, 80 N. E. 469.

The violation of the New York Labor Law (Laws 1897, chap. 415, § 20; Laws 1890, chap. 192), requiring fences or barriers around shafts or floor openings in buildings under construction, if elevators or hoists are used to lift materials, is not the proximate cause of the injury to a workman struck by a wheelbarrow jarred off the elevator by a sudden stoppage, although had the statute been obeyed, the fence or barrier would probably have prevented the contact of the wheelbarrow with the injured man. *Conroy v. Acken*, 110 App. Div. 48, 96 N. Y. Supp. 530, affirmed in 185 N. Y. 566, 77 N. E. 1184.

When a statute forbidding the employment, in certain industries and works, of children under a stated age, who are neither blind nor able to read and write English, L.R.A.1915E.

edged receipt of it, and called no attention to failure of proof in that respect.

(Collin and Hiscock, JJ., dissent.)

(April 13, 1915.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of a Trial Term for Chemung County in plaintiff's favor, and from an order denying a motion for new trial, in an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. Affirmed.

during the time when the public schools are in session, allows them be employed in vacation time, the mere employment of a lad in violation of the statute cannot be considered a proximate cause of an injury to him in the course of his employment. *Steel Car Forge Co. v. Chec*, 107 C. C. A. 192, 184 Fed. 868.

If the violation of a statutory duty tends to and finally does injure someone, such violation is deemed the proximate cause of the injury. *Cleveland, C. C. & St. L. R. Co. v. Tauer*, 176 Ind. 621, 39 L.R.A. (N.S.) 20, 96 N. E. 758.

It is not essential that an act of negligence be the sole cause, to constitute it the proximate cause of an injury. It may still be the proximate cause if it concurs with another cause in producing the effect. *Galveston, H. & S. A. R. Co. v. Vollrath*, 40 Tex. Civ. App. 46, 89 S. W. 279.

VII. Contributing negligence of persons injured by violations of statutes.

The violator of a statute when an injury follows is only liable to the injured one when the latter is free from contributory negligence. *Richards v. Waltz*, 153 Mich. 416, 117 N. W. 193.

Notwithstanding a railroad company was guilty of violating a statute in neglecting to give the warning signals of the approach of its train to a highway crossing, as commanded by such statute, and injured a traveler on the highway as he was crossing its track, yet such negligence will not make the railroad company liable for the traveler's injuries, if they were due to his own contributing negligence. *Nashville, C. & St. L. R. Co. v. Vincent*, — Ala. —, 66 So. 697; *Cleveland, C. C. & St. L. R. Co. v. Sparks*, 122 Ill. App. 400; *Chicago, M. & St. P. R. Co. v. Gill*, 132 Ill. App. 310; *Missouri P. R. Co. v. Trahern*, 77 Kan. 803, 91 Pac. 48; *Beagle v. Pere Marquette R. Co.* — Mich. —, 150 N. W. 345; *Pogue v. Great Northern R. Co.* 127 Minn. 79, 148 N. W. 889; *Hutchinson v. Missouri P. R. Co.* 195 Mo. 546, 93 S. W. 931; *Sanguinette v. Mississippi River & B. T. R. Co.* 196 Mo.

Statement by Cuddeback, J.:

The action is to recover damages for the death of the plaintiff's intestate, who lost his life, as it is alleged, through the defendant's violation of the labor law relating to fire escapes on factories.

The defendant was engaged in operating a tannery, and the plaintiff's intestate at the time of his death was in the defendant's employ. One of the buildings connected with the tannery was a drying loft. The loft was a wooden building 123 feet long and 43 feet wide, and, according to the plaintiff, was three stories high. The floor of the first story was the ground; the second and third stories had each a floor made of boards. It was about 16 feet from the ground, or from tan bark banked around

the building on the outside, to the top story. There were seven bents in the building, and in the second and third floors there were ventilators in each bent. The ventilator openings were 8 feet wide and 3 feet high, were on a level with the floor, and each was covered by a pair of shutters. The shutters were fastened at the top, and could be easily swung outward at the bottom.

The plaintiff's intestate and a man named Mott were at work in the loft on the day the former lost his life. They were taking hides soaked with oil out of a wheel on the first floor, loading them on a truck, taking them up by an elevator to the top floor, and there hanging them on sticks over the beams of the ceiling to dry. At about 3 o'clock in the afternoon they took a truck

466, 95 S. W. 386; *Porter v. Missouri P. R. Co.* 199 Mo. 82, 97 S. W. 880; *Fagg v. Missouri & N. A. R. Co.* 185 Mo. App. 79, 170 S. W. 912; *Sprague v. Northern P. R. Co.* 40 Mont. 481, 107 Pac. 412; *Lee v. Northwestern R. Co.* 84 S. C. 125, 65 S. E. 1031; *International & G. N. R. Co. v. Edwards*, 100 Tex. 22, 93 S. W. 106; *Texas & P. R. Co. v. Marrujo*, — Tex. Civ. App. —, 172 S. W. 588; *Southern R. Co. v. Jones*, 106 Va. 412, 56 S. E. 155; *Smith v. Norfolk & W. R. Co.* 107 Va. 725, 60 S. E. 56; *Chesapeake & O. R. Co. v. Hall*, 109 Va. 296, 63 S. E. 1007; *Chicago, M. & St. P. R. Co. v. Donaldson*, 85 C. C. A. 185, 157 Fed. 821.

The law, however, imposes no duty of anticipating negligence in others, but presumes that everyone will perform the duties enjoined by statute. *Chicago City R. Co. v. Fennimore*, 199 Ill. 9, 64 N. E. 985.

Hence, everyone for whose protection and benefit a statute has been enacted which imposes a duty upon another has a right to expect that the statutory duty has been or will be performed. He is entitled to rely upon obedience to the statute. He cannot be charged with contributory negligence from merely assuming that the statute would not be violated. *Elgin, J. & E. R. Co. v. Hoadley*, 220 Ill. 462, 77 N. E. 151; *Henry v. Cleveland, C. C. & St. L. R. Co.* 236 Ill. 219, 86 N. E. 231; *Butters v. Chicago, B. & Q. R. Co.* 157 Ill. App. 369; *Greenwaldt v. Lake Shore & M. S. R. Co.* — Ind. —, 73 N. E. 910; *Toledo, St. L. & W. R. Co. v. Lander*, 48 Ind. App. 56, 95 N. E. 319; *Illinois C. R. Co. v. Sumrall*, 96 Miss. 860, 51 So. 545; *Pesin v. Jugovitch*, 85 N. J. L. 256, 88 Atl. 1101, 5 N. C. C. A. 324; *Rooney v. Brogan Constr. Co.* 107 App. Div. 258, 95 N. Y. Supp. 1; *Bornstein v. Faden*, 149 App. Div. 37, 133 N. Y. Supp. 608; *Phelps v. Kaufman*, 152 App. Div. 457, 137 N. Y. Supp. 345; *El Paso & S. W. R. Co. v. Murtle*, 49 Tex. Civ. App. 273, 108 S. W. 998; *Smith v. Norfolk & W. R. Co.* 107 Va. 725, 60 S. E. 56; *Kujawa v. Chicago, M. & St. P. R. Co.* 135 Wis. 562, 116 N. W. 249.

One about to cross a railroad track upon L.R.A.1915F.

a public highway has a right to expect the railroad company to obey the statute requiring on-coming trains to give warning by bell and whistle as they approach with the intention of passing over the highway. *Henry v. Cleveland, C. C. & St. L. R. Co.* 236 Ill. 219, 86 N. E. 231; *Butters v. Chicago, B. & Q. R. Co.* 157 Ill. App. 369; *Greenwaldt v. Lake Shore & M. S. R. Co.* — Ind. —, 73 N. E. 910; *Toledo, St. L. & W. R. Co. v. Lander*, 48 Ind. App. 56, 95 N. E. 319; *Doddy v. Boston & M. R. Co.* — N. H. —, 92 Atl. 801; *Illinois C. R. Co. v. Sumrall*, 96 Miss. 860, 51 So. 545; *Smith v. Norfolk & W. R. Co.* 107 Va. 725, 60 S. E. 56; *Kujawa v. Chicago, M. & St. P. R. Co.* 135 Wis. 562, 116 N. W. 249.

One lawfully upon a railroad crossing in the performance of his regular work of trimming and adjusting an overhanging lamp has a right to presume that the railroad will not run a locomotive or cars over the crossing without giving him the statutory warning by bell and whistle to enable him to avoid injury. *Elgin, J. & E. R. Co. v. Hoadley*, 220 Ill. 462, 77 N. E. 151.

Members of a train crew on a train which first reaches and essays to cross a grade crossing of another railroad in Texas have a right to expect and to act in reliance upon the assumption that trains on the other cross line, seen or unseen, coming toward the crossing, will obey the statute (Rev. Stat. 1895, art. 4507), which requires each locomotive approaching such a crossing to come to a full stop before reaching it. *El Paso & S. W. R. Co. v. Murtle*, 49 Tex. Civ. App. 273 108 S. W. 998.

Although a train hand upon a train moving across another railroad track at grade knows that trains on the other track are constantly and habitually operated at such crossing in violation of the Texas statute (Rev. Stat. 1895, art. 4507), which requires every locomotive approaching to come to a full stop before reaching such a crossing, he cannot be held to be contributorily negligent if he relies upon the statute being obeyed, and is injured by its violation. *Ibid.*

loaded with hides and placed it on the elevator. Then Mott went out into the yard for some purpose, and did not return for about ten minutes. On returning he found the loft in flames. It burned very rapidly, and was entirely consumed. After the fire the body of the plaintiff's intestate was found on the ground under the place where he and Mott had been hanging the hides on the third floor before the fire, and the truck was not far from his body.

Messrs. Stanchfield, Lovell, Falck, & Sayles, with Messrs. Baker & Sessions, for appellant:

Failure to provide fire escapes is not negligence as matter of law.

Gelder v. International Ore Treating Co.

But this does not imply that a beneficiary of the statute may recklessly run into danger. It does not absolve him from the duty to exercise reasonable care for his own safety. *Cleveland, C. C. & St. L. R. Co. v. Sparks*, 122 Ill. App. 400; *Cleveland, C. C. & St. L. R. Co. v. Dukeman*, 130 Ill. App. 105; *Chicago, M. & St. P. R. Co. v. Gill*, 132 Ill. App. 310; *Madison v. Clippingier*, 74 Kan. 700, 88 Pac. 260; *Missouri P. R. Co. v. Trahern*, 77 Kan. 803, 91 Pac. 48; *Kansas Buff Brick & Mfg. Co. v. Stark*, 77 Kan. 648, 95 Pac. 1047; *Beghold v. Auto Body Co.* 149 Mich. 14, 14 L.R.A.(N.S.) 609, 112 N. W. 691; *Schulte v. Pfaudler Co.* 150 Mich. 427, 113 N. W. 1120; *Richards v. Waltz*, 153 Mich. 416, 117 N. W. 193; *Beagle v. Pere Marquette R. Co.* — Mich. —, 150 N. W. 345; *Schutt v. Adair*, 99 Minn. 7, 108 N. W. 811, 20 Am. Neg. Rep. 598; *Hopson v. Kansas City, M. & B. R. Co.* 87 Miss. 789, 40 So. 872; *Illinois C. R. Co. v. Sumrall*, 96 Miss. 860, 51 So. 545; *Hutchinson v. Missouri P. R. Co.* 195 Mo. 546, 93 S. W. 931; *Sanguinette v. Mississippi River & B. T. R. Co.* 196 Mo. 466, 95 S. W. 386; *Porter v. Missouri P. R. Co.* 199 Mo. 82, 97 S. W. 880; *Millsap v. Beggs*, 122 Mo. App. 1, 97 S. W. 956; *Gee v. St. Louis & G. R. Co.* 122 Mo. App. 358, 99 S. W. 506; *Stegmann v. Gerber*, 146 Mo. App. 104, 123 S. W. 1041; *Sprague v. Northern P. R. Co.* 40 Mont. 481, 107 Pac. 412; *Melville v. Butte-Balaklava Copper Co.* 47 Mont. 1, 130 Pac. 441; *Kiernan v. Eidlitz*, 109 App. Div. 726, 96 N. Y. Supp. 387; *Lather v. Bannmann*, 122 App. Div. 13, 106 N. Y. Supp. 790; *Schindler v. Welz & Zerweck*, 145 App. Div. 532, 130 N. Y. Supp. 344; *Faerber v. 969 Park Ave. Co.* 83 Misc. 645, 146 N. Y. Supp. 783; *Lee v. Northwestern R. Co.* 84 S. C. 125, 65 S. E. 1031; *International & G. N. R. Co. v. Edwards*, 100 Tex. 22, 93 S. W. 106; *Southern R. Co. v. Jones*, 106 Va. 412, 56 S. E. 155; *Smith v. Norfolk & W. R. Co.* 107 Va. 725, 60 S. E. 56; *Chesapeake & O. R. Co. v. Hall*, 109 Va. 296, 63 S. E. 1007; *Willette v. Rhineland Paper Co.* 145 Wis. 537, 130 N. W. 853; *Chicago, M. & St. P. R. Co. v. Donaldson*, 85 C. C. A. 185, 157 Fed. L.R.A.1915E.

150 App. Div. 184, 134 N. Y. Supp. 782; *Fluker v. Ziegele Brewing Co.* 201 N. Y. 40, 93 N. E. 1112, Ann. Cas. 1912A, 793; *Kiernan v. Eidlitz*, 109 App. Div. 726, 96 N. Y. Supp. 387; *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153; *Knupfle v. Knickerbocker Ice Co.* 84 N. Y. 488; *Ziegler v. Brennan*, 75 App. Div. 584, 78 N. Y. Supp. 342; *Lee v. Sterling Silk Mfg. Co.* 115 App. Div. 589, 101 N. Y. Supp. 78; *Smith v. Variety Iron & Steel Works Co.* 147 App. Div. 242, 131 N. Y. Supp. 1033.

The negligence, if any, was not the cause of the accident.

Henson v. Lehigh Valley R. Co. 194 N. Y. 205, 19 L.R.A.(N.S.) 790, 87 N. E. 85; *Palcheski v. Brooklyn Heights R. Co.* 69 App. Div. 440, 74 N. Y. Supp. 987.

821; *Grand Trunk R. Co. v. Hainer*, 36 Can. S. C. 180.

A traveler on a highway, about to cross a railroad track, may, in regulating his conduct, have some regard to the presumption that the railroad company will give the statutory signals of an approaching train; and if the traveler hears none, the same preparedness and caution should not be expected of him as would be if the warning signals were given. *Pogue v. Great Northern R. Co.* 127 Minn. 79, 148 N. W. 889.

But while such a traveler has the right to expect obedience to the statute from the railroad company, he is nevertheless bound to be careful for his own safety. *Nashville, C. & St. L. R. Co. v. Vincent*, — Ala. —, 66 So. 697; *Cleveland, C. C. & St. L. R. Co. v. Sparks*, 122 Ill. App. 400; *Chicago, M. & St. P. R. Co. v. Gill*, 132 Ill. App. 310; *Missouri P. R. Co. v. Trahern*, 77 Kan. 803, 91 Pac. 48; *Beagle v. Pere Marquette R. Co.* — Mich. —, 150 N. W. 345; *Pogue v. Great Northern R. Co.* supra; *Hutchinson v. Missouri P. R. Co.* 195 Mo. 546, 93 S. W. 931; *Sanguinette v. Mississippi River & B. T. R. Co.* 196 Mo. 466, 95 S. W. 386; *Porter v. Missouri P. R. Co.* 199 Mo. 82, 97 S. W. 880; *Fagg v. Missouri & N. A. R. Co.* 185 Mo. App. 79, 170 S. W. 912; *Sprague v. Northern P. R. Co.* 40 Mont. 481, 107 Pac. 412; *Lee v. Northwestern R. Co.* 84 S. C. 125, 65 S. E. 1031; *International & G. N. R. Co. v. Edwards*, 100 Tex. 22, 93 S. W. 106; *Texas & P. R. Co. v. Marrujo*, — Tex. Civ. App. —, 172 S. W. 588; *Smith v. Norfolk & W. R. Co.* 107 Va. 725, 60 S. E. 56; *Chesapeake & O. R. Co. v. Hall*, 109 Va. 296, 63 S. E. 1007; *Chicago, M. & St. P. R. Co. v. Donaldson*, 85 C. C. A. 185, 157 Fed. 821.

He must stop, look, and listen for the approach of a train. *Nashville, C. & St. L. R. Co. v. Vincent*, — Ala. —, 66 So. 697; *Cleveland, C. C. & St. L. R. Co. v. Sparks*, 122 Ill. App. 400; *Chicago, M. & St. P. R. Co. v. Gill*, 132 Ill. App. 310; *Beagle v. Pere Marquette R. Co.* — Mich. —, 150 N. W. 345; *Sanguinette v. Mississippi River & B. T. R. Co.* 196 Mo. 466, 95 S. W. 386;

In an action under the employer's liability act, proving the notice is a condition precedent to a recovery under the act.

Johnson v. Roach, 83 App. Div. 351, 82 N. Y. Supp. 203; *Hope v. Scranton & L. Coal Co.* 120 App. Div. 595, 105 N. Y. Supp. 372; *Welch v. Waterbury Co.* 206 N. Y. 525, 100 N. E. 426.

Mr. Richard H. Thurston, with **Mr. Edgar Denton**, for respondent:

Failure to provide fire escapes is negligence as matter of law.

Jetter v. New York & H. R. Co. 2 Keyes, 154; *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536; *Caddy v. Interborough Rapid Transit Co.* 195 N. Y. 415, 30 L.R.A.(N.S.) 30, 88 N. E. 747; *Brown v. Wittner*, 43 App. Div. 135, 59 N. Y. Supp. 385; *Pitcher v.*

Lennon, 12 App. Div. 356, 42 N. Y. Supp. 156; *Marino v. Lehmaier*, 173 N. Y. 530, 61 L.R.A. 811, 66 N. E. 572, 13 Am. Neg. Rep. 403; *Arnold v. National Starch Co.* 194 N. Y. 42, 21 L.R.A.(N.S.) 178, 86 N. E. 815; *Thomp. Neg.* §§ 10, 11; *Labatt, Mast. & S.* §§ 1906, 1909; *Gelder v. International Ore Treating Co.* 150 App. Div. 184, 134 N. Y. Supp. 782; *Kiernan v. Eidlitz*, 109 App. Div. 726, 96 N. Y. Supp. 387; *Ziegler v. Brennan*, 75 App. Div. 584, 78 N. Y. Supp. 342; *Smith v. Variety Iron & Steel Works Co.* 147 App. Div. 242, 131 N. Y. Supp. 1033.

The building in which the plaintiff's intestate lost his life was three stories in height, and the statute applied to it.

Porter v. Missouri P. R. Co. 199 Mo. 82, 97 S. W. 880; *International & G. N. R. Co. v. Edwards*, 100 Tex. 22, 93 S. W. 106; *Texas & P. R. Co. v. Marrujo*, — Tex. Civ. App. —, 172 S. W. 588.

Although a traveler on a highway crossing a railroad track has a right to expect the statutory warning signals of the approach of a train, and to govern his conduct accordingly, he may not wholly omit the duty to look and listen for an on-coming train because of not hearing the customary or prescribed signals of its approach. *Pogue v. Great Northern R. Co.* 127 Minn. 79, 148 N. W. 889.

The violation of the statute by the railroad company does not excuse one about to cross the railroad track from using his senses and ordinary care to avoid being injured. *Sprague v. Northern P. R. Co.* 40 Mont. 481, 107 Pac. 412.

The failure of a railroad company to give the statutory warnings of the approach of a train to a highway crossing will not render it liable to a traveler who knows the train is coming, and carelessly runs into obvious danger, which he might easily avoid by the use of his senses. *Chesapeake & O. R. Co. v. Hall*, 109 Va. 296, 63 S. E. 1007.

Thus, railroad companies guilty of negligence in failing to give the warnings required by statutes from trains approaching highway crossings have escaped liability for killing or injuring contributorily negligent persons crossing their tracks, in the following cases:

—where the injured person was aware of the presence of the train and of the purpose to run it over the highway, and stepped in front of it without looking. *Beagle v. Pere Marquette R. Co.* — Mich. —, 150 N. W. 345;

—where he drove upon the railroad track on a clear morning, when the coming train could have been plainly seen a quarter of a mile away. *Fagg v. Missouri & N. A. R. Co.* 185 Mo. App. 79, 170 S. W. 912;

—where he was in full possession of his faculties, thoroughly familiar with the crossing, near which he had lived for many L.R.A.1915E.

years, and where the railroad track was straight and unobstructed for a mile or more, and where, from any point within 50 feet of the track, the headlight of an on-coming locomotive was plainly visible at that distance. *Chicago, M. & St. P. R. Co. v. Donaldson*, 85 C. C. A. 185, 157 Fed. 821;

—where he was killed while walking on the highway and across the railroad track 25 feet in front of a long freight train, which came on with great noise, after dark, with the headlight of the locomotive shining full on the track for a quarter of a mile ahead. *Texas & P. R. Co. v. Marrujo*, — Tex. Civ. App. —, 172 S. W. 588;

—where, while walking on the highway toward and over the crossing at night, he failed wholly to stop and look before stepping on the track, when he could have plainly seen the locomotive headlight a mile or more off, and could have clearly heard the noise of an on-coming train at a considerable distance. *International & G. N. R. Co. v. Edwards*, 100 Tex. 22, 93 S. W. 106.

The purpose of statutes which require railroad engines and cars to ring bells and blow whistles as they approach highway crossings, with intent to pass over them, being to give warnings to travelers on the highways of their approach, a failure to obey such a statute affords no right of action for killing or injuring a person on the highway crossing who plainly saw and was fully aware that a train was coming, and took the chances of crossing the track ahead of it safely. *Missouri P. R. Co. v. Trahern*, 77 Kan. 803, 91 Pac. 48; *Hutchinson v. Missouri P. R. Co.* 195 Mo. 546, 93 S. W. 931.

If a traveler on a highway crossing a railroad track looks and sees an on-coming train, and yet proceeds to cross, he does so at his own risk, or, if the circumstances are such that he should be aware that the train is approaching, he still acts at his own risk in going forward, and is in both cases contributorily negligent so as to preclude his recovery if struck and injured by the train at the crossing, notwithstanding the railroad company may violate the stat-

The burden was on the defendant to prove contributory negligence.

Miller v. McCloskey, 9 Abb. N. C. 303; Clark v. Dillon, 97 N. Y. 370; Paige v. Willet, 38 N. Y. 28; Snyder v. Free, 114 Mo. 360, 21 S. W. 847.

Cuddeback, J., delivered the opinion of the court:

At the time of the fire § 82 of the labor law (Consol. Laws, chap. 31) contained the following requirement with regard to fire escapes on factories: "Such fire escapes as may be deemed necessary by the commissioner of labor shall be provided on the outside of every factory in this state consisting of three or more stories in height."

It has been held that the statute is mandatory, and that the owner of a factory may

not delay action until the directions of the commissioner of labor are given. Arnold v. National Starch Co. 194 N. Y. 42, 21 L.R.A. (N.S.) 178, 86 N. E. 815. There were no fire escapes on the building in which the plaintiff's intestate was burned.

(a) The court charged the jury as follows: "It is my duty to say to you that this building was, in legal effect, a factory, and that an absolute duty was imposed upon this defendant to provide a fire escape for this building, and that there was a violation of this duty, as the proof indicates, so that, if you find that the failure to provide the fire escape was the direct cause of the death of the decedent, you will find a verdict in favor of the plaintiff, unless you find that the defendant has established

ute concerning either the giving or prescribed warning signals or the rate of permissible speed; but the general rule as to the necessity for persons crossing a railroad track, to look in both directions for approaching trains to learn if it is safe to cross, although a proper and salutary rule, is not so absolute and arbitrary as to admit of no exception in any circumstances; and if a traveler at a crossing after dark waits before proceeding until a seen freight train has passed, and is then struck and killed or injured by another train running in the opposite direction at an excessive rate of speed in violation of a positive prohibitory statute, and the conditions are such that the noise of the first train, with the dust and smoke that accompanied it, and flurries of snow occurring at the same time, operated to prevent the traveler from hearing or seeing the second train coming, he is not chargeable with contributory negligence in assuming the safety of the crossing, and essaying to cross in the supposition that the statute will be obeyed by trains in the vicinity, if any there are. Grand Trunk R. Co. v. Hainer, 36 Can. S. C. 180.

Although it is negligence *per se* in a railroad company to fail to give the statutory signals as a train approaches a crossing, and it is presumed, when such signals are not given and a person is injured at the crossing, that the omission of the signals caused or helped to cause the injury, yet the railroad company may escape liability by proof that, notwithstanding no signals were given, the injured individual knew the train was coming, in time to avoid a collision. Lee v. Northwestern R. Co. 84 S. C. 125, 65 S. E. 1031.

For a railroad company to fail to give the warning signals required by statute as a train draws near a crossing is, in South Carolina, negligence *per se*, and the failure is presumed to be the cause of an injury to a person at the crossing, rendering the railroad company liable in damages unless the injured person was himself guilty of gross and wilful negligence,—not merely contributorily careless. Drennan v. South-I.R.A.1915E.

ern R. Co. 91 S. C. 507, 75 S. E. 45; Easterling v. Atlantic Coast Line R. Co. 91 S. C. 546, 75 S. E. 133.

The negligence of a railroad company in failing to obey the Maryland statute (Code 1912, art. 23, § 280), which requires the erection of signposts wherever the tracks cross public roads, to warn travelers on such roads to look out for cars, does not make it liable for injuring, by collision with a motor vehicle, a person who, well knowing of the location of the railroad track, attempted to drive across it without looking or listening for approaching cars. Glick v. Cumberland & W. Electric R. Co. 124 Md. 308, 92 Atl. 778.

A person about to cross a railroad track in a city or town has indeed a right to assume that a statute limiting the speed of railroad trains running through the place to a stated number of miles the hour will be obeyed by the railroad company, but he is not thereby at liberty to fail to use his sight and hearing and ordinary care to keep out of danger. Cleveland, C. C. & St. L. R. Co. v. Dukeman, 130 Ill. App. 105; Illinois C. R. Co. v. Sumrall, 96 Miss. 860, 51 So. 545.

If the violation of a statute regulating the running of railroad trains did not cause the injury, but such injury was the consequence of the injured person's own negligence in disregarding a warning to leave a railroad track, then there is no cause of action. Wade v. Louisville & N. R. Co. 54 Fla. 277, 45 So. 472.

The driver of a team on a highway crossing a railroad, who stopped his horses at a safe distance, listened for the approach of a train, heard none, expected the statutory whistling signal, which was not given, consulted his watch, found it indicated a half hour later than the supposed time a train was due at the crossing, and then concluded the train had passed and that it was safe to go on, cannot be deemed to have been guilty, as a matter of law, of contributory negligence in proceeding across the rails without also looking up and down the tracks. Doody v. Boston & M. R. Co. — N. H. —, 92 Atl. 801.

affirmatively and by a fair preponderance of evidence that decedent was himself negligent, and that his negligence contributed in some way to cause the accident. . . . The negligence of the defendant is established as a matter of law by his failure to provide a fire escape. You have only to determine whether or not the defendant's failure was the cause of the accident outside of the question of contributory negligence."

To this charge the defendant duly accepted. I regard the charge as correct, and the case as falling within the doctrine of *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536. In that case, which was an action in negligence, the plaintiff's wife was suffocated in her apartments on the third story

of a tenement house by reason of a fire in a lower story of the building. A statute of the state (Laws 1873, chap. 863) required that such tenement houses should be provided with fire escapes, and made it a misdemeanor to violate the statute. The defendant's house had no fire escape. The court said: "Here was, then, an absolute duty imposed upon the defendant by statute to provide a fire escape, and the duty was imposed for the sole benefit of the tenants of the house, so that they would have a mode of escape in the case of a fire. For a breach of this duty causing damage, it cannot be doubted that the tenants have a remedy. It is a general rule that, whenever one owes another a duty, whether such duty be imposed by voluntary contract or

The mere failure of one driving a horse and wagon along a highway crossed by a railroad track, to stop before driving on the track, does not make him negligent, as a matter of law, so as to preclude his recovery for an injury by a passing train which neared and crossed the highway in violation of a statute which limited its speed and required warning signals by bell and whistle. *Louisville & N. R. Co. v. Crominarity*, 80 Miss. 464, 38 So. 633.

While contributory negligence in an injured person is a defense to a railroad company in an action for the injury grounded upon a violation of the statute limiting the speed of railroad trains in the limits of and over street crossings in cities and towns, its existence is for the jury to determine, except in those rare cases where it is perfectly obvious to the court. *Hopson v. Kansas City, M. & B. R. Co.* 87 Miss. 789, 40 So. 872.

In an action against a railroad company for wrongfully causing the death of a traveler on a highway crossing, where the evidence is contradictory as to whether the train which killed him gave the statutory warning signals as it approached the crossing, it is reversible error to direct a verdict for the defendant upon the assumption that the signals were given, and, if given, the evidence of deceased's contributory negligence was conclusive. *Kennedy v. Southern R. Co.* 2 Tenn. C. C. A. 103.

A traveler on a highway crossing a railroad has a right to expect an approaching train to give the warning signals by bell and whistle required by statute, and where those are not given it is for the jury to say whether or not he was negligent in not stopping or taking other precautions to find out whether the way was clear and safe. *Kujawa v. Chicago, M. & St. P. R. Co.* 135 Wis. 562, 116 N. W. 249.

The findings of a jury upon conflicting testimony that a railroad company was negligent in that the statutory signals were not given from a train that struck and killed a traveler at a crossing as it approached, and also that the traveler was not contributorily negligent in not again

looking after he had looked both ways before driving across the track at an acute angle, where his back was toward the train which hit him, are not so unreasonable as to warrant the court in pronouncing a verdict against the railroad company unjustifiable. *Wabash R. Co. v. Misener*, 38 Can. S. C. 94.

A verdict against a railroad company in an action for killing a traveler at a railroad crossing after dark on a mid winter afternoon, on the ground of negligence in omitting to give the statutory warning signals as its train drew near the crossing, will not be disturbed where it appears that just before the fatality a train going in the opposite direction, and giving the signals, passed the crossing where the deceased was waiting to cross. *Grand Trunk R. Co. v. Griffith*, 45 Can. S. C. 380, Ann. Cas. 1912B, 711, 1 N. C. C. A. 503.

The defense of contributory negligence was urged in both the cases of *Mattes v. Great Northern R. Co.* 95 Minn. 386, 104 N. W. 234, on second appeal, 100 Minn. 34, 110 N. W. 98, and *Ellington v. Great Northern R. Co.* 96 Minn. 176, 104 N. W. 827, cases of children killed on railroad tracks because of alleged negligence in the railroad company in not putting up the fences required by statute. In both the question was held to be one of fact for the jury, but in the *Mattes Case* the defense failed because the little victims were sent to herd cattle on adjoining land, and had implied license to go on the tracks, while it prevailed in the *Ellington Case* because the child killed was a trespasser and had been directed by his parents to cross the tracks on an errand.

Despite the negligent failure of the proprietor of a public bathing establishment at the seaside to obey the Florida statute which requires every person, firm, or corporation maintaining such an establishment and renting bathing suits to equip the beach with life lines and rafts for the safety of bathers, if at anytime peculiar conditions should make bathing at the usual places in the customary way patently dangerous, it might be contributory negligence in a patron to encounter the obvious dangers, and

by statute, a breach of such duty causing damage gives a cause of action. Duty and right are correlative; and, where a duty is imposed, there must be a right to have it performed." 78 N. Y. 314.

In a suit upon a cause of action thus given by statute, it is not necessary for the plaintiff to prove negligence on the part of the defendant, because the failure to observe the statute creates a liability *per se*, or, as is otherwise and with less accuracy sometimes said, is conclusive evidence of negligence. *Jetter v. New York & H. R. Co.* 2 Abb. App. Dec. 458; *Racine v. Morris*, 201 N. Y. 240, 94 N. E. 864; *Watkins v. Naval Colliery Co.* [1912] A. C. 693; 27 Laws of England (Halsbury) 192.

Whether a statute gives a cause of ac-

tion to a person injured by its violation, or whether it is intended as a general police regulation, and the violation made punishable solely as a public offense, "must to a great extent depend on the purview of the legislature in the particular statute and the language which they have there employed." *Atkinson v. New Castle & G. Water Co.* L. R. 2 Exch. Div. 441; *Taylor v. Lake Shore & M. S. R. Co.* 45 Mich. 74, 40 Am. Rep. 457, 7 N. W. 728.

Actions to recover damages for the breach of a statutory duty are not to be confounded with those based solely on negligence. In the latter class of cases the violation of a statute or an ordinance, if it has some connection with the injuries complained of, is evidence, more or less cogent, of negligence,

in such a case, if injured, he would not be entitled to recover damages from the negligent proprietor. *McKinney v. Adams*, — Fla. —, L.R.A.1915D, 442, 66 So. 988.

Although the owner of a building may have violated a statute requiring safety bars at entrances to or upon freight elevators in use therein, and thus been negligent, yet his failure to obey such statute does not render him liable for an injury sustained by a person falling into the elevator opening in consequence of his own want of care and contributory negligence. *Amiot v. Foster*, 213 Mass. 573, 100 N. E. 1007.

A statute of Georgia (Civ. Code, 1910, § 3699), requires landlords of rented houses to keep them in repair, and makes them liable for all substantial improvements made by their consent. Under the operation of this statute the remedy of a tenant of premises that got out of repair after the tenancy began is to notify the landlord, wait a reasonable time for repairs to be made, refrain from using the premises where there is danger, and then, if the landlord neglects or refuses to make the needed repairs, either to have them made at the landlord's expense, or move out. If he does neither, but continues to occupy the ill-conditioned premises, the courts hold him guilty of contributory negligence in case of injury, and deny him a recovery against the landlord. *Ball v. Walsh*, 137 Ga. 350, 73 S. E. 585; *Clements v. Blanchard*, 141 Ga. 311, L.R.A. —, —, 80 S. E. 1004.

It is not contributory negligence as a matter of law for the tenant of a tenement house to descend or ascend an unlighted stairway in the house, where the landlord has failed to obey the statute (N. Y. Consol. Laws 1909, chap. 61, § 76) requiring tenement-house hallways to have lights burning after nightfall, since the tenant has a legal right to do so, in a careful manner. *Bornstein v. Faden*, 149 App. Div. 37, 133 N. Y. Supp. 608, affirmed in 208 N. Y. 605, 102 N. E. 1099.

The contributory negligence of a servant injured in consequence of the master's disobedience of a statute enacted for the benefit of workmen precludes his recovery of L.R.A.1915E.

the master for his injury, unless the statute has shut out such a defense. *Melville v. Butte-Balaklava Copper Co.* 47 Mont. 1, 130 Pac. 441.

The legislature of Wisconsin when it abolished the defense of assumption of risk (Laws 1905, chap. 303, § 1636jj) in cases of injury to a servant where the master had neglected to discharge his statutory duty to guard and protect belting, shafting, gearing, and machinery, did not deprive him of the defense of contributory negligence. *Willette v. Rhinelander Paper Co.* 145 Wis. 537, 130 N. W. 853.

Although a miner does not assume the risk of injury by working in a mine which is not efficiently ventilated in conformity with the requirements of a mandatory statute, yet he may be chargeable with contributory negligence in continuing at work, where the danger from bad air is so obvious that an ordinarily prudent man would not incur the risk of injury in the conditions prevailing. *Log Mountain Coal Co. v. Crunkleton*, 160 Ky. 202, 169 S. W. 692, 7 N. C. C. A. 178.

The independent negligence of a miner who is injured by the falling of a mine roof will preclude his recovering from the owner of the mine, notwithstanding the latter's failure to comply with a statute which requires him to furnish props and other timbers for use in supporting the roof. *Look-out Fuel Co. v. Phillips*, 11 Ala. App. 657, 66 So. 946.

The negligence of a girl who had very nearly reached the age limit below which the statute forbade children to be employed to run or assist in running elevators, in carelessly putting her leg between an elevator and the wall of the shaft, upon the assumption that the space was sufficient to allow it to pass in safety, precludes her recovering against her employer, for an injury to the limb incurred while she was operating the elevator to deliver a message received under her employment to answer telephone calls. *Boesel v. Wells, F. & Co.* 260 Mo. 463, 169 S. W. 110.

A doubt was expressed by the supreme court of Minnesota in *Schutt v. Adair*, 99

which the jury may consider with all the facts proved. Union P. R. Co. v. McDonald, 152 U. S. 262, 283, 38 L. ed. 434, 443, 14 Sup. Ct. Rep. 619; Hayes v. Michigan C. R. Co. 111 U. S. 228, 239, 28 L. ed. 410, 414, 4 Sup. Ct. Rep. 369; Kelley v. New York State R. Co. 207 N. Y. 342, 100 N. E. 1115; Fluker v. Ziegele Brewing Co. 201 N. Y. 40, 93 N. E. 1112, Ann. Cas. 1912A, 793.

This principle of law is illustrated in Union P. R. Co. v. McDonald and Fluker v. Ziegele Brewing Co. supra. In Union P. R. Co. v. McDonald the defendant failed to erect a fence required by statute to protect cattle and horses, and by reason of the absence of the fence a child was injured. The court (Hayes v. Michigan C. R. Co.

111 U. S. 240, 28 L. ed. 415, 4 Sup. Ct. Rep. 369), quoting, said: "And although in the case of injury to persons by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence."

Fluker v. Ziegele Brewing Co. was a case where a public way was obstructed by beer kegs placed therein by the defendant in violation of a general city ordinance prohibiting streets obstructions. This court said: "The violation of the ordinance did not subject the wrongdoer to a civil liability for damages; but its disregard was something which, in connection with the other facts of

Minn. 7, 108 N. W. 811, 20 Am. Neg. Rep. 598, as to whether the plaintiff, who had been injured by falling into an open elevator shaft while lawfully upon defendant's premises, but not in his service, was within the protection of the statute of that state (Gen. Stat. 1894, § 2250) requiring elevator shafts to be guarded as therein stated, and it was intimated that the purpose of the statute was to protect only employees in warehouses, factories, etc., but even if the plaintiff could be regarded as within the protected classes, it was held that the statute did not create an absolute liability, but merely imposed a duty to put up guards against injuries, the failure to discharge which would be negligence, but would not entail liability if contributory negligence in the injured person should be established, and as the evidence in the case at bar warranted the jury in finding that the plaintiff was himself negligent in falling into the shaft, he could not recover for the injury he sustained.

In North Carolina, by statute (Pub. Laws 1913, chap. 6), the defense of contributory negligence in actions by servants for personal injuries against masters has been abolished. Williams v. Atlantic Coast Line R. Co. 168 N. C. 360, 84 S. E. 408.

One who suffers an injury in consequence of another's failure to perform a duty a statute has imposed upon that other cannot recover of the other damages for his injury, if he himself either prevented the other from performing the duty, or was equally bound to perform it.

Thus, an owner of land adjoining a railroad right of way, whose horse has been injured by a barbed-wire fence along the railroad tracks, cannot recover for the injury from the railroad company, where he prevented its servants from replacing and reconstructing such fence to meet statutory requirements, and notified the company to stop work upon it, under a claim that it was improperly located on his land. Baltimore & O. R. Co. v. McIllyar, 77 Ohio St. 391, 83 N. E. 497.

Again, the violation of a statute requiring at least 75 per cent of the cars of railroad trains to be equipped and controlled

by safety air brakes does not render a railroad company liable to the conductor of a freight train who sustained injuries from a deficiency of such air brakes, where such conductor was himself the agent the company employed to discharge the duties imposed upon it by the statute. St. Louis Southwestern R. Co. v. Wilkes, — Tex. Civ. App. —, 159 S. W. 126.

And an officer, whether such *de jure* or *de facto*, of a corporation which had leased and was occupying as a tenant a building provided with a freight elevator not equipped with the safety mechanical devices prescribed by statute to stay it from falling in case an accident should happen to the hoisting machinery or ropes, cannot recover from the owner of the building for his personal injuries consequent upon a fall of the elevator, where the statutory duty rested equally upon both owners and lessees. Welker v. Anheuser-Busch Brewing Asso. 103 Minn. 189, 114 N. W. 745.

This is because when a statute has provided that one or the other of two persons shall do something for the benefit of a third or others in all circumstances, and not merely that one must do it in certain circumstances and the other must do it in other circumstances, such statute imposes a duty upon both, and leaves it to them to determine which shall perform that duty. Rooney v. Brogan Constr. Co. 107 App. Div. 258, 95 N. Y. Supp. 1. [The subsequent appeals in this case (see *infra*, subdiv. VIII.) left this point unaffected. Ed.]

VIII. Assumption of risk in cases of violated statutes.

In actions for personal injuries brought by servants against masters, and grounded upon the neglect of the defendants to discharge duties imposed by statutes enacted for the benefit of laborers, the doctrine of assumption of risk has claimed much attention from the courts, and the cases decided since the publication of the primary note have not settled the law upon the subject.

the case, furnished some evidence for the consideration of the jury in passing upon the question of the liability of the defendant." 201 N. Y. 43, 93 N. E. 1113, Ann. Cas. 1912A, 793.

A brief review of the decisions in this court cited to impeach the judge's charge as to the defendant's liability will show that they either fall within the class wherein the violation of an enactment gives no personal cause of action, but is simply evidence of negligence, or else that the decisions did not turn upon that question, and what was said upon the subject was aside from the case.

Knupfle v. Knickerbocker Ice Co. 84 N. Y. 488, cited by the defendant, was a case where the ice company's team was left untied and

unattended in the public street, in violation of a municipal ordinance. The horses started, and the plaintiff's intestate was run over and killed by the wagon to which they were attached. The ordinance in that case was a general police regulation for the use and occupation of the public streets, and was not enacted for the benefit of any particular class of persons. It was a case of the same nature as *Fluker v. Ziegele Brewing Co.* supra, and was decided in the same way.

Marino v. Lehmaier, 173 N. Y. 530, 61 L.R.A. 811, 66 N. E. 572, 13 Am. Neg. Rep. 403, was a case involving § 70 of the labor law adopted in 1897 (Laws 1897, chap. 415). Section 70 provided that a child under the age of fourteen years should not

It may be stated generally that children employed in violation of prohibitory statutes ordinarily do not assume the risks of the employment.

A statute prohibiting the employment, except in certain stated cases, of children under a stated age, necessarily excludes the application of the doctrine of assumption of risks. *Elk Cotton Mills v. Grant*, 140 Ga. 727, 48 L.R.A. (N.S.) 656, 79 S. E. 836.

The doctrine of assumption of risk has no application to a child below the age limit named in a statute absolutely prohibiting the employment of children at any work dangerous to life and limb, and injured when the statute was violated. *Sterling v. Union Carbide Co.* 142 Mich. 284, 105 N. W. 755; *Syneszewski v. Schmidt*, 153 Mich. 438, 116 N. W. 1107.

An employer who has violated a statute prohibiting the employment, in certain factories or at dangerous work, of children under stated ages, does so at his own peril, and if sued for damages for personal injuries sustained by a child in the prohibited employment cannot defend upon the doctrine of assumption of risk; that doctrine is unavailable for the purposes of defense. *Lenahan v. Pittston Coal Min. Co.* 218 Pa. 311, 12 L.R.A. (N.S.) 461, 120 Am. St. Rep. 885, 67 Atl. 642; *Stehle v. Jaeger Automatic Mach. Co.* 220 Pa. 617, 69 Atl. 1116, 14 Ann. Cas. 122.

The doctrine of assumption of risk does not apply in case of the violation of a mandatory statute forbidding absolutely the cleaning of machinery in motion by any female employee under the age of eighteen years, where there is no affirmative proof that the injured minor fully appreciated the danger of her employment and voluntarily elected to take the chances. *Bromberg v. Evans Laundry Co.* 134 Iowa, 38, 111 N. W. 417, 13 Ann. Cas. 33.

With respect of adult servants, there is more discord in the decisions over the doctrine of the assumption of risk.

The negligence of a manufacturer in failing to comply with the Indiana factory act (Acts 1899, p. 234, chap. 142, § 9; L.R.A.1915E.

Burns's Anno. Stat. 1901, § 7087i), which requires guards on all vats, pans, saws, cogs, gearing, planers, belting, shafting, set screws, and machinery, is not to be defended upon the doctrine of assumption of risk by the workmen. *United States Cement Co. v. Cooper*, — Ind. App. —, 82 N. E. 981, reversed on other grounds in 172 Ind. 599, 88 N. E. 69.

When a master is charged with the violation of a statutory duty to guard cogwheels on machinery, which caused injury to a servant, the latter cannot be charged with having assumed the risk of such injury. *American Car & Foundry Co. v. Wyatt*, — Ind. App. —, 108 N. E. 12.

Under the Iowa statute requiring saws in mills and other dangerous machinery to be guarded where practicable, a workman at an unguarded power-driven saw does not assume the risk of injury by continuing at work, unless the danger is so obvious and imminent that no prudent person would face it. *Correll v. Williams*, — Iowa, —, 148 N. W. 633.

The doctrine is not recognized as affording any defense to an action grounded on a violation of the Kansas factory act (Laws 1903, p. 540, chap. 356, § 4), which imposes a mandatory duty on manufacturers to guard belting, shafting, and machinery for preventing injuries to their workmen. *Kansas Buff Brick & Mfg. Co. v. Stark*, 77 Kan. 648, 95 Pac. 1047.

It is declared to be the rule in Missouri at the present time, whatever it may be elsewhere, that a workman does not assume the risk of injury from an inadvertent contact in the course of his duties with an unguarded dangerous machine, however obvious the absence of guards may be, where the master in violation of his duty under a statute has neglected to provide the safety guards prescribed by law. *Stafford v. Adams*, 113 Mo. App. 717, 88 S. W. 1130.

When a manufacturer neglects to obey the Washington statute (Laws 1903, chap. 37) which requires dangerous machinery, etc., to be protected by safety guards, he incurs a liability to a workman who sustains, while free from contributory negli-

be employed in any factory in this state, and that a child over fourteen and under sixteen years of age should not be so employed without the certificate of a health officer. A violation of this statute was made a misdemeanor. The plaintiff, a boy thirteen years and three months old, was employed in the defendant's printing establishment, and his fingers were caught in a cogwheel of a printing press and were cut off. The court placed the case in the category of those wherein the violation of a statute is evidence of negligence in an action by one injured through its violation, and in that respect the decision has since been followed. *Koester v. Rochester Candy Works*, 194 N. Y. 92, 19 L.R.A.(N.S.) 783, 87 N. E. 77, 16 Ann. Cas. 589. The legisla-

ture intended, by § 70 of the labor law, to regulate, and in some cases, forbid, child labor in factories, regarding it as detrimental to the public welfare and undesirable for many reasons. The object sought was quite as much for the benefit of the public as for the protection of the child.

A child employed in a factory is not only exposed to risk of accidental bodily injury, but to the far greater risk of physical, mental, and moral deterioration, which will prevent his becoming a useful member of the community. The wrong done to the child by a violation of the statute is a wrong done to the whole social order. The number of children who are injured accidentally through their employment about machinery in factories is small compared

gence, an injury by the unguarded machinery; and the fact that the risk of danger was open and obvious affords no defense, for the doctrine of assumption of risk does not apply. *Hoveland v. Hall Bros. Marine R. & Shipbuilding Co.* 41 Wash. 164, 82 Pac. 1090; *Erickson v. E. J. McNeeley & Co.* 41 Wash. 509, 84 Pac. 3; *Campbell v. Wheelihan-Weidauer Co.* 45 Wash. 675, 89 Pac. 161.

In Wisconsin, by statute (Laws 1905, chap. 303, § 1636jj) the defense of assumption of risk in cases of injury to a servant where the master had negligently omitted to discharge his statutory duty to guard and protect belting, shafting, gearing, and machinery, was abolished. *Willette v. Rhinelander Paper Co.* 145 Wis. 537, 130 N. W. 853.

The doctrine of assumed risk, it has been said, has no proper place in an action based upon a failure to perform a statutory duty; for the reason that the only risks assumed are those arising after the statutory duty has been performed. *Log Mountain Coal Co. v. Crunkleton*, 160 Ky. 202, 169 S. W. 692, 7 N. C. C. A. 178.

A servant cannot impliedly waive his master's compliance with a statute which imposes a duty upon the master for the protection and safety of the servant, or, stated otherwise, a servant does not assume the risk arising from the master's violation of his statutory duty. *Great Western Coal & Coke Co. v. Cunningham*, 43 Okla. 417, 143 Pac. 26; *Great Western Coal & Coke Co. v. Coffman*, 43 Okla. 404, 143 Pac. 30; *Great Western Coal & Coke Co. v. Boyd*, 43 Okla. 439, 143 Pac. 36.

The ordinary risks of an employment are distinct from risks due to negligence in the master; the servant, unless a statute changes the rule, generally assumes the former risks, and generally does not assume the latter risks. *Pecos & N. T. R. Co. v. Collins*, — Tex. Civ. App. —, 173 S. W. 250.

A miner only assumes the risks which arise after the mine owner has performed the duty imposed on him by the Kentucky statute (§ 2731), which requires a stated L.R.A.1915E.

quantity of fresh air to be supplied every minute for every worker in mines. *Jellico Coal Min. Co. v. Walls*, 160 Ky. 730, 170 S. W. 19.

The risk assumed by a workman in a New Jersey factory, mill, or workshop, in contemplation of law, where the statute (P. L. 1904, p. 156, § 13) requires all vats and pans whenever practicable to be guarded, is only such risk as pertains to the vats and pans when properly guarded as required by the statute. *Dix v. Union Ice Co.* 76 N. J. L. 178, 68 Atl. 1101.

The doctrine of assumption of risk affords no defense to a delinquent master who has neglected and omitted to obey a mandatory statute making it his duty to inclose or secure, properly and substantially, elevators, with roofs and sides, running side by side in a single open shaft, when his servant is injured as he is loading one elevator, by a heavy article falling from the other above him. *Fowler Packing Co. v. Enzenperger*, 77 Kan. 406, 15 L.R.A.(N.S.) 784, 94 Pac. 995.

Whether or not when a case has been made showing a manufacturer's culpability in neglecting obedience to the Missouri statute (Rev. Stat. 1899, § 6433), which requires all belting, shafting, gearing, and drums in factories placed so as to be dangerous to workmen discharging their ordinary duties, to be safely and securely guarded, the manufacturer may be allowed the benefit of the doctrine that the workmen assumed obvious risks of injury, the court in *Millsap v. Beggs*, 122 Mo. App. 1, 97 S. W. 956, deemed it unnecessary to consider, because on the trial of that case the question whether the injured plaintiff had assumed the risk had been submitted to the jury as one of fact, in an instruction asked by the defendant, so that he had had the benefit of the doctrine anyway.

While the doctrine of assumption of risk is available as a defense to a master in an action by a servant for personal injuries sustained in consequence of the defendant's neglect to obey the Minnesota statute (Rev. Laws 1905, § 1813), which requires dangerous machinery to be equipped, whenever

with the great number so employed who suffer indirectly in the stunted growth of their minds and bodies. The decision in the Marino Case, that the child labor law was intended primarily for the public benefit, and that a violation thereof is merely evidence of negligence, is in no wise contrary to the ruling of the court in Willy v. Mulledy, 78 N. Y. 310, 34 Am. Rep. 536.

McRickard v. Flint, 114 N. Y. 222, 227, 21 N. E. 153, was a case which did not involve the question as to the full force that should be given to proof of the violation of a statute causing personal injuries. The case arose under § 5 of chapter 547, Laws 1874, providing that elevator shafts should be properly guarded. The trial judge charged that, if any person failed to com-

ply with the requirements of the statute, he was prima facie guilty of negligence, to which exception was taken. This court said that the charge "had reference to the failure to perform the statutory duty, unqualified by any circumstances bearing upon the question, and was not necessarily applied to the present case so as to treat the question of negligence of the defendant as one of law." The court then went on to say, further, that there was other evidence in the case to justify the finding of the defendant's negligence, and sustain the plaintiff's recovery. In the McRickard Case, therefore, the court expressly refused to consider how far the failure to perform a statutory duty to guard the elevator shaft bore, as matter of law, on the de-

practicable, with safety guards, yet whether or not the servant assumed the risk of injury is ordinarily a question of fact for the jury. Callopy v. Atwood, 105 Minn. 80, 18 L.R.A.(N.S.) 593, 117 N. W. 238.

The courts of Wisconsin regarded the doctrine in the same light before the legislature abolished the defense. Van de Bogaert v. Marinette & M. Paper Co. 132 Wis. 367, 112 N. W. 443.

In some other states the doctrine of assumption of risk still affords a defense to an injury resulting to a servant from the master's failure to discharge a duty imposed on him by a statute enacted for the servant's benefit.

In Montana the defense is available to the master unless it has been expressly taken away by statute. Melville v. Butte-Balclava Copper Co. 47 Mont. 1, 130 Pac. 441.

In Iowa it has been held that notwithstanding a master's omission to comply with a statute commanding safety guards to be affixed to all saws, planers, cogs, gearing, belting, shafting, set screws, and other machinery (Acts 29 Gen. Assem. [Iowa] p. 107, chap. 149; Code Supp. 1902, § 4999b), is negligence on his part, still an adult workman in his employ knowingly engaged in operating an unguarded and dangerous machine, who suffers an injury, must be deemed to have assumed the risk, and hence cannot recover. Sutton v. Des Moines Bakery Co. 135 Iowa, 390, 112 N. W. 836.

Weaver, J., in concurring in the conclusion of the court (the facts showing contributory negligence as well as an assumption of risk), did "not wish to be bound by the proposition as to the application of the doctrine of assumption of risk by the servant of a master who violates a statute expressly requiring the use of safety appliances."

The question of assumption of risk by the victim of a violation of a statutory duty was conspicuous in the New York case of Rooney v. Brogan Constr. Co. 107 App. Div. 258, 95 N. Y. Supp. 1.

That case up to the time of writing has been reported in the New York reports L.R.A.1915E.

seven times, and it is not apparent that the end of the litigation is in sight.

The action was grounded upon a violation by the defendant of the duty imposed by the New York Labor Law (Laws 1897, chap. 415, § 20, as amended by Laws 1899, chap. 192), which required safety barriers to inclose or fence all sides of shafts, hatchways, and openings for hoisting materials in floors of buildings under construction, and which was enacted for the benefit of workmen employed in such buildings.

The plaintiff's intestate, a workman whose duty required him to maintain fires in such a building to prevent the freshly applied plaster on the walls from freezing, while carrying a stove used for the purpose, after dark one winter evening, lighted only by a pair of gasolene torches carried by himself and a fellow workman, tripped and fell to his death through an unguarded floor opening upon the ninth floor.

From a judgment entered upon a verdict directed by the trial court in defendant's favor on the ground that the deceased had assumed the risk, the plaintiff appealed. And in reversing the judgment the appellate division said: The learned justice thought that upon the question of contributory negligence the evidence presented a question of fact for the jury. In this view we concur, and think that the question of assumption of risk was also for the jury. Upon this question the defendant had the affirmative. There was no affirmative evidence that the deceased knew of the unguarded condition of the elevator openings, and we do not think such knowledge could be inferred as a matter of law from the mere fact that for a few days he had been lighting fires on the different floors; certainly that occupation did not necessarily call his attention to the absence of guards about these openings. He knew, of course, that the hoisting apparatus was there, but, so far as the evidence discloses, the only place where his employment must necessarily have directed his attention to such apparatus was in the basement, and the evidence does not disclose either that he could or should have observed the absence

defendant's liability. It was not necessary to decide that question.

McGrath v. New York C. & H. R. R. Co. 63 N. Y. 522, was a railroad crossing case, and there was no flagman at the crossing, as required by a municipal ordinance. The trial judge refused to receive the ordinance in evidence, which this court held was erroneous. Whether proof of the violation of the ordinance established liability, or only showed negligence, it was in either case error to exclude it.

In Graham v. Manhattan R. Co. 149 N. Y. 336, 341, 43 N. E. 917, 9 Am. Neg. Cas. 648, there was a nonsuit. The plaintiff was injured while on the platform of one of the cars of the defendant's elevated railroad. The court, in considering the facts

of guards about the openings on the floors above. Under these circumstances we think it cannot be said, as a matter of law, either that he knew of the absence of guards, that he assumed the risk, or that he acted other than as an ordinarily prudent person would have acted under the circumstances, bearing in mind his right to rely on the assumption that the duty to guard these openings had been discharged.

A judgment for the defendant on the next trial was reversed (113 App. Div. 813, 90 N. Y. Supp. 939) on the ground that the court had erred in charging the jury that if it should be found that the deceased knew of the opening through which he fell, and of the absence of a barrier about it, then he assumed the risk of injury and the plaintiff could not recover for his death, because, in the view of the appellate division this charge took away from the jury a question which it was the sole province of the jury to determine, *viz.*, whether the deceased had such a foreknowledge as to appreciate the danger.

Upon the next trial the jury was instructed in conformity to the decision just cited, and rendered a verdict for the plaintiff, and the judgment entered thereon was unanimously affirmed (*vide* 121 App. Div. 919, 106 N. Y. Supp. 1143).

This might have terminated the contest, the rule in New York being that a unanimous affirmance by the appellate division in such cases is not reviewable by the court of appeals unless the appellate division grants leave to appeal to that court.

But leave was granted to the defendant to appeal to the court of appeals from that decision (*vide* 124 App. Div. 911, 108 N. Y. Supp. 1146).

Then the court of appeals (*vide* 194 N. Y. 32, 86 N. E. 814) reversed the judgment and ordered a new trial on the ground that the trial court had committed a prejudicial error in qualifying a charge requested by defendant's counsel to the effect that if the jury should find that the deceased knew the open hole was where it was, and was unguarded, and knew the condition of the flooring where he stumbled, then as a mat-

ter of law he assumed the risk, and the plaintiff could not recover, when the trial court added that this was so, provided the deceased appreciated all the danger incidental to the conditions.

ter of law he assumed the risk, and the plaintiff could not recover, when the trial court added that this was so, provided the deceased appreciated all the danger incidental to the conditions.

What kind of evidence, or the force thereof, the court did not say, nor was it necessary for the court to say, in rendering its decision.

In Briggs v. New York C. & H. R. R. Co. 72 N. Y. 26, 30, there was a general ordinance regulating stovepipes, and the court charged: "That putting up the stovepipe in a manner forbidden by the city ordinances was evidence of negligence, which the jury had a right to consider."

After the new trial following that decision, another judgment for the plaintiff was reversed by the appellate division for error in charging the jury upon the same topic (*vide* 136 App. Div. 925, 120 N. Y. Supp. 1143).

Another trial followed this reversal, and resulted in a verdict for the plaintiff, but the judgment thereon was reversed by the appellate division (*vide* 147 App. Div. 68, 131 N. Y. Supp. 720) on the ground that the verdict was against the weight of evidence, which indubitably went to prove that the deceased necessarily knew that this opening in the floor existed and was not protected by barriers, and hence, by continuing at work with such knowledge, assumed the risk of injury as a matter of law.

Upon the second trial of the action of Kiernan v. Eidlitz, after the reversal reported in 109 App. Div. 726, 96 N. Y. Supp. 387, which went upon the ground that the failure to obey the statute requiring openings in floors used for hoisting materials in buildings under construction to be fenced all around did not conclusively establish negligence as a matter of law, but simply raised a question of fact for the jury (*vide* *infra*, subd. XIII. a) there was another verdict for the plaintiff which led to a second reversal (*vide* 115 App. Div. 141, 100 N. Y. Supp. 731), grounded upon the ground that the question of assumption of risk should have been, but was not, submitted to the jury as a question of fact for its determination.

The inapplicability of the doctrine of assumption of risk where a servant suffers an injury by the master's neglect to obey a statute imposing a duty for the former's benefit rests, it has been said, upon the ground that assuming the risk results from and is a part of the contract of employment. Swick v. Aetna Portland Cement Co. 147 Mich. 454, 111 N. W. 110; Poole v.

The only question in this court was whether there was any evidence to show that noncompliance with the ordinance in any manner contributed to the injury sued for. The court found there was, and that there was no error in allowing the jury to take the ordinance into consideration. A judgment for the plaintiff was affirmed. The decision is not an authority either way in the case at bar.

In *Donnelly v. Rochester*, 166 N. Y. 315, 59 N. E. 989, 9 Am. Neg. Rep. 550, one of the defendant's ordinances relating to guards about area ways was violated by an abutting property owner, not by the city. The city was held liable for the failure to maintain its streets reasonably safe and secure, and the violation of its own ordi-

nance was some evidence of its neglect of duty.

In *Beisegel v. New York C. R. Co.* 14 Abb. Pr. N. S. 29, the plaintiff was struck by the defendant's train, and had a judgment. The court had charged that the violation by the defendant of a municipal ordinance regulating the speed of trains was some evidence of negligence. This court held that the ordinance had the force of a statute, and that the running of a train in violation of its provision was an unlawful act, and that it was proper to show the unlawfulness of the act by which the injury was received in an action against the parties committing the act. The reasoning of the court in this case would apparently

American Linseed Co. 119 App. Div. 136, 103 N. Y. Supp. 1047.

Now if the doctrine has its source in the contract of employment, then, inasmuch as the master cannot legally contract to violate the statute, the servant does not contract to assume the risk that the master will fail to do his statutory duty. *Swick v. Aetna Portland Cement Co.* supra.

And if no contractual relation exists between an owner of a building and a workman at work in it then the doctrine of assumption of risk cannot apply to such workman in case he is injured while at work by the neglect of that owner to obey a duty imposed by statute commanding safety guards to surround dangerous machinery. *Poole v. American Linseed Co.* supra.

The theory that assumption of risk is a feature inherent in the employment contract helps one to understand the accepted view that infants employed in violation of statutes assumed no risk of injury.

Inasmuch as both the Constitution (art. 15, § 16) and the statutes (Rev. Codes, §§ 5052, 5053) of Montana declare void contracts releasing employers from liability for negligence, the supreme court of that state, being of the opinion that the doctrine of assumption of risk is available to a master who has violated a statute requiring safety casings and doors to mine elevators when an injury to a workman in the mine has followed such violation has felt constrained to disagree with the many cases that grounded the doctrine upon an express or implied contract of the servant to assume the risk of injury while at work, and to base the doctrine upon the maxim *Volenti non fit injuria*, in order to avoid the constitutional and statutory provisions. *Osterholm v. Boston & M. Consol. Copper & S. Min. Co.* 40 Mont. 508, 107 Pac. 499.

The negligent failure of a coal mining company to obey a statute which requires mine operators when requested by a miner to furnish sufficient props, caps, and other suitable timber to hold up and make safe for workers underneath the roof of the mine, affords a miner injured by falling rock a right of recovery only when it was L.R.A.1915E.

prudent for him to continue at work after he had requested supports to be put in, and there had been a wilful failure to furnish them. *Mammoth Vein Coal Co. v. Publiss*, 83 Ark. 367, 104 S. W. 210.

Assumption of risk and contributory negligence are distinct things. *Poole v. American Linseed Co.* 119 App. Div. 136, 103 N. Y. Supp. 1047.

But, it has been said, the distinction between assumption of risk and contributory negligence is so shadowy that it is not to be wondered at that one is sometimes spoken of when circumstances more clearly characterizing the other are in mind. *Marshall, J., in Willette v. Rhineland Paper Co.* 145 Wis. 537, 130 N. W. 863.

The abolition, by successive statutes in Wisconsin, of the defenses of assumption of risk and negligence of a fellow servant where four or more servants were engaged in a common employment, and of contributory negligence where a want of ordinary care was not wilful (§ 2394-1; Laws 1913, chap. 599), in actions against a master for death or injury of his servant, made it more essential than it theretofore had been for courts to discriminate between assumption of risk and contributory negligence, which formerly, from the point of view of defeating a recovery, were very much alike, according to the court in *Puza v. C. Hennecke Co.* 158 Wis. 482, 149 N. W. 223.

These defenses, said the court, no longer can be considered from that point the same. Under these statutes the effect upon the right of recovery, of assumption of risk and contributory negligence, are dissimilar, and while, in the court's esteem, "it would be rash to attempt to indicate in a single decision all the points of difference between assumption of risk and contributory negligence, or to attempt to set limits to the meaning of the expression 'want of ordinary care not wilful,'" it was "quite safe to say that an intended and continued use of a known defective appliance or a known unsafe place by the employee in substantially the same way as the employer instructed or intended it should be used falls under the definition of assumption of risk

justify a charge that the violation of the ordinance was negligence *per se*.

Hoffman v. Union Ferry Co. 47 N. Y. 176, 7 Am. Rep. 435, and similar cases which hold that the violation of a statute is not conclusive evidence of contributory negligence on the part of a plaintiff, only illustrate the familiar principle that, although a party is in fault, yet, if that fault does not in any way contribute to an injury, the injured party may have an action against the wrongdoer to whose acts the injury is attributable. To the same effect is *Platz v. Cohoes*, 89 N. Y. 219, 42 Am. Rep. 286.

I think it is unnecessary to make further reference to the decided cases. There is no precedent shown, and I venture to say

that none can be found in this court, which requires a holding that a violation of the labor law in regard to fire escapes on factories, where a violation causes injury to a person employed in the factory, is simply evidence of negligence, and does not in and of itself establish liability, though the question involved has been a mooted one at the appellate divisions. *Gelder v. International Ore Treating Co.* 150 App. Div. 184, 134 N. Y. Supp. 782; *Kiernan v. Eidlitz*, 109 App. Div. 726, 96 N. Y. Supp. 387.

The case here under consideration is controlled by what Judge Earl said in *Willy v. Mulledy*, supra, and there was no error in the charge of the trial court as to the extent of the defendant's liability.

(b) The defendant also argues that the

as expressed in this statute, and is not to be considered contributory negligence."

IX. Actions against railroads for neglecting statutory duties.

a. The duty to signal approach of trains to highway crossings.

The later like the earlier cases declare it negligence in a railroad company to omit the warning signals by bell and whistle which a statute requires from locomotives and trains approaching public highways and purposing to cross. This negligence is held to render the railroad company liable for an injury of which it was the proximate cause, inflicted on the crossing, to a traveler on the highway who was himself free from contributory negligence. *Western R. Co. v. Moore*, 169 Ala. 284, 53 So. 744; *Louisville & N. R. Co. v. Loyd*, 186 Ala. 119, 65 So. 153; *Nashville, C. & St. L. R. Co. v. Vincent*, — Ala. —, 66 So. 697; *St. Louis, I. M. & S. R. Co. v. Tomlinson*, 78 Ark. 251, 94 S. W. 613; *Kansas City Southern R. Co. v. Harris*, 105 Ark. 374, 151 S. W. 992, Ann. Cas. 1914D, 932; *Eaton v. Southern P. Co.* 22 Cal. App. 461, 134 Pac. 801, *Southern R. Co. v. Combs*, 124 Ga. 1004, 53 S. E. 508; *Cleveland, C. C. & St. L. R. Co. v. Sparks*, 122 Ill. App. 400; *Illinois Southern R. Co. v. Hayer*, 128 Ill. App. 315; *Chicago, M. & St. P. R. Co. v. Gill*, 132 Ill. App. 310; *Cook v. Chicago, R. I. & P. R. Co.* 153 Ill. App. 596; *Butters v. Chicago, B. & Q. R. Co.* 157 Ill. App. 369; *Pittsburgh, C. C. & St. L. R. Co. v. Terrell*, 177 Ind. 447, 42 L.R.A.(N.S.) 367, 95 N. E. 1109; *New York, C. & St. L. R. Co. v. Robbins*, 38 Ind. App. 172, 76 N. E. 804; *Chicago & E. I. R. Co. v. Coon*, 48 Ind. App. 675, 93 N. E. 561, N. E. 598; *Pittsburgh, C. C. & St. L. R. Co. v. Macy*, — Ind. App. —, 107 N. E. 486; *Heise v. Chicago, G. W. R. Co. — Iowa*, —, 114 N. W. 180; *Nashville, C. & St. L. R. Co. v. Higgins*, 29 Ky. L. Rep. 89, 92 S. W. 549; *Cincinnati, N. O. & T. P. R. Co. v. Champ*, 31 Ky. L. Rep. 1054, 104 S. W. 988; *Louisville & N. R. Co. v. Joshlin*, 33 Ky. L. Rep. L.R.A.1915E.

513, 110 S. W. 382; *Louisville & N. R. Co. v. Crominarity*, 86 Miss. 464, 38 So. 633; *Hutchinson v. Missouri P. R. Co.* 195 Mo. 546, 93 S. W. 931; *Stotler v. Chicago & A. R. Co.* 200 Mo. 107, 98 S. W. 509; *McNulty v. St. Louis & S. F. R. Co.* 203 Mo. 475, 101 S. W. 1082; *Mitchell v. St. Louis & S. F. R. Co.* 122 Mo. App. 50, 97 S. W. 552; *Midgett v. St. Louis & S. F. R. Co.* 124 Mo. App. 540, 102 S. W. 56; *Sprague v. Northern P. R. Co.* 40 Mont. 481, 107 Pac. 412; *De Atley v. Northern P. R. Co.* 42 Mont. 224, 112 Pac. 76; *Doody v. Boston & M. R. Co. — N. H. —*, 92 Atl. 801; *Turbyfill v. Atlanta & C. Air Line R. Co.* 83 S. C. 325, 65 S. E. 278; *Lee v. Northwestern R. Co.* 84 S. C. 125, 65 S. E. 1031; *Missouri, K. & T. R. Co. v. Malone*, — Tex. Civ. App. —, 110 S. W. 958 (This decision was reversed in 102 Tex. 269, 115 S. W. 1158, on grounds not affecting the point to which it is here cited); *Kujawa v. Chicago, M. & St. P. R. Co.* 135 Wis. 562, 116 N. W. 249; *Chicago, M. & St. P. R. Co. v. Donaldson*, 85 C. C. A. 185, 157 Fed. 821; *Wabash R. Co. v. Mesener*, 38 Can. S. C. 94; *Grand Trunk R. Co. v. Griffith*, 45 Can. S. C. 380; *Pedlar v. Canadian Northern R. Co.* 20 Manitoba L. Rep. 265.

The failure to obey a mandatory statute commanding warning signals by bell and whistle at railroad crossings is negligence, even where other means of warning have been employed. *Cincinnati, N. O. & T. P. R. Co. v. Champ*, 31 Ky. L. Rep. 1054, 104 S. W. 988.

The failure of a railroad company to comply with statutory requirements prescribed for the purpose of preventing injuries from the running of trains over public crossings, resulting in an injury to a traveler, establishes a *prima facie* case of negligence in the railroad company, and it can escape liability only by showing that the injured person might have avoided injury by ordinary care on his part. *Dozier v. Central of Georgia R. Co.* 12 Ga. App. 753, 78 S. E. 469.

It has long been settled by many decisions of the Indiana supreme court, it was

building in this case was not a factory within § 82 of the labor law as the section stood when the accident happened, and that the court erred in charging the contrary. The proof shows that the defendant was the proprietor of a tannery, and that one of the buildings connected with the tannery and used in the work of manufacturing leather was this dry loft which burned. The statute says that the term "factory" should be construed to include any mill, workshop, or other manufacturing or business establishment where one or more persons are employed at labor. Certainly, on the day of the accident the plaintiff and the witness Mott were oiling hides and hanging them up to dry in this loft. The building comes within the precise definition

contained in the statute, and no argument can make it plainer.

(c) The contention of the defendant further is that it was error for the court to charge that the building was three stories high within the meaning of the labor law. The evidence showed that the building contained a first floor, which was the ground, where the hides were oiled, and above that a second and a third story, where the hides were hung up to dry. No argument can amplify the evidence that the building consisted of three stories in height. It is true that tan bark was banked up to the height of 2 or 3 feet around the bottom of the building, but that could not affect the number of stories which the structure contained.

(d) The defendant also argues that the

asserted by that tribunal in Pittsburgh, C. C. & St. L. R. Co. v. Terrell, 177 Ind. 447, 42 L.R.A.(N.S.) 367, 95 N. E. 1109, that the failure of a railroad company in the operation of its road to give the signals enjoined by statute, of the approach of its trains to public highways crossed by its tracks, in violation of its duty owing to travelers on such highway, constitutes negligence giving rise to a cause of action in favor of such traveler who has been injured thereby without negligence on his part which contributed to his injury.

In a number of cases such omission of signals has been pronounced negligence *per se*. Latham v. Cleveland, C. C. & St. L. R. Co. 179 Ill. App. 324; Greenawaldt v. Lake Shore & M. S. R. Co. — Ind. —, 73 N. E. 910; on rehearing, 165 Ind. 219, 74 N. E. 1081; Chicago & E. I. R. Co. v. Coon, 48 Ind. App. 675, 93 N. E. 561, 95 N. E. 596; Toledo, St. L. & W. R. Co. v. Lander, 48 Ind. App. 56, 95 N. E. 319; Lake Shore & M. S. R. Co. v. Myers, 52 Ind. App. 67, 98 N. E. 654, 100 N. E. 313; Wabash R. Co. v. McNow, 53 Ind. App. 116, 99 N. E. 126, 100 N. E. 383; Brown v. Kansas City, C. & S. R. Co. 166 Mo. App. 255, 148 S. W. 457; Lee v. Northwestern R. Co. 84 S. C. 125, 65 S. E. 1031; Drennan v. Southern R. Co. 91 S. C. 507, 75 S. E. 45; Easterling v. Atlantic Coast Line R. Co. 91 S. C. 546, 75 S. E. 133; Galveston, H. & S. A. R. Co. v. Vollrath, 40 Tex. Civ. App. 46, 80 S. W. 279; Johnson v. Texas & G. R. Co. 45 Tex. Civ. App. 146, 100 S. W. 206; Rogers v. Rio Grande Western R. Co. 32 Utah, 367, 125 Am. St. Rep. 876, 90 Pac. 1075; Stokes v. Southern R. Co. 104 Va. 817, 52 S. E. 855.

The duty of a railroad company to give the statutory warning signals as a train approaches a highway crossing is fixed by law, and a failure to give such signals constitutes negligence *per se*, rendering the railroad company liable for injuries proximately caused by such failure, where the person injured was without contributory fault. Pittsburgh, C. C. & St. L. R. Co. v. Macy, — Ind. App. —, 107 N. E. 486.

Whether or not an action against a rail-

road company for personal injuries inflicted by a train at a railroad crossing is one at common law, or is grounded on a violation of a statute, it is negligence *per se* in the railroad company not to give the warning signals prescribed by statute. Clifford v. Southern R. Co. 87 S. C. 324, 69 S. E. 513.

A railroad company which omits performance of duties prescribed by statutes designed to protect the public from injuries at crossings is at least guilty of simple negligence *per se*, and, if the omission is proven, is negligent as a matter of law. Weatherly v. Nashville, C. & St. L. R. Co. 166 Ala. 575, 51 So. 959.

In South Carolina the violation of the statute respecting signals as railroad trains approach crossings is negligence as a matter of law. Dyson v. Southern R. Co. 83 S. C. 354, 65 S. E. 344.

In respect of persons at and upon railroad crossings, the failure of a railroad company to give the statutory warning signals by bell and whistle when a train approaches a crossing is negligence as a matter of law in Texas, while in respect of others it is not, but may be negligence as a matter of fact, proper for the consideration of a jury. Ft. Worth & D. C. R. Co. v. Poteet, 53 Tex. Civ. App. 44, 115 S. W. 883; Texas & P. R. Co. v. Hemphill, — Tex. Civ. App. —, 125 S. W. 340.

It is negligence as a matter of law to back a train of cars across a highway without giving the warning signals by bell and whistle which the statute requires, notwithstanding the train gets in motion within the statutory distance, especially where the movement is at night, in darkness, and there is neither a light nor a lookout or other warning of approach. Bowles v. Chesapeake & O. R. Co. 61 W. Va. 272, 57 S. E. 131.

The failure of a railroad company to obey a statute requiring it to ring a bell as its train approaches a public crossing is statutory negligence, and if such failure is a proximate cause of an injury to a person traveling in a street car toward such crossing to pass over it, the railroad company

failure to provide fire escapes was not the cause of the plaintiff's death. The plaintiff and the witness Mott had been hanging the hides on the third floor of the building on the day of the fire. They would load a truck with hides, place it on the elevator, carry the load to the third floor, and there hang up the hides. Shortly before the fire the deceased and Mott loaded the truck and placed it on the elevator; then Mott went out into the yard. The deceased at that time was standing on the elevator with the truck. That was the last anybody saw of him alive. When Mott returned after an absence of about ten minutes, the building was on fire. After the fire the body of the deceased was found under the place where before the fire he and Mott were

hanging hides on the third floor, and not far from his body was the truck. The jury might have found that the deceased, after the departure of Mott, went on with the work in which he was engaged, the same as he had been doing before, *viz.*, that he took the loaded truck to the third floor and proceeded to hang up the hides when the fire occurred. If not that, he must have stood idle after Mott went away and continued idle for the greater part of the ten minutes that Mott was gone. If he had remained idle on the first floor, it is likely he would have escaped from the building.

In connection with this same subject, the defendant argues that, if the deceased was on the third floor of the building, the ventilators afforded him means of escape as am-

is liable for such injury, no matter if the negligence of another party concurred to produce it. *Galveston, H. & S. A. R. Co. v. Vollrath*, 40 Tex. Civ. App. 46, 89 S. W. 279.

In other cases the failure to give the statutory warning signals of the approach of a railroad train to a public crossing is spoken of as evidence of negligence in the railroad company. *Ft. Smith & W. R. Co. v. Messek*, 96 Ark. 243, 131 S. W. 686, rehearing denied in 96 Ark. 248, 131 S. W. 966; *Giacomo v. New York, N. H. & H. R. Co.* 196 Mass. 192, 81 N. E. 899; *Kelsall v. New York, N. H. & H. R. Co.* 196 Mass. 554, 82 N. E. 674; *Corbs v. Michigan C. R. Co.* 144 Mich. 73, 107 N. W. 892.

The failure of the servants of a railroad company to comply with the law respecting the keeping of trains under control when approaching public crossings, and requiring the ringing of warning bells on moving trains about to cross highways, is not negligence as a matter of law when a train between two public crossings less than the statutory distance apart injures a person on the track by implied license; but it is a circumstance for a jury to consider in connection with other evidence in determining whether or not the railroad company was in fact negligent. *Macon & B. R. Co. v. Parker*, 127 Ga. 471, 56 S. E. 616.

The failure of a railroad company to give the statutory signals to warn a pedestrian of a highway that a train was coming, after dark, cannot be esteemed a proximate cause of his death, where, having an unobstructed view of the track, he walked upon it only 25 feet in front of a long train of noisily moving freight cars, the locomotive headlight of which was shining full on and illuminating the track for a quarter of a mile ahead. *Texas & P. R. Co. v. Marrujo*, — Tex. Civ. App. —, 172 S. W. 588.

b. Duties at crossings.

The failure of a railroad company to comply with the requirement of a statute commanding all trains to be stopped within a stated distance of a crossing, and not to go

on until the way is known to be clear, constitutes legal negligence. *Southern R. Co. v. Williams*, 143 Ala. 212, 38 So. 1013.

A statute that not only requires railroad trains approaching a crossing to come to a full stop within a stated distance, but also forbids them to proceed until the trainmen know that the way is clear, charges the servants of railroad companies with the highest degree of diligence to assure themselves that the way is clear and will remain so long enough to permit the train to pass the crossing in safety. *Billingsley v. Nashville, C. & St. L. R. Co.* 177 Ala. 342, 58 So. 433.

The violation of the Texas statute (*Rev. Stat. 1895, art. 4507*), which requires each locomotive engine approaching a place where two lines of railway cross at grade to come to a full stop before reaching the crossing, is the direct and proximate cause of the death of a trainman on a train moving across a crossing, killed by collision with an on-coming train on the other line, which failed to stop. *El Paso & S. W. R. Co. v. Murtle*, 49 Tex. Civ. App. 273, 108 S. W. 998.

In an action against a steam surface railroad company and a street railway company sued as joint tortfeasors for personal injuries inflicted at a crossing of the two roads upon a passenger in a street car, an instruction by the trial court, grounded upon a statute (*Mo. Rev. Stat. 1899, § 1180*) requiring the conductor or another railway servant, when a street car essays to cross a railroad track, to go upon such track and look for on-coming trains before proceeding to cross, that it was the duty of the street railway company to obey the requirement of such statute, and that its failure to do so would be negligence, for which the company would be liable if such failure caused or helped to cause the injury, is not erroneous notwithstanding the testimony shows that the view from the street car at the crossing in question was wholly unobstructed, and that the railroad company had gates at such crossing, and a watchman operating them at the time the injuries occurred. *Mulderig v. St. Louis*,

ple as any fire escape. These ventilators were on a level with the floor, and were only 3 feet high. The criticism of the defendant's argument made by counsel for the plaintiff is that the decedent, in order to escape by way of the ventilators, would have been compelled to lie down on the floor and roll out of the building and drop 16 feet to the tan bark below. That criticism seems to be justified. The jury could have found that, if the factory had been provided with fire escapes, the deceased could have got to the ground by means thereof in safety.

(e) The defendant also says that the court erred in charging that the burden of proving contributory negligence on the part of the deceased rested upon the defendant.

K. C. & C. R. Co. 116 Mo. App. 655, 94 S. W. 801.

A judgment in that case in the plaintiff's favor was reversed on account of other errors in giving instructions, but in respect of the instruction above referred to the court said: "It is contended that the statute . . . has no application to railroad cars where the view of the track is unobstructed, . . . nor where the railroad company maintains gates and a watchman who is present and operating the gates. We will not attempt to engraft exceptions on the statute. It seems to us that there is some evidence tending to show that had the conductor been on the track where the statute said he should be, instead of on the car, that he could have been of some assistance in extricating the motorman from the state of confusion the evidence tends to prove he was in, and perhaps have avoided the collision. In the circumstances we think the instruction was properly given."

Where a statute requires safety gates which have been erected and are raised and lowered at crossings of railroad tracks over public highways to be closed during the passage of trains and for a stated length of time before and after such passage, and, if they are not operated all the time, a notice stating what times they are operated to be posted at the crossings, a traveler approaching the track to cross it on the highway has a right to assume that the railroad company has obeyed and will obey the statute, and if he proceeds where the gates are up or open and no notice has been posted, he is warranted in the belief that the gates are in working order, and that no train is near, and hence is not to be charged with contributory negligence, as a matter of law, if he goes on the track without stopping to look and listen for an on-coming train. *Brown v. Erie R. Co.* — N. J. L. —, 91 Atl. 1023.

A railroad company is not shown to have been derelict in any statutory duty respecting the erection of gates and the keeping of flagmen at highway crossings, without proof that it was requested by town or

This is based on the failure of the plaintiff to put in evidence the notice required by the employers' liability law. The complaint alleged that a notice was given to the defendant, stating the time and place and cause of the decedent's injury, pursuant to the statute, and the answer admits that the defendant received a paper writing purporting to state the time, place, and cause of the injuries mentioned in the complaint. The notice was not, however, put in evidence. The failure to put it in evidence resulted perhaps from a mistake or misunderstanding for which the plaintiff was at any rate not wholly to blame. At the outset of the trial the court ruled that the complaint did not show a cause of action

city officers to erect gates and station a flagman at a certain crossing, under a statute requiring compliance with such requests, although it may actually have provided the gates and a flagman during daylight hours only. *Giacomo v. New York, N. H. & H. R. Co.* 196 Mass. 192, 81 N. E. 899.

The failure of a railroad company to obey the mandatory Indiana penal statute (Acts 1895, p. 233; Burns's Anno. Stat. 1908, §§ 5250-5254), requiring it properly to grade, gravel, or plank its tracks at sidewalk crossings in incorporated towns, is negligence *per se*. *Pittsburgh, C. C. & St. L. R. Co. v. Reed*, 44 Ind. App. 635, 88 N. E. 1080.

The act of a railroad company in blocking for an undue length of time a street crossing, in violation of a statute of Indiana (Burns's Anno. Stat. 1908, § 2671; Acts 1905, p. 584, § 666) making it a misdemeanor for a conductor or other person in charge of a freight train to permit or suffer it to remain standing across any public highway, street, alley, or farm crossing without a break of 60 feet, when a stop is necessary, will afford a house owner whose property is on fire, and when fire engines on the way to extinguish it are stopped and delayed by the violation of the statute, with the direct result of increasing the loss and damage, an action against the delinquent railroad for the enhanced injury; but, the action being for an injury to property, the plaintiff has the burden of alleging and proving his own freedom from contributory negligence in order to recover. *Cleveland, C. C. & St. L. R. Co. v. Tauer*, 176 Ind. 621, 39 L.R.A.(N.S.) 20, 96 N. E. 758.

When a workman employed by a railroad company is injured on a public street in a city by a frightened horse driven in front of a locomotive standing part way across such street, emitting steam, the circumstance that such locomotive had been standing there for more than five minutes previously, in violation of the statute (N. Y. Penal Code, § 421) making it a misdemeanor for anyone in charge of a locomotive

under the employers' liability law. Later on the court reversed that ruling. It may be that, if the trial had proceeded without interruption, the plaintiff would have offered the notice in evidence. At any rate, under the circumstance, the defendant should have called particular attention in his motion for a nonsuit to the fact that there was a failure of proof on the part of the plaintiff which might have been supplied, but nothing of the kind occurred. The defendant had the notice in his possession, and, if it was insufficient in any way, he had only to submit it to the court.

Upon the whole case, I recommend that the judgment appealed from be affirmed, with costs.

tive wilfully to obstruct a highway longer than five consecutive minutes, does not, as a matter of law, charge the railroad company with negligence, in an action by the injured person to recover for his injuries, and it is reversible error in a trial court to instruct the jury that if the street was obstructed for more than five minutes when the injury occurred the company might be found to have been negligent on that account. *Burns v. Delaware & H. Co.* 110 App. Div. 592, 96 N. Y. Supp. 509.

A second trial resulted in a verdict for the plaintiff, but the judgment entered thereon was again reversed (*vide* 116 App. Div. 111, 101 N. Y. Supp. 225). The appellate justices failed, however, to agree upon the reasons for reversal; one (Kelllogg, J.) was of opinion that the obstructing train was under the control not of the defendant, but of the company controlling the union station adjoining the street, for the twenty minutes prior to the time it was scheduled to depart, and hence the injury to the plaintiff was due to an independent contractor; another (Smith, J.), that while after the train pulled into the station to depart twenty minutes later it was under control of the station company, nevertheless it was the defendant who was responsible if the train was sent there unreasonably early, which might render it liable; only the case was submitted to the jury solely upon the question whether the highway was wilfully obstructed at the time of the accident, and whether the injury resulted from such wilful obstruction,—an erroneous theory; while the third justice (Parker, P. J.) concurred in the reversal without giving his opinion.

c. Duty of blocking frogs, switches, and crossings.

The violation of the Ohio statute (Act April 25, 1898, Rev. Stat. 1906, § 3365-18; 930 L. 342), which requires the blocking of all angles in frogs, switches, and crossings of railroad tracks in yards where trains are made up, must be deemed the proximate cause of injury to a brakeman knocked L.R.A.1915E.

Willard Bartlett, Ch. J., and Hogan, Cardozo, and Seabury, JJ., concur.

Collin, J., dissenting:

The intestate and the defendant were employee and employer. The complaint alleges that the death of the intestate was caused solely by the negligence of the defendant, in that the building consumed by fire, in which the intestate was burned to death, was provided with stairs and elevator as means of passing from one floor to another, and there was no fire escape on the outside of it or elsewhere, or no ladder nor stairs as a means of escape to the roof, or no automatic sprinkling device nor any other to prevent and check the spread of fire, and the said defendant was negligent

down and dragged into an unblocked frog in a railroad yard by a moving locomotive without his fault. *Cooper v. Baltimore & O. R. Co.* 16 L.R.A.(N.S.) 716, 86 C. C. A. 272, 159 Fed. 82, 14 Ann. Cas. 693.

d. Duty to equip rolling stock with safety hand- and foot-holds.

The violation by a railroad company of the Texas statute (Acts 1909, p. 65, §§ 5, 7, Rev. Stat. 1911, art. 6713), making it unlawful for any common carrier moving traffic within the state to use a locomotive, tender, or car unprovided with sufficient and secure grab-irons, hand-holds and foot stirrups, constitutes negligence and renders it liable for personal injuries to a train hand, due to the giving way, under his pull and weight, of an inadequate and insecure hand-hold. *Galveston, H. & S. A. R. Co. v. Enderle*, — Tex. Civ. App. —, 170 S. W. 276; *Missouri, O. & G. R. Co. v. Plemmons*, — Tex. Civ. App. —, 171 S. W. 259; *Galveston, H. & S. A. R. Co. v. Roemer*, — Tex. Civ. App. —, 173 S. W. 229.

By the Texas statute (Acts 1909, p. 65, §§ 5-7) railroad hands who should be injured in consequence of the violation of the statute requiring locomotives, tenders, and cars to be equipped with sufficient and secure grab-irons, hand-holds, and foot stirrups must be held not to have assumed the risks of their employment, or to have been contributorily negligent. *Missouri, O. & G. R. Co. v. Plemmons*, — Tex. Civ. App. —, 171 S. W. 259.

The assumption of risk and contributory negligence doctrines having been set aside by statute in cases of violation by common carriers of the statute requiring sufficient and secure grab-irons, hand-holds and foot stirrups on locomotives, tenders, and cars, a train hand injured through the giving way of a defective hand-hold which he had seized did not assume the risk of using it, even if he knew it was defective, provided he himself did not cause the defect. *Missouri, O. & G. R. Co. v. Plemmons*, — Tex. Civ. App. —, 171 S. W. 259; *Missouri, K.*

in not providing each of such lacking appliances. The allegations of negligence were supported by proof.

The labor law (Laws of 1909, chap. 36; Consol. Laws, chap. 31) provided at the time of the accident: "Such fire escapes as may be deemed necessary by the commissioner of labor shall be provided on the outside of every factory in this state consisting of three or more stories in height." Section 82.

The section also prescribes the plan and method of construction of the fire escapes, and § 83 provides for any other plan or style approved in writing by the commissioner of labor. The trial justice, having correctly held that the building was, within the sense of the statute, a factory,

charged the jury that the negligence of the defendant was established, as a matter of law, by his failure to provide a fire escape. A question presented by the briefs and argument of counsel is: Was it, as a matter of law, negligence on the part of the defendant to refrain from providing the fire escapes?

The statute creates a duty independent of any direction or approval on the part of the commissioner of labor. *Arnold v. National Starch Co.* 194 N. Y. 42, 21 L.R.A. (N.S.) 178, 86 N. E. 815. The idea of duty implies that of mandate. A statute prescribing simply a duty is not more mandatory than is the common-law creation or declaration of a duty. The statute which required signals to be given upon all mov-

& T. R. Co. v. Barrington, — Tex. Civ. App. —, 173 S. W. 595.

A railroad company is not excused from liability to a train hand for an injury to him while at work, due to the giving way of an insecure hand-hold on a car, and grounded upon a neglect to obey the Texas statute (Rev. Stat. 1911, art. 6713) imposing upon railroads a duty to equip cars, locomotives, and tenders with sufficient and secure grab-irons, hand-holds and foot stirrups, by having received the car with the insecure hand-hold from another road, since it was its duty to inspect the car before using it, and to make sure the requirements of the statute had been met. *Galveston, H. & S. A. R. Co. v. Roemer*, — Tex. Civ. App. —, 173 S. W. 229.

e. Duties at stations.

The failure of a railroad company to ring the bell or blow the whistle of a train before leaving and when about to leave a station as required by statute is *per se* negligence. *McElvane v. Central of Georgia R. Co.* 170 Ala. 525, 34 L.R.A. (N.S.) 715, 54 So. 489, 3 N. C. C. A. 340.

When a statute makes it the duty of a carrier to stop its trains at stations, it is negligence to fail to do so, as respects a passenger who attempts to alight at the proper stopping place, and is injured in doing so, having specifically called the train conductor's attention to her destination, and received his promise to assist her. *Martin v. Southern R. Co.* 77 S. C. 370, 122 Am. St. Rep. 574, 58 S. E. 3.

f. Limitations on speed.

When a person is injured by a railroad train running within municipal limits at a rate of speed made unlawful by statute, only two defenses are open to the railroad company when sued for the injury; namely, that the unlawful speed was not the proximate cause of the injury or, that the injured person was guilty of contributory negligence; failing both the liability of the railroad company is absolute. *Illinois C. R. Co. v. Watson*, — Miss. —, 39 So. 69. L.R.A.1915E.

The negligence of a railroad company is sufficiently established where travelers on a village street crossing its tracks were killed by an express train running at a rate of speed prohibited by the Canadian statute (55 and 56 Vict. chap. 27, §§ 197 and 259) and in violation thereof at an unfenced point, where no evidence of recklessness or want of care by the deceased has been offered. *Grand Trunk R. Co. v. Hainer*, 36 Can. S. C. 180.

Under the Wisconsin statute (§ 1809), which prohibits a train or locomotive to run faster than 12 miles an hour within 20 rods of a grade crossing in a city, except when a flagman is stationed, or gates are erected, maintained, and operated, and an electric bell has been installed and is kept in good working order at such crossing, the running of a train in a city, at a speed beyond the statutory limit, across a street at grade, in the nighttime, when the gates there are and for several hours have been out of order, and there is neither a flagman nor an electric bell there (although another bell is ringing at the time), is held to make out a case of negligence against a railroad company, and to entail its liability for striking and killing a pedestrian at the crossing not shown to have been grossly negligent of his own safety, even though he may have been inattentive at the time. *Jorgensen v. Chicago & N. W. R. Co.* 153 Wis. 108, 140 N. W. 1088.

Two members of the court dissented on the ground that the violation of the statute could not be deemed the proximate cause of the injury because there was an efficient substitute for the electric gong in a distinctly heard bell rung by hand, and the condition of the gates themselves, out of order as they were, gave sufficient warning of the approaching train to the deceased.

g. Headlights at night.

For a railroad company to run a train at night without any headlight on its locomotive is a violation of the North Carolina statute (Laws 1909, chap. 446), which re-

ing railroad trains and engines approaching highway crossings at grade was not, or the present statute which requires a signboard at every railroad crossing of a highway at grade is not, more mandatory in an action for negligence than the declaration of the common law that a traveler upon a highway approaching a railroad crossing must look and listen for an approaching train. The legislature may enact that the violation of a statute, and the common law may declare that the violation of a specific duty, shall impose an absolute liability, but an action thereon can scarcely be said with technical accuracy to be in negligence. It is rather a statute or rule creating liability regardless of negligence. While negligence is the violation of a duty,

not every violation of a duty begets negligence. It is the violation of the duty to exercise the degree of care which the particular circumstances of the case demand which begets negligence. The duty is relative, not absolute, and the effect of any particular statute, rule, or expediency must, unless the legislature or the common law otherwise intend, depend upon the particular circumstances and exigencies of each case. Therefore in this state it has been uniformly held that in actions for negligence the violation of a statute or ordinance merely defining or creating a duty was evidence, but not conclusive evidence, of the negligence of the violator.

In *Fluker v. Ziegele Brewing Co.* 201 N. Y. 40, 43, 93 N. E. 1112, Ann. Cas. 1912A,

quires locomotives to be equipped with headlights, and makes it a misdemeanor to fail to so equip them, and constitutes negligence *per se*. *Powers v. Norfolk Southern R. Co.* 166 N. C. 599, 82 S. E. 972, 6 N. C. C. A. 1032.

h. Duty to fence tracks.

Independent of statute, no duty rests upon a railroad company to fence its tracks; its duty in that respect is coextensive with the statute, and ends where the statute ends. *Bejma v. Chicago & M. Electric R. Co.* — Wis. —, 149 N. W. 588, 152 N. W. 180.

Though a railroad company may have neglected to build fences along its right of way as required by statute, yet it will not thereby become liable for killing or injuring live stock, where the animals got in the way of its train by the culpable negligence of their owner. *Gee v. St. Louis & G. R. Co.* 122 Mo. App. 358, 99 S. W. 506.

Although the Minnesota statute (Gen. Stat. 1894, § 2692) requiring fences along railroads is for the benefit of children as well as live stock, a failure to obey it, or to build such fence as will undeniably turn away children and animals, is only evidence (but not conclusive evidence) to go to the jury of the railroad's negligence, when a child is killed or injured on the tracks. *Mattes v. Great Northern R. Co.* 95 Minn. 386, 104 N. W. 234; on second appeal. 100 Minn. 34, 110 N. W. 98; *Ellington v. Great Northern R. Co.* 96 Minn. 176, 104 N. W. 827, 19 Am. Neg. Rep. 342.

i. Duty to build and maintain cattle guards.

The failure of a railroad company to build and maintain proper cattle guards required by statute at highway crossings, sufficient to prevent horses and cattle from entering the right of way from the highway, in consequence of which failure a mare gets upon the highway, and is frightened by an approaching hand car noisily operated, so that she dashes wildly against a barbed wire fence along the right of way, and suf-

fers mortal injury, renders the railroad company liable to her owner for the loss. *Shell v. Missouri P. R. Co.* 132 Mo. App. 528, 112 S. W. 39.

Whether or not cattle guards constructed by a railroad company at crossings in conformity with the Kentucky statute of 1903 (§ 1793) were sufficient to satisfy the statutory requirements when cattle passed over them and were killed on the right of way is a question of fact for the jury, notwithstanding uncontroverted testimony that the cattle guards were like those in general use on railroads. *Nashville, C. & St. L. R. Co. v. Russell*, 129 Ky. 14, 110 S. W. 317.

j. Duty to construct culverts.

By the Texas statute (Rev. Stat. 1895, art. 4436), which requires every railroad company before constructing its roadbed to build such culverts as the topography of the land makes necessary for its proper drainage, an absolute duty to construct and maintain such culverts is imposed, and not merely a duty to exercise ordinary care in making and maintaining them, and hence a breach of such duty creates a liability for land injured by an overflow. *Ft. Worth & D. C. R. Co. v. Suter*, 54 Tex. Civ. App. 238, 118 S. W. 215.

X. Actions based on violation of statutes requiring spark arresters on engines.

A failure to comply with a statute forbidding every owner of a traction engine to use or operate it or permit it to be used or operated, unless there has been securely attached to its smokestack a sufficient spark arrester of conical or funnel shaped heavy wire material of a specified mesh is negligence *per se*, and renders the owner of a threshing machine operated by him without such spark arrester, in violation of the statute, liable to one who sustains an injury as the direct consequence of such violation. *Shockley v. McCullough*, 2 Boyce (Del.) 504, 82 Atl. 144.

If a threshing engine and boiler, which by statute may not be operated without a

793, the plaintiff, injured by the falling of a beer keg or barrel upon him, charged the defendant with negligence in the manner of piling the beer kegs, and also in violating an ordinance of the city of Buffalo which prohibited the use of the alley upon which the kegs were in part for such purpose. The trial justice charged originally that the violation of the ordinance "is not sufficient to make out negligence against the defendant in this case. It is a circumstance to be taken into account in connection with the manner in which the kegs were piled in the alley, and to be considered as a circumstance bearing on the question of negligence on the part of the defendant."

At the request of the plaintiff, this part of the charge was withdrawn and the

charge was made: "That in piling the barrels in the street it (the defendant) violated a duty which it owed to the public, including this boy."

Judge Gray, writing for the unanimous court, said: "In this there was grave error, for the commission of which the judgment should be reversed, and a new trial should be had. . . . The violation of the ordinance did not subject the wrongdoer to the civil liability for damages; but its disregard was something which, in connection with the other facts of the case, furnished some evidence for the consideration of the jury in passing upon the question of the liability of the defendant. That is to say: Were the kegs negligently deposited and allowed unduly to remain in a

screen or wire netting atop of its smokestack, and must be so constructed as to give the most practicable protection against the escape of sparks from its smokestack, and also be provided with the most practicable devices to prevent the escape of fire from the ash pan and fire box, is equipped with a cone-shaped spark arrester of screen wire set apex down in the smokestack, so burned or rusted as to be in holes at the rim, which allows fire to escape from it while in use on a farm threshing grain, which fire ignites and destroys near-by property, a prima facie case of violation of the statute is established, and a liability for the consequent loss follows. *Legro v. Carley*, 159 Wis. 534, 150 N. W. 985.

A threshing engine in use threshing grain on a farm is included in the Wisconsin statute (§ 1494-57), which makes it between stated dates unlawful for any traction or portable engine and all other engines, boilers, and locomotives (except railway locomotives) operated in, through, or near forest, brush, or grass land, which do not burn oil as fuel, to be operated without a screen or wire netting on top of the smokestack, so constructed as to give the most practicable protection against the escape of sparks and cinders from the smokestack, and which also requires each such engine to be provided with the most practicable devices to prevent the escape of fire from the ash pans or fire boxes, since the statute includes all traction or portable engines and all other engines, boilers, and locomotives, except railway locomotives, and the phrase "operated in, through, or near forest, brush, or grass land," does not limit the effect of the statute as respects threshing engines used on farms. *Legro v. Carley*, *supra*.

The failure of a railroad company to discharge a duty, imposed by statute, to equip locomotives with a device or contrivance that will most effectually guard against the emission of fire and sparks which otherwise would be thrown out by such engines, gives rise to a cause of action for property destroyed or injured, in consequence of such failure, by fire communicated from a passing locomotive. *Chicago & E. R. Co. v. Ohio City Lumber Co.* 131 C. C. A. 57, 214 Fed. 751.

When a barn beside and a short distance from a railroad track is discovered afire a few minutes after a train has passed noticeably emitting sparks from the locomotive smokestack, when the wind is blowing from the track toward the barn, and no cause other than sparks from the engine can be found to account for the fire, a prima facie case of negligence is made out against the railroad company, and it then has the burden of proving that it had obeyed a statute (W. Va. Code, 1913, chap. 62, § 54, serial § 3518) which requires locomotives to be equipped with iron or steel netting so made as to afford the best practical protection against fire and sparks escaping from the smokestacks, and with devices adequate to prevent fire from escaping from the furnaces and ash pans. *McLaughlin v. Baltimore & O. R. Co.* — W. Va. —, 83 S. E. 999.

The Kentucky statute of 1903 (§ 782), which requires railroad companies to equip the tops of locomotive smokestacks with spark arresters, having been enacted for the purpose of preventing fire losses and damage, a person injured by a hot cinder entering the eye cannot recover on the ground that the spark arrester was not efficient, — especially as none known will entirely prevent the escape of such small sparks. *Cincinnati, N. O. & T. P. R. Co. v. Baxter*, 33 Ky. L. Rep. 305, 18 L.R.A.(N.S.) 241, 110 S. W. 248.

XI. Actions based on violation of statutes regulating use of motor vehicles.

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The violation of a statute limiting the speed of motor vehicles on public highways to such as is reasonable and proper, having regard to the common uses of highways and the danger to the lives and limbs of people thereon, and, in any event, to 20 miles an hour, is negligence *per se*. Hence the driver of a motor vehicle who exceeds the statutory speed limit on a public highway, and thereby slays or injures a traveler free

public street, where persons rightfully there might, innocently on their part, be exposed to injury? The facts bearing upon their handling and the place where deposited all entered into the question; no one being conclusive, however strongly evidential it might be. The case of *Knupfle v. Knickerbocker Ice Co.* 84 N. Y. 488, was one where a violation of a municipal ordinance in leaving a horse attached to a vehicle in a street unattended or unsecured was charged by the trial court to be 'necessarily negligence.' The action was for negligently causing death, and the plaintiff's judgment was reversed by this court upon the ground that the judge went too far in holding that the 'violation of the ordinance was negligence of itself.' The rule was

from contributory negligence on his part, is liable in damages. *Fox v. Barekman*, 178 Ind. 572, 99 N. E. 989.

The failure of the driver of an automobile to obey a statute directing operators of motor vehicles to give reasonable warning to travelers ahead of them on public highways, of their coming, and to use every precaution to avoid injuring persons and animals, and prescribing conduct on such occasions, affords a right of action to one suffering an injury by such failure. *Campbell v. Walker*, 2 Boyce (Del.) 41, 78 Atl. 601.

The violation, by the driver of a motor vehicle on a highway, of statutes requiring such vehicles when they meet or overtake a wagon and horse driven by a child, woman, or aged person, to reduce speed to 4 miles an hour when passing, or, on signal, to stop altogether and silence the motor if the horse shows fright or becomes uncontrollable, is negligence rendering one liable for an injury to a child driving a buggy, whose horse takes fright at the automobile and throws her out, to her serious injury. *Schaar v. Comforth*, — Minn. —, 151 N. W. 275.

If a statute requiring automobiles to be registered and certified does not prescribe any qualifications for those who drive them, a failure to obey the statute is merely a condition, and not the cause of an injury to a traveler on the highway struck by an unregistered car. *Armstrong v. Sellers*, 182 Ala. 582, 62 So. 28.

The fact that the driver of a motor vehicle which injured a pedestrian on the highway did not have at the time a license to operate the car, as required by statute, does not of itself render him liable for the injury. To make him liable, some causal relation between the absence of a license and the injury must be established. That is, the disobedience to the statute requiring the license must have been a proximate cause of the injury. *Lindsay v. Cecchi*, 3 Boyce (Del.) 133, 35 L.R.A.(N.S.) 699, 80 Atl. 523, 1 N. C. C. A. 88.

The fact that when two automobiles collided while traveling on a highway the L.R.A.1915E.

there stated, as the result of the decisions, that such a violation 'is some evidence of negligence, but not necessarily negligence.' The authority of that case has been repeatedly recognized. The rule itself had been previously asserted in *McGrath v. New York C. & H. R. R. Co.* 63 N. Y. 522. See *McRickard v. Flist*, 114 N. Y. 222, 226, 21 N. E. 153, and *Donnelly v. Rochester*, 166 N. Y. 315-319, 59 N. E. 589, 9 Am. Neg. Rep. 550."

An ordinance was considered in that case, but a municipal by-law or ordinance duly enacted has the force and effect of a statute within the territory for which it is provided. *Carthage v. Frederick*, 122 N. Y. 268, 10 L.R.A. 178, 19 Am. St. Rep. 490, 25 N. E. 480; *Atlantic Coast Line R. Co.*

driver of one of them was without the license required by statute (his license having expired a short time before, and not having been renewed until afterwards) does not prove that he was negligent, and does not of itself make him liable for injuring an occupant of the other vehicle, because the injury cannot be ascribed to the violation of the statute. *Bourne v. Whitman*, 209 Mass. 155, 35 L.R.A.(N.S.) 701, 95 N. E. 404, 2 N. C. C. A. 318.

When one is injured on a highway crossing a railroad, while traveling in an automobile; in consequence of a failure of the railroad company to obey statutory regulations respecting warning signals and speed of trains, the fact that he himself was disregarding a statute regulative of motor vehicles will not save the railroad company from liability, if the failure to conform to the requirements of the latter statute in nowise contributed to the injury. *Latham v. Cleveland, C. C. & St. L. R. Co.* 179 Ill. App. 324.

XII. Actions based on violation of navigation laws.

It is negligence entailing liability for a consequent injury, for the owner of a boat sunk in a navigable channel before 9 o'clock in the morning, and who knows of the disaster before noon, utterly to fail, for almost ten hours, to obey the Federal Statute (act March 3, 1899, chap. 425, § 15, 30 Stat. at L. 1152; Comp. Stat. 1913, § 9920), which requires a vessel sunk in a navigable channel to be marked immediately by the owner with a buoy or beacon by day and a light by night, in a case where the statute could have been fully complied with in an hour's time. *The Anna M. Fahy*, 83 C. O. A. 48, 153 Fed. 866.

XIII. Actions for violation of statutes relating to buildings.

a. Neglect to guard elevators and their shafts, well-holes and other floor openings.

The violation of the Kansas statute

v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 Sup. Ct. Rep. 364.

In *McGrath v. New York C. & H. R. R. Co.* 63 N. Y. 522, 530, the defendant violated an ordinance of the city of Albany which required it to station a flagman at every street crossing. The trial justice erroneously refused to receive the ordinance in evidence. Judge Earl, writing for the court, said: "It [the ordinance] was therefore in the nature of a law to be observed within the city by all railroad companies. . . . A violation or disregard of the ordinance, while not conclusive evidence of negligence, is some evidence upon the question to be submitted to the jury, with all the other evidence."

In *McRickard v. Flint*, 114 N. Y. 222,

226, 21 N. E. 153, the plaintiff charged the defendant with negligence in leaving uncovered in his place of business an elevator hatchway. A statute required the covering of it. Judge Bradley, writing for a unanimous court, said: "The failure to perform a duty imposed by statute, where, as the consequence, an injury results to another, is evidence upon the question of negligence of the party chargeable with such failure. *Jetter v. New York & H. R. Co.* 2 Abb. App. Dec. 458; *McGrath v. New York C. & H. R. R. Co.* 63 N. Y. 523; *Massoth v. Delaware & H. Canal Co.* 64 N. Y. 524; *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536; *Knupfle v. Knickerbocker Ice Co.* 84 N. Y. 488. It is not conclusive evidence of negligence."

(*Laws* 1903, p. 540, chap. 356, § 1), which requires every owner or operator of any manufacturing establishment to cause every elevator, hoisting shaft, or well hole to be properly and substantially inclosed or secured in order to protect the lives and limbs of those employed in such establishment, by omitting to put sides and roofs to two platform elevators run in a single open shaft, constitutes actionable negligence when a workman engaged in loading one elevator is injured by a heavy body falling from the other elevator higher up. *Fowler Packing Co. v. Enzenperger*, 77 Kan. 406, 15 L.R.A.(N.S.) 784, 94 Pac. 995.

The neglect to comply with the provisions of the New York Labor Law (*Laws* 1897, chap. 415, § 20, as amended by *Laws* 1899, chap. 192), which requires safety barriers to inclose or fence all sides of shafts or openings for hoisting materials in buildings under construction, and which puts the duty of compliance upon owners and contractors, affords a workman in such a building a right of action against either the owner of it or the contractor for injuries sustained by falling inadvertently, while at work, into an unguarded hoistway. *Rooney v. Brogan Constr. Co.* 107 App. Div. 258, 95 N. Y. Supp. 1.

The amendment to that statute, empowering the factory inspector to enforce the law by stated methods, did not provide an exclusive remedy for its violation; but a workman injured in consequence of the neglect to obey it still has his legal right of action for the failure to discharge the statutory duty to his injury. *Ibid.*

The Michigan statute (*Pub. Acts* 1909, No. 285, § 12), which makes it the duty, under penalties of fine or imprisonment, of owners, agents, or lessees of manufacturing establishments having hoisting shafts or well holes in use, to inclose and secure them properly, and to provide all elevator openings with automatic gates or doors so constructed as to open and close automatically by the action of the elevators in ascending or descending, although it does not in terms create a right of private action for any violation of its provisions, does im-

pose a duty upon the owner of a building in which manufacturing is carried on as a business to supply automatic gates or doors at entrances to elevators in use, and was enacted for the benefit of those having a lawful right to use such elevators; hence, a violation of the statute which results in an injury to a person in the class for whose benefit the law was passed, and who was free from contributory negligence, affords an action for the injury. *Barfoot v. White Star Line*, 170 Mich. 349, 136 N. W. 437.

Although in general an owner of private premises owes no duty of active vigilance to a mere licensee upon his premises without an invitation, express or implied, not even the duty of ordinary care in respect of the condition of the premises, buildings, structures, or machinery, he does owe such licensee a duty to refrain from intentionally or wilfully injuring him while he is lawfully on the premises, and hence becomes liable for injuries to the licensee that result from affirmative acts of negligence by the owner or his servants. *Racine v. Morris*, 136 App. Div. 467, 121 N. Y. Supp. 146, affirmed in 201 N. Y. 240, 94 N. E. 864.

He is therefore charged with liability to a policeman who had entered his building in the lawful discharge of public and official duty, and sustained injuries in consequence of the owner's having violated the New York Building Code (§ 95), which requires that hoistways and well holes not inclosed by fireproof walls shall be protected by safety guards and gates. *Ibid.*

The charter (*Laws* 1901, chap. 466, § 761) and building code (§ 95) of the city of New York, imposing upon owners and occupants of buildings the duty to close all hoistways, well holes, trap doors and iron shutters daily at the end of business, without limit in respect of any designated class or classes of persons, apply to and protect all persons lawfully within the buildings; and therefore a violation of such duty renders the owner of a building liable for the death of a policeman who entered it, in the line of his duty, by an open doorway in the evening, and was killed by falling

In *Donnelly v. Rochester*, 166 N. Y. 315, 318, 59 N. E. 989, 9 Am. Neg. Rep. 550, the plaintiff charged the defendant with negligence in leaving insufficiently guarded an area way. An ordinance of the city required a guard of a height greater than that actually used. Chief Judge Cullen, then Judge Cullen, writing for the unanimous court, said: "This action is not brought to impose liability upon the city for failing to enforce its ordinances, but for default in its own primary duty to maintain its streets reasonably safe and secure for travelers thereon. . . . The defendant's own ordinance prescribed 3½ feet as the proper height for such railings. Though a violation of the ordinance is not negligence *per se*, it is some evidence of

negligence. *Knupfle v. Knickerbocker Ice Co.* 84 N. Y. 488."

In *Briggs v. New York C. & H. R. R. Co.* 72 N. Y. 26, 30, the plaintiffs charged that through the negligence of the defendant their building was destroyed by fire which caught from sparks from the switch house. The stovepipe in the switch house was placed in a manner forbidden by the city ordinances, and the trial justice charged that that fact was evidence of negligence which the jury had a right to consider. Judge Rapallo, writing for the unanimous court, said: "The ordinance was admissible, provided the evidence was such as to permit an inference that its violation contributed to the injury; and the charge that the jury might take it into consideration in

into an open and unguarded elevator well. *Racine v. Morris*, 201 N. Y. 240, 94 N. E. 864, affirming 136 App. Div. 467, 121 N. Y. Supp. 146.

An owner and occupant of a storage warehouse who has failed to obey the Pennsylvania statute (Act of April 25, 1903, P. L. 304), which requires that openings to elevator, dumb-waiter, light, vent, and other shafts, well holes, chutes, hoistways and hatchways, shall be guarded with safety gates and trapdoors, to be kept closed when not in use, and at the end of business each day, is negligent, and thereby renders himself liable for injuries to a municipal fireman who, in the line of his duty, entered the warehouse at night to extinguish a fire in it, and fell into an open elevator shaft on one of the upper floors. *Drake v. Fenton*, 237 Pa. 8, 85 Atl. 14, Ann. Cas. 1914B, 517.

The statute, being a general one enacted in the exercise of the police power of the state, and unrestricted in terms to the benefit and protection of any particular class of persons, must be deemed to have been passed for the benefit of every person lawfully coming upon the premises, and to impose a duty for his protection, of which a breach proximately causing an injury to him would constitute actionable negligence. *Ibid.*

The failure of the owner or contractor for the iron or steel work of a building under construction to obey the New York Labor Law (Laws 1897, chap. 415, § 20), requiring floors as soon as completed to be entirely planked over, save for such openings as are requisite for raising and lowering materials, is negligence, and affords a right of action when a workman on the building is killed or injured by accidentally falling through an unplanked floor. *Schramme v. Lewinson*, 126 App. Div. 279, 110 N. Y. Supp. 599.

The neglect to conform to the requirement of the New York Labor Law (Laws 1897, chap. 415, § 20; Laws 1899, chap. 192, § 21), that if elevating machines or hoisting apparatus are used in constructing a building to lift materials, then the con-

tractors or owners shall cause the openings on each floor and the shafts to be fenced or barred on all sides, does not conclusively establish negligence as a matter of law, but simply raises a question of fact for the jury. *Kiernan v. Eidlitz*, 109 App. Div. 726, 96 N. Y. Supp. 387, O'Brien, P. J., and Laughlin, J., dissenting. (See the citation of this case on second appeal, in respect of the doctrine of assumption of risk, ante, subdiv. VIII.)

The failure of a master to comply with the requirements of the Massachusetts statute (Rev. Laws, chap. 104, § 27) providing that elevator cabs or cars for freight or passengers shall be guarded or equipped with some attachment or device to prevent a person entering or leaving from being caught between the floors of the cab and building, does not give rise to a cause of action to a workman injured by the absence of safety appliances, but it does afford evidence of the master's negligence for the jury in a suit for the injuries. *Finnegan v. Winslow Skate Mfg. Co.* 189 Mass. 580, 76 N. E. 192, 19 Am. Neg. Rep. 279.

A defendant sued for injuries resulting from his neglect to obey the New York Labor Law (Laws 1897, chap. 415, § 20; Laws 1899, chap. 192), requiring the owner or contractor of a building undergoing construction, when elevating machines or hoisting apparatus are used to raise building materials, to cause the shafts and openings on each floor to be fenced or barred on all sides, has a right to go to the jury on the question of contributory negligence of the plaintiff. *Kiernan v. Eidlitz*, supra.

An employee of a tenant in a building, well knowing of the absence of sufficient protective guards from one side of an elevator cage in such building, and the presence on that side of a bar affording, when in place, some protection, who plainly fails to exercise due care in entering the elevator, and deliberately omits to put the guard rail in position, when injured by falling from the open side of the elevator down the well shaft is contributorily negligent, and cannot recover for his injuries from the owner of the building and elevator, on

determining the question of negligence was correct, subject to the same proviso."

In *Graham v. Manhattan R. Co.* 149 N. Y. 336, 341, 43 N. E. 917, 9 Am. Neg. Cas. 648, this court said: "Again, the defendant's disregard of the statute which required gates upon every passenger car used upon its elevated railroad, and that they should be kept closed while the car was in motion, was also evidence of its negligence. *Knuffle v. Knickerbocker Ice Co.* 84 N. Y. 498; *McRickard v. Flint*, 114 N. Y. 222, 226, 21 N. E. 153. . . . The evidence in this case was clearly sufficient to require the submission to the jury of the question of the defendant's negligence."

In *Koester v. Rochester Candy Works*, 194 N. Y. 92, 95, 10 L.R.A.(N.S.) 783, 87

the ground that the latter violated a statute commanding him to furnish and maintain safety guards upon the elevator for the purpose of preventing such injuries. *Amiot v. Foster*, 213 Mass. 573, 100 N. E. 1007.

Assuming the operator of an elevator in a factory to be in the class of persons for whose benefit was enacted the Missouri statute (Rev. Stat. 1899, chap. 91, art. 17, § 6435) requiring all openings of hatchways, elevators, and well holes upon all floors of factories and certain other buildings to be protected by trapdoors, self-closing hatches, safety catches, or strong guard rails to be kept closed except when in actual use, the occupant of the building in control, whose duty it is to obey the statute, is not liable for personal injuries of a boy in his employ ordered to run the elevator, and accidentally falling down the open shaft while reaching for the starting rope, because the accident was within the express terms of the statutory exception. *Latapie-Vignaux v. Askew Saddlery Co.* 193 Mo. 1, 91 S. W. 496.

b. Duty to equip buildings with fire escapes.

The failure of an owner or of a lessee in full possession and actual control under a lease for years of a business building, to obey a statute requiring such buildings to be furnished with suitable, sufficient, and proper fire escapes of metal reaching from the top floor to or nearly to the ground, gives rise to a cause of action for negligence in favor of one lawfully in the building when a fire breaks out, and injured because of inadequate means of escape. *Cowen v. Story & C. Piano Co.* 170 Ill. App. 92.

The lessee of a building who converts it into a factory by putting machinery and manufacturing goods for sale in it is charged with the duty of erecting upon it fire escapes required by the New York statute (Laws 1897, chap. 415, §§ 82, 83), although the law is silent respecting who shall construct and attach them, and hence is liable for the death of a factory work-

N. E. 77, 16 Ann. Cas. 589, the defendant was charged with the violation of §§ 70 and 81 of the labor law. Chief Judge Cullen, writing for the unanimous court, said: "The labor law makes a violation of its provisions a misdemeanor, but does not give a civil remedy therefor to the party injured. Nevertheless it was held by this court in *Marino v. Lehmaier*, 173 N. Y. 530, 534, 61 L.R.A. 811, 66 N. E. 572, 13 Am. Neg. Rep. 403, that a violation of the statute was *per se* evidence of negligence for which a jury might find the defendant liable. . . . Under this doctrine the gist of civil liability is the negligence of the master in employing a person of such tender years that the legislature has forbidden his employment. Therefore, if the em-

ployee, due to the absence of fire escapes, when a destructive fire occurred in the factory. *Di Santo v. Brooklyn Chair Co.* 140 App. Div. 119, 125 N. Y. Supp. 8, affirmed in 205 N. Y. 538, 98 N. E. 1101. Leave to appeal to the Court of Appeals was afterwards granted in this case (*vide* 142 App. Div. 901, 127 N. Y. Supp. 1117) but at the time of writing, the result is not known.

The failure of the owner of a three-story building used for a factory shop on the upper floor, to equip it with fire escapes pursuant to a mandatory statute for the protection of workmen employed therein, must be deemed the proximate cause of an injury sustained by a workman in jumping from a window during a fire, where no other means of escape existed. *Steiart v. Coulter*, 54 Ind. App. 643, 102 N. E. 113, 103 N. E. 117, 4 N. C. C. A. 561.

The enactment in succession of two statutes for the protection of humanity in case of fires, commanding the erection of fire escapes upon certain kinds of public and other buildings, including factories and workshops where people are employed above the second story, the later being intended to replace and be a substitute for the earlier one by it repealed, where each contained a section subjecting the owners of any building described in the statute who should neglect or refuse to obey it to a fine of \$200, imprisonment for at least a month, and an action for damages in case of the death or injury of anyone consequent upon the absence of fire escapes, but of which the later statute limits the application of such section to owners, lessees, and occupants of hotels and to school officers in charge of public schools, does not, by such limitation alone, without provisions to that effect, cut off the civil right of action for damages resulting by a violation of the duty imposed on owners of factories and workshops within the statute, but only relieves them from its penal features. *Ibid.*

The owner of a hotel in which a guest lost his life by a fire in the night while seeking to escape is liable in damages for the death because of negligence in failing to comply with the Ontario statute (Rev.

ployer, in the exercise of proper vigilance and due caution, is led to believe that the employee is above the statutory age, he cannot well be charged with negligence in employing an infant. . . . The question always is whether the employer is justified in believing that the employee is of sufficient age to authorize his employment. For this purpose he may not rest alone on the representation of the plaintiff, but is required to exercise proper vigilance to discover the fact. What such vigilance would dictate differs in different cases. There can readily be imagined a case where the employee is of such mature appearance that the employer may naturally and properly accept his statement as to age. In other cases the appearance of the employee might

be the exact reverse. No definite rule can be laid down to relieve the employer from liability in violating the statute."

In *Scott v. International Paper Co.* 204 N. Y. 49, 51, 97 N. E. 413, the plaintiff charged the defendant with negligence in violating § 81 of the labor law, requiring machinery of every description to be properly guarded. Judge Chase, writing for the court, said: "Where it is practicable to guard a machine, and danger from its remaining unguarded should be reasonably anticipated, the provisions of the statute quoted are mandatory. A machine that is maintained wholly without guards is presumptively contrary to the statute. The burden of showing that it is impracticable to guard a machine, or that its location

Stat. [Ont.] 1897, chap. 264, § 3), which requires a fire escape to be provided for every guest room of hotels above the ground floor, notwithstanding the statute imposes a penalty for its violation as a public offense a fine, no part of which is a recompense to injured persons. *Hagle v. Laplante*, 20 Ont. L. Rep. 339.

Inasmuch as the New Jersey tenement house statute (Act 1904, P. L. 96), which requires tenements more than three stories high and not fireproof to be furnished with exterior fire escapes, imposes specific penalties for its violation, and does not confer a right of private action for failure to obey it, one who is injured by a neglect to comply with such statute has only a common-law action based upon negligence and governed by common-law principles, in which the statute figures as providing a standard of prudent conduct. *Evers v. Davis*, 86 N. J. L. 196, 90 Atl. 677.

c. Duty to light halls and stairways.

In recent years, statutes have been enacted in some states which require the landlords of tenement houses to keep the halls and stairways lighted during the hours of darkness between sunset and sunrise. There have been failures to obey these statutes, and coincidentally injuries to persons in the unlighted hallways and stairways. And the liability of the delinquent landlords for these injuries has been claimed on the ground of negligence in disobeying the commands of the statutes.

The decisions in these cases show applications of all the general principles set forth *ubi supra et infra*.

The failure of a person charged with the duty of obeying one of these statutes, to comply with its requirements, is evidence of negligence on his part, in an action by one of the class within the protection of the statute who has suffered an injury in consequence of such failure. *Pesin v. Jugovich*, 85 N. J. L. 256, 88 Atl. 1101, 5 N. C. A. 324; *Kargman v. Carlo*, 85 N. J. L. 632, 90 Atl. 292; *Lather v. Bammann*, 122 App. Div. 13, 106 N. Y. Supp. 790; *Schind-L.R.A.1915E*.

ler v. Welz & Zerweck, 145 App. Div. 532, 130 N. Y. Supp. 344; *Bornstein v. Faden*, 149 App. Div. 37, 133 N. Y. Supp. 608; *Phelps v. Kaufman*, 152 App. Div. 457, 137 N. Y. Supp. 345; *Lichtman v. Rose*, 110 N. Y. Supp. 935.

This duty to light the halls of tenement houses at night in conformity to statutory command rests not only upon the owners of the building, but, under the New Jersey tenement house act (P. L. 1904, p. 126, § 126; Comp. Stat. 1910, p. 5341) upon a lessee for years of a tenement-house who occupies a part of it himself and sublets the rest. *Pesin v. Jugovich*, 85 N. J. L. 256, 88 Atl. 1101, 5 N. C. A. 324.

And in New York, by separate statute (Laws 1912, chap. 13), an apartment house is included in the category of tenement houses to which the statute of that state (Consol. Laws, chap. 61, § 76) requiring the public halls of tenement houses to be kept lighted at night applies. *Faerber v. 969 Park Ave. Co.* 83 Misc. 645, 146 N. Y. Supp. 783.

These statutes are held to have been enacted not alone for the benefit and protection of the tenants in the tenement houses, but also for their guests. *Kargman v. Carlo*, 85 N. J. L. 632, 90 Atl. 292; *Baumler v. Wilm*, 136 App. Div. 857, 122 N. Y. Supp. 98; *Lichtman v. Rose*, 110 N. Y. Supp. 935. And for persons who lawfully enter tenement houses for the purpose of delivering goods to tenants. *Pesin v. Jugovich* and *Faerber v. 969 Park Ave. Co. supra*.

As in all other cases of neglect to discharge statutory duties, the neglect of a landlord to obey a statute commanding him to light the halls of his tenement house after nightfall does not constitute actionable negligence unless it was the proximate cause of a resulting injury.

The neglect of the landlord of a tenement house to obey that statute, and keep the halls lighted during the night, cannot be deemed the proximate cause of injury to a tenant who, descending the stairs before sunrise, and lighting his way down by striking matches every now and then, fell

removes it from danger to employees, is upon the person or corporation maintaining it."

It is worthy of notice that the learned counsel of the plaintiff relied upon the principle stated in their brief: "The failure of defendant to guard the machinery was sufficient evidence of negligence to warrant the submission of the case to the jury."

In *Kelley v. New York State R. Co.* 207 N. Y. 342, 345, 100 N. E. 1115, the plaintiff who was injured in collision with a car of the defendant, was violating a statute. This court said: "It [the statute] is evidence for the jury to consider on the question of negligence with all the other evidence in the case. The court, therefore,

erred in taking the statute from the consideration of the jury."

In *Barr v. Green*, 210 N. Y. 252, 255, 104 N. E. 619, Ann. Cas. 1915B, 855, the plaintiff was injured by a barbed wire fence constructed by the defendant in violation of a statute. Judge Chase, writing for the court, said: "It is not claimed that the defendant has complied with it [the statute]. Its provisions should be considered in determining whether the defendant was negligent. . . . We are of opinion that a barbed wire fence is not a nuisance as a matter of law. . . . A person may or may not be negligent in building or maintaining such a fence, depending upon the place where the same is erected or maintained and the circumstances affecting the

as he reached the landing at the head of the last flight, through slipping on an apple paring, where there was no proof that the landlord had any notice of the presence of the appleskin. *Horn v. Breakstone*, 75 Misc. 345, 133 N. Y. Supp. 285.

To make the landlord of a tenement house liable for an injury to a tenant alleged to have been due to a neglect to obey a statute (N. Y. Consol. Laws 1909, chap. 61, § 76) which requires lights to be kept burning in tenement hallways after nightfall, a causal connection must be established between the disobedience of the statute and the injury; hence, mere proof that the tenant fell and was injured in descending an unlighted stairway after dark, where the stairs, though curving, were in no wise defective, does not prove that the landlord's failure to obey the statute was the proximate cause of the injury. *Schindler v. Welz & Zerweck*, 145 App. Div. 532, 130 N. Y. Supp. 344.

The case of *Bornstein v. Faden*, 149 App. Div. 37, 133 N. Y. Supp. 608, affirmed in 208 N. Y. 605, 102 N. E. 1099, was an action brought by an administratrix to recover for the death of her intestate by falling down an unlighted stairway in a tenement house belonging to the defendant. It was grounded upon the landlord's negligence in disobeying the statute (N. Y. Consol. Laws 1909, chap. 61, § 76), which laid upon him a duty to burn lights in the hallways of the building after dark. As in the case of *Schindler v. Welz & Zerweck*, supra, which was based upon a violation of the same statute, but in which the injury had not been fatal, there was no proof of any defect in the stairway,—it was merely proved that the tenant had fallen and sustained injuries, mortal in the latter case. But whereas in the *Schindler* Case the court was unable to see any causal relation between the violation of the statute and the coincident injury, or any evidence sufficient to go to the jury, of the absence of contributory negligence, and held the plaintiff not entitled to recover, a majority of the court in the *Bornstein* Case agreed in reversing a judgment of nonsuit, upon the L.R.A.1915E.

ground that it was one of the purposes of the statute that persons lawfully using the stairways of tenements with due care should be enabled to see the steps and avoid slipping, stumbling, or missing their footholds, and therefore it was error to keep the case from the jury. The dissentients contended that there was no proof whatever that the injury complained of was the proximate result of the neglect to obey the statute.

Although a landlord of a tenement house failed to obey a statute which required lights to be kept burning throughout the night in the public halls, near the stairways in such buildings, a tenant who, having knowledge of the unlighted state of the halls in his tenement, has attempted to descend the stairs in darkness before dawn, after emerging from his lighted rooms and closing the door behind him, and has fallen and been injured, was contributorily negligent himself, and so cannot recover from the landlord. *Lather v. Bammann*, 122 App. Div. 13, 106 N. Y. Supp. 790.

Notwithstanding the negligence of the landlord of a tenement house is established by proof of his failure to obey such a statute, a tenant who has been injured by falling down at night an unlighted stairway in the tenement, with which he had long been familiar, and which was in sound condition, is nevertheless bound to prove that he exercised reasonable and sufficient care on his own part to justify submitting to the jury the question of contributory negligence. *Schindler v. Welz & Zerweck*, 145 App. Div. 532, 130 N. Y. Supp. 344.

A woman injured by falling down the cellar stairway of a tenement house in the middle of a summer day, while visiting her daughter, who was a tenant of the ground floor, as she attempted to descend in darkness without carrying a light, where there was an outside entrance that she might have used, was guilty of such contributory negligence as to preclude her recovering damages for her injuries from the landlord, notwithstanding he had violated the New York statute respecting tenement houses, both by omitting to light the stair-

question whether such a fence would in any way constitute a source of danger."

In *Macauley v. Schneider*, 9 App. Div. 279, 282, 41 N. Y. Supp. 519, Chief Judge Cullen, then Justice Cullen, speaking for an unanimous court, of which the chief judge of this court was a member, of an ordinance violated by the defendant, said: "Nor did the ordinance of the city directing that the water be discharged under the sidewalk make the defendant's method of discharge unlawful *per se*, but it was only evidence authorizing the jury to find the method improper."

In *McCambley v. Staten Island Midland R. Co.* 32 App. Div. 346, 348, 52 N. Y. Supp. 850, Justice Woodward, speaking for the same court of a violated ordinance,

way, and making the top step too high and the handrail too short. *Bauml v. Wilm*, 136 App. Div. 857, 122 N. Y. Supp. 98.

A porter delivering furniture after dark at an unoccupied apartment house not yet lighted at all, who was escorted by an agent of the owner carrying a lighted lantern to show the way to the suite where the goods were to be delivered, and who, without asking to be lighted down, attempted to leave the premises by himself, and was injured while passing through a dark hallway on his way out, was contributorily negligent, and hence precluded from recovering for his injuries from the house owner upon the ground that the latter had neglected to obey the tenement house law. *Faerber v. 969 Park Ave. Co.* 83 Misc. 645, 146 N. Y. Supp. 783.

A person delivering heavy goods after sunset to a tenant of an upper floor of a tenement house, who discovers on his way up that the landlord has neglected to perform the duty imposed by statute upon him, of lighting the hallways, is not contributorily negligent as a matter of law in going on and completing the delivery and returning empty-handed, when he suffers an injury on the way back, where he is without any means himself of lighting his way, and no one else is at hand to show him a light. *Pesin v. Jugovich*, 85 N. J. L. 256, 88 Atl. 1101, 5 N. C. C. A. 324.

The facts in the case of *Kargman v. Carlo*, 85 N. J. L. 632, 90 Atl. 292, differed in no essential particular from those in *Pesin v. Jugovich*, *supra*. The unlighted hall and stairway where the injury was suffered was a different floor, and the plaintiff had been a guest of a tenant, and was returning home from her visit, escorted by her host in advance, and proceeding cautiously down the dark stairway. The decision was the same in both cases.

The failure of a landlord to maintain a light in the hall of a tenement house after dark, in violation of the New York statute (Laws 1901, chap. 334), is evidence of his negligence in case of an injury to one lawfully on the premises as the guest of a tenant, and injured in consequence of the L.R.A.1915E.

said: "Its violation is not negligence *per se*, as a matter of law, and conclusive evidence on the question, but it is competent evidence, and sufficient to justify the jury in finding, as a fact, that its violation was negligence. The charge of the court that the violation of the ordinance was insufficient for the jury to find negligence was therefore error. Its violation should have been submitted to them as a fact."

In *Sitts v. Waiontha Knitting Co.* 94 App. Div. 38, 44, 87 N. Y. Supp. 911, 915, Judge Hiscock, then Justice Hiscock, said: "A violation of the statute would furnish sufficient evidence from which a jury could say that defendant was negligent."

The principle that the violation of a statute does not establish conclusively negli-

darkness while descending, with due care, the unlighted stairway. *Lichtman v. Rose*, 110 N. Y. Supp. 935.

It is reversible error in a trial court to dismiss an action against the landlord of a tenement house by a tenant thereof for personal injuries sustained by her in falling down a stairway to the cellar as she was descending it for the first time, where the stairway was not lighted, and had been constructed with narrow and defective treads, in violation of the tenement house statute, even if she had not provided herself with a light to light her way down, because she had a right to suppose on her first essay the landlord had obeyed the law. *Phelps v. Kaufman*, 152 App. Div. 457, 137 N. Y. Supp. 345.

A statute which requires the owners of factory buildings to have the halls lighted every workday during the year, from the opening of the buildings for use until they are closed in the evening, is violated when the hall of a factory is left unlighted on a statutory holiday when work is going on as usual upon other secular days; and such violation is negligence in an owner, which renders him liable for an injury to an employee, free from contributory negligence, descending a dark stairway where there was no handrail. *Wax v. Woodbury G. Langdon Co.* 88 Misc. 5, 150 N. Y. Supp. 351.

XIV. Actions for violation of factory acts.

There have been, of late, numerous statutes enacted to conserve the safety of workmen in factories by imposing upon their employers the duty to set up guards on and about belting, cogs, gearing, machinery, pans, planers, saws, set-screws, shafting, and other dangerous implements, whenever it is possible to do so without materially hampering ordinary operations.

A failure to obey such a statute—an omission to discharge a duty imposed by it—is negligence in an employer. *Corell v. Williams*, — Iowa, —, 148 N. W. 633; *Swick v. Aetna Portland Cement Co.* 147 Mich. 454, 111 N. W. 110; *Callopy v. At-*

gence on the part of the violator is applicable also to a plaintiff charged with contributory negligence. *Hoffman v. Union Ferry Co.* 47 N. Y. 176, 7 Am. Rep. 435; *Lambert v. Staten Island R. Co.* 70 N. Y. 104; *Blanchard v. New Jersey S. B. Co.* 59 N. Y. 292; *Carroll v. Staten Island R. Co.* 58 N. Y. 126, 17 Am. Rep. 221; *Connolly v. Knickerbocker Ice Co.* 114 N. Y. 104, 11 Am. St. Rep. 617, 21 N. E. 101, 12 Am. Neg. Cas. 305; *Kelley v. New York State R. Co.* 207 N. Y. 342, 100 N. E. 1115. See also *Parsons v. Syracuse, B. & N. Y. R. Co.* 205 N. Y. 226, 98 N. E. 331. We have not in any decision disregarded or violated the principle established and applied by the decisions cited and the others not cited. *Willy v. Mulledy*, 78 N. Y. 310, 314, 34

wood, 105 Minn. 80, 18 L.R.A. (N.S.) 593, 117 N. W. 238; *Stafford v. Adams*, 113 Mo. App. 717, 88 S. W. 1130.

It is negligence *per se*. *Millsap v. Beggs*, 122 Mo. App. 1, 97 S. W. 956.

And it has been denominated negligence as a matter of law. *Monteith v. Kokomo Wood Enameling Co.* 159 Ind. 149, 58 L.R.A. 944, 64 N. E. 610; *Davis v. Mercer Lumber Co.* 164 Ind. 414, 73 N. E. 899; *M. S. Huey Co. v. Johnston*, 164 Ind. 489, 73 N. E. 996; *Robertson v. Ford*, 164 Ind. 538, 74 N. E. 1; *Tucker & D. Mfg. Co. v. Staley*, 40 Ind. App. 63, 80 N. E. 975; *United States Cement Co. v. Cooper*, — Ind. App. —, 82 N. E. 981, reversed on other grounds in 172 Ind. 599, 88 N. E. 69; *Evansville Hoop & Stave Co. v. Bailey*, 43 Ind. App. 153, 84 N. E. 549; *Erickson v. E. J. McNeeley & Co.* 41 Wash. 509, 84 Pac. 3.

The failure of a manufacturer to obey the Missouri statute (Rev. Stat. 1899, § 6433), which requires all belting, shafting, gearing, and drums in factories placed so as to endanger workers at their ordinary duties to be safely and securely guarded when possible, and when not possible requires that a notice of danger shall be conspicuously posted, by neither providing the safety guards nor posting the alternative notice for a machine within the statute, is held to be negligence *per se* in case of resulting injury to a workman. *Millsap v. Beggs*, 122 Mo. App. 1, 97 S. W. 956.

This negligence in a master in omitting to obey the commands of a statute of such character renders him liable to a workman free from contributing negligence on his part, who suffered injuries as a result of the absence or inadequacy of the safety guards about dangerous machinery which the statute prescribed. *Corell v. Williams*, — Iowa, —, 148 N. W. 633; *Reddington v. Blue*, — Iowa, —, 149 N. W. 933; *Tucker & D. Mfg. Co. v. Staley*, 40 Ind. App. 63, 80 N. E. 975; *Swick v. Aetna Portland Cement Co.* 147 Mich. 454, 111 N. W. 110; *Dix v. Union Ice Co.* 76 N. J. L. 178, 68 Atl. 1101; *Poole v. American Linseed Co.* 119 App. Div. 136, 103 N. Y. Supp. 1047. L.R.A.1915E.

Am. Rep. 536, was brought and sustained upon the rule that "where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." *Rochester v. Campbell*, 123 N. Y. 405, 413, 10 L.R.A. 393, 20 Am. St. Rep. 760, 25 N. E. 937; *Pauley v. Steam Gauge & Lantern Co.* 131 N. Y. 90, 96, 15 L.R.A. 194, 29 N. E. 999.

This court and other courts of the state have deemed the decision therein consistent with the principle, that the violation of a statute is not conclusive evidence of negligence. *McRickard v. Flint*, 114 N. Y. 222, 226, 21 N. E. 153; *Marino v. Lehmaier*,

A right of action accrues to a workman operating a dangerous circular saw, and sustaining an injury by a flying piece of wood undergoing cutting, against the master for negligence in not obeying the Minnesota statute (Rev. Laws 1905, § 1813) requiring, whenever practicable, safety guards about dangerous machinery; and a liability follows unless there is conclusive evidence that the injured servant assumed the risk or was contributorily negligent. *Callopy v. Atwood*, 105 Minn. 80, 18 L.R.A. (N.S.) 593, 117 N. W. 238.

In Kansas and Missouri the failure of a manufacturer to perform the duty imposed by the respective statutes of those states, which require belting, shafting, machinery, etc., to be, whenever practicable, guarded to prevent the death or injury of a workman, is *prima facie* actionable negligence when, in consequence of such failure, a workman free from fault is killed or injured. *Kansas Buff Brick Mfg. Co. v. Stark*, 77 Kan. 648, 95 Pac. 1047; *Morgan v. C. Hager & Sons Hinge Mfg. Co.* 120 Mo. App. 590, 97 S. W. 638.

Inasmuch as the Pennsylvania factory act of May 2, 1905 (P. L. 352) was enacted for the avowed purpose of providing for the safety of employees in industrial establishments, the failure of a factory proprietor either to affix a proper guard to a revolving saw, or to have it adjusted and used effectively to prevent an injury to a workman operating the saw, constitutes actionable negligence when an injury results to an unskilled workman set to work without proper instructions, and using the machine for the first time in the way he had been directed to do. *Freedom Casket Co. v. McManus*, 218 Fed. 323.

The similar statute of Ohio (Code § 1027, subdvs. 3 and 7, as amended 1911, 102 Ohio Laws, 428) is also held to impose upon proprietors of factories an absolute and positive duty to furnish the statutory protection to workmen, a failure to discharge which constitutes negligence, *per se*. *Crucible Steel Forge Co. v. Moir*, 219 Fed. 151.

The Iowa statute (Code Supp. § 4999a2)

173 N. Y. 530, 535, 540, 61 L.R.A. 811, 66 N. E. 572, 13 Am. Neg. Rep. 403; Ziegler v. Brennan, 75 App. Div. 584, 78 N. Y. Supp. 342. In *Arnold v. National Starch Co.* 194 N. Y. 42, 48, 21 L.R.A.(N.S.) 178, 86 N. E. 815, 817, the principle was not under consideration, and the conclusion there reached, as stated by Judge Hiscock, "These views lead to the conclusion that the appellant furnished evidence upon which she was entitled to go to the jury, and that it was error to dismiss her complaint," is consistent with it. In *Racine v. Morris*, 201 N. Y. 240, 94 N. E. 864, the liability of the defendant, predicated upon the violation of the section of the Building Code, was submitted to the jury. The appellate division expressed therein the principle

above stated. *Racine v. Morris*, 136 App. Div. 467, 474, 121 N. Y. Supp. 146. In what may be termed the scaffold cases, based upon §§ 18 and 19 of the labor law, there has existed a doubt which this court has not had occasion to remove, as to whether or not the statute made the liability of the employer absolute. *Stewart v. Ferguson*, 164 N. Y. 553, 58 N. E. 662, 9 Am. Neg. Rep. 132; *Caddy v. Interborough Rapid Transit Co.* 195 N. Y. 415, 30 L.R.A.(N.S.) 30, 88 N. E. 747; *Gombert v. McKay*, 201 N. Y. 27, 42 L.R.A.(N.S.) 1234, 94 N. E. 186; *Smith v. Variety Iron & Steel Works Co.* 208 N. Y. 543, 101 N. E. 709; *Smith v. Variety Iron & Steel Works Co.* 147 App. Div. 242, 131 N. Y. Supp. 1033; *Grady v. National Conduit &*

which makes it the duty of an owner, agent, superintendent, or person in charge of a factory using machinery, to furnish or cause to be supplied belt shifters to throw belts on and off pulleys, and properly to guard all saws, planers, cogs, gearing, belting, shafting, and set screws, is mandatory, so that when a workman on a machine within the statute is injured in its operation, and the machine was not guarded, or was inadequately and insufficiently guarded, a prima facie case of negligence and liability is made out against the master. *Reddington v. Blue*, — Iowa, —, 149 N. W. 933.

The Wisconsin statute (Stat. 1898, § 1636j) of this sort, however, does not make a rule of absolute liability, but a statutory requisite of ordinary care on the part of the master, and prescribes conditions giving rise to a prima facie inference of negligence in fact. *Willette v. Rhineland Paper Co.* 145 Wis. 537, 130 N. W. 853.

In that state it is evidence of a master's negligence to be submitted to a jury, that a bare unguarded set screw affixed to and projecting from a rapidly revolving shaft less than 5 feet above the factory floor caught the hair of and inflicted injuries upon a young woman required by her ordinary duty now and then to stoop below such shaft, where a general statute required machinery and shafting in factories so located as to endanger employees at work to be properly safeguarded and protected. *Van de Bogart v. Marinette & M. Paper Co.* 132 Wis. 367, 112 N. W. 443.

Whether a master was negligent, and what was his duty under the Pennsylvania statute (act May 2, 1905 [P. L. 352], § 11), which requires revolving shafts in factories to be guarded for the safety of employees; and whether or not a servant was contributorily negligent,—are questions of fact for the determination of the jury in an action by a woman against her employer, who had been injured as she stooped underneath a table upon which she was running a sewing machine, to recover a portion of her work that had dropped, and was caught by her hair on the power-transmitting shaft revolving in semi-darkness, open and un-

guarded. *Harner v. F. H. White Co.* 246 Pa. 402, 92 Atl. 494.

In an action against a master by a servant injured in consequence of slipping in a pool of oil on a factory floor, and being thereby thrown against the unguarded rollers of a machine, where no violation of the statute requiring safety guards is alleged, but only negligence in omitting to inspect the machine so as to prevent the dripping of oil from it, it is error to receive proof that similar machines were guarded. *Martin v. Walker & W. Mfg. Co.* 122 App. Div. 280, 106 N. Y. Supp. 708.

After the complaint was amended so as to charge defendant with negligence in failing to perform the statutory duty to cover or guard the rolling parts of the machine, and following the second trial resulting in a verdict for the plaintiff, a judgment was again reversed, on the ground that the accident was such an unusual and unforeseeable event that the master could not reasonably have anticipated and guarded against its occurrence (*vide* 128 App. Div. 733, 113 N. Y. Supp. 78).

The reversal having been upon questions of law only (*vide* 137 App. Div. 936, 122 N. Y. Supp. 1136) the decision was open to review by the court of appeals (*vide* 198 N. Y. 324, 91 N. E. 798), and as that court found no error of law committed on the trial, and was of the opinion that the facts proved justified a recovery for the injury, it in turn reversed the appellate division, and affirmed the judgment entered on the verdict.

A machine used for filling and sealing metal caps upon glass bottles containing sparkling fluids, and unprovided with sufficient and efficient protective guards to prevent injury to a workman operating it, is within the Iowa statute (Code Supp. § 4999a2), which imposes a mandatory duty upon an owner, agent, a superintendent or person in charge of a manufacturing or other establishment, properly to guard all saws, planers, cogs, gearing, belting, shafting, set screws, and machinery of every description; and the bursting of a bottle while undergoing filling and capping at such ma-

Cable Co. 153 App. Div. 401, 138 N. Y. Supp. 549.

The principle has recognition in other jurisdictions. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 418, 36 L. ed. 485, 489, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; *Finnegan v. Winslow Skate Mfg. Co.* 189 Mass. 580, 76 N. E. 192, 19 Am. Neg. Rep. 279; *Gately v. Taylor*, 211 Mass. 60, 39 L.R.A.(N.S.) 472, 97 N. E. 619; *Ubelmann v. American Ice Co.* 209 Pa. 398, 58 Atl. 849; *Fane v. Philadelphia Rapid Transit*

Co. 228 Pa. 471, 77 Atl. 806; *H. Channon Co. v. Hahn*, 189 Ill. 28, 59 N. E. 522; *True & T. Co. v. Woda*, 201 Ill. 315, 66 N. E. 369.

It would be supererogation to vindicate at this time our adoption of the principle. It has existed through more than half a century, and the legislature has not deemed it wise or beneficent to annul or modify it, — a convincing proof that we have correctly applied the enactments. It therefore is not necessary, and I think it unwise, to substi-

chine, with the consequent injury from flying glass, of the workman operating it, entails a liability for the resulting injury grounded upon a violation of the statute. *Reddington v. Blue*, — Iowa, —, 149 N. W. 933.

The neglect of an employer properly to guard a screw conveyor revolving in an open box and dangerous to workmen at work in or about it constitutes a violation of the Iowa statute (Code Supp. § 4999a2) which requires all saws, planers, cogs, gearing, belting, shafting, set screws, and machinery of every description to be properly guarded, it being included by the phrase "machinery of every description," which embraces all machines not specifically mentioned, and which might reasonably be expected to cause injury if not provided with safety guards. *United States Gypsum Co. v. Karnaca*, 216 Fed. 857.

A wood-planing machine consisting of a slotted table with a rapidly revolving horizontal shaft with knives attached projecting above the table, and driven by steam power transmitted by a belt, is within the Missouri statute (Rev. Stat. 1899, § 6433), requiring belting, shafting, gearing, and drums in factories so placed as to be dangerous to workers at their ordinary duties to be safely and securely guarded when possible. *Millsap v. Beggs*, 122 Mo. App. 1, 97 S. W. 956.

And a set screw for fastening a circular knife to a revolving shaft in a factory is a part of such shaft, within the meaning of a statute which requires mill owners and proprietors securely to fence and guard all shafting and machinery that is so located as to endanger employees when discharging their duties. *Van de Bogart v. Marinette & M. Paper Co.* 132 Wis. 367, 112 N. W. 443.

The Missouri statute (Rev. Stat. 1899, § 6433), requiring dangerous machines in workshops to be guarded if possible without interfering with their operation, and, if that is not possible, to have attention called to the danger by a posted notice, allows a master who has neglected to comply with it, and neither guarded a dangerous machine nor posted a warning notice, to escape liability for injuries to one of his workmen caused by falling into the machine, and simply alleging its dangerous character and unguarded condition without referring to the absent notice, by proof that, although

dangerous, the machine could not properly be guarded without a substantial impairment of its use and efficiency. *Huso v. Heydt Bakery Co.* 210 Mo. 44, 108 S. W. 63. *Woodson, J.*, dissenting.

To render a master liable for injuries to a workman due to falling into an unguarded belt and pulley because of slipping upon an oily, greasy floor, where the New York Labor Law (Laws 1897, chap. 415, § 81; Laws 1899, chap. 192), providing that all gearing, belting, shafting, set screws, and machinery in factories should be properly guarded, was violated, it is not requisite to show either that the injured workman had given notice or complained of the absence of guards, or that the master or any superior employee had any actual notice of the neglect to obey the statute. *Johnson v. Onondaga Paper Co.* 112 App. Div. 667, 98 N. Y. Supp. 602.

The Minnesota statute (Rev. Laws 1905, § 1813), and the Ontario factories act (Rev. Stat. Ont. 1897, chap. 206, § 20) both of which require the guarding of dangerous machinery where it is practicable, have alike been held by the Minnesota and Ontario courts to have been enacted for the benefit of persons whose business brings them in proximity with, as well as those who operate, such machinery. *Callopy v. Atwood*, 105 Minn. 80, 18 L.R.A.(N.S.) 593, 117 N. W. 238; *Moore v. J. D. Moore Co.* 4 Ont. L. Rep. 167.

It is the duty of a manufacturer to obey the New Jersey factory act (P. L. 1904, p. 156, § 13), which requires for the safety and protection of workers all vats and pans in factories, mills, and workshops, whenever practicable, to be properly guarded, irrespective of whether or not the risk of danger is obvious. *Dix v. Union Ice Co.* 76 N. J. L. 178, 68 Atl. 1101.

This statute embraces within its scope hot-water tanks in ice-making establishments, used to loosen the cakes of ice so that they can be readily taken from the vessels in which they were frozen; and the neglect to cover such tanks when not in use, that being feasible, gives rise to a right of action for negligence when a workman, without fault on his part and while discharging his regular duties, accidentally steps or falls into one of such tanks, and is scalded. *Ibid.*

The general duty of a master to provide a safe place for his servant to work in has

tute confusion and uncertainty for clarity and certainty. In determining whether or not the defendant was negligent the jury should have been permitted and required to consider, in connection with the statute and its violation, the construction of the shed, the means of egress, the manner of its use and occupation, and all the facts tending to show that danger from its remaining without a fire escape should or should not have been reasonably apprehended, or that defendant failed or did not

fail to use the care which the circumstances of the case demanded.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

Collin, J., reads dissenting opinion.

Hiscock, J., dissents on ground that it does not appear that intestate's death was caused by lack of fire escapes.

been explicitly imposed by statute in Wisconsin (§§ 2394-48 and 2394-49).

This statute greatly enlarged the common-law duties of masters in respect of the working places of their servants; they were thereby not only required to furnish safe places, as therein defined, for their servants to work in, but were forbidden to allow their servants to work in other places. *Puza v. C. Hennecke Co.* 158 Wis. 482, 149 N. W. 223.

Under the Wisconsin statute, which requires that the places furnished the servants to work in shall be as safe as the nature of the employment will reasonably permit, it is a master's duty, and negligence in him to omit to perform it, to surround, when practicable, an emery wheel with such guards as will probably be effective to prevent injuries to workmen in case the wheel should break, as emery wheels are likely to do while revolving. *Sobek v. George H. Smith Steel Casting Co.* 158 Wis. 517, 149 N. W. 152.

The Wisconsin statute defines the word "safe" in that association to mean such freedom from danger to the life, health, or safety of employees or frequenters as the nature of the employment shall reasonably permit, and it has accordingly been held not to have been violated when a master furnished for use on a pile driver a chain of sufficient strength to make it safe for workmen moving in the customary manner a heavy pile driver, although the chain proved in fact too weak to stand the strain, and broke to the injury of an employee when the pile driver was moved in an unusual way, over obstacles in its path not in reason to have been expected. *Olson v. Whitney Bros. Co.* — Wis. —, 150 N. W. 959. In so deciding, however, the court was divided, and Barnes and Siebecker, JJ., dissented.

The Pennsylvania factory act (P. L. 352) of May 2, 1905, which requires the use of safety guards upon dangerous machines, for the avowed purpose of providing for the safety of all employees in industrial establishments, does not merely enjoin the presence of a "proper guard" upon a dangerous machine, but means and intends such proper guard to be so adjusted and used as to be effective. *Freedom Casket Co. v. McManus*, 218 Fed. 323.

A master's statutory duty to guard dangerous machinery for the safety of his servants

is not conclusively and as a matter of law discharged by providing a casing or covering for a machine, if the operation of it and the servants' service requires the coverings more or less frequently to be opened in the ordinary course of work; but he must in such cases go further, and provide, where it is possible and practicable, safeguards within and under the enclosing covers. *Bailod v. Nelson Grain Co.* 93 Kan. 775, 145 Pac. 895.

Whether or not it was practicable to apply and maintain safety guards as required by statute to a machine or a part of it which caused an injury to a workman is usually a fact to be determined by a jury. *Morgan v. C. Hager & Sons Hinge Mfg. Co.* 120 Mo. App. 590, 97 S. W. 638; *Hoveland v. Hall Bros. Marine R. & Shipbuilding Co.* 41 Wash. 164, 82 Pac. 1080; *Erickson v. E. J. McNeeley & Co.* 41 Wash. 509, 84 Pac. 3; *Rector v. Bryant Lumber & Shingle Mill Co.* 41 Wash. 556, 84 Pac. 7; *Campbell v. Wheelihan-Weidauer Co.* 45 Wash. 675, 89 Pac. 161; *Noren v. Larson Lumber Co.* 46 Wash. 241, 89 Pac. 563; *Adams v. Peterman Mfg. Co.* 47 Wash. 484, 92 Pac. 339.

Whether or not guards or other safety appliances to prevent injury to a workman turning forgings in a lathe from projecting bolts, nuts, set screws, and other prominences on its revolving parts, are practicable, so as to charge the owner or proprietor of a machine shop with negligence in omitting them, where a statute made it his duty to supply and attach them if practicable, is a question of fact to be decided by a jury, where a skilled machinist has testified that a practical method of safeguarding the projections had been described and illustrated in technical trade publications, notwithstanding other witnesses testified that they knew of no factory or machine shop using safety appliances upon lathes of like construction, and that none had been ordered by the state factory inspector in the particular case. *Crucible Steel Forge Co. v. Moir*, 219 Fed. 151.

When a workman suffers an injury from contact with an unguarded power-driven saw, which the Iowa statute required to have been guarded if practicable, it is for the master to show, if he can, that no guard that was practicable would have been likely to prevent the injury. *Corell v. Williams*, — Iowa, —, 148 N. W. 633.

Under the Iowa statute (Code Supp. §

4999a2), which imposes a mandatory duty upon owners, agents, superintendents, and others in charge of factories, to guard all saws, planers, cogs, gearing, belting, shafting, and set screws for the protection of workmen, the burden is on the master, when a workman has been injured at a machine within the statute either unguarded or not sufficiently guarded, to prove that no guard reasonably calculated to prevent accidents was practical. *Reddington v. Blue*, — Iowa, —, 149 N. W. 933.

When a mill hand is injured by coming in contact with the exposed cog-wheels and cutting parts of a machine in the mill, it is for the jury to determine whether or not the guards required by statute were sufficient, and also whether or not the accident ought not to have been anticipated. *Vosberg v. Michigan Lumber Co.* 45 Wash. 670, 89 Pac. 168; *Noren v. Larson Lumber Co.* 46 Wash. 241, 89 Pac. 563; *Boyle v. Anderson & M. Lumber Co.* 46 Wash. 431, 90 Pac. 433; *Barclay v. Puget Sound Lumber Co.* 48 Wash. 241, 16 L.R.A. (N.S.) 140, 93 Pac. 430.

The violation of the statute must, as in all other cases, be the proximate cause of the injury to the workman for which he seeks to recover, in order for the employer to be liable. This abundantly appears elsewhere in this note, in the division treating of the doctrine of proximate cause in actions for injuries following a neglect to perform statutory duties.

If, however, a workman suffers an injury as the natural, though not necessarily inevitable, result of the failure of his employer to obey a statute imperatively requiring guards about dangerous machinery, the violation of the statute is deemed the proximate cause of the injury. *Evansville Hoop & Stave Co. v. Bailey*, 43 Ind. App. 153, 84 N. E. 549.

The question of proximate cause in an action for personal injury grounded on negligence in violating a statute requiring guards on dangerous machinery in factories is primarily one of fact. *United States Cement Co. v. Cooper*, — Ind. App. —, 82 N. E. 981, reversed on other grounds in 172 Ind. 599, 88 N. E. 69.

If the presence of the guard required by statute upon revolving circular saws to prevent accidents to workmen in mills and factories would probably have prevented an injury to a workman exercising ordinary and reasonable care, its absence in violation of the statute warrants a jury in finding that the failure to obey the statute was the proximate cause of the injury which occurred, and the circumstance that other causes helped will not relieve the negligent employer from liability. *Tucker & D. Mfg. Co. v. Staley*, 40 Ind. App. 63, 80 N. E. 975.

The temporary removal of a guard which had been used about a running belt in a factory pursuant to a Michigan statute (2 Comp. Laws, § 5349), requiring, *inter alia*, all belting to have proper safeguards, may well be deemed the proximate cause of an L.R.A.1915E.

injury to a workman thrown backward against the belt by the sudden slipping of his feet or the tool he was using while at work close by. *Swick v. Aetna Portland Cement Co.* 147 Mich. 454, 111 N. W. 110.

An injury to a workman in a factory while operating a circular rip-saw not provided with a loose pulley or belt-shifter, received as he was endeavoring to remove a sliver which interfered with the working of the saw, is attributable to the master's violation of a statute (Kan. Gen. Stat. 1909, § 4679) which requires owners and proprietors of factories using machinery to furnish it with belt-shifters or other safe mechanical appliances to throw belts or pulleys on and off, and to operate such machinery, wherever practicable, with loose pulleys. *Rank v. Kansas City Packing Box Co.* 92 Kan. 917, 142 Pac. 942.

While the violation of a duty expressly imposed by statute upon a master to put up guards about a saw and other machinery dangerous to his servants or the public is negligence, and makes him liable in damages when an injury results from such violation, nevertheless the contributory negligence of an employee injured in operating an unguarded saw will defeat his recovery. *Madison v. Clippinger*, 74 Kan. 700, 88 Pac. 260.

Notwithstanding a master's negligence in disobeying a statute requiring him to set safety guards about dangerous machinery, he may escape liability to an injured servant by proving contributory negligence. *Millsap v. Beggs*, 122 Mo. App. 1, 97 S. W. 956.

To an action grounded upon a violation of the duty imposed by the Kansas factory act (Laws 1903, p. 540, chap. 356, § 4) to guard properly and safely all belting, shafting, and machinery, contributory negligence is a defense, but an affirmative one. *Kansas Buff Brick & Mfg. Co. v. Stark*, 77 Kan. 648, 95 Pac. 1047.

The failure of a master to perform the duty enjoined by the Michigan statute (2 Comp. Laws, § 5349), of guarding and covering the gearing and cog-wheels of a machine in his works, does not deprive him of the defense of contributory negligence when sued by a servant of adult years injured while running the machine, where the unguarded cogs were plainly in sight, and the workman understood the operation, and was not obliged to get in dangerous proximity to them. *Schulte v. Pfaunder Co.* 150 Mich. 427, 113 N. W. 1120.

In an action by a servant against his master for personal injuries sustained in consequence of the master's neglect to obey the Minnesota statute (Rev. Laws 1905, § 1813), which requires dangerous machinery to be provided with safety guards whenever practicable, the defendant may defend upon the ground of the plaintiff's contributory negligence; but ordinarily the question whether the plaintiff was or was not contributorily negligent is one of fact for the jury. *Callopy v. Atwood*, 105 Minn. 80, 18 L.R.A. (N.S.) 593, 117 N. W. 238.

When a master has neglected to obey a statute requiring machinery and shafting in mills and factories, if so located as to endanger his servants when at their tasks, to be fenced or guarded, and a servant in performing ordinary duties suffers injury by coming in contact with an unguarded shaft within the statute, the question of contributory negligence is one for the jury to determine in the usual cases. *Van de Bogart v. Marinette & M. Paper Co.* 132 Wis. 367, 112 N. W. 443.

A workman injured by coming in contact with unguarded dangerous machinery in consequence of slipping on an oily floor, which it was his own duty to keep clean and safe, must be charged with contributory negligence precluding him from recovering of the master, notwithstanding the latter had neglected to comply with a statute requiring all dangerous machinery to be guarded if possible without impairing its efficiency, and, if not so possible, to have a notice posted giving warning of danger. *Huss v. Heydt Bakery Co.* 210 Mo. 44, 108 S. W. 63. *Woodson, J.*, dissenting.

A workman cannot be deemed to have been contributorily negligent when, while he was engaged, pursuant to an express order from his foreman, in an effort to tighten a set screw on a revolving shaft of the machine he was operating, his hand involuntarily slipped into and was mangled by an open cog-wheel and gearing on the shaft, which the master had, in violation of his statutory duty, left uncovered and unprotected by safety guards. *American Car & Foundry Co. v. Wyatt*, — Ind. App. —, 108 N. E. 12.

Furthermore, such injury must be regarded as proximately caused by the master's neglect to perform the duty enjoined on him by statute to provide safety guards about such cog-wheel and gearing. *Ibid.*

It is possible, said the court, anent this point, that under the holdings in the cases of *P. H. & F. M. Roots Co. v. Meeker*, 165 Ind. 132, 73 N. E. 253, 17 Am. Neg. Rep. 484, and *Crawford & M. C. Co. v. Gose*, 172 Ind. 81, 87 N. E. 711, cited by appellant's counsel in support of the proposition that the failure to guard the cogs was a condition only, not the cause of the injury, which was the attempt to adjust the set screw while the machine was in motion, their contention would be correct, but these cases have been expressly overruled, or so criticized that they are of little or no value as authorities. (Citing, *King v. Inland Steel Co.* 177 Ind. 201, 96 N. E. 337, 97 N. E. 529.)

The neglect of a master to comply with statutes requiring him to furnish seats for female servants, and to box shafts revolving near the floor of his workshop, his knowledge of and acquiescence in the use of a window sill as a seat and the window as a means of entrance and exit to and from the work room by his employees (the window being at once more convenient and safe than the passageway and doorway to the factory on a lower floor), his failure to

warn his employees of danger from a revolving shaft beneath the window and near the floor,—combine to render him liable in damages for an injury sustained by a young woman of nineteen in his service through the catching of her skirts by the unboxed shaft while she was seated on the window sill awaiting materials for her usual task, where the jury find, upon proper instructions, that there was no contributory negligence. *Michigan Headlining & Hoop Co. v. Wheeler*, 72 C. C. A. 71, 141 Fed. 61.

A workman employed on a machine not properly guarded in conformity with statutory requirements, whose hands are mangled by coming in contact with cogs and toothed rollers near which he was at work in the usual course of his employment in operating the machine and keeping it free from clogging material fed to it, is not guilty of contributory negligence as a matter of law, when the injury occurs in consequence of his foot slipping and an involuntary lurch forward, but it is for a jury to say whether or not he was negligent in the circumstances. *Baillod v. Nelson Grain Co.* 93 Kan. 775, 145 Pac. 895.

In holding it reversible error in a trial court to rule that a workman who sustained an injury to his hand by inadvertently throwing it upon a set of unguarded revolving knives near which he was at work was contributorily negligent as a matter of law, and therefore could not recover for his injury from his employer, notwithstanding the latter's neglect to obey a statute requiring the knives to be guarded if practicable, the supreme court of Washington, in a recent case, said in substance: The rule announced by the trial court, that the law does not permit a workman at work in a place of manifest danger to forget the peril, is correct in a measure but it has limitations. If the court meant that a mill hand, with his mind intent upon his work, must at all times remember at his peril every unguarded device in the mill about which he is employed, it put too heavy a tax on the human intellect. If a workman by some overt act comes in contact with machinery which he is operating and which is under his immediate control, and is injured, he will ordinarily be contributorily negligent, but when in the course of his work he comes in contact with unguarded machinery which he is not operating, and which is not under his immediate control, a different rule applies. The rule is well established that one is not necessarily guilty of contributory negligence simply because he had previous knowledge of a defect which caused his injury. *Rector v. Bryant Lumber & Shingle Mill Co.* 41 Wash. 556, 84 Pac. 7.

The defense of assumption of risk, where a servant has been injured in consequence of unguarded machinery which a statute required to be guarded, was abolished by statute (Laws 1911, § 2394-1) in Wisconsin. *Sobek v. George H. Smith Steel Casting Co.* 158 Wis. 517, 149 N. W. 152.

XV. Actions for violation of statutes prohibiting child labor.

The violation of statutes prohibiting the employment of children under stated ages, in labor of specified sorts and in various establishments, has given rise to much litigation since the publication of the primary note.

When a child under the statutory age limit is employed in contravention of such a statute, in an occupation or workshop under statutory ban, the employer is universally held to be negligent. *Elk Cotton Mills v. Grant*, 140 Ga. 727, 48 L.R.A.(N.S.) 656, 79 S. E. 836; *Platt v. Southern Photo Material Co.* 4 Ga. App. 159, 60 S. E. 1068; *American Car & Foundry Co. v. Armentraut*, 116 Ill. App. 121, affirmed in 214 Ill. 509, 73 N. E. 766; *Jefferson Theatre Program Co. v. Crejezyk*, 125 Ill. App. 1; *Jones v. Co-operative Asso.* 109 Me. 448, post, 745, 84 Atl. 985; *Sterling v. Union Carbide Co.* 142 Mich. 284, 105 N. W. 755; *Braasch v. Michigan Stove Co.* 147 Mich. 676, 111 N. W. 197; *Beghold v. Auto Body Co.* 149 Mich. 14, 14 L.R.A.(N.S.) 609, 112 N. W. 691; *Synszewski v. Schmidt*, 153 Mich. 438, 116 N. W. 1107; *Fitzgerald v. International Flax Twine Co.* 104 Minn. 138, 116 N. W. 475; *Nairn v. National Biscuit Co.* 120 Mo. App. 144, 96 S. W. 679; *Lee v. Sterling Silk Mfg. Co.* 115 App. Div. 589, 101 N. Y. Supp. 78; and on later appeal in 134 App. Div. 123, 118 N. Y. Supp. 852; *Fortune v. Hall*, 122 App. Div. 250, 106 N. Y. Supp. 787, affirmed in 195 N. Y. 578, 89 N. E. 1100; *Regling v. Lehmaier*, 50 Misc. 331, 98 N. Y. Supp. 642; *Schmidt v. Bruen Printing Business*, 56 Misc. 130, 106 N. Y. Supp. 443; *Rolin v. R. J. Reynolds Tobacco Co.* 141 N. C. 300, 7 L.R.A.(N.S.) 335, 53 S. E. 891, 8 Ann. Cas. 638; *Starnes v. Albion Mfg. Co.* 147 N. C. 556, 17 L.R.A.(N.S.) 602, 61 S. E. 525, 15 Ann. Cas. 470; *Lenahan v. Pittston Coal Min. Co.* 218 Pa. 311, 12 L.R.A.(N.S.) 461, 120 Am. St. Rep. 885, 67 Atl. 642; *Stehle v. Jaeger Automatic Mach. Co.* 220 Pa. 617, 69 Atl. 1116, 14 Ann. Cas. 122; *Stirling v. Bettis Mfg. Co.* — Tex. Civ. App. —, 159 S. W. 915.

Such negligence is sometimes characterized as negligence *per se*. *Elk Cotton Mills v. Grant*, 140 Ga. 727, 48 L.R.A.(N.S.) 656, 79 S. E. 836; *Platt v. Southern Photo Material Co.* 4 Ga. App. 159, 60 S. E. 1068; *Starnes v. Albion Mfg. Co.* 147 N. C. 556, 17 L.R.A.(N.S.) 602, 61 S. E. 525, 15 Ann. Cas. 470;

—and sometimes as negligence as a matter of law. *Stirling v. Bettis Mfg. Co.* — Tex. Civ. App. —, 159 S. W. 915.

In other cases, those in Maine and New York, *ubi supra*, the courts regard the violation of a child labor statute as but evidence of the employer's negligence to be submitted to the jury.

The disobedience of the command of a statute being evidence of negligence to be submitted to a jury in an action for personal injuries, when it has been proven it L.R.A.1915E.

is prejudicial error to grant a nonsuit. *Jones v. Co-operative Asso.* 109 Me. 448, post, 745, 84 Atl. 985.

Thus, under the Maine statute (Laws 1907, chap. 4, § 1), which forbids under penalty any person, firm, or corporation to employ or permit anyone under fifteen years of age to have the care, custody, management, or operation of an elevator, a woman customer in a department store, who was injured as she attempted to leave an elevator at rest which was operated by a boy below the age named in the statute, and which another boy riding with him mischievously started, is entitled to go to the jury on the question of the employer's negligence and consequent liability for damages. *Ibid*.

When a boy fourteen years old is injured while operating an elevator, it is reversible error to direct a verdict for the defendant in an action against the master for the injuries, where a statute (Mich. Pub. Acts 1901, No. 113, § 3) forbids the employment of children under sixteen years of age in any work dangerous to life and limb. *Braasch v. Michigan Stove Co.* 147 Mich. 676, 111 N. W. 197.

When a statute has prohibited persons, firms, and corporations to employ or allow anyone under eighteen years of age to run or have charge of any freight or passenger carrying elevator, a verdict against a partnership, in an action for the death of a boy under that age employed as a messenger and office boy, while running an elevator to carry himself on an errand to an upper floor, as he had frequently done before, will not be disturbed, where the questions of assumption of risk and contributory negligence were submitted to the jury with proper instructions. *Beaver v. Mason, E. & Co.* — Or. —, 143 Pac. 1000.

In an action against a master for personal injuries suffered by a girl under fifteen years of age while in his employ, it is reversible error for the trial court to withhold from the jury the consideration of the question of the negligence of the master in employing the injured girl, and permitting her to work without the official certificate which the statute (N. Y. Labor Law, §§ 70 *et seq.*, as amended by Laws 1903, chap. 184) requires in such cases. *Kenyon v. W. P. Sanford Mfg. Co.* 119 App. Div. 570, 103 N. Y. Supp. 1053.

In general an employer who violates a child labor statute thereby incurs a liability for injuries to the child in the course of its employment, whenever such injuries were the proximate result of violating the statute. *Elk Cotton Mills v. Grant*, 140 Ga. 727, 48 L.R.A.(N.S.) 656, 79 S. E. 836; *American Car & Foundry Co. v. Armentraut*, 116 Ill. App. 121; *Stirling v. Bettis Mfg. Co.* — Tex. Civ. App. —, 159 S. W. 915.

It is negligence affording an action in case of consequent injury, for the proprietor of a laundry to direct or permit a female under eighteen years of age, employed by him, to clean a mangle while running in

violation of a statute expressly and positively forbidding such an operation. *Bromberg v. Evans Laundry Co.* 134 Iowa, 38, 111 N. W. 417, 13 Ann. Cas. 33.

When a girl seventeen years of age, employed in a yarn mill as a cone winder to walk to and fro before a spinning machine, removing waste, tying broken threads, and keeping the spools busy winding yarn, sustained an injury by catching her hand in cog-wheels on shafts underneath while, as she alleged, she was reaching for some waste that had dropped from her hands and fallen on the revolving shaft below; and it appears that there was a clear space of 18 inches in front of the cog-wheels to the frame of the machine, which made it safe under all ordinary conditions, and it is alleged in defense that the injury could not have occurred as described by the girl, but only because she attempted to clean the shafts while they were in motion, an issue of fact arises to be submitted to the jury under proper instructions as to whether the mill owner was required by the statute to guard cog-wheels so situated, or was negligent in leaving them unguarded, and whether or not the injury occurred as asserted, so as to be the proximate result of the unguarded cog-wheels or of the girl's own negligence. *Faulkner v. Delph Spinning Co.* 245 Pa. 40, 91 Atl. 607.

To employ a child under sixteen years of age about dangerous machinery, without first obtaining from the school superintendent or board permission by certificate, is a violation of the Minnesota statute (Laws 1907, p. 403, chap. 299), and if such child is injured while so employed, by a neglect properly to guard the machinery, the employer is *prima facie* liable in damages. *Fitzgerald v. International Flax Twine Co.* 104 Minn. 138, 116 N. W. 475.

The Michigan child labor statute (Pub. Acts 1901, p. 157, No. 113, as amended by Pub. Acts 1905, p. 239, No. 171), prohibiting the employment of any child under fourteen in any manufacturing establishment, and of any child under sixteen at any work dangerous to life and limb, raises a duty toward and for the benefit of persons in the classes liable to injury by its violation. *Synszewski v. Schmidt*, 153 Mich. 438, 116 N. W. 1107.

The violation of the North Carolina statute (Rev. 1905, § 1981a) forbidding any child under twelve years of age to be employed or worked in any factory or manufacturing establishment constitutes actionable negligence whenever a child suffers injuries in a factory while so employed, regardless of whether or not it incurred the danger in or by reason of the particular work it was employed to do. *McGowan v. Ivanhoe Mfg. Co.* 167 N. C. 192, 82 S. E. 1028.

While the violation of the Georgia child labor law, forbidding the employment of children under a stated age except in particular cases is negligence, *per se*, and gives rise to an action when a child under age suffers an injury in the course of his em-

ployment, the failure to comply with a further requirement of that statute permitting the employment of children above that age, but requiring the filing of certain affidavits and certificates stating their ages, does not constitute negligence as a matter of law, nor of itself give a right of action for an injury to a child whose employment is lawful. *Platt v. Southern Photo Material Co.* 4 Ga. App. 159, 60 S. E. 1068.

The mere failure to file a certificate granted by the board of health in conformity with the New York Labor Law (§ 70) upon employing in a factory a child between the ages of fourteen and sixteen raises no presumption of the employer's negligence, in case of an injury to the child in the course of his employment. *Schmidt v. Bruen Printing Business*, 56 Misc. 130, 106 N. Y. Supp. 443.

There is a causal relation between the employment of a child under sixteen years of age to operate a dangerous machine in violation of a prohibitory statute, and an injury to such child by the operation of that machine which makes it the proximate cause of such injury. *Sterling v. Union Carbide Co.* 142 Mich. 284, 105 N. W. 755.

The employment of a child under twelve years of age in a cotton factory, in violation of the prohibitory statute of North Carolina (Rev. 1905, § 3362), is in itself the proximate cause of an injury to such child, due to its attempt to remove a bit of cotton from a carding machine, although its duties did not require such a service. An employer by reason of his violation of such statute becomes liable for every injury which naturally and reasonably results from the child's employment. *Starnes v. Albion Mfg. Co.* 147 N. C. 556, 17 L.R.A. (N.S.) 602, 61 S. E. 525, 15 Ann. Cas. 470.

The act of a workman in charge of certain machines in a cotton mill, in forcing against its will, a child employed, in violation of a statute, to do other work, to attempt the removal from a machine in motion of a shred of cotton, resulting in the mangling of the child's hand, cannot be regarded as a wanton and malicious one of his own, but is, on the contrary, conduct fairly within the scope of his work and authority, for the consequence of which the master is responsible. *McGowan v. Ivanhoe Mfg. Co.* 167 N. C. 192, 82 S. E. 1028.

A child not regularly employed and carried on the pay roll, but permitted frequently to work in a cotton mill, to the knowledge of its superintendent or manager, and occasionally compensated in money for its services, is within the protection of the North Carolina statute (Rev. 1905, § 1981a) forbidding any child under twelve years of age to be employed or worked in any factory or manufacturing establishment. *Ibid.*

When a master employing a minor fifteen years of age sets him at work on a machine rolling candy flat, in violation of a statute (Mo. Rev. Stat. 1899, § 6434) forbidding him to require a minor to work be-

tween fixed or moving parts of any machine while it is in motion driven by steam, water, or other mechanical power, the master assumes all the risks of danger to the minor from injuries incidental to the work. *Navin v. National Biscuit Co.* 120 Mo. App. 144, 96 S. W. 679.

As the employment of a child under the age named in a statute prohibiting child labor at any employment dangerous to life and limb is illegal and the contract of employment is void, there is no room for the application of the fellow servant doctrine when the statute is violated and the child is injured in its employment. A child who is prohibited by law from being a servant cannot be a fellow servant of another. *Synszewski v. Schmidt*, 153 Mich. 438, 116 N. W. 1107.

There are differences of judicial opinion respecting the defense of contributory negligence, where a child employed in violation of a statute is injured at his work.

In Pennsylvania and Illinois it has been decided that the contributory negligence of a child injured while employed in contravention of a statute prohibiting the employment of children in specified occupations or dangerous work is no defense to the master when sued for damages. *Lennahan v. Pittston Coal Min. Co.* 218 Pa. 311, 12 L.R.A.(N.S.) 461, 120 Am. St. Rep. 885, 67 Atl. 642; *Stehle v. Jaeger Automatic Mach. Co.* 220 Pa. 617, 69 Atl. 1116, 14 Ann. Cas. 122; *Jefferson Theatre Program Co. v. Crejczyk*, 125 Ill. App. 1.

In Missouri a youth fifteen years old set at work passing candy through a steam rolling machine, in violation of a statute of that state (Rev. Stat. 1899, § 6434), which declares that no minor shall be required to work between the fixed or traversing parts of any machine while it is in motion by the action of steam, water, or other mechanical power, where his duties required him to sprinkle starch on the rollers to prevent the candy from sticking to and clogging them, who was injured while so busied by inadvertently touching the clammy rollers and having his fingers drawn between them, was held not to be charged with contributory negligence. *Nairn v. National Biscuit Co.* 120 Mo. App. 144, 96 S. W. 679.

In the light of the factory statute of North Carolina (Acts 1903, chap. 473) a child under twelve years of age presumably is incapable of appreciating dangers from machinery due to the acts, or omissions of or conditions brought about by the negligence of other persons, and hence is chargeable with contributory negligence if injured, only when its capacity to appreciate such danger has been proved to the satisfaction of a jury. *Rolin v. R. J. Reynolds Tobacco Co.* 141 N. C. 300, 7 L.R.A.(N.S.) 335, 53 S. E. 891, 8 Ann. Cas. 638.

Whether or not a child under sixteen years of age, injured while operating a dangerous machine while employed in violation of the Michigan statute (Pub. Acts 1901, No. 113, § 3), was contributorily

negligent, is a question of fact for a jury. *Sterling v. Union Carbide Co.* 142 Mich. 284, 106 N. W. 755.

A boy of fourteen years working in a factory and suffering an injury by coming in contact with a dangerous piece of machinery which the master, in violation of a statute, has negligently left without guards, cannot be said, as a matter of law, to have been guilty of contributory negligence, even if he was at the time momentarily inattentive or forgetful, since his capacity and reasonable care is a question of fact for the jury, notwithstanding the statute only prohibits absolutely the employment of children under his age, and thus inferentially allows the employment of those of such age. *Moore v. J. D. Moore Co.* 4 Ont. L. Rep. 167.

Inasmuch as the New York Labor Law (Laws 1897, chap. 415, § 70) prohibiting the employment of children under fourteen years of age in factories does not confer a statutory right of action for its violation, nor declare a violation of it conclusive evidence of negligence, nor that damages are a necessary consequence of its violation, an action for personal injuries resulting from its violation is governed by the rules of common law, and hence is open to the defense of contributory negligence. *Lee v. Sterling Silk Mfg. Co.* 115 App. Div. 589, 101 N. Y. Supp. 78. This doctrine was reaffirmed upon a later appeal in this case in 134 App. Div. 123, 118 N. Y. Supp. 852.

When a statute fixes at fourteen years the age limit at which children may be employed in factories without an official certificate permitting them to work, a child over that age is presumed to be *sui juris*, and hence if injured at his work is bound to show his freedom from contributory negligence. *Fortune v. Hall*, 122 App. Div. 250, 106 N. Y. Supp. 787, affirmed in 195 N. Y. 578, 89 N. E. 1100.

Such a statute ceases automatically longer to be applicable as soon as a child who was employed in violation of it reaches and passes the stated age. *Ibid.*

Although a master is negligent in violating a statute (Mich. Pub. Acts 1901, No. 113, § 3) prohibiting the employment of anyone under sixteen years of age upon any machinery dangerous to life and limb, yet a lad who has almost reached the age limit, and is intelligent and normally discreet, if injured while operating a dangerous machine, by his own intentional, voluntary act done knowing the danger and risk, is guilty of such contributory negligence, as a matter of law, as precludes recovery. *Beghold v. Auto Body Co.* 149 Mich. 14, 14 L.R.A.(N.S.) 609, 112 N. W. 691.

An intelligent youth fifteen years old, fully cognizant of the danger of his act, who while feeding a meat grinder or sausage machine deliberately thrust his hand too far into the hopper, and was injured by the cutters, was guilty of such contributory negligence as to preclude recovery of the master for the resulting injury, even if the master could be deemed to have vio-

lated a statute forbidding the employment of women and minors at certain kinds of work upon and in proximity to moving machinery. *Stegmann v. Gerber*, 146 Mo. App. 104, 123 S. W. 1041.

A statute forbidding the employment of children under fifteen years of age to run or assist in running elevators is not violated by a temporary and intermittent engagement of a girl less than a year younger to answer and report telephone calls, where as an incident she was directed to deliver the messages received by way of a freight elevator under her own operation. *Boesel v. Wells, F. & Co.* 260 Mo. 463, 169 S. W. 110. *Woodson, J.*, in dissent on this proposition.

The mere superseding of one by another statute prohibiting child labor, and the consequent repeal of the earlier law, where the later statute raises the age limit, is more drastic in terms, and abolishes conditions favorable to employers, does not impair any right or remedy for any injury incurred by a child employed in violation of the former statute. *Stirling v. Bettis Mfg. Co.* — Tex. Civ. App. —, 169 S. W. 915.

A statute prohibiting child labor in factories is fairly within the police powers of the state, and the constitutional guaranty of freedom of contract does not apply to children of tender years, nor restrain legislation for their protection. *Starnes v. Albion Mfg. Co.* 147 N. C. 556, 17 L.R.A. (N.S.) 602, 61 S. E. 525, 15 Ann. Cas. 470.

XVI. Actions for violation of statutes regulating mining.

A considerable number of the later cases have been predicated upon violations of statutes regulative of mining operations, and designed to promote the safety of mine workers.

As in other cases, it constitutes negligence to disregard duties imposed by these statutes, and if such negligence should be the proximate cause of injuring a person in the protected class, a liability for the injury would follow unless warded off by some defense recognized as good in law.

To disobey a mandatory statute requiring operators of mines to provide and maintain ample means of ventilation for circulating air through the mains, entries, and working places in their mines in sufficient volumes to dilute, carry off, and render harmless noxious gases generated in mines, is negligence *per se*, which makes the disobedient mine operator liable in damages to a workman in his mine who is injured while at work by an explosion of gas, without other proof of negligence. *Sloss-Sheffield Steel & I. Co. v. Sharpe*, 161 Ala. 432, 50 So. 52.

Under statutes of Illinois (Min. act April 18, 1899, §§ 16, 18; 4 Starr & C. Anno. Stat. Supp. ed. pp. 855, 857) which in substance require a mine examiner at every mine, charged with the duty of visiting it before workmen are permitted to enter it, and to see that the air ventilating current

is flowing in its proper course and in sufficient volume, to inspect all passes and places of work, note any unsafe conditions, and inscribe the walls with chalk marks indicative of the time of his visit, and, if dangerous conditions exist, with notices warning miners to keep out until they have been made safe, and to make daily reports of actual conditions; and also charging mine managers with the duty of frequent examinations of the various working places in their mines, and with the supplying of props, caps, and timbers on the miners' requisitions; and requiring owners, agents, and operators of all coal mines to keep constantly ready sufficient timber of suitable sizes for the purpose,—it is held to be negligence *per se* to fail to comply with the statute, entitling a miner injured while at work in consequence. *Kellyville Coal Co. v. Strine*, 217 Ill. 516, 75 N. E. 375; *Ingraham v. Harmon*, 133 Ill. App. 82, affirmed in 229 Ill. 168, 82 N. E. 256.

The disobedience of a mine owner to the command of a statute imposing upon him the duty of ventilating the mine and sprinkling the coal dust in it to dispel noxious and explosive gases commonly generated in mines constitutes negligence, and renders him liable for the death of a miner while at work in the mine through an explosion of gas attending the blasting of coal, where the deceased was not shown to have had such a knowledge of the dangerous conditions as to be charged with contributory negligence. *Great Western Coal & Coke Co. v. Cunningham*, 43 Okla. 417, 143 Pac. 26; *Great Western Coal & Coke Co. v. Coffman*, 43 Okla. 404, 143 Pac. 30; *Great Western Coal & Coke Co. v. Boyd*, 43 Okla. 438, 143 Pac. 36.

The operator of a mine who fails to obey the Kentucky statute (§ 2731), which requires to be supplied and circulated through mines 100 cubic feet of pure air for each mine worker, and forbids working places to be advanced further than 60 feet beyond the air openings, is negligent and answerable in damages to a miner injured, while at work at a point beyond the statutory distance limit, by noxious gases there prevalent and too subtle to be noticeable. *Jellico Coal Min. Co. v. Walls*, 160 Ky. 730, 170 S. W. 19.

The neglect of a mine operator to obey a statute requiring mine roadways to be regularly and thoroughly sprayed, sprinkled, and cleaned, gives rise to a right of action when a workman in the mine sustains an injury by an explosion caused or aggravated by such neglect. *Maplewood Coal Co. v. Graham*, 134 Ill. App. 277.

The failure to obey the Illinois statutes relating to mines and mining (Rev. Stat. chap. 93, § 19, subdivs. e and f) requiring all permanent doors in mines used in guiding ventilating currents to be so hung as to close automatically, and an attendant to be stationed at all principal doorways to open and close them when cars are passing through them to and from the workings, gives rise to a cause of action when in con-

sequence of such failure a miner is injured, irrespective of whether or not his injury was due to a lack of proper ventilation. *Madison Coal Co. v. Hayes*, 116 Ill. App. 94, affirmed in 215 Ill. 625, 74 N. E. 755.

A mine owner and operator who has neglected to obey the Kentucky statute (§ 2731), which requires the ventilation of mines, cannot successfully defeat an action by a miner who suffers an injury in consequence of the violation of the statute, upon the theory of assumption of risk, unless, perhaps, where the danger from bad air was so obvious that no reasonable man would have incurred it. *Log Mountain Coal Co. v. Crunkleton*, 160 Ky. 202, 169 S. W. 692, 7 N. C. C. A. 178.

Any knowing and conscious failure to obey and conform to the requirements of the Illinois mine and miners statutes respecting examinations, inspections, ventilating air currents, props, caps, and timbers, with notices and warnings of danger, is esteemed a wilful violation of the statute, by the courts of that state. *Athens Min. Co. v. Carnduff*, 221 Ill. 354, 77 N. E. 571, 20 Am. Neg. Rep. 38.

The responsibility of a mine owner or operator when such statutes of Illinois are violated to the injury of a workman in the mine cannot be escaped by proving that the delinquent examiner, manager, or inspector was a competent person certified officially as duly qualified for his post when employed, for such delinquent is a vice principal, and not a coservant of the injured miner. *Henrietta Coal Co. v. Martin*, 221 Ill. 460, 77 N. E. 902.

The Pennsylvania and West Virginia cases of *Durkin v. Kingston Coal Co.* 171 Pa. 193, 29 L.R.A. 808, 50 Am. St. Rep. 801, 33 Atl. 237, and *Williams v. Thacker Coal & Coke Co.* 44 W. Va. 599, 40 L.R.A. 812, 30 S. E. 107, holding the contrary doctrine, disapproved.

The duty of a mine owner under the Kentucky statute (§ 2739b), which requires operators of mines to furnish props and caps for use in securing the roofs after the miners who require them have selected and marked the materials, does not begin upon a mere request for props, with notice of their need, but only after a selection and marking by the miner. *Palmer v. Empire Coal Co.* 162 Ky. 130, 172 S. W. 97.

It is conceded by the Arkansas supreme court to be negligence in a coal mining company to fail of obedience to a statute requiring mine operators, when requested by a miner, to furnish props, caps, and other suitable timbers sufficient to uphold and make safe the mine, for workers beneath the roof; but it is held that this does not necessarily entail a liability for an injury to a miner by falling rock, unless a request for the props, etc., was wilfully ignored, and if the miner imprudently continued at work risking danger. *Mammoth Vein Coal Co. v. Bubliss*, 83 Ark. 567, 104 S. W. 210.

The conscious violation of a statute limiting the rate of speed at which a cage may L.R.A.1915E.

be lowered with passengers into the shaft of a mine affords a miner injured in consequence an action against the mine operator for damages. *Joseph Taylor Coal Co. v. Dawes*, 220 Ill. 145, 77 N. E. 131.

The inadvertent failure of a mine owner, through ignorance of the existence of the law, to comply with a statute making it unlawful, upon pain of fine or imprisonment, to sink or work through any vertical mining shaft of a depth greater than a stated number of feet, unless it is provided with an iron-bonneted safety hoisting cage for raising and lowering the employees, no more excuses him from liability for an injury to an employee consequent upon his neglect to obey the statute than would his wilful disobedience and conscious violation of it. *Ryan v. Manhattan Big Four Min. Co.* — Nev. —, 145 Pac. 907.

The duty imposed by the Nevada statute (Rev. Laws, § 6799), which makes it unlawful, under penalty of fine or imprisonment or both, for any person or persons, natural or artificial, to sink or work through any vertical mining shaft at a depth greater than 350 feet, unless such shaft shall be provided with an iron-bonneted safety cage to be used in lowering and hoisting those employed in the mine, is not discharged by merely providing the prescribed cage without using it for the purpose designated. *Ibid.*

That the workmen in a mining shaft had never requested that they be lowered to and hoisted from their work in a cage of the description given in a statute making it unlawful, under a penalty of fine or imprisonment, to sink or work through a vertical mining shaft over 350 feet deep, unless it was provided with an iron-bonneted safety hoisting cage to be used by employees in ascending and descending, does not relieve a mine owner from a charge of negligence in violating the statute and consequent liability for an injury to a miner due to his having violated it. *Ibid.*

Under the Kentucky statute (§ 2739b, subsec. 7), which reads: "Each owner, lessee, or operator of every mine to which the mining laws of the state apply shall provide and furnish to the miners employed in said mine a sufficient number of caps and props . . . to be used by said miners in securing the roof in their rooms and at such other working places where by law or custom of those usually engaged in such employment it is the duty of said miners to keep the roof propped after the miner has selected and worked (marked) the same,"—only an absolute duty of supplying needed props and caps is put upon a mine owner, and the question as to whose duty it is to set up such props in place, the miner's or the operator's, is one of fact to be determined by their agreement or the prevalent custom. *Old Diamond Coal Co. v. Denney*, 160 Ky. 554, 169 S. W. 1016.

A miner who has requested the owner of the mine daily to furnish planking to support the roof at the place in the mine where he is at work, and has obtained the owner's

promise to furnish it immediately, where a statute has made it the duty of the mine owner to supply props and caps to hold up the roofs, neither assumes the risk of injury from a falling roof nor is guilty of any contributory negligence in continuing to work in daily expectation of being supplied with the planking called for, when the roof under which he is working is deemed to be safe, and no peril is obvious. *Big Branch Coal Co. v. Wrenchie*, 160 Ky. 668, 170 S. W. 14.

A miner does not, merely by entering upon and continuing in the employment of a mine owner who has neglected to obey a statute requiring vertical mining shafts over 350 feet deep to be provided with safety hoisting cages to carry workmen up and down, assume the risk of injury in ascending or descending the shaft without such cage; the only risks which he assumes are those which are unavoidably incident to the employment, and not such as are due to the master's own negligence and violation of an express statute. *Ryan v. Manhattan Big Four Min. Co.* — Nev. —, 145 Pac. 907.

The Montana statute (Rev. Codes, § 8536) making it unlawful for any corporation or person to sink or work through any vertical shaft greater than a stated depth, where mining cages are used to raise and lower workmen, unless such cages are bonneted and encased and provided with doors for the safety of the employees, under penalty of a heavy fine, while affording a workman injured by its violation a right of action, and removing the question of the employer's negligence from the region of uncertainty, does not as construed by the supreme court of the state, abolish the doctrines of assumption of risk and contributory negligence, because the statute does not so provide, and the courts, it is said, cannot add to its penalties by depriving the employer of these defenses. *Osterholm v. Boston & M. Consol. Copper & S. Min. Co.* 40 Mont. 508, 107 Pac. 499.

In Illinois a miner is not charged with contributory negligence if he continues at work amid conditions he has noticed to be unsafe, because he is held to have the right to assume that his inference of danger was a mistaken one, and that if the danger was real the statute would have been obeyed. *Kellyville Coal Co. v. Strine*, 217 Ill. 516, 75 N. E. 375; *Ingraham v. Harmon*, 133 Ill. App. 82, affirmed in 229 Ill. 168, 82 N. E. 256.

The failure to obey the Illinois mines and mining statute (Act of 1899, § 28), which requires mine operators to station at the top and bottom of every shaft operated by steam power a man to signal starts and stops, preserve order, and enforce rules for carrying workmen in the cages, requires such men to be on duty at their posts before, after, and during the movement of the cages, and regulates the illumination of landing places in the shafts,—constitutes negligence as a matter of law, giving rise to a right of action when a miner suffers

an injury in consequence. *Brunnworth v. Kerens-Donnewald Coal Co.* 260 Ill. 202, 103 N. E. 178.

Such a failure to obey the statute must be regarded as the proximate cause of injuring a miner who was killed as he attempted to enter a cage after it had started to ascend, because the absence of light obscured the danger, and the attempt of the deceased to enter the cage would have been frustrated had the absent signal man been present attending to his duties. *Ibid.*

It is the rule in Illinois that the contributory negligence of a miner injured in consequence of the mine owner's wilful violation of the mines and mining statutes affords the delinquent operator no defense. *Kellyville Coal Co. v. Strine*, 217 Ill. 516, 75 N. E. 375; *Ingraham v. Harmon*, 133 Ill. App. 82, affirmed in 229 Ill. 168, 82 N. E. 256; *Maplewood Coal Co. v. Graham*, 134 Ill. App. 277; *Brunnworth v. Kerens-Donnewald Coal Co.* supra.

The case of *Carterville Coal Co. v. Abbott*, 181 Ill. 495, 55 N. E. 131, 7 Am. Neg. Rep. 40, cited in the primary note to the effect that contributory negligence in a miner injured in consequence of the wilful disregard of the duties prescribed by the Illinois statute regulating the management and operation of coal mines for the protection of workmen will not preclude a recovery was cited and its doctrines were approved in *Kellyville Coal Co. v. Strine*, supra.

In the Northwest Territory, where by statute the fellow servant rule has been abrogated, the failure of a mine owner to meet the requirements of the statute respecting the ventilation and inspection of coal mines is negligence entailing liability for the death of a miner by an explosion of gas in an unventilated passage where he was at work, and such failure is to be deemed the proximate cause of the injury notwithstanding the explosion was due to an exposed flame by the act of a third person. *Daye v. W. H. McNeill Co.* 6 Terr. L. Rep. 23.

To entitle a workman in a mine to recover of his employer for an injury sustained, upon the ground the latter had negligently disobeyed a statute enacted for the former's benefit, he must indeed not only prove that the statute was violated by the employer, but also that such violation was the proximate cause of the injury; if, however, the culminating catastrophe could not and would not have occurred except for the violation of the statute, that violation should be deemed the proximate cause of the injury, notwithstanding there may have been one or more intervening agencies operative to produce the result. *Ryan v. Manhattan Big Four Min. Co.* — Nev. —, 145 Pac. 907.

A miner's injuries incurred through a fall from a bucket to the floor of a vertical mining shaft while being drawn to the top, in consequence either of the swaying of the bucket and its collision with side timbers, or the tangling of hoisting or signal ropes,

nevertheless is attributable as the proximate result of the absence from the shaft of a hoisting cage to carry passengers, and hence to the mine owner's having violated a statute making it unlawful, under penalty of fine or imprisonment, to sink or work through a vertical mining shaft as deep, unless it should be provided with an iron-bonneted safety hoisting cage to be used in lifting and lowering the employees. *Ibid.*

In an action to recover damages for injuries sustained in consequence of a wilful violation of the Illinois statutes relating to mines and mining (Rev. Stat. chap. 93, § 19, subdive. e and f), which require all permanent doors in mines used in guiding ventilating currents to close automatically, and an attendant to be stationed at all principal doorways to open and close them for passing cars, the question whether or not a door is permanent, or a doorway a principal one, is one of fact for the jury. *Madison Coal Co. v. Hayes*, 116 Ill. App. 94, affirmed in 215 Ill. 625, 74 N. E. 755.

It is for the jury to say whether or not injuries complained of by a miner in an action against a mine operator were caused by the failure of the latter to obey the Kentucky statute (§ 2731), which requires mines to be ventilated. *Log Mountain Coal Co. v. Crunkleton*, 160 Ky. 202, 169 S. W. 692, 7 N. C. C. A. 178.

It is for the jury to determine whether or not a mine operator neglected to obey the Kentucky statute (§ 2731), which requires the ventilation of mines, when a miner sues for injuries alleged to be consequent upon bad air in the mine. *Ibid.*

The omission of a mine owner to obey a statute commanding all abandoned mine shafts, pits, or other excavations dangerous to the life of man or beast, to be securely covered or fenced, renders it liable in damages for the death of a child by falling into a shaft insecurely covered, while lawfully at play on the premises by license of the mine owner. *Richardson v. El Paso Consol. Gold Min. Co.* 51 Colo. 440, 118 Pac. 982.

That statute was enacted under the police power of the state for the benefit and protection of the public, and is open to no objection upon the score of constitutionality. *Ibid.*

The statutes at the foundation of the principal case and that of *Richardson v. El Paso Consol. Gold Min. Co.* supra, were very much alike in language. In both cases a child fell a victim to the violation of the statute, by falling into an inadequately protected and insecurely covered unworked mine shaft. One case resulted in the death of the child, the other in his severe injury. In both the mine owner was held civilly liable for negligence in not complying with the statutory command. The principal difference in the two cases was that in the principal case the child was trespassing at the shaft, while in the other case he was there by license as one of a family tenanting the near-by land of the mine owner. L.R.A.1916E.

XVII. Actions for violation of statutes regulating sales of commodities inimical to public welfare.

The violation of a statute absolutely prohibiting, under penalty of fine or imprisonment, the sale of an article inherently dangerous to the public, renders a wholesale merchant liable in damages for the death of a person by the explosion of a toy pistol purchased of a retail dealer to whom the merchant knowingly sold it for resale. *Pizzo v. Wiemann*, 149 Wis. 235, 38 L.R.A. (N.S.) 678, 134 N. W. 899, Ann. Cas. 1913C, 803, 3 N. C. C. A. 149.

It is such negligence in merchants to sell and deliver, give or furnish, in violation of a penal statute making it a public offense, an air gun, a dangerous weapon, to a boy of thirteen, as will render them liable to a person injured by the discharge of the gun by the act of the boy in careless or reckless use of it. *Fowell v. Grafton*, 20 Ont. L. Rep. 639, affirmed in 22 Ont. L. Rep. 550.

The Minnesota statute (Gen. Stat. 1894, § 6946), which makes it unlawful for any minor under fourteen years to handle, possess, or control, unless in company or under the supervision of his parent or guardian, any firearm, and making it a misdemeanor for him to violate, or for any other person to aid or knowingly permit him to violate, the statute, creates a duty both to the public generally and to private persons. *Anderson v. Settergren*, 100 Minn. 296, 111 N. W. 279.

The act of adult persons in lending to a boy known to them to be under fourteen years of age and careless in the use of firearms, of a rifle, and selling him cartridges to go with it, in violation of such statute, is negligence rendering them *prima facie* liable for an injury to a third person shot by the boy's reckless discharge of the gun. *Ibid.*

Such act must be deemed the proximate cause of the injury to the person thus recklessly shot, notwithstanding the interposition of the boy. *Ibid.*

One who purchases intoxicating liquor which is served at a bar to a minor in violation of the Indiana statute (*Burns's Anno. Stat.* 1908, § 8329), is guilty of a breach of duty owing to the state and such minor; and such breach is negligence *per se*, entitling the minor when injured in consequence, to an action for damages, provided he is not of such an age as to be chargeable with contributing to his injury by knowingly and voluntarily drinking such liquor. *Cole v. Searfoss*, 49 Ind. App. 334, 97 N. E. 345.

A violation of a penal statute of Oregon (*Laws* 1903, p. 103, § 2) which requires, under a penalty of fine or imprisonment, the impressing upon or plain marking of every barrel, can, or other vessel in which shall be sold benzole, benzine, gasoline, naphtha, and other distillates, of the true name and grade of the contents; and that every similar receptacle of kerosene or coal oil on sale shall be likewise labeled with

the degree Fahrenheit of fire test below which the oil will not take fire,—is negligence *per se* in a manufacturer or refiner toward an unwitting purchaser of kerosene oil from a misbranded vessel, who when using the oil suffers an injury by its explosion. *Peterson v. Standard Oil Co.* 55 Or. 511, 106 Pac. 337, Ann. Cas. 1912A, 625.

Forasmuch as the erroneous filling of a prescription by a druggist is, independent of statute, negligence for which an action will lie if an injury results, the violation of the Oregon statute (§ 4750, L. O. L.) making it unlawful for anyone to manufacture, compound, sell, or dispense any drug, poison, medicine, or chemical, or to fill and deliver any physician's prescription, without being registered as a pharmacist or an assistant pharmacist, and requiring every drug store, dispensary, and laboratory to be in charge of a registered pharmacist, is conclusive evidence of negligence, when an injury results. *Goodwin v. Rowe*, 67 Or. 1, 135 Pac. 171.

In *Mazetti v. Armour & Co.* 75 Wash. 622, 48 L.R.A.(N.S.) 213, 135 Pac. 633, the plaintiff, having sued for damages for loss of profits, patronage, and reputation in his business as the keeper of a restaurant through serving bad meat from an original package put up by defendants, and purchased in open market from an independent distributor, attacked the judgment of the court below, which sustained a general demurrer to his complaint, upon the ground in part that in putting up and sending the package to market for sale the defendants had violated the pure food statute, and so had been actionably negligent. The defendants, admitting as a general proposition that the violation of the pure food law would constitute negligence for which a right of action might accrue, met the argument by contending that the plaintiff was not one of those for whose benefit the statute had been enacted, and insisted that it was intended solely for the protection of consumers of food. The court was indisposed to consider this phase of the case, and merely said that those who traded in and those who consumed food products of the kind involved in the action were equally within the statutory protection, and it concluded that the demurrer was bad and the complaint good.

XVIII. Action for violating statute designed to promote safety of sea bathers.

The failure of the proprietor of a seaside bathing establishment to comply with a penal statute of Florida which requires all persons, firms, and corporations who maintain such establishments and furnish bathing suits for hire, to provide and maintain life lines and life rafts for the protection of bathers, upon pain of a \$500 fine, or six months' imprisonment, or both, constitutes negligence, and renders him liable in damages, when as a proximate result of such failure a bather free from contributory neg-

ligence is drowned. *McKinney v. Adams*, — Fla. —, L.R.A.1915D, 442, 66 So. 988.

XIX. Action for violating statute regulating the harvesting of ice.

The violation of the Michigan statute (Pub. Acts 1899, No. 221, p. 342) making it the duty of those who cut ice on lakes and streams to set up danger warnings and barricades consisting of a pole, rail, rope, or chain a yard above the surface, laid on cross bars about and 10 feet from openings, does not afford the owner of a cow drowned through an unguarded opening any right of action for the loss, where the animal was allowed to go unattended in search of water to drink, and wandered from the highway, across intervening land of third persons, to reach the opening where she met her death. *Richards v. Waltz*, 153 Mich. 416, 117 N. W. 193.

This case was decided by a court almost evenly divided, and the conclusion of the majority was rested upon three reasons: First, that the statute was not designed to prevent casualties to live stock running at large unattended, because the barrier prescribed was plainly too slight and weak to turn the animals away; second, that the owner of the cow was guilty of contributory negligence in permitting it to go on the quest for water unattended, although the local law allowed stock to run at large; and, third, because the drowned beast was a trespasser to which no duty was owed except to refrain from wilfully and wantonly injuring it.

XX. Actions for violating penal statutes.

The violation of a penal statute is evidence of the delinquent's negligence respecting all the consequences the statute intended to prevent. *Bourne v. Whitman*, 209 Mass. 155, 35 L.R.A.(N.S.) 701, 95 N. E. 404, 2 N. C. C. A. 318.

To disobey a penal statute commanding or prohibiting something for the benefit or protection of others is in general negligence *per se* as a matter of law, and entitles any beneficiary who may suffer an injury by an infraction of such statute to maintain an action against the delinquent. *Melville v. Butte-Balaklava Copper Co.* 47 Mont. 1, 139 Pac. 441.

The right of an individual to his action for damages individually sustained as the direct result of a breach of duty imposed by a statute enacted for the benefit of the public as individual units, but not expressly conferring a right of action, is in nowise affected by the circumstance that the statute imposed a penalty for its violation, provided such penalty was not made the exclusive remedy. *Clements v. Potomac Electric Power Co.* 26 App. D. C. 482; *Prest-O-Lite Co. v. Skeel*, — Ind. —, 106 N. E. 365, 7 N. C. C. A. 724; *Cole v. Seaross*, 49 Ind. App. 334, 97 N. E. 345; *Steiert v. Coulter*, 54 Ind. App. 643, 102 N. E. 113, 103 N. E. 117, 4 N. C. C. A. 561; *Jones v. Co-operative Asso.* 109 Me. 448, post, 745,

84 Atl. 985; *Barfoot v. White Star Line*, 170 Mich. 349, 136 N. W. 437; *Anderson v. Settergren*, 100 Minn. 296, 111 N. W. 279; *Evers v. Davis*, 86 N. J. L. 196, 90 Atl. 677; *Peterson v. Standard Oil Co.* 55 Or. 511, 106 Pac. 337, Ann. Cas. 1912A, 625; *Beaver v. Mason, E. & Co.* — Or. —, 143 Pac. 1000; *Pizzo v. Wiemann*, 149 Wis. 235, 38 L.R.A.(N.S.) 678, 134 N. W. 899, Ann. Cas. 1913C, 803, 3 N. C. C. A. 149; *Hagle v. Laplante*, 20 Ont. L. Rep. 339; *Fowell v. Grafton*, 20 Ont. L. Rep. 639, affirmed in 22 Ont. L. Rep. 550.

That a statute specifies a penalty of fine or imprisonment, or both, for violating it, where it does not make such penalty the exclusive consequence of the violation, does not preclude one for whose benefit the statute was enacted, and who has sustained a personal injury by its violation, from maintaining a civil action to recover damages for such injury. *McKinney v. Adams*, — Fla. —, L.R.A.1915D, 442, 66 So. 988.

A right of action is afforded to an individual traveler on a public highway crossing a railroad track, free from fault on his part when he suffers an injury in consequence of the violation of a statute regulating the operation of railroads and railroad trains at and near crossings of public highways, and requiring "blow posts" to be erected at stated distances either side, the speed of trains approaching to be checked, and certain signals by bell and whistle to be given within such distances, since the railroad company is negligent in omitting either to erect the blow posts, or, having erected them, to slacken speed or give the statutory signals; and the right of action is unaffected by the fact that in the one case the superintendent of the road, and in the other the locomotive engineer, is indictable for a violation of the statute. *Southern R. Co. v. Combs*, 124 Ga. 1004, 53 S. E. 508.

The violation of a statute making it a criminal offense for any person in charge of an interurban electric car equipped with a whistle to fail to sound it within a stated distance as the car nears a crossing constitutes actionable negligence. *Indiana Union Traction Co. v. Myers*, 47 Ind. App. 646, 93 N. E. 888.

That a statute requiring headlights upon locomotives makes it a misdemeanor to omit them does not affect the right of one injured by its violation to a civil action against the offending railroad company. *Powers v. Norfolk Southern R. Co.* 166 N. C. 599, 82 S. E. 972, 6 N. C. C. A. 1032.

Although by statute a wilful violation of the North Carolina child labor law (Rev. 1905, § 1981a) is made a misdemeanor, yet a child within its terms, injured during its employment in violation of the statute, is still entitled to recover of the offending master on the ground of negligence in disobeying the statute. *McGowan v. Ivanhoe Mfg. Co.* 167 N. C. 192, 82 S. E. 1028.

A penal statute making it a misdemeanor punishable by fine or imprisonment upon conviction, to employ a child under fourteen L.R.A.1915E.

years of age in certain named manufacturing establishments, or to permit one under sixteen years to clean or oil machinery in motion or run an elevator, does not supersede the right to recover damages in a civil action for injuries to a child employed in violation of the statute. *Stehle v. Jaeger Automatic Mach. Co.* 220 Pa. 617, 69 Atl. 1116, 14 Ann. Cas. 122.

The mere fact that a statute making it unlawful for a corporation or person to sink or work in a vertical mining shaft deeper than a stated depth, where cages are used to lift and lower workmen, unless the cages are bonneted and incased and provided with doors for the safety of workmen, penalizes its violation by a heavy fine, does not prevent a workman injured by the violation from maintaining an action against his employer grounded on negligence and subject to common-law defenses. *Osterholm v. Boston & M. Consol. Copper & S. Min. Co.* 40 Mont. 508, 107 Pac. 499.

The Nevada statute (Rev. Laws, § 6799), which makes it unlawful, under a penalty of fine or imprisonment or both, for any person or persons, natural or artificial, to sink or work through any vertical mining shaft over 350 feet deep, unless it is provided with an iron-bonneted safety hoisting cage to be used in lowering and raising employees, is not merely a penal statute to subject its violator to punishment, but is intended also to safeguard the lives and limbs of those whose vocation takes them into danger imminent all the time, and hence a neglect to obey it affords any member of the protected class thereby injured a civil action against the delinquent mine owner. *Ryan v. Manhattan Big Four Min. Co.* — Nev. —, 145 Pac. 907.

XXI. Conclusion.

Notwithstanding the great number of decisions reported since the publication of the primary note,—a number almost as large as that of the cases therein cited,—the conclusions there reached and announced stand unmodified by later opinion. They therefore need no restatement here.

J. B. G.

CALIFORNIA SUPREME COURT. (Department No. 1.)

MARIA HAGAN, Appt.,
v.

J. D. McNARY, Admr., etc., of C. A. Kupper, Deceased, Resp't.

(— Cal. —, 148 Pac. 937.)

Contract — to pay for support — necessity of writing.

A contract to pay money in consideration of support for life is within a statute making invalid, unless in writing, an agreement

which is by its terms not to be performed during the lifetime of the promisor.

(May 5, 1915.)

A PPEAL by plaintiff from a judgment of the Superior Court for Colusa County, in defendant's favor, in an action brought to recover a certain sum alleged to be due under a contract to pay money in consideration of support for life. Affirmed.

The facts are stated in the opinion.

Messrs. Seth Millington and U. W. Brown, for appellant:

The one-year statute does not apply where the contract can, by any possibility, be fulfilled or completed in the space of a year.

Doyle v. Dixon, 93 Am. Dec. 87, note; Okin v. Selidor, 138 Am. St. Rep. 601, note; Thomas v. Armstrong, 86 Va. 323, 5 L.R.A. 529, 10 S. E. 6.

No agreement is void under the statute of frauds as "not to be performed within a year" if consistently with its terms it may be performed within that period.

Note.—Contract to support for life as within statute of fraud, as to contracts not to be performed within a year or the lifetime of promisor.

The present note supplements that part of the note to White v. Fitts, 15 L.R.A. (N.S.) 330, which deals with the applicability of the statute of frauds concerning contracts not to be performed within one year to contracts to support for life.

Agreeably to the general rule that an oral agreement the performance of which is dependent upon the happening of a certain contingency is not within the statute if the contingency is such as may occur within one year, it being sufficient if the possibility of performance within the prescribed time exists (20 Cyc. 200), the cases cited in that note uniformly hold that a contract by one to support another or others for life does not come within that provision of the statute of frauds which requires to be in writing an agreement not to be performed within a year, since death is a contingency which may happen within that time. To bring a case within the above mentioned provision of the statute of frauds there must be an expressed and specific agreement not to be performed within the space of a year; and if the thing may be performed within the year, it is not within the statute.

So, a verbal agreement by a son to pay a mother's board at \$10 per month during her natural life was, in Waggener v. Howsley, — Ky. —, 175 S. W. 4, held not to be within the statute of frauds, since the agreement might have been performed within a year by reason of the mother's death.

So, an oral agreement by grantees to pay a certain portion of the crops on land granted, during the lifetime of the grantor, L.R.A.1915E.

Jilson v. Gilbert, 26 Wis. 642, 7 Am. Rep. 100; Blakeney v. Goode, 30 Ohio St. 364; Somerby v. Buntin, 118 Mass. 286, 19 Am. Rep. 459.

The statute includes only such agreements as, fairly and reasonably interpreted, do not admit of valid execution within the space of one year from the making.

Dougherty v. Rosenberg, 62 Cal. 36; Blanding v. Sargent, 33 N. H. 239, 66 Am. Dec. 721; McKeany v. Black, 117 Cal. 592, 49 Pac. 710; Stewart v. Smith, 6 Cal. App. 158, 91 Pac. 667.

Messrs. J. W. Goad and Thomas Rutledge, for respondent:

In an oral promise to pay money the test is, When by the terms of the contract was the money due? and not when it might have been paid.

McKeany v. Black, 117 Cal. 587, 49 Pac. 710; Swift v. Swift, 46 Cal. 267.

Shaw, J., delivered the opinion of the court:

The plaintiff appeals from a judgment in

was in Tipton v. Tipton, 55 Tex. Civ. App. 192, 118 S. W. 842, held not within the statute, since the contract was performable upon the grantor's death, and this was a contingency which might have happened within one year.

To the same effect is Johnson v. Johnson, 31 Utah, 408, 88 Pac. 230, under similar facts.

The decision in Tolley v. Greene, 2 Sandf. Ch. 91, that an oral contract to support for life is within the statute seems to have been discredited as an authority by the subsequent course of decision in New York (see note in 15 L.R.A. (N.S.) 330).

It is probable that HAGAN v. McNARY would have followed the uniform ruling of the earlier cases had the same provision of the statute been involved. That case, however, is controlled by the added provision which requires to be in writing "an agreement which by its terms is not to be performed during the lifetime of the promisor." Consequently, it is held in that case that the contract comes within the condemnation of the statute, since the promisor's part of the agreement was not by its terms to be performed in his lifetime, but was by its terms to be performed immediately after his death. No case has been found precisely in point with HAGAN v. McNARY.

Many other questions arising out of contracts to support for life are annotated in notes indexed in the Index to L.R.A. Notes, under the title "Support."

As to validity of contract to furnish a patient medical services for life, see note to Re McVicker, 28 L.R.A. (N.S.) 1112.

As to contracts for permanent employment and similar agreements, see note to Carnig v. Carr, 35 L.R.A. 514, and Cox v. Baltimore & O. S. W. R. Co. 50 L.R.A. (N.S.) 454. J. D. C.

favor of the defendant. It is alleged in the complaint that in January, 1912, Kupper offered and agreed to pay the plaintiff the sum of \$7,000 if she would give and furnish him for and during the term of his natural life a regular, permanent, and established home; that plaintiff accepted said offer; and that thenceforth to the time of his death she furnished Kupper such permanent and established home. Kupper died on May 17, 1912, and thereafter the defendant, McNary, was appointed and qualified as administrator of his estate. Thereafter plaintiff presented for allowance a claim against the estate of deceased for the sum of \$7,000, which claim was rejected by the administrator. Plaintiff then commenced this action to establish said claim.

The agreement was not in writing, and it was proved upon the trial by oral evidence. The objection is made that, the agreement being oral, it is within the statute of frauds, and therefore invalid. Civil Code, § 1624, subdiv. 7; Code Civ. Proc. § 1973, subdiv. 7. The provisions of these sections above referred to are as follows:

"The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent:

"7. An agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will."

The question is fairly presented whether or not the agreement falls within the language of these provisions.

Subdivision 7 aforesaid was added to these two sections in 1905 and 1907, and it has not heretofore been presented to this court for consideration. Plaintiff contends that its construction is controlled by a number of cases arising under subdivision 1 of the same sections. That subdivision provides that "an agreement that by its terms is not to be performed within a year from the making thereof" is invalid, unless it is in writing and subscribed by the party to be charged, or by his agent. The decisions referred to hold that an oral agreement is not invalid under this subdivision if its terms are such that it may be performed within a year, although it is not expressly so stipulated, and that before such a contract can be held void under subdivision 1 its terms must be such that performance within a year is impossible without a departure from such terms. For the purposes of this case it may be conceded that the same principle of law will apply to subdivision 7. The agreement, as alleged and proved, states no time for the payment of L.R.A.1915E.

the \$7,000 which Kupper agreed to pay to plaintiff for the services to be rendered. The services consisted of furnishing Kupper a regular, permanent, and established home during the term of his natural life. This, of course, includes his whole life, and the service was not, and could not be, completed so long as breath remained in his body. The plaintiff's part of the agreement became completely executed upon his death, and not until then. The case comes under the somewhat familiar rule that, where services are to be performed for a given period for a stated sum, without any agreement as to when the payment is to be made, and the contract is entire, as it is here, the obligation to pay does not become matured, and payment is not due, until the services are completely performed. *Krumb v. Campbell*, 102 Cal. 375, 36 Pac. 664; 2 *Parsons*, Contr. 9th ed. 521; 2 *Page*, Contr. § 1157; 3 *Elliott*, Contr. § 2102. Complete performance of the service did not take place until the moment of Kupper's death. No obligation for immediate payment arose, therefore, until the moment after; that is, after the death of Kupper. His part of the agreement was not by its terms to be performed in his lifetime, but was by its terms to be performed immediately after his death; consequently it comes within the condemnation of the statute of frauds. It is invalid, and no action can be maintained upon it. The plaintiff's remedy, if any, is an action for the value of the services rendered, and not an action for the sum alleged to have been agreed to be paid therefor.

The judgment is affirmed.

We concur: Sloss, J.; Lawlor, J.

NEBRASKA SUPREME COURT.

FARMERS' LOAN & TRUST COMPANY
OF IOWA CITY, IOWA, Appt.,

v.

WALTER PLANCK.

(— Neb. —, 152 N. W. 390.)

Bills and notes — negotiability — discount for prepayment.

A promissory note is not rendered non-negotiable by the insertion of the follow-

Headnote by ROSE, J.

Note. — Bills and notes: negotiability as affected by provision for discount in event of payment before maturity.

This note is supplementary to the note to *Farmers' Loan & T. Co. v. McCoy*, 40 L.R.A. (N.S.) 177.

ing provision: "A discount of 6 per cent will be allowed if paid in full within fifteen days from date."

(April 16, 1915.)

APPEAL by plaintiff from a judgment of the District Court for Madison County in defendant's favor, in an action brought to recover the amount alleged to be due on a promissory note. Reversed.

The facts are stated in the opinion.

Mr. M. S. McDuffee, for appellant:

A memorandum attached to a note, and not qualifying it, is not a part of it, and may be detached by the holder of the note without destroying its negotiability.

Davis v. Henry, 13 Neb. 497, 14 N. W. 523; Palmer v. Largent, 5 Neb. 223, 25 Am. Rep. 479; Stephens v. Davis, 85 Tenn. 271, 2 S. W. 382; Bothell v. Schweitzer, 84 Neb. 271, 22 L.R.A.(N.S.) 263, 133 Am. St. Rep. 623, 120 N. W. 1129.

If one signs an instrument which is apparent to him to be in such a form that a note included in it may be so detached from the rest of the instrument as to appear a simple promissory note, he will be liable therefor, if it is so detached, to a good-faith holder for value and before maturity.

Brown v. Reed, 79 Pa. 370, 21 Am. Rep. 75; Garrard v. Haddan, 67 Pa. 82, 5 Am. Rep. 412.

A provision for discount in an instrument otherwise containing all the essentials of a negotiable instrument does not render it non-negotiable.

Even before the enactment of the negotiable instruments act a promissory note containing the words "with exchange" was held negotiable.

Kendall v. Selby, 66 Neb. 60, 103 Am. St. Rep. 697, 92 N. W. 178.

Messrs. Allen & Dowling for appellee.

Rose, J., delivered the opinion of the court:

This is an action on a promissory note for \$587, dated August 30, 1909. The principal is payable in six instalments maturing at different times within thirteen

months. The Equitable Manufacturing Company is named as payee, and defendant is maker. By mesne assignments plaintiff, September 1, 1909, became the holder of the note as collateral security for a loan. The instrument, when executed, was attached to a contract for the purchase of jewelry, and it was given for the price thereof. Under the terms of sale defendant was entitled to the possession of a piano to be given as a prize to the holder of the largest number of jewelry certificates issued by defendant to purchasers of goods from him. Plaintiff claims to be a holder of the note for value before maturity. In his answer defendant pleaded that the note was obtained by fraudulent representations; that he immediately rescinded the contract of purchase; and that he never received the jewelry or the piano. Upon a trial of the issues the district court directed a verdict in favor of defendant, and plaintiff has appealed.

Defendant contends that, under the rule in Bothell v. Schweitzer, 84 Neb. 271, 22 L.R.A.(N.S.) 263, 133 Am. St. Rep. 623, 120 N. W. 1129, the note in controversy is not negotiable, and that even a bona fide holder cannot recover in an action thereon. When Planck signed the note it was attached to the order for goods to be shipped, but was separated therefrom by a perforated line, above which were these words: "The instalment note below to be detached by Equitable Mfg. Co."

The contract of sale also contained the following: "If goods are shipped, detach and credit my account with attached instalment note which I hereby give in payment of this bill. If goods are not shipped, note is to be returned to me."

In the Bothell Case the note was glued to the contract of sale, and was unlawfully detached. In the present case, when the goods were shipped, the note was detached according to agreement. The rule in the Bothell Case is correct, but is inapplicable here.

The note executed by defendant contained the following provision: "A discount of 6

As to the effect of a provision accelerating maturity as affecting the negotiability of a note, see notes to Holladay State Bank v. Hoffman, 35 L.R.A.(N.S.) 390, and Kennedy v. Broderick, L.R.A. 1915B, 472.

The difference of opinion shown in the earlier note as to whether a provision for discount in the event of payment of a promissory note before maturity renders the note non-negotiable continues in the later decisions.

Thus, in Harrison v. Hunter, — Tex. Civ. App. —, 168 S. W. 1036, it is held that a provision in a note for a discount of 6 per L.R.A.1915E.

cent if the instrument is paid at maturity of the first instalment does not render the note non-negotiable because of uncertainty as to the amount to be paid.

On the other hand, in Farmers' Loan & T. Co. v. Devear, 2 Tenn. C. C. A. 366, the court takes the opposite view from that taken in FARMERS' LOAN & T. CO. v. PLANCK, and holds that a note practically identical with the one involved in that case is non-negotiable because of the fact that it contains a provision for a discount of 5 per cent if paid within fifteen days from its date.

R. L. S.

per cent will be allowed, if paid in full within fifteen days from date."

Is the negotiability of the note thus destroyed? Under the statute an instrument, to be negotiable, "must contain an unconditional promise or order to pay a sum certain in money." Rev. Stat. 1913, § 5319. The act of the legislature defines what a "sum certain" is, but does not mention discount. Rev. Stat. 1913, § 5320. The authorities upon this point are in conflict. In the following cases it is held that such a note is non-negotiable: *Fralick v. Norton*, 2 Mich. 130, 55 Am. Dec. 56; *Story v. Lamb*, 52 Mich. 525, 18 N. W. 248; *Way v. Smith*, 111 Mass. 523; *National Bank v. Feeney*, 9 S. D. 550, 46 L.R.A. 732, 70 N. W. 874; *Farmers' Loan & T. Co. v. McCoy*, 32 Okla. 277, 40 L.R.A.(N.S.) 177, 122 Pac. 125.

Story v. Lamb, 52 Mich. 525, 18 N. W. 248, follows the holding in *Lamb v. Story*, 45 Mich. 488, 8 N. W. 87. In *Kirkwood v. First Nat. Bank*, 40 Neb. 484, 24 L.R.A. 444, 42 Am. St. Rep. 683, 58 N. W. 1016, this court said: "In *Lamb v. Story*, 45 Mich. 488, 8 N. W. 87, it was held that the negotiability of a note payable on or before two years from date was destroyed by a memorandum attached, providing that if paid within one year there should be no interest, and that case is cited by Mr. Daniel in support of a similar statement, and is the only authority cited. We are not satisfied with that doctrine. In *Hope v. Barker*, 112 Mo. 338, 34 Am. St. Rep. 387, 20 S. W. 567, the provision was 'without interest thereon if paid at maturity; if not paid at maturity, to bear interest from date.' It was held that that provision did not destroy the negotiability of the note; the note on its face showing what should be paid at any particular time, and being therefore certain in its terms."

In *Farmers' Loan & T. Co. v. McCoy*, 32 Okla. 277, 40 L.R.A.(N.S.) 177, 122 Pac. 125, it is held that a provision in a note similar to the one now in controversy impairs its negotiability. This decision rests upon *Randolph v. Hudson*, 12 Okla. 516, 74 Pac. 946, and *South Dakota* cases therein cited.

In *Randolph v. Hudson*, supra, it was held that a provision "with interest at the rate of 12 per cent from date, if not paid at maturity," destroyed the negotiable character of the note. This is contrary to *Hope v. Barker*, 112 Mo. 338, 34 Am. St. Rep. 387, 20 S. W. 567, cited with approval in *Kirkwood v. First Nat. Bank*, 40 Neb. 484, 24 L.R.A. 444, 42 Am. St. Rep. 683, 58 N. W. 1016.

Oklahoma also holds that a provision for an attorney's fee, if the debt is not paid at L.R.A.1915E.

maturity, renders the note non-negotiable. This is contrary to the holding in *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37, and is inconsistent with the negotiable instruments law. The Oklahoma cases were decided under local statutes in force when the notes were executed, and in the *McCoy* Case the court says that it does not decide what the result would be under the negotiable instruments law subsequently adopted by that state. The Oklahoma decisions were rendered under the following statutory provisions: "A negotiable instrument must be made payable in money, only, and without any condition not certain of fulfillment," and "must not contain any other contract than such as is specified" in the statute.

These provisions were adopted from *South Dakota*, and the Oklahoma cases follow the *South Dakota* construction.

In *National Bank v. Feeney*, 12 S. D. 156, 46 L.R.A. 732, 76 Am. St. Rep. 594, 80 N. W. 186, it is held that "a stipulation for a discount of 12 per cent if a note is paid before maturity renders it non-negotiable because of the uncertainty as to the amount to be paid."

And the court quotes an earlier decision containing the following language: "While, in the opinion of the writer, a promissory note, otherwise unobjectionable, meets the requirements, and stands the test of negotiability, when there is no date at which the exact amount then due cannot be ascertained by inspection and computation, this court has placed itself in line with a class of authorities which require such a degree of certainty that the exact amount to become due and payable at any future time is clearly ascertainable at the date of the note, uninfluenced by any conditions not certain of fulfillment; and the rule thus established must control cases subsequently arising, where the facts are substantially the same."

The doctrine thus stated is in conflict with some of the Nebraska decisions and with the negotiable instruments law. *Kirkwood v. First Nat. Bank*, 40 Neb. 484, 24 L.R.A. 444, 42 Am. St. Rep. 683, 58 N. W. 1016; *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37; *Fisher v. O'Hanlon*, 93 Neb. 529, — L.R.A. —, 141 N. W. 157; Rev. Stat. 1913, §§ 5320, 5322.

In *Loring v. Anderson*, 95 Minn. 101, 103 N. W. 722, it is held that a note providing for a discount of 6 per cent, if the debt is paid on or before maturity, does not make the instrument non-negotiable, as the amount of the deduction is readily ascertainable from the face of the paper. To the same effect is *Harrison v. Hunter*, — Tex. Civ. App. —, 168 S. W. 1036. This is in harmony with the statutory and the

general rule that a note is negotiable, though payable on or before a certain date. Rev. Stat. 1913, § 5322. The amount of the discount and the amount due on the note in controversy, if paid within fifteen days from date, are sums readily ascertainable. With the question of negotiability determined in favor of plaintiff, the peremptory instruction for defendant is erroneous. Whether plaintiff is a "holder in due course," within the meaning of the statute, and whether there was fraud on the part of the original payee, are issues not determined on this appeal. The judgment of the District Court is therefore reversed, and the cause remanded for further proceedings.

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WASHINGTON SUPREME COURT.
(Department No. 2.)

STATE OF WASHINGTON EX REL. C. G.
CROMBIE

v.

SUPERIOR COURT FOR KING COUNTY.

(— Wash. —, 148 Pac. 882.)

Divorce — refusal to proceed — default in payment of alimony.

1. The court may refuse to proceed to

Note. — Refusal to proceed with trial of divorce suit because of noncompliance with order to pay temporary alimony, suit money, or counsel fees.

This note does not include cases involving the striking out of pleadings because of failure to comply with an order for temporary alimony. For such cases see *Trough v. Trough*, 4 L.R.A.(N.S.) 1185, and the cases cited therein, and the additional divorce cases cited in the note thereto on the general question of the power to punish disobedience to orders in a case by striking out pleadings, which note is supplemented by a note to *McNamara v. McNamara*, 27 L.R.A.(N.S.) 1082.

Nor does the present note include cases involving the remedies for failure to comply with an order for payment of temporary alimony, suit money, or counsel fees, where an appeal has been taken from a divorce decree, such cases being discussed in a note to *Brown v. Brown*, 51 L.R.A.(N.S.) 1119.

For appeal as affecting a decree for permanent alimony, see *Robinson v. Robinson*, L.R.A. 1915D, 1071, and note.

Although the court has no power to strike out an answer by a defendant by way of punishment, it may stay the defendant from any affirmative progressive action. So, in an action for divorce it is proper for the court to stay the defendant from moving the trial of the suit until he has complied with the order of the court for counsel

trial of an action for divorce while the husband fails to comply with its order to pay alimony *pendente lite*, notwithstanding he has appealed from the order.

Mandamus — to compel proceeding with case — reasonableness of interlocutory order.

2. The reasonableness of an order for alimony *pendente lite* and the wife's motives cannot be questioned in a mandamus proceeding to compel the trial court to proceed with the trial of a divorce action on its merits after the husband has appealed from an order committing him for contempt for refusal to comply with the order.

(May 27, 1915.)

APPPLICATION by relator for a writ of mandamus to compel respondent to proceed to final judgment in a divorce action. Denied.

The facts are stated in the opinion.

Mr. Frank A. Paul for petitioner.

Messrs. Griffin & Griffin for respondent.

Main, J., delivered the opinion of the court:

This is an original application in this court for a writ of mandamus to compel the superior court for King county to proceed to a final judgment in a divorce action.

fees and temporary alimony. *Harney v. Harney*, 110 App. Div. 20, 96 N. Y. Supp. 905.

Thus, in *Fennessy v. Fennessy*, 111 App. Div. 181, 97 N. Y. Supp. 602, it is held that a defendant in a divorce suit should not be heard in any proceeding instituted by himself until he has complied with the order of the court requiring the payment of counsel fees and alimony, although he has a constitutional right to be heard on any affirmative steps taken by the plaintiff; so, while he is in default, he should not be allowed to move for a preference in the trial of his case under a statutory provision for such preference, designed for the protection of husbands paying counsel fees or alimony by affording them a speedy trial of the issues, to the end that, if innocent, they may soon be relieved from the order.

In *Maran v. Maran*, 137 App. Div. 348, 122 N. Y. Supp. 9, an action for separation on the part of the wife, to which the defendant husband answered, denying the allegations of the complaint, and counterclaiming for a separation on his part, the court draws a clear distinction between denying a party a right to any affirmative action by the court until he has relieved himself from contempt of the court, and denying him a right to defend against an affirmative action on the part of the other party; the court saying: "Of course, the court may refuse to hear a party in contempt on an affirmative application by him; but the court cannot admin-

The facts, so far as pertinent to the present inquiry, are, in substance, as follows: On the 7th day of March, 1914, the relator, C. G. Crombie, was married to his present wife, Jennie M. Crombie. On November 20, 1914, the relator brought an action for divorce against his wife. Mrs. Crombie on November 24, 1914, answered the complaint, with certain admissions and denials, and a cross complaint. On January 16, 1915, upon the petition of Mrs. Crombie, the superior court entered an order directing that the husband pay \$60 per month alimony to his wife *pendente lite*. The first installment of this alimony was not paid when due. Prior to the time when the second installment became due, Mrs. Crombie caused her husband to be cited to show cause why he should not be committed for contempt for failure to comply with the order. On March 3, 1915, the court adjudged the husband to be in contempt for his failure to pay temporary alimony, and he was ordered committed to the county jail until he should comply with the order, or be discharged by due process of law. Mr. Crombie on the

same day appealed from the order of commitment and superseded the order by a bond. The divorce action, under the superior court rules, was on January 12, 1915, noted to be placed upon the trial calendar. On March 5, 1915, Mrs. Crombie made a motion that the case be stricken from the trial calendar until such time as the husband should comply with the order requiring him to pay temporary alimony. This motion was granted on March 8, 1915. On March 9, 1915, a petition was filed in the superior court, asking that the cause be restored to the trial calendar, and that it be set for trial in the regular course prescribed by the court rules. The trial court declined to grant the prayer of this petition. The relator then made the present application for the purpose of compelling the trial court to reinstate the case upon the trial calendar, and to set the same for trial upon a day certain, and proceed to final judgment in the cause.

The controlling question is whether the trial court abused its discretion in refusing to proceed with the trial of the cause

in favor of the relator. The trial court, in its decision, heard only one side of the case, nor can it refuse to hear any evidence relating to facts duly stated tending to defeat the plaintiff's cause of action, merely because the defendant is in contempt of court." Accordingly, an order of the trial court which permitted the plaintiff to move the trial of the cause, and precluded the defendant from being heard upon, or offering evidence to sustain, his counterclaim while he was in contempt, was modified so as to merely stay affirmative action by him in moving the cause for trial or making any application to the court therein other than in defense of some step or proceeding taken by the plaintiff.

So, in *Gray v. Gray*, 162 App. Div. 586, 148 N. Y. Supp. 24, it was held that a husband, while in contempt for nonpayment of temporary alimony, could not take any affirmative steps though he would be entitled to be heard in defense on any motion or steps taken in the case, and hence, he should not be permitted to enter judgment upon a verdict in his favor until payment had been made.

In *Waters v. Waters*, 49 Mo. 385, the court, in discussing the allowance of expense money to a wife who was defendant in a divorce suit, said that the allowance may be enforced by attachment or execution, or, when the husband is plaintiff, the court may make its payment a condition to the further prosecution of the suit, although the question of the method of enforcement was not involved in the case.

In *State ex rel. Dawson v. St. Louis Ct. of Appeals*, 99 Mo. 216, 12 S. W. 661, the court, in considering the question whether the appellate court could require plaintiff to pay arrears of temporary alimony as a condition of entry of a final decree in his

favor, first determined that the trial court had power to make such payment a condition of the entry of a final decree and found from that fact that the power existed in the appellate court.

In *Reed v. Reed*, 70 Neb. 779, 98 N. W. 73, it was held that the trial court did not err in refusing to allow the plaintiff in a divorce suit to proceed with the trial of his case without complying with the order of the court for the payment of temporary alimony, and in dismissing the action because of an absolute refusal on plaintiff's part to comply with that order.

In *Leslie v. Leslie*, 3 Daly, 194, affirmed in 10 Abb. Pr. N. S. 64, it was held that the court could require a plaintiff in a divorce action to comply with an order for the payment of alimony *pendente lite* and a counsel fee as a condition to his being permitted to discontinue his suit.

In *Deemer v. Deemer*, 7 Pa. Co. Ct. 554, it is held that it is not necessary for a wife who is a defendant in a suit for divorce, and has made application for an allowance to enable her to conduct her defense, to aver that her husband is able to contribute the means for her, the court saying that, as to her husband's ability to furnish the means, it is immaterial whether he has the ability or not, for if he has the ability, the wife is protected by an order in her favor, and if he has not the ability and he is the plaintiff, the same thing is accomplished by making the allowance and suspending the proceedings until he becomes of sufficient ability to pay it.

And in *Schireman v. Schireman*, 7 Pa. Co. Ct. 110, an allowance of \$50 for counsel fees was made to a wife who was the defendant in a divorce suit, and it was or-

until the relator had complied with the order of the court relative to the payment of temporary alimony. Or, in other words, did the relator have the right to proceed to a trial upon the merits after appealing from the order committing him for contempt for failure to pay the alimony, and superseding the order by a bond? The rule, as supported by the authorities, is that, where the husband is in default in paying alimony *pendente lite*, it is not an abuse of discretion on the part of the trial court to refuse to proceed with the cause upon the merits until the order requiring the payment of such alimony is complied with. *Spencer, Dom. Rel. § 427; 2 Bishop, Marr. Div. & Sep. § 981; 14 Cyc. 755; Purcell v. Purcell, 3 Edw. Ch. 194; Mangels v. Mangels, 6 Mo. App. 481; Winter v. Superior Ct. 70 Cal. 295, 11 Pac. 633.* In the text of *Bishop, supra*, the rule is stated as follows: "But a plaintiff husband, destitute both of funds and ability, will in a proper case have his suit suspended until he can do justice to his defending wife. If he cannot

aliment her, and give her the means of defense, he cannot have his divorce."

If the husband, after appealing and superseding the order for temporary alimony, has a right to proceed with the trial of the case upon the merits pending the appeal from the order requiring the payment of alimony *pendente lite*, he would defeat, or could defeat, the purpose for which such money was awarded.

Much is said in the brief relative to the financial ability of the husband, the motives of the wife, and other kindred questions. But these are questions which cannot be reviewed in this proceeding. If the amount of alimony adjudged is not reasonable, or if the wife is actuated by improper motives, these and kindred questions must be determined upon the appeal from the order directing the payment of temporary alimony.

The writ will therefore be denied.

Morris, Ch. J., and Ellis, Fullerton, and Crow, JJ., concur.

Petition for rehearing denied.

dered that the proceedings be stayed until the payment of the allowance.

In *Wright v. Wright, 6 Tex. 29*, the court says that where a husband is plaintiff, the court may refuse to hear the cause until the alimony due is paid.

In *Bates v. Bates, 145 N. Y. Supp. 411*, an action for divorce instituted by a wife, judgment was rendered for separation in favor of the husband upon his counterclaim, but later the plaintiff moved to vacate the judgment upon the ground that defendant had failed to pay the temporary alimony awarded by the court, and the court granted the motion, it appearing that the default of defendant was not known to the court at the time the judgment was rendered in his favor; and the court said that if a motion had been made after the decision and before the entry of judgment in the action, such entry would have been stayed until the defendant had come into court and purged himself of his contempt, either by submission and payment, or by procuring a modification of the alimony order.

In *Bird v. Bird, 1 Lee, Eccl. Rep. 572*, the court ordered that the temporary alimony granted to defendant in a divorce suit, which was in arrears, together with a sum for expenses, should be paid before the cause should be heard.

In *Latham v. Latham, 2 Swabey & T. 299, 30 L. J. Prob. N. S. 163, 7 Jur. N. S. 219, 4 L. T. N. S. 308, 9 Week. Rep. 680*, the court refused to make a decree in favor of a husband for dissolution of the marriage absolute until he had paid the arrears of alimony which had been awarded *pendente lite*.

In *Winter v. Superior Ct. 70 Cal. 295, 11 Pac. 633*, it was held that it was not an abuse of discretion for the trial court L.R.A.1915E.

to refuse to proceed with the trial of an action by a wife for permanent support and maintenance upon motion of defendant until he should comply with an order for expense money, or such order should be annulled or reversed by the supreme court, to which it had been appealed.

In *Brinkley v. Brinkley, 47 N. Y. 40*, where defendant was in default in the payment of counsel fees, expense money, and temporary alimony which had been ordered by the court, the trial court ordered that all proceedings on the part of defendant in the action, including his proceedings on appeal taken from the order for alimony, should be stayed until he complied with the order, which order was reversed by the court of appeals, that court stating the rule to be in such circumstances "that a party in contempt and until he is purged of it will not be permitted to ask for the favor of the court, nor to take any aggressive proceedings against his adversary; but that it is his right to take measures to protect himself and to make any motion designed to show that the order adjudging him in contempt was erroneous. He may move to discharge the order though in contempt for not obeying it."

See also *Storke v. Storke, 116 Cal. 47, 47 Pac. 869, 48 Pac. 121*, in which it was held that while the court had authority to direct the plaintiff's husband, in whose favor a judgment of divorce had been rendered, to pay further alimony pending a motion for a new trial, an order vacating the judgment of divorce would not be a remedy applicable for the enforcement of such an order, for the reason that the rights of the parties as fixed by judgment could be changed only in the mode prescribed by statute.

R. L. S.

**WEST VIRGINIA SUPREME COURT
OF APPEALS.**

**ELMUS E. HARBERT
v.**

HOPE NATURAL GAS COMPANY.

(— W. Va. —, 84 S. E. 770.)

Mines — gas — use — place.

1. A stipulation in an oil and gas lease, that, if gas is found in paying quantities, the lessor shall have free gas for domestic purposes, by making his own connection, is a covenant running with the land, but is not necessarily to be performed on the land.

Same — intention — how shown.

2. Consumption of the gas not being confined to a dwelling house on the leased premises by the terms of the lease, the place of consumption is one of intention, to

Headnotes by WILLIAMS, J.

Note. — Place of use of gas contemplated by covenant or reservation in an oil and gas lease.

The particular question before the court in *HARBERT v. HOPE NATURAL GAS Co.* had apparently not been before the courts prior to that case. The provision in oil and gas leases to furnish lessor with "free gas" for domestic purposes is very common. *Thorn-ton, Oil & Gas*, § 226. The practice seems to be so common that it has been held that a clause providing that the lessee is "to pipe gas to the house for domestic purposes as soon as well is completed" has been construed to mean that the gas furnished is to be free of charge. *Pellevue Gas & Oil Co. v. Pennel*, 76 Kan. 785, 92 Pac. 1101.

In *Fanker v. Anderson*, 173 Pa. 86, 34 Atl. 434, the clause in the lease was as follows: "It is further agreed that if gas is obtained in sufficient quantities and utilized off these premises, the consideration in full to the party of the first part shall be the free use thereof for domestic purposes, and one eighth of the gas sold for each and every gas well drilled on the premises herein described and piped off the same," but there was no question raised as to where the free gas was to be used.

And the clause in *Hall v. Philadelphia Co.* 72 W. Va. 573, 78 S. E. 755, was practically the same as the one in *HARBERT v. HOPE NATURAL GAS Co.*, but the question was whether the lessee was entitled to an open light outside the dwelling.

A few cases construing clauses in oil and gas leases providing for free gas to the lessor may be cited here, not because they are in point, but as illustrative of various constructions placed upon such clauses. But, of course, the list is not exhaustive of cases in which free gas clauses have been construed.

A clause in an oil and gas lease that the "first party shall have, free of expenses, gas from the well or wells, to use at his L.R.A.1915E.

be determined by the facts and circumstances relating to the subject-matter of the contract, known to the parties at the time, and by their subsequent conduct in the execution thereof, indicating such intention.

Same — practical construction.

3. If, after a producing gas well is drilled on the lease, the lessor's grantee and assignee of the free gas right applies to the lessee's assignee of the lease for free gas for use in his dwelling house not situate on the lease, and such assignee, through its agents, having knowledge of the facts, permits him to tap one of its gas lines in the vicinity of such well, but not connected with it, and to use gas therefrom for a long period of time, such conduct evidences a practical construction of the covenant, and is an implied admission of the covenantee's right to consume the gas elsewhere than on the lease, but not of his right to free gas from wells other than those on the leased premises.

own risk, to light and heat the dwellings now on the premises, with pipe to conduct the same to said dwellings free of cost," was held, in *Indiana Natural Gas & Oil Co. v. Hinton*, 159 Ind. 398, 64 N. E. 224, to be a covenant running with the land, so that the right to sue for a breach thereof remained in the occupant of the land even though he transferred by deed (construed to be a mortgage) title to the land, using in the transfer the following language: "The said grantees to have the proceeds accruing from said lease." The court held that these words in the transfer "refer to the \$56 to be paid as money rent, the one eighth of the oil produced to be delivered to the appellee (transferor), and the \$200 per year for each gas well," etc. Here is a distinct holding that assigning what is commonly called "royalties" does not convey the right to the free gas for use on the premises unless possession of the premises is given. The court further states that the benefit of this covenant could not be assigned to anyone not an occupant of the premises. But as this clause expressly provided that the gas was for use in the dwellings on the premises, it was apparently a physical impossibility to give anyone other than the occupants the use of the free gas. This holding was approved and followed in *Indiana Natural Gas & Oil Co. v. Ganiard*, 45 Ind. App. 613, 91 N. E. 362, on the point that the covenant runs with the land, and that it forms a separate agreement the breach of which makes the lessee liable to the vendee of the property.

On the other hand, it was held in *Belle-vue Gas & Oil Co. v. Pennel*, supra, that under the particular form of lease used the free gas was part of the consideration, but the only question before the court was whether the gas was to be free to the lessor.

In *Indiana Natural Gas & Oil Co. v. Stew-art*, 45 Ind. App. 554, 90 N. E. 384, it was held that under a clause which provided

Injunction — gas lease — interference with rights.

4. In such case, the assignee of the covenantor may be enjoined from interfering with the rights of the lessor's grantee to make connections with, and obtain gas from, a well on the leased premises.

(Robinson, P., dissents.)

(April 20, 1915.)

CCROSS APPEALS from a decree of the Circuit Court for Doddridge County, plaintiff appealing from the decree dismissing a bill filed to enjoin defendant from interfering with plaintiff's right to take and use gas free of charge for domestic purposes from a certain well owned by defendant, situate on plaintiff's farm and defendant appealing from rulings made during the progress of the trial. Reversed.

The facts are stated in the opinion.

that "first party shall have, free of expense, gas from the well or wells to use at his own risk, to light and heat the dwellings on the premises, with pipe to conduct the same to said dwelling, free of cost, within one day from this date, or, in lieu thereof, the sum of \$20 yearly in advance," the lessor had the option of accepting the gas or the money, and he could collect the money even if he had no dwellings upon the premises.

In *Central Fuel Co. v. Wallace*, 174 Ind. 721, 93 N. E. 65, the Algers (lessors) "were to receive gas from the nearest pipe line for three fires and seven lights, to be used in the dwelling house situated on said premises or at the Alger residence in the city of Rushville." The Algers sold the part of the premises upon which the dwelling house stood, and assigned the lease to the purchaser, who later agreed with the lessee that the free gas should be furnished to him at another house. It was held that the purchaser had full rights according to the terms of the lease and his separate agreement with the lessee, so that he could enjoin the lessee from drilling wells upon the part of the land retained by the Algers under a subsequent lease from them, and collect damages from the lessee for breach of contract, as the extra wells would exhaust the gas and thus impair his right to free gas.

The question whether the free gas provided for in a lease may, in the absence of an express stipulation, be used off the leased premises, cannot be regarded as settled as a general question, even by the decision in *HARBERT v. HOPE NATURAL GAS CO.*, because that decision in the last analysis turned upon the fact that the parties had, in the opinion of the court, placed a construction upon the lease for themselves, and the court, of course, adopted that construction. The rule would therefore seem to be that such clauses are to be interpreted just as any other contract is to be interpreted, *i. e.*, in the light of every fact and L.R.A.1915E.

Mr. Homer Strosnider, for plaintiff:

It was error to dissolve the temporary injunction and dismiss the suit.

Thornton, Oil & Gas, § 226; *Bellevue Oil & Gas Co. v. Pennel*, 76 Kan. 785, 92 Pac. 1101; *Stone v. Marshall Oil & Gas Co.* 188 Pa. 602, 41 Atl. 748, 1119, 19 Mor. Min. Rep. 593.

It was error to decree that the "free gas" cannot be used except upon the tract of land on which the well is located, since the lease does not provide where it shall be used, whether on or off the leased premises.

Bettman v. Harness, 42 W. Va. 433, 36 L.R.A. 566, 26 S. E. 271, 18 Mor. Min. Rep. 500; *Eclipse Oil Co. v. South Penn Oil Co.* 47 W. Va. 84, 34 S. E. 923, 20 Mor. Min. Rep. 234; *Yoke v. Shay*, 47 W. Va. 40, 34 S. E. 748; *Bank of Old Dominion v. McVeigh*, 32 Gratt. 531; *Thornton, Oil & Gas*,

circumstance that may indicate the intention of the parties. On the point as to what the decision would be in the absence of any such fact or circumstance, we can but wait for a decision. In this view of the case, the incidental question as to character of the covenant—whether it runs with the land or is a personal covenant—is immaterial, since the court has held that the character of the covenant is such that none of the principles involved therein are determinative of the question where the gas may be used. The incidental questions are, of course, not within the scope of this note, and cannot be here annotated. It may be said, however, that the courts have always exercised considerable discretion in determining what particular covenants run with the land. See note to *Glidden v. Second Ave. Invest. Co.* L.R.A.1915C, 190, subdiv. IV. c, 2 (e), where the question, so far as it involves the rights of the transferee of the reversion, is discussed and particular covenants are classified. And it may be further observed that the point made by the court in *HARBERT v. HOPE NATURAL GAS CO.*, that a covenant running with the land need not necessarily be performed on the land itself, is in harmony with the statement in 11 Cyc. 1080, that "whether a covenant will or will not run with the land does not, however, so much depend on whether it is to be performed on the land itself, as on whether it tends directly or necessarily to enhance its value or render it more beneficial and convenient to those by whom it is owned or occupied, for if this be the case every successive assignee of the land will be entitled to enforce the covenant." But, as already suggested, the value of the decision in *HARBERT v. HOPE NATURAL GAS CO.* lies in the fact that it is authority for the proposition that the nature and character of the covenant do not stand in the way of the adoption of the broad rule of interpretation here indicated. J. W. M.

§ 92; 11 Cyc. 1080; Van Rensselaer v. Smith, 27 Barb. 104.

The defendant, by permitting Harbert to have and use "free gas," under the provision of the lease, for almost four years, construed the lease to entitle him to "free gas" in his present dwelling house, and is estopped to deny him "free gas" now, since he has been at large expense in laying his service lines and fitting up his house for use of gas.

1 Beach, Contr. § 721; Camden v. McCoy, 48 W. Va. 377, 37 S. E. 637.

The defendant was affected with the knowledge that its agents and employees had,—that plaintiff did not reside upon the tract of land upon which the well was located,—and cannot deny that it did have such knowledge.

31 Cyc. 1587.

Messrs. A. B. Fleming, Charles Powell, and Kemble White, for defendant:

Plaintiff is not entitled under the free gas clause to gas free of charge from the Lyon well in his dwelling situate off the leased premises; and inferentially dissolving the injunction, and expressly dismissing his bill, are clearly right.

Hall v. Philadelphia Co. 72 W. Va. 573, 78 S. E. 755; Shrader v. Gardner, 70 W. Va. 780, 40 L.R.A.(N.S.) 1145, 74 S. E. 990; United States Coal & Oil Co. v. Harrison, 71 W. Va. 217, 47 L.R.A.(N.S.) 870, 76 S. E. 346; Hurxthal v. St. Lawrence Boom & Lumber Co. 53 W. Va. 87, 97 Am. St. Rep. 954, 44 S. E. 520; Wood v. Woodley, 160 N. C. 17, 41 L.R.A.(N.S.) 1107, 75 S. E. 719; Jones, Easements, § 28; Thornton, Oil & Gas, § 226.

Williams, J., delivered the opinion of the court:

Plaintiff brought this suit against the Hope Natural Gas Company, praying that it be enjoined from interfering with his right to take and use, for domestic purposes, free of charge, the gas from defendant's gas well situate on his land. A temporary injunction was awarded; and defendant gave notice that it would move for its dissolution. Plaintiff appeared and resisted the motion, which was heard by the judge in vacation, upon the bill, answer, and affidavits taken, pro and con; and the judge took time to consider thereof. On the 25th of February, 1911, at a special term of court, he overruled the motion, and continued the injunction in force, until further order of the court. The cause was thereafter fully matured and heard upon the pleadings, and numerous depositions taken by the respective parties, and a final decree entered on the 15th of September, 1913, holding that plaintiff was entitled L.R.A.1915E.

to gas from defendant's well for domestic purposes, free of charge, to be consumed on the land on which the well was situate, and not elsewhere, and dissolving the injunction and dismissing plaintiff's bill; and he has appealed.

The land, described as containing 221.47 acres and situate in Doddridge county, was conveyed to plaintiff by W. H. H. Lyon and wife on the 9th of February, 1906. It was subject to an oil and gas lease made by the grantors to the South Penn Oil Company, in 1902. In addition to the usual oil and gas rentals, which, for each gas well, was \$400 a year, the lease contained this clause: "If gas is found on this farm in paying quantities, the first party shall have gas free of charge for domestic purposes by making their own connections at their own risk."

In the conveyance to plaintiff, Lyon accepted and reserved the Pittsburg stratum of coal, and all the oil and gas in and under the land, together with mining rights for exploring for and removing said minerals, but the right to free gas for domestic purposes was expressly conveyed; and the deed further provided that, if Lyon should make any other or further oil and gas lease, he was to make a similar reservation of free gas for plaintiff's benefit. When Lyon leased to the South Penn Oil Company, he was living on another tract of land, situate about 2 miles from the one leased; and the only building on the leased tract was a two-room log cabin, a story and a half high. As to whether it was occupied by anyone at that time, the evidence is conflicting. Mr. Lyon says he thinks his son was then living in it, but he is not certain. At the time of the conveyance to plaintiff, he also was living on another tract of land, separate from that on which Lyon lived, situate about a mile from the leased land, and continued to reside thereon.

In the year 1904, the South Penn Oil Company assigned to the Hope Natural Gas Company the gas and mining rights in connection therewith on the Lyon land; and in 1905 it drilled a producing gas well thereon. In the latter part of 1906, plaintiff applied to it, through its agents in the field, for gas from the well for domestic purposes; and in January or February, 1907, his line was connected with one of defendant's pipe lines, which connected with other wells than the well on the Lyon tract. He continued to use the gas thus supplied until he was disconnected by defendant on June 13, 1910. He thereupon moved his line, and connected it up with the J. O. Ice Line, which was fed by the gas well on the Lyon tract; and he was again cut loose. He then brought this suit

to enjoin defendant from interfering with his right to connect his pipe line with the well on the Lyon farm, and for general relief. The bill avers that, at the date of the lease to the South Penn Oil Company, Lyon was not living on the leased land; that in November, 1906, plaintiff applied to defendant for free gas, for domestic purposes, to be used in the dwelling house in which he now lives; that defendant permitted him to take and use it from one of its lines not connected with the Lyon well, until some time in June, 1910, when his line was disconnected; and that he thereafter connected with the well on the Lyon farm, and was again disconnected. None of these allegations are denied, and most of them are expressly admitted, in defendant's answer. The bill also avers that plaintiff has not consumed any more gas in his dwelling house, where he now lives, than he would have consumed if he had lived on the leased premises. This averment is not denied, but is alleged to be immaterial.

Defendant has taken much evidence to prove that the connection with its line was made without authority; and there is some conflict in the testimony as to which one of defendant's agents did make the connection. But, in view of defendant's admission, it is unnecessary to consider this conflicting testimony. That defendant knew plaintiff was connected with its line, and was using gas, free of charge, in his dwelling house, not on the leased premises, is, we think, abundantly shown. All of its field agents who had charge of its lines in that vicinity during the time plaintiff was using gas must have known that he was consuming it off the leased land. A letter to plaintiff from defendant's home office in Pittsburgh, written by John G. Pew, its vice president, on December 30, 1908, exhibited with plaintiff's deposition, proves that it knew he was using gas, free of charge, from its line. In this letter Mr. Pew complains of leakage in plaintiff's pipe line and of using an open outside light; and he closes by saying: "We do not object to your using an outside inclosed light of a Wellsbach or similar pattern, but all others must be disconnected."

This letter was accompanied by a circular one, intended for consumers of gas generally in defendant's territory, and it calls attention to the great waste of gas in the field on account of leakages in private lines, and to past efforts by the legislature and public-spirited men generally, to prevent such useless waste, and requests the users of gas to put their pipe lines and appliances in good repair by the 20th of January, 1909. This letter was addressed to all consumers of gas from defendant's wells or L.R.A.1915E.

lines, and a copy of it, together with the private letter, was delivered to plaintiff by one of defendant's agents. It concludes with the following clause: "In order to secure prompt co-operation in this movement, the Hope Natural Gas Company offers the labor of its own employees free of charge to you, to complete the first repairs to your lines, regulators, and appliances, after which you will be expected to maintain your pipes, etc., in proper condition with reasonable care. The company also offers to furnish a new regulator at cost."

Even if defendant did not expressly authorize the connection to be made with its line, these letters, admitted by Mr. Pew to have been written by him, prove a ratification of its agent's act. It is therefore not material to inquire which one of defendant's numerous field agents made the connection; that it was done by some one of them is made sufficiently certain by the evidence.

Plaintiff, of course, had not the right to demand free gas from any of defendant's wells, except the one on the Lyon tract; still, as long as defendant supplied him with free gas, it was immaterial to him where it came from, provided it cost him no more to make his connection with the line or well. But his right was limited to the wells on the Lyon land; and he could demand that he be supplied with gas therefrom, on making his own connection, so long as he owned the surface of the Lyon tract, and the wells thereon produced gas. That the Lyon well was producing, at the time this suit was brought, is proven by Mr. Lyon, who testified that he was still receiving, from defendant, his gas well rental of \$400 per year. If the well were not flowing, it would not be paying.

Defendant seeks to excuse itself for denying free gas to plaintiff on the alleged ground that it is not bound by law, or by the terms of its covenant, to furnish free gas for domestic purposes to plaintiff's dwelling house situate off the Lyon land. The lease is silent as to where the free gas is to be consumed, and defendant insists that the law confines its use on the particular tract of land. It urges, furthermore, that the covenant for free gas was personal to the covenantee and unassignable. The latter claim, we think, is wholly untenable. But, passing it for the present, we ask: What possible pecuniary interest can defendant have in the question where the gas shall be consumed, so long as it is at no expense in delivering it, and no more is consumed at one place than would be consumed at another? The question answers itself. Defendant knew, by its agents, that plaintiff lived off the land when he made application for free gas; and it also

knew, from the same source, that he lived on a different tract of land from that on which Lyon lived at the time the South Penn Oil Company covenanted with him for free gas for domestic purposes. Yet, notwithstanding, it permitted plaintiff to lay a private line, more than a mile in length, at considerable cost, and allowed him to connect with one of its pipe lines, and continue to use the gas therefrom for a period of three and one half years. Presumably it did so as a compliance with its obligation to perform what it understood to be the covenant of its assignor, the South Penn Oil Company, with Lyon, without raising the slightest objection thereto, so far as appears from the record. If defendant objected to the consumption of the gas elsewhere than on the Lyon land, why did it not advise plaintiff before he incurred the expense of laying his line? These facts and circumstances clearly indicate that the objection now made is an afterthought with defendant, and tend to prove the interpretation the parties placed upon the covenant; they are evidence of a practical construction of it. The lease itself is silent as to where the free gas is to be consumed. It is clear, however, that the covenant is not a mere personal one, but a covenant running with the land; as much so as the covenant to pay the money rental on gas wells. It was a benefit to the land, and would have passed with a grant of the land. 2 Minor, Inst. 2d ed. pages 187 and 698; Stone v. Marshall Oil & Gas Co. 188 Pa. 602, 614, 41 Atl. 748, 1119, 19 Mor. Min. Rep. 593. But, to avoid any question on this point, Lyon expressly assigned the covenant to plaintiff, in terms. He saw fit, however, to reserve to himself the money rental for the gas wells. Had he not done so, it, too, would have passed to plaintiff by the grant of the land. A covenant to pay rent is one running with the land; but that it is such does not prevent the owner from passing title to it and reserving the land, or *vice versa*. Whether Lyon could have separated the free gas covenant from the land, by a reservation of it, or by assigning it to a stranger to the title, is a question we are not required to decide. But, granting that he could have done so, it still would not indicate that the covenant was not a real covenant, running with the land. He did not do so, but passed both the land and the covenant to plaintiff.

The legal question presented for decision is this: Has plaintiff, owning both the land and the covenant for free gas from the wells thereon, for domestic purposes, the right to carry the gas off the land for his consumption? The covenant for free gas, although running with the land, is, never-
L.R.A.1915E.

theless, a part of the consideration of the lease. Thornton, Oil & Gas, § 226. What right has the lessee to say how the lessor shall use the consideration, so long as his burden is not increased? A covenant running with the land need not, necessarily, be performed on the land itself. 11 Cyc. 1080. "A covenant is capable of running with the land, although not directly to be performed on it." Van Rensselaer v. Smith, 27 Barb. 104. See also Norman v. Wells, 17 Wend. 136. There is certainly nothing in the public policy which would prohibit the owner of the land and covenantee for free gas from consuming it off the premises; and we find no reason for so interpreting the lease. If the purpose was to confine the use of gas to a dwelling house on the leased premises, why did not the covenantor so stipulate? The subsequent conduct of the parties, giving practical construction to the covenant, indicates that they did not so intend. Consumption of the gas elsewhere than on the land does not destroy the real character of the covenant. The covenant runs with the land, regardless of where the gas is consumed, because it issues out of the land, and is a benefit to it. As before stated, defendant is interested only in the quantity consumed. It is bound, however, to furnish gas for one dwelling house only, and has a right to demand that plaintiff keep his pipe lines and appliances in good repair, and use a closed light on the outside, with a Welsbach or some other approved burner, in order to prevent needless waste. Hall v. Philadelphia Co. 72 W. Va. 573, 78 S. E. 755.

Defendant's counsel have assigned cross error. One is that defendant was improperly refused permission to file an amended answer. This was not error. The amended answer was tendered after the issues had been made and numerous depositions taken, and after the cause was ready for final submission. Defendant does not show sufficient reason why he should have been allowed to amend. The rule is much stricter in regard to amending answers than bills. Ratliff v. Sommers, 55 W. Va. 30, 46 S. E. 712, 1 Ann. Cas. 970. It is largely within the discretion of the chancellor, and we do not see that he has abused his discretion in this instance. Liggon v. Smith, 4 Hen. & M. 407. The statute permitting a defendant to file his answer any time before a final decree has no relation to amendments. Plaintiff's case is disclosed by his bill, and defendant is supposed to be fully advised of his defense before answering. Moreover, both the bill and answer were sworn to in this case, an additional reason for refusing amendment. The other cross assignments are sufficiently answered in the

discussion of the principal question concerning the nature of the free gas clause in the lease.

The decree will be reversed, and a decree entered here reinstating the injunction and requiring defendant to permit plaintiff to connect his private pipe line with the well on the Lyon tract of land, or with its pipe line running thereto, as it may elect.

Robinson, P., dissents.

Lynch, J., absent.

KENTUCKY COURT OF APPEALS.

FEDERAL INSURANCE COMPANY,
Appt.,
v.

F. A. HITER, Doing Business as Hiter
Motor Car Company.

(164 Ky. 743, 176 S. W. 210.)

Insurance — automobile — theft — diminution in value.

1. Diminution in the value of an automobile because of theft is within the opera-

Note. — Insurance covering automobiles or indemnifying against injury or liability for injury caused thereby.

This note supplements the notes to *Harbis v. American Casualty Co.* 44 L.R.A. (N.S.) 70, and *Patterson v. Standard Acci. Ins. Co.* 51 L.R.A. (N.S.) 585, on the same subject.

Automobile insurance—accident insurance.

Supplementing notes in 44 L.R.A. (N.S.) 71, and 51 L.R.A. (N.S.) 583.

It has been held that damage to an automobile resulting from driving it off the road and down a bank of 3 or 4 feet into a river is not covered by a policy providing that it covers damage to the automobile "by being in collision . . . with any other automobile, vehicle, or object, excluding . . . damage caused by striking . . . the rails or ties of street, steam, or electric railroads." *Wettengel v. United States*, 157 Wis. 433, 147 N. W. 360, Ann. Cas. 1915A, 626. The court said: "In order to bring the case within the policy there must have been, first, a collision; second, the collision must have been with another automobile, vehicle, or somewhat similar object, *ejusdem generis*; and third, it must not have been with any portion of the roadbed, meaning the ground on which the machine was running or attempting to run. No such collision was shown as that insured against."

And no recovery can be had under a policy insuring an automobile against damage by collision with any other vehicle, and pro- L.R.A.1915E.

tion of a policy insuring against any loss or damage if amounting to \$25 or more on any single occasion by theft, robbery, or pilferage, although the policy also provides that in the event of loss or damage the insurer shall be liable only for the actual cost of repairing, or, if necessary, replacing the parts damaged or destroyed.

Same — conversion — what constitutes.

2. Liability under a policy insuring the owner of an automobile against loss or damage by theft, robbery, or pilferage arises in case one borrowing the car to go to a specified place drives it to a distant state and abandons it in a remote place in a badly damaged condition, and fails to notify the owner where it may be found.

(May 19, 1915.)

APPEAL by defendant from a judgment of the Common Pleas Branch, Third Division of the Circuit Court for Jefferson County, in plaintiff's favor in a suit to recover an amount alleged to be due under an automobile insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. Burnett, Batson, & Cary, for appellant:

To constitute theft there must be a fraud-

viding that if the insurer should claim that damage was caused by the act or neglect of any person or corporation, private or municipal, the insurer, on payment of the loss, should be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and that such right should be assigned by the insured on receiving payment, where the insured entered into a settlement with a municipality for an injury to his automobile which resulted from a collision with a fire engine, and executed an instrument to the city, releasing it from all claims of every character arising out of the collision, there being no claim in favor of the insurer reserved, and the whole cause of action being merged in the one settlement. *Maryland Motor Car Ins. Co. v. Haggard*, — Tex. Civ. App. —, 168 S. W. 1011.

There is no waiver of the right to subrogation by the insurer where, shortly after the collision, the insured offered to make an assignment to an attorney for the insurer, but the attorney refused to take it at the time for want of full authority to act for the insurer, and because a reasonable time had not elapsed to make an investigation, it appearing that the insured, immediately after the attorney's refusal, made a settlement with the wrongdoer, since the insurer was entitled to a reasonable time to pay the loss. *Ibid*.

In *Underwriters at Lloyd's Ins. Co. v. Vicksburg Traction Co.* — Miss. —, 51 L.R.A. (N.S.) 319, 63 So. 455, an insurer of an automobile, who had, in accordance with a provision of the policy, become subrogated to the claim of the owner for dam-

ulent intention to make use of the possession as a means of converting the goods to one's own use and actual conversion, thus depriving the owner of his ownership.

Elliott v. Com. 12 Bush, 180; *Com. v. Williamson*, 96 Ky. 1, 49 Am. St. Rep. 285, 27 S. W. 812; *Blackburn v. Com.* 28 Ky. L. Rep. 96, 89 S. W. 160.

Mr. Edward G. Hill for appellee.

Turner, J., delivered the opinion of the court:

In August, 1913, appellee was engaged as an automobile dealer in the city of Louisville. He held a policy of insurance on a new Henderson Special Roadster which he had in his place of business, the policy being for \$1,500. For several weeks he had

ages thereto against a street railway company before the institution by such owner of a suit for personal injuries growing out of the same accident, in which a judgment had been recovered, was held not precluded thereby from maintaining an action on the theory that the injury to the automobile and the personal injuries constituted but one cause of action, and could not be split so that separate suits could be brought, since, when the owner of the automobile instituted suit for his injuries, he had no cause of action for damages to the automobile, this right of action having been transferred to the insurer in pursuance of the conditions of the policy, and the two causes then being in different persons.

Generally as to injury both to person and to property at the same time as constituting more than one cause of action, see note appended to the above case, 51 L.R.A.(N.S.) 319.

Where an owner of automobiles insured against loss or injury entered into an agreement with the insurer after the automobiles had been destroyed while in the custody of a carrier, whereby, in consideration of a sum paid by the insurer, the insured agreed to put forward a claim against the carrier, and, upon receiving payment from the carrier, to refund whatever was recovered up to the amount paid by the insurer, and providing that all over that amount should be retained by the insured, and that the insurer should be responsible for all costs, attorneys' fees, and expenses incurred in connection with the claim, an attorney employed by the insurer to prosecute the claim against the carrier cannot, as against the insured, retain his fees from the amount recovered, and the amount so retained can be recovered in an action for money had and received. *Locomobile Co. v. Nichols*, 84 Misc. 44, 145 N. Y. Supp. 941.

—fire insurance.

Supplementing notes in 44 L.R.A.(N.S.) 71, and 51 L.R.A.(N.S.) 584.

A policy insuring an automobile against

employed in his place of business a young man by the name of Yost, but business being dull, he notified Yost a week in advance that on the next Saturday he would have to let him go, and when Saturday came he paid Yost off and terminated the employment at noon on that day. The same afternoon Yost represented to him that he desired to go to Indianapolis to procure other employment, and requested the loan of the new Henderson Roadster to make the trip, promising that he would return it either Sunday night or Monday morning following. Appellee loaned him the car, Yost drove it to Indianapolis, there tried to sell it, then went on with it to the state of Missouri, where some six or seven weeks later it was found in a remote part of that

loss or damage by fire, pilferage, and perils of transportation is a policy of fire insurance, and in an action to recover for damage resulting from fire the Code form is properly used in declaring upon it. *Union Marine Ins. Co. v. Charlie's Transfer Co.* 186 Ala. 443, 65 So. 78.

A provision in a fire policy that the insured automobile "shall not be used for carrying passengers for compensation, and that it shall not be rented or leased," means that the car will not be continually so used for any length of time; or, in other words, that the insured will not make a business of using the machine for carrying passengers for hire, and there is no breach of this provision where the insured's son uses the car two or three afternoons without the insured's knowledge for carrying passengers for hire to and from the fair grounds. *Commercial Union Assur. Co. v. Hill*, — Tex. Civ. App. —, 167 S. W. 1095.

And in *Crowell v. Maryland Motor Car Ins. Co.* — N. C. —, 85 S. E. 37, it was held that a clause in a policy insuring an automobile against loss by fire which provides that the car "will not be rented or used for passenger service of any kind for hire, except by special consent of the company," does not contemplate a single act of renting or using the car for hire, but something of a more permanent nature.

And there is no breach of this provision where the insured, who operates a garage and rents automobiles, kept the insured car for his own use, but one of his employees took it, on one occasion when the other cars were out, without the insured's knowledge, to carry a party for hire, the forbidden use having ceased before the car was burned. *Ibid*.

Nor does the use of the car for carrying a man to the station some time before the loss occurred avoid the risk, this being too remote from the time of loss. *Ibid*.

It has been held that where the rate sheet issued to its agents by an insurer prohibited the writing of a fire policy upon any automobile prior to a 1908 model, and it was shown that automobiles depreciate in value very rapidly, and as they grow older the

state in a badly battered and damaged condition. Appellee, when he discovered the whereabouts of the car, went to the state of Missouri, taking with him an expert machinist, recovered the car, and returned it to Louisville at an expense of \$130.44. After the car was returned to Louisville the missing parts were supplied and all necessary repairs made at a cost of \$339.44, and the car was thereafter sold for \$750. This is a suit to recover under the policy of insurance for the expense of recovering the car and bringing it to Louisville, for the cost of repairs thereon after it reached Louisville, and for the diminution in value of the car by reason of the alleged theft thereof and the consequent damage. The policy, after insuring the automobile against

loss or damage by fire or exposure, or while being transported by land or water, or against general average or salvage charges, says: ". . . And also against loss or damage if amounting to \$25 or more on any single occasion by theft, robbery, or pilferage by any person or persons other than those in the employment, service, or household of the insured."

It is also provided in another part of the policy that "in the event of loss or damage under this policy, this company shall be liable only for the actual cost of repairing, or, if necessary, replacing the parts damaged or destroyed."

The law and facts being submitted to the court, it was adjudged that the plaintiff recover the expense incurred in recovering the

chances of self-ignition increase, a representation that an insured car is a 1910 model when it is in fact a 1907 model is, without regard to whether it was made in good faith or not, material to the risk as a matter of law, since it affects the very subject-matter of the contract, and places the automobile in a class which made it appear insurable when it was not. *Smith v. American Auto. Ins. Co.* — Mo. App. —, 175 S. W. 113.

And the effect of the insured's representation as to the year model is not avoided by the fact that the agent through whom the insurance was secured went to see the car, where there was no means of his telling by inspection what year's model it was, and the insured knew that the agent's only means of knowledge in regard to the car was that which he was giving him. *Ibid.*

And under the circumstances in this case there was held to be little or no difference in effect between the insured's agent, who formerly owned the car, telling the insurer that he bought the car for a 1910 model, and telling him that it was such; neither one, under the circumstances, being the statement of a fact upon which he knew the one to whom the application was made was relying, and which the insured knew was received by the company, it having been put in the policy. *Ibid.*

And where the one to whom the application for insurance was made was only writing life and accident insurance, and took the application for automobile insurance to an insurance broker, who obtained the insurance through the company's agents, and there was a division of the commissions by the several agents, it was held that the one to whom the application was made was not the agent of the insurer, but was a mere broker, and the insurer was not bound by his failure to learn for himself the year model of the insured car, although he had knowledge that the insured did not know the model. *Ibid.*

In *Locke v. Royal Ins. Co.* — Mass. —, 107 N. E. 911, in an action involving three fire policies, one a nonvalued policy and the others valued, covering automobiles of for-

eign make, the evidence as to the year models of the machines was held to be such that the jury might find that the machines were of the year models stated in the policies, and that the minds of the parties met, and that the case was properly one for the jury.

And it was further held that even if it was assumed that the jury could not properly find that the year models were correctly described, it did not follow as a matter of law that the policies did not attach, where there were many accurate terms of description, including the individual one of the factory number, so that the jury might have found that the minds of the parties met notwithstanding an incorrect description as to one fact, if they found that fact not material. *Ibid.*

In *St. Paul F. & M. Ins. Co. v. Huff*, — Tex. Civ. App. —, 172 S. W. 755, in an action on a policy insuring an automobile against loss by fire, the jury's finding that the insured's statements in the application as to the cost of the insured car and the length of time which it had been run were not material to the risk were held to be supported by the evidence, which in part showed that the insured did not pay cash for the car, but traded certain property for it, and also showed that he understood the question as to time of service of the car to refer to the time he had used it, and not the length of time it had been used altogether.

A fire policy covering an automobile, and providing that, in consideration of a reduced rate of premium, the machine should at all times be kept in a private garage designated, with the privilege to operate it and house it in any other building for a stated period at any one location at any one time, provided it was *en route*, visiting or being cleaned or repaired, is avoided because of a breach of this warranty, notwithstanding Revisal, § 4808, and although the breach in no way contributed to the loss, where the car was taken from the private garage to another state, where it remained for about six months, when it was removed to a machine shop in a third state to be

car and returning it to the city of Louisville, the cost of repairs thereon, and \$750 diminution in the value thereof. The finding of fact by the lower court was that at the time the automobile was borrowed by Yost he was not employed by the plaintiff; that Yost borrowed the same intending to convert it to his own use; that the \$130.44 expense incurred was necessary in recovering and preserving the car; that it cost the plaintiff \$339.78 to repair the car after its recovery, and this was necessary and reasonable expenditure; that the market value of the car at the time Yost borrowed it was \$1,800, and was valued at \$1,500 in the policy, and that immediately after it was repaired it was worth \$750. The uncontradicted evidence is that the contract of em-

ployment of Yost by appellee had been terminated before the car was borrowed, and the court could not have held, under the evidence, that Yost was at the time still an employee of appellee.

It is argued by appellant that, inasmuch as, under the express language of the policy, "this company shall be liable only for the actual cost of repairing, or, if necessary, replacing the parts damaged or destroyed," there was no liability for the diminution in value of the machine. But to so hold would give no effect whatsoever to the express language insuring "against loss or damage if amounting to \$25 or more on any single occasion." It is apparent that the language limiting the liability to the actual cost of repairing or replacing the

painted, and was there destroyed by fire, it appearing that the car while in the second state was not *en route*, visiting or being cleaned or repaired, since there was a removal of the property permanently, in violation of the provision of the policy. *Lummas v. Firemen's Fund Ins. Co.* 167 N. C. 654, L.R.A. 1915D, 239, 83 S. E. 688.

As to effect of provision permitting temporary removal of property from place designated in policy where there has been a permanent removal from that place, see note to the above case in L.R.A. 1915D, 239.

In *Commercial Union Assur. Co. v. Hill*, — Tex. Civ. App. —, 167 S. W. 195, a clause in a fire policy warranting that the insured automobile, in consideration of a reduced rate, should be kept at a certain private garage, with the privilege of operating the car and housing it elsewhere for a stated period provided the car was *en route*, visiting or being cleaned or repaired, was held to be waived where the insurer's general agent told the insured on a number of occasions when he was going on trips that the insured did not need any writing, and that it was all right for him to take the car on such trips.

A provision in a fire policy insuring an automobile that it should be void if the insured property "be or become encumbered by a chattel mortgage . . . or if any change other than by the death of an assured take place in the interest, title, or possession of the subject of insurance" is reasonable and valid, and in case the property is encumbered, the insurer has a right to insist that its liability is terminated. *Springfield F. & M. Ins. Co. v. Chandlee*, 41 App. D. C. 209.

And an insured automobile is encumbered within the meaning of the above provision where the insured purchased the car by making a partial payment and giving his note for the balance, and after the issuance of the policy, in order to make it easier for his vendor to discount the note, he executed a conditional contract of sale which extended the time of payment of the insured's debt, and which was recorded. *Ibid.*

L.R.A.1915E.

In an action on a policy insuring an automobile which was practically new against damage by fire, and providing that the loss should not exceed what it would cost the insured to repair or replace the same with material of like kind and quality, there is no objection to the manner in which the plaintiff's experts arrived at the amount of the loss because they estimated the cost of certain parts necessary to be replaced at their cost when new, without deduction for depreciation. *Jones v. Orient Ins. Co.* 184 Mo. App. 402, 171 S. W. 28.

And in an action on a policy insuring an automobile against damage by fire, in view of § 2082, Mo. Rev. Stat. 1909, the insurer is not entitled to a reversal on the ground that evidence of the difference in value of the machine immediately before and after the fire was admitted, although the policy created a different measure of damages, where the evidence complained of showed that the difference in value was \$500, and the plaintiff's experts who testified with reference to the terms of the policy placed the loss at less than \$500, and stated that then the car would not be in as good condition as it was before the fire, and the jury returned a verdict for less than either of these estimates, since the insurer was not injured by the admission of such evidence. *Ibid.*

Where the owner of an automobile, who held a policy insuring against loss by fire, after a loss wrote the insurer in response to an offer to repair that if the car was made as good as before the fire, and the insured was not delayed too long, that would be satisfactory, and the insurer estimated that the repairs would take about four weeks, and seventy-four days elapsed between the insured's letter consenting to repairs and a letter from the insurer stating that the car was all ready but the body, and requesting instructions as to the model desired, it was held that the insured was not confined to his remedy upon the agreement to repair, but that an action was properly brought upon the policy, leaving the insurer the right to show that the insured had agreed to accept repairs in satisfaction

damaged parts, in the light of the other language used, should not be interpreted as claimed by appellant. The car when it was loaned to Yost was a new car, and it had never been run more than 100 or 200 miles, and was of the value of \$1,800; when appellee recovered it, even after the expense of recovering it and the expense of repairing it, it was a secondhand car, and only worth \$750. The language used in the policy insuring against loss or damage, if amounting to \$25 or more on any single occasion by the theft, robbery, or pilferage, is very broad and comprehensive, and it cannot be maintained with any degree of reason that the diminution in value was not a part of the loss or damage insured against under the plain terms of the policy.

of the policy, and that the repairs were made as agreed, and the terms of the insured's letter complied with. *Gaffey v. St. Paul F. & M. Ins. Co.* 164 App. Div. 381, 149 N. Y. Supp. 859.

Where the insured automobile was destroyed by two fires which occurred two or three days apart, the insurer cannot escape liability on the ground that the insured neglected after the first fire to protect the machine from further damage, there being nothing in the terms of the policy entitling the insurer to forfeit the policy for such reason. *St. Paul F. & M. Ins. Co. v. Huff*, — Tex. Civ. App. —, 172 S. W. 755.

Generally as to successive losses under same fire policy, see note in 45 L.R.A. (N.S.) 847.

The provision in a policy insuring against loss or damage to an automobile by fire, that it may be canceled at any time by either party upon written notice, and that notice of cancellation, deposited in the United States mail, postage prepaid to the address of the insured, as stated in the policy, shall be sufficient notice, is not complied with where the insurer wrote a letter of notice of intention to cancel, and sent it by registered letter to the insured's address in an envelope on which there was an instruction to return in five days if not delivered, and upon the expiration of that time the letter was returned to the insurer, and the insured, who was away for about a month after the arrival of the letter, had no notice of the attempted cancellation until the automobile was burned, over a month after his return, it appearing that, in the absence of an instruction to return a letter within a specified time, the postmaster, under the postoffice regulations, would have been authorized in holding the letter for three months if he believed that it could be delivered by holding, and that such regulations also provided that letters on which there was a request to return to the sender within a certain time should not be advertised, since it was not within the contemplation of the parties that the insurer should be at liberty to reduce the insured's chance of getting the notice to the mini-L.R.A.1915E.

But if there was any doubt about this, and the two provisions of the policy quoted were construed to be in conflict with each other or susceptible of two interpretations, still, under the rule of construction adopted by this court, that interpretation would be given it which would fully protect the insured. If ambiguous or contradictory provisions appear in an insurance policy, or its different provisions are susceptible of two interpretations, it will be given that interpretation which would furnish to the insured that protection for which he has paid. *Spring Garden Ins. Co. v. Imperial Tobacco Co.* 132 Ky. 23, 20 L.R.A. (N.S.) 277, 136 Am. St. Rep. 164, 116 S. W. 234; *National Life & Acci. Ins. Co. v. O'Brien*, 155 Ky. 502, 159 S. W. 1134.

mum. American Auto Co. v. Watts, — Ala. App. —, 67 So. 758.

—theft insurance.

Supplementing notes in 44 L.R.A. (N.S.) 75, and 51 L.R.A. (N.S.) 584.

In an action on a policy insuring against loss of an automobile by theft by persons "other than those in the employment, service, or household of the insured," the burden is upon the insured to show that the automobile was not stolen by some person coming within the above provision. *Kansas City Regal Auto Co. v. Colony Ins. Co.* 187 Mo. App. 514, 174 S. W. 153.

In this case, where the evidence of theft was purely circumstantial, it was held that the questions whether the car had been stolen and whether it had been stolen by someone not in the service of the insured were for the jury. *Ibid.*

A policy insuring an automobile owner against "loss or damage on each occasion of theft, robbery, or pilferage by persons other than those in the employment, service, or household of the assured" does not cover a loss resulting from the machines being taken for a joy ride without authority by one not in the employment, service, or household of the insured, since to warrant a recovery under such provision there must be an intent to steal the automobile, such intent being necessary to a conviction for theft, robbery, or pilferage, these words having the same meaning when used in an insurance policy as in a prosecution for such offenses. *Michigan Commercial Ins. Co. v. Wills*, — Ind. App. —, 106 N. E. 725.

And a policy insuring the owner of an automobile against loss by theft does not cover a loss caused by an accident to the car while it is in the possession of employees of a shop to which it had been taken for repairs, who had taken it from the shop in the daytime after working hours for a joy ride, intending to return it to the shop when they were through with it, there having been no criminal intent to deprive the owner of the car permanently, and therefore no theft of it. *Valley Mercantile Co.*

But it is argued by appellant that there was no actual conversion by Yost of appellee's property so that he was deprived of the ownership thereof; that because he did not actually sell the machine there was no conversion. But, manifestly, this argument is unsound; the machine was loaned to Yost for a specific purpose, and to go to a certain place; he went not only beyond that place, but he never did in fact return the machine, but abandoned it in a remote section of a distant state in a badly damaged condition, and did not even notify ap-

pellee where it might be found, and it was not in fact recovered for some six or seven weeks after it should have been returned. This was just as effectual a conversion as if he had actually sold the machine and appropriated the proceeds. Appellant's argument, if followed to its logical end, would mean that there would have been no conversion even if Yost had retained possession of the machine for five years, just so he had not sold it. Manifestly this cannot be true.

Judgment affirmed.

v. St. Paul F. & M. Ins. Co. 49 Mont. 430, L.R.A. 1915B, 327, 143 Pac. 559.

And in *Rush v. Boston Ins. Co.* 88 Misc. 48, 150 N. Y. Supp. 457, under a policy insuring against the loss of an automobile by theft, robbery, or pilferage it was held that although the insured had been deprived of his property, he could not recover unless he had been deprived of it feloniously.

It was held that the criminal intent must usually be gathered from the surrounding circumstances, and that proof of taking by trick and device would be sufficient to allow an inference of felonious intent, but that this inference would be completely rebutted if it appeared that the person taking the car acted under an honest belief that he was entitled to the possession of it, and merely used a trick to obtain possession of what he thought was his property. *Ibid.*

And in this case, where the insured testified that he bought the car, evidence that shortly afterward a motor sales company which he financed and of which the one who took the car was president gave the insured a note for the same amount as the purchase price of the car, and that the note was paid by various checks, and also evidence of conversations with the insured, showing the exact nature of the terms upon which he received the car, was held admissible upon the question whether the one who took the car was acting under a real claim of right. *Ibid.*

Where the insured subsequently to taking a policy insuring against theft, robbery, or pilferage of his automobile placed the car in a salesroom under an agreement that the company operating the salesroom was to sell the car and pay the insured a stated sum in full payment after the company had sold the machine, although it was further agreed that the insured might end the contract and remove the car at any time prior to sale, it was held that the insured parted with the machine with the expectation of receiving the sum stated from the sales company within the meaning of § 100 of the sales act, providing that when goods are delivered to the buyer on sale or return, or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer, and it was accordingly held that no recovery could be had on the policy upon L.R.A.1915E.

its appearing that after the insured had instructed the sales company to do nothing until it heard from him, it sold the car the same day it was left with it for a sum less than that which the company had agreed to pay the insured, and failed to return the proceeds to the insured. *Siegel v. Union Assur. Soc.* 90 Misc. 550, 153 N. Y. Supp. 662.

Liability insurance.

Supplementing notes in 44 L.R.A.(N.S.) 73 and 51 L.R.A.(N.S.) 584.

A provision in a policy covering loss by reason of the ownership, maintenance, and use of an automobile, that "none of the automobiles herein described are rented to others," speaks as of the date of the policy, and is not violated because the automobile was rented at the time an accident occurred, some time after the date of the policy. *Mayor, L. & Co. v. Commercial Casualty Ins. Co.* 150 N. Y. Supp. 624.

It has been held that a provision in an indemnity policy issued to an automobile owner that the insurer shall not be liable for accidents if the automobile, at the time of accident, was being driven by a person in violation of law as to age, will protect the insurer from liability for loss on account of the death of one who was killed by the insured's automobile while it was being driven by his sixteen-year-old son, if a city ordinance making it unlawful for any person under eighteen years of age to operate an automobile within the city limits is valid. *Royal Indemnity Co. v. Schwartz*, — Tex. Civ. App. —, 172 S. W. 581.

The ordinance in this case, however, was held invalid because it attempted to extend the prohibition to all property within the city limits, including private property as well as public. *Ibid.*

In *Brock v. Travelers' Ins. Co.* 88 Conn. 308, 91 Atl. 279, a policy undertaking to indemnify one for loss suffered on account of bodily injuries accidentally sustained by others by reason of the insured's ownership and maintenance of an automobile, and providing that it should not apply while the automobile was driven or manipulated "by any person under the age fixed by law, or under the age of sixteen in any event," was held to cover damage resulting to the owner on account of an injury inflicted on a third person by the insured's machine, which was

being driven by his sixteen-year-old son, unaccompanied by a licensed chauffeur, where the statute provided that "no person shall operate a motor vehicle . . . until he shall have obtained from the secretary . . . a license for that purpose, but no such license shall be issued until said secretary is satisfied that the applicant is over eighteen years of age and is a proper person to receive it. . . . Nothing herein contained shall prevent the operating of a motor vehicle by an unlicensed person sixteen years of age or more, . . . if accompanied by a licensed operator," it being held that the provision that an unlicensed person operating a car must be accompanied by a licensed operator had no relation to the age of the operator, and that the insured's son did not come within the meaning of the words, "under the age fixed by law," contained in the policy, which related solely to the question of age, and not to the question whether the operator had complied with the other requirements of law.

Under a policy undertaking to indemnify an automobile company for loss occasioned by injuring third persons, and providing that no action shall lie against the insurer unless it shall be brought by the insured for loss or expense actually sustained and paid in money after actual trial of the issues, no recovery can be had in equity against the insurer by one who has recovered a judgment against the insured for an injury resulting from the operation of one of its automobiles, although the insured is in the hands of a receiver, since a court of equity cannot treat the contract as made for the benefit of any person injured by the insured's automobiles without regard to the terms of the contract, and by the terms of the policy no recovery could be had even by the insured except for liabilities actually discharged by the payment of money. *Goodman v. Georgia L. Ins. Co.* — Ala. —, 66 So. 649.

An indemnity policy providing that if any person shall sustain bodily injury by accident by reason of the use of insured's automobile, for which injuries the insured is or is alleged to be liable for damages, then the company will indemnify the insured against such liability, and will pay all costs incurred with the company's written consent, indemnifies against liability, and therefore the insured, upon establishing that he is obligated to pay, and that the fee is reasonable, is entitled to recover an attorney's fee contracted by him in the defense of a suit instituted against him for injuries inflicted by his automobile, which the insurer had refused to defend, although he has not paid such fee. *Royal Indemnity Co. v. Schwartz*, — Tex. Civ. App. —, 172 S. W. 581.

As to insurance against injuring property or person of third person as indemnity or liability insurance, see note in 48 L.R.A. (N.S.) 184.

It was held in the preceding case that the insurer, after repudiating its obligation L.R.A.1915E.

to defend, was estopped to set up a failure to obtain its consent in writing to the incurring of the attorney's fees. *Royal Indemnity Co. v. Schwartz*, supra.

J. T. W.

ARIZONA SUPREME COURT.

TOWN OF TEMPE, Appt.,
v.

C. A. CORBELL.

(— Ariz. —, 147 Pac. 745.)

Evidence — breach of municipal contract — sufficiency.

1. Breach by a municipality of a contract for street sprinkling is not shown by evidence that the one having the contract was told by the marshal that they were going to take off the wagon; that he was ordered off; without anything to show action by the municipal council.

Municipal corporation — power of council to contract beyond term.

2. Retiring members of a municipal council cannot, on grounds of public policy, pending the induction into office of their successors, who have been elected, make a binding contract by the year for the sprinkling of the streets, where a statute confers upon the council the exclusive control of the streets, although power is also given to appoint agents for the town from time to time.

(Ross, Ch. J. dissents.)

(April 20, 1915.)

APPEAL by defendant from a judgment of the Superior Court for Maricopa County in plaintiff's favor, and from an order denying a new trial, in an action brought to recover damages for breach of a contract for street sprinkling. Reversed.

Statement by Cunningham, J.:

The appellee, as plaintiff, commenced this action against the incorporated town of Tempe, the appellant, seeking to recover damages resulting from a breach of a con-

Note. — Power of board to appoint officer or to make contract for term extending beyond its own term.

For the earlier cases upon this question, see the note to *Manley v. Scott*, 29 L.R.A. (N.S.) 652.

In *Robbins v. Boulder County*, 50 Colo. 610, 115 Pac. 526, it was held that within the statutory or constitutional limits each board of county commissioners must determine for itself the tax levy and the amount of appropriations, and it is beyond the power of the board in any one year to determine for its successor in any subsequent year how it shall perform such duties, or pre-

tract alleged to have been entered into by the parties on June 1, 1912. A copy of the contract was annexed to the complaint, and considered as proven on the trial.

The contract, so far as deemed material, is as follows:

"This agreement made and entered into this 1st day of June, 1912, by and between Tempe, an incorporated town in the state of Arizona, party of the first part, and C. A. Corbell, a resident of the town of Tempe, Arizona, party of the second part, witnesseth:

"That the said party of the second part, for and in consideration of the payments hereinafter mentioned to be paid by the said party of the first part to the said party of the second part, hereby contracts, cove-

nants, and agrees to work for the said party of the first party for the period of one year, to wit, from the 1st day of June, 1912, to the 1st day of June, 1913, for the sum of \$85 per month, payable monthly at the time and in the manner in which all bills against the city are paid, said second party working every day except Sundays. Said party of the second part shall furnish one good span of horses, harness, and one good farm wagon with dump boards and box.

"The work to be done shall consist in sprinkling the streets under the supervision of the supervisor of streets, and when said sprinkling is unnecessary or completed, the said party of the second part shall put in the balance of his time in hauling dirt and gravel and repairing streets and sidewalks

scribe or limit its actions in the exercise of governmental functions, and therefore it is legally impossible for a board of commissioners to bind the county forever to maintain and support a hospital, the construction of which was provided for in the bequest of an individual.

In *McCormick v. Hanover Twp.* 246 Pa. 169, 92 Atl. 195, it is held that in engaging counsel supervisors are acting as agents of the township and are exercising a governmental, as distinguished from a proprietary or business, function, and that where, under usual and ordinary conditions, the board changes with each fiscal year, by the expiration of the term of service of one supervisor to whose place a newly elected supervisor succeeds, the employment of an attorney for a term to begin after a new fiscal year has been entered upon is beyond the power of the board.

In *Sanders v. Belue*, 78 S. C. 171, 58 S. E. 762, it was held that where the county board of commissioners were by law made responsible for the general supervision of the poorhouse and poor farm of the county, it was never intended that the subordinate officer appointed by them as the superintendent of the institution should have a longer term than those by whom he was appointed, so that an appointment of a superintendent by a board of commissioners for a term extending beyond their own terms was invalid, and the fact that some years the retiring board had been accustomed to elect a superintendent of the poorhouse and farm for terms extending beyond their own terms could not have the effect of changing the law, nor could the court take account of the charge that the appointee, though recognized as an excellent officer, was turned out of office in fulfillment of campaign promises.

And the preceding case was followed in *State ex rel. Acker v. Major*, 94 S. C. 472, 78 S. E. 896, where the outgoing commissioners undertook, a short time before the expiration of their term, to appoint a clerk of the board for two years from that date.

In *Moon v. South Bend*, 50 Ind. App. 251, 98 N. E. 153, it is held, under a statute providing that school trustees of incorporat-

ed towns and cities shall have power to employ a superintendent for the schools and prescribe his duties and direct in the discharge of the same, that a school board consisting of three members, each of whose term of office was three years, the term of one expiring each year, had authority to employ a superintendent of schools for a term extending beyond the term of the commissioner whose term was longest at the time the contract was made, so long as there was nothing to indicate an abuse of discretion on the part of the board, unfair dealing, fraud, or collusion for the purpose of doing something detrimental to the interest of the schools.

In *Davis v. Public Schools*, 175 Mich. 105, 140 N. W. 1001, it was held that, under a statute providing that "the board of education shall appoint and employ a superintendent and the teachers and instructors for the public schools, and determine their salaries and assign their duties," the only limit to the power of the board to employ a superintendent of schools is that fixed by reasonableness and good faith, and that where the board made a contract for the employment of a superintendent for one year, and five days thereafter, and but a few days before the expiration of the terms of two of the members of the board, it made another contract for a period of three years, to supersede the one-year contract, and the change in the board left a majority unfavorable to the employment of the superintendent, the facts were such that an inquiry into the good faith of the parties was suggested, and a new trial was granted to enable a jury to pass upon that question.

In *Murray v. Wilkes-Barre Twp. School Dist.* 33 Pa. Super. Ct. 373, it was held that, although the school board would have had authority to elect plaintiff as a teacher for three years, electing him for one year exhausted their power, and subsequently electing him for two more years just before the close of the school year and the retiring of part of the board, thus electing him for a new term to begin after the change in the personnel of the school board, was invalid.

R. L. S.

under the supervision of the supervisor of streets. . . .

"It is further distinctly understood and agreed by and between the parties hereto, that in case the said party of the second part does not give his personal attention to the performance of the work hereinbefore mentioned, that he shall furnish a man to take his place that is entirely satisfactory to the supervisor of streets. It is further understood and agreed that the said party of the second part shall not be compelled to haul any garbage. It is further understood that the refuse and sweepings from the streets shall not be considered as garbage, and that the same shall be hauled by the said party of the second part when directed so by the supervisor of streets.

Signed by the mayor and plaintiff, and attested by the town clerk.

It is admitted that on June 1, 1912, when the contract is alleged to have been entered into, the common council was composed of Dines (mayor), Goodwin, Curry, Lukins, and Ellison, councilmen, and that the contract was entered into pursuant to or by authority of the following resolution adopted at a special meeting of the council held on that day at the call of the mayor: "Whereas the contract for street sprinkling the town of Tempe, between the town of Tempe and C. A. Corbell, has expired: It is hereby resolved that said contract be renewed for a period of one year, beginning June 1, 1912, and ending June 1, 1913, and that an agreement by and between the town of Tempe and C. A. Corbell be entered into, and the mayor is instructed to sign said agreement on the part of the town of Tempe, and the clerk is instructed to attest the same."

It is admitted that Birchett, Fogal, Nielsen, Miller, and Goodwin were elected members of the common council on May 27, 1912, to succeed the other members of the council, and that they qualified as such between the time they were elected and the 13th day of June, 1912, and took their office on June 13, 1912. It is otherwise shown that the votes cast at said election of May 27, 1912, were duly canvassed on May 31, 1912, and the said members declared elected. Tempe was incorporated under the provisions of act No. 72 of the Laws of the Seventeenth Legislative Assembly of the Territory of Arizona (approved April 12, 1893), by the order of the board of supervisors of Maricopa county made and entered on the 26th day of November, A. D. 1894.

The plaintiff testified, in substance, that he performed the service of sprinkling the streets of the town of Tempe with a street sprinkler from June 1 to June 13, 1912, L.R.A.1915E.

during fifteen days, in performance of his part of the contract.

He was asked this question by his counsel:

Q. Why did you quit sprinkling the streets?

A. The marshal told me they were going to take the wagon. I was ordered off.

Q. Did anybody take your place?

A. George Nichols was the one employed by the council.

The witness testified that he was offered about \$40 for the work he did, and refused the offer; that he made written demand each month for about three months for his wages of \$85 per month, and the council rejected his claim; that he sold the wagon and team on August 7, 1912, for \$275; that he owned them at the time the contract was made, and had served the city as street sprinkler for the year previous to June 1, 1912. Plaintiff testified that he had been employed at many things since the 13th day of June, 1912, and had earned on contracts a large sum of money, but he was engaged in performing such contracts at the same time and without conflict with his duties of street sprinkler; that he could not get employment for his time not required for his contract business, as profitable to him as the street sprinkling contract with defendant, because of the state of his health. He could perform the street sprinkling duties, but other occupations required more arduous labor in order to earn a like wage.

It is alleged that plaintiff entered upon the performance of the said contract on the 1st day of June, 1912, and performed the duties required of him for fifteen days, at which time the defendant ousted plaintiff from his employment, and refused to further "recognize him as the street sprinkler of Tempe, and placed in his place and stead one George Nichols, and the said Tempe has further failed and refused, and still fails and refuses, to pay plaintiff his said sum of eighty-five dollars (\$85) per month for said services, which plaintiff has been ready and willing at all times to perform, and would have performed but for the breach of said contract by the defendant. Plaintiff would show that by reason of the said breach of said contract that he is left without employment, and has been unable to obtain other employment which he is able to perform, and will not be able to obtain a position where he will be able to earn a sum equal to the sum which defendant agreed by its contract to pay him for serving in the capacity aforesaid."

Plaintiff further alleges that he was required to, and did, purchase a wagon and team at an outlay of \$300, and without the employment the said wagon and team are

useless, and have entailed great expense. He demands \$1,200 as damages by reason of said breach of contract.

The cause was tried to the court without a jury, and resulted in judgment for the plaintiff in the sum of \$225, from which judgment, and from an order refusing a new trial, defendant appeals.

Other facts appear in the opinion.

Mr. Charles Woolf, for appellant:

The amended petition is fatally defective in that it states no cause of action, and the defendant's general demurrer should have been sustained for that reason.

Stiles v. McClellan, 6 Colo. 89; *Robinson Consol. Min. Co. v. Johnson*, 13 Colo. 258, 5 L.R.A. 769, 22 Pac. 459; *Wilkinson v. Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708, 26 N. W. 139; *Lawson, Contr.* ¶ 97; *Gutheil v. Schmidt*, 8 Colo. App. 71, 44 Pac. 853.

When mutuality is lacking, contracts of employment are void.

Vogel v. Pekoc, 167 Ill. 339, 30 L.R.A. 491, 42 N. E. 386; *East Line & R. River R. Co. v. Scott*, 72 Tex. 70, 13 Am. St. Rep. 758, 10 S. W. 99; *St. Louis, I. M. & S. R. Co. v. Matthews*, 64 Ark. 398, 39 L.R.A. 467, 42 S. W. 902; *Louisville & N. R. Co. v. Offutt*, 99 Ky. 427, 59 Am. St. Rep. 467, 36 S. W. 181; *Woolsey v. Ryan*, 59 Kan. 605, 54 Pac. 664; *Missouri, K. & T. R. Co. v. Bagley*, 60 Kan. 431, 56 Pac. 759; *Farrell v. Greenlee County*, 15 Ariz. 106, 49 L.R.A.(N.S.) 380, 136 Pac. 638.

Where the nature and character of an office or employment are such as to require a municipal board or officer to exercise a supervisory control over the appointee or employee, such appointment or contract of employment by the board is in the exercise of a governmental function, and hence contracts relating thereto must not extend beyond the life of the board making the same.

State ex rel. Hudson County v. Layton, 28 N. J. L. 244; *State v. Platner*, 43 Iowa, 140; *Shelden v. Butler County (Shelden v. Fox)* 48 Kan. 356, 16 L.R.A. 257, 29 Pac. 759; *Jay County v. Taylor*, 123 Ind. 148, 7 L.R.A. 160, 23 N. E. 752; *Millikin v. Edgar County*, 142 Ill. 528, 18 L.R.A. 447, 32 N. E. 493.

Messrs. Bullard & Carpenter for appellee:

Cunningham, J., delivered the opinion of the court:

The only evidence in the record tending to prove that the defendant, town of Tempe, discharged plaintiff as its street sprinkler, and thereby violated any contract relation, is the testimony of the plaintiff as follows: "The marshal told me they were going to take the wagon. I was ordered off. . . . L.R.A.1915E.

George Nichols was the one employed by the council."

The plaintiff does not state who ordered him off; whether the marshal, of his own volition, ordered him off, or whether the town council ordered him off the wagon, and the marshal was delivering its order. The town could not speak on the matter of discharging plaintiff except at a legal meeting. The corporate act of the municipality is performed through its council, and the minutes of its meeting are the evidence of the corporate act. No effort seems to have been made by any party to produce the evidence of such act. Perhaps no action was taken. Certainly, when the marshal told plaintiff that the council were "going to take the wagon," the inference is irresistible that no action had then been taken, but was contemplated. So far as the evidence goes, the marshal did not claim he was delivering plaintiff notice of any action theretofore taken by the council, nor did he claim to be acting in obedience to the council's orders in informing plaintiff of the council's intended action. At most, the information imparted had reference to the council's intention to discharge plaintiff, but, until some official act towards carrying out that intention was performed, the corporation was not chargeable with any breach of the alleged contract. If plaintiff acted upon the information of the intention of defendant to discharge him, and gave up his employment because the town marshal ordered him off the wagon, and the council had actually made no such order, nor given the marshal such instructions, then the marshal's order was without authority and ineffective for any purpose. The corporation acts only through its agents, that is, its officers. In order to bind the principal by an act, the agent (here both the council and the marshal) must act strictly within the scope of his agency.

In 2 *Dillon on Municipal Corporations*, 5th ed. § 775, it is said: "Public corporations may, by their officers and duly authorized agents, make contracts within the scope of their legislative powers the same as individuals and other corporations, in matters that appertain to the corporation; being artificial persons, they cannot contract in any other way. Public officers or agents are held more strictly within their prescribed powers than private general agents; and a contract made by a public agent within the apparent scope of his powers does not, if there be no estoppel, bind his principal in the absence of actual authority. A distinction has been held to exist in certain cases at least between the acts of an officer or agent of a public mu-

municipal corporation and those of an agent for a private individual. In cases of public agents the public corporation, it is said, is not bound unless it manifestly appears that the agent is acting within the scope of his real and lawful authority, or he is held out by the authorized and proper officials or body of the municipality as having authority to do the act, or is employed in his capacity as a public agent to make the declaration or representation for the government."

To work a breach of a valid contract by the municipality through the acts of its officers, and thereby fix a liability, would require no less authority. The town marshal must have been acting within the scope of his duty as an agent of the municipality to effectively order plaintiff off the wagon and discharge him from the service of the defendant, and plaintiff was chargeable with notice of the marshal's authority as an officer. As an officer, the marshal had no authority to discharge the plaintiff and thereby cause a breach of the town's contract of employment of plaintiff. The town, acting through its common council, could or might have discharged the plaintiff, and, if the contract was a binding one, thereby fix a liability on the town by its breach. The evidence of plaintiff tends to prove that plaintiff abandoned the service under the contract, upon being informed that "they" were going to take the wagon, and acquiesced in the marshal's order to deliver the wagon. If the marshal was acting under orders from the defendant, the authority could have been shown either by the corporate records, by the members of the council, or, perhaps, by the marshal's own testimony, if no objection to the same was interposed that would exclude his testifying, and, in fact, by any competent evidence, but neither course was attempted to prove the fact of authority, and certainly an intimation as to a supposed action to be taken by the council was not sufficient to work a breach of a valid contract. Certainly there is no evidence that the town council had theretofore or thereafter acted on the matter as the marshal informed plaintiff they were going to act.

The evidence of the breach of this contract is far from sufficient to sustain a judgment. The evidence sufficiently establishes the fact that the town marshal discharged the plaintiff, but his authority to do so is absent. The plaintiff must therefore be deemed to have abandoned the contract upon receiving information, through the marshal, that the council was going to take the wagon, and when he delivered the wagon to the marshal upon the marshal's order. For this reason we are justified in vacating L.R.A.1915E.

the judgment; but, as the parties and the trial court seem to have proceeded upon the theory that the evidence was sufficient to establish a breach of the contract at some time by the town, we prefer to base our decision upon another reason, and one affecting the initial relation of the parties.

At the close of the evidence the defendant moved for judgment upon the grounds that the contract pleaded and in evidence is one for services to the defendant town, and that the members of the town council in office at the time the contract was made had no power under the law to enter into such contract as would bind the city and the council succeeding them in office. This position was assumed and consistently asserted at all stages of the suit, and is preserved for decision on this appeal. The questions of the power of the common council to make this contract and to remove plaintiff during the contract period are thereby raised.

Article 3, § 1, subdiv. 3, act No. 72, Laws of 1893, confers the power upon councilmen " . . . to have . . . the exclusive control over the streets, alleys, avenues, and sidewalks of the town; . . . to widen, extend, straighten, regulate, grade, clean, or otherwise improve the same. . . . "

By article 4, § 4, act No. 72, supra, the common council "may appoint, from time to time, all officers and agents of the town, whose appointment is not herein provided for, and remove the same."

Exclusive control over the streets, to clean and otherwise improve them, fairly includes the exclusive right to cause the streets to be sprinkled. To accomplish this beneficial purpose the council must necessarily provide or appoint from time to time officers and agents to perform the service; provide the instrumentalities to accomplish this purpose. The officers or agents so appointed, while performing the duty of their appointment, are under the exclusive control of the common council making the appointment. The appointment of the street sprinkler for a definite term is not provided for by act No. 72, but the right to appoint is incident to the performance of the duty required, and, having been appointed by the common council, he was subject to be removed by the council at its pleasure, unless the council, in appointing him, had the power to contract with him and bind the town to retain him a specified term.

This was attempted in this instance. The evident purpose of this contract was to bind the incoming elected council to retain in its service one selected for that particular duty by the outgoing council. The contract was intended to prevent the new council

then elected from appointing another person, a person of its choice, to sprinkle the streets of Tempe for one year at the least. Such is the effect of this contract if it is a valid contract of the town. If the contract is valid, the new council was thereby deprived of the exclusive control over the streets, in the particular mentioned, from June 13, 1912, to June 1, 1913, so long as that work is performed by plaintiff satisfactorily to the street supervisor. By the terms of the contract the street supervisor had delegated to him the right to determine whether the duty is properly performed by the plaintiff, and, if so, the council is powerless to control the matter of the street sprinkling as to its manner or means of performance, and the council was thereby deprived of an express statutory right to control the streets and to remove its appointee. For one year all the while the council had in the matter of control over the streets and their sprinkling was to pay plaintiff \$85 per month. The street supervisor and street sprinkler controlled all other matters incident thereto. The council, composed of the outgoing members, placed the matter of sprinkling the streets beyond the control of the corporation. We are of opinion such contract is void as against public policy. The general rule, supported by a number of authorities, is that a contract extending beyond the term of office of the members of a public board, such as a board of county commissioners, a municipal board, or other like controlling body representing a municipal corporation, is, if made in good faith, ordinarily a valid contract. *Liggett v. Kiowa County*, 6 Colo. App. 269, 40 Pac. 475; *Pulaski County v. Shields*, 130 Ind. 6, 29 N. E. 385; *Webb v. Spokane County*, 9 Wash. 103, 37 Pac. 282; *Reubelt v. Noblesville*, 106 Ind. 478, 7 N. E. 206; *Wait v. Ray*, 67 N. Y. 36; *Pickett Pub. Co. v. Carbon County*, 36 Mont. 188, 13 L.R.A.(N.S.) 1115, 122 Am. St. Rep. 352, 92 Pac. 524, 12 Ann. Cas. 986; *Manley v. Scott*, 108 Minn. 142, 29 L.R.A.(N.S.) 652, 121 N. W. 628. The ground upon which these decisions are based is that a board is a continuous existing corporation; while the personal membership changes, the corporation continues unchanged.

A well-recognized exception to the rule exists applicable to contracts in reference to matters which are personal to the board in their nature, and the contract limits the power of the succeeding members to exercise a discretion in the performance of a duty owing to the public. This exception to the rule is based upon the grounds of public policy. *Jay County v. Taylor*, 123 Ind. 148, 7 L.R.A. 160, 23 N. E. 752; *Hancock v. Craven County*, 132 N. C. 209, 43 L.R.A.1915E.

S. E. 634; Sheldon v. Butler County (Shelden v. Fox) 48 Kan. 356, 16 L.R.A. 257, 29 Pac. 759; *Coffey County v. Smith*, 50 Kan. 355, 32 Pac. 30; *Millikin v. Edgar County*, 142 Ill. 528, 18 L.R.A. 447, 32 N. E. 493; *Vacheron v. New York*, 34 Misc. 420, 69 N. Y. Supp. 608; *Franklin County v. Frank*, 6 Ohio C. D. 133, 9 Ohio C. C. 301, cited in note 12 Ann. Cas. 990; 3 McQuillin, Mun. Corp. § 1254, p. 2730; *Egan v. St. Paul*, 57 Minn. 1, 58 N. W. 267.

In the last case cited the court said: "The rule established by the decision of the lower court is that public officers upon whom is devolved the duty of selecting persons to render daily routine services of a very common character about a public building have the power to enter into contracts with these persons, which, both as to terms of service and compensation, will bind the public, and will deprive their successors in office from making any changes, except for such causes as would relieve the master from the obligations of a contract entered into with a servant. No authority can be found which will sustain such a rule of law. Should this doctrine prevail, the committee in question could have contracted with plaintiff for his services as custodian for a period of three, four, or five years. . . . and the compensation to be paid would, if the right be conceded at all, necessarily be within the somewhat unlimited discretion of the committee. Authorized to appoint a janitor, a custodian, and, in general language, such other employees as may be deemed necessary, the committee could, on any day during the year, enter into a time contract with any employee, from janitor down to scrubwoman, for no distinction can be made based upon the kind of work performed by the employee. If a custodian can be permitted to bind the public with a contract, so can the most menial employee about the premises. Under this doctrine, places with excessive salaries attached could be made for a host of political friends by the members of an outgoing committee, and their successors would be powerless—practically unable—to change the force, or to drop persons not needed, or to reduce their compensation. A rule of this kind in the public service would prove intolerable. It is not even the law relating to public officers, for, where the tenure of an appointive office is not prescribed by the Constitution or by statute, the appointee holds at the will of the appointing power and of himself, and he may be removed by the former at pleasure. *Ex parte Hennen*, 13 Pet. 255, 10 L. ed. 150; *People ex rel. Royal v. Fire Comrs.* 73 N. Y. 437. . . . To have charge and to exercise control over the building, the committee must be given full

power, within reasonable limits, of course, to determine the number and kind of employees needed in addition to the janitor and custodian, to select all employees, and to fix their compensation."

The facts of this case place its decision within the exception to the general rule, and the contract sued upon is therefore invalid as against public policy.

The removal of the plaintiff by the incoming town council was not a violation of the contract, but was a valid exercise of the corporate power. In *Mack v. New York*, 37 Misc. 371, 75 N. Y. Supp. 809, the court lays down this rule: "The rule is that where the power of appointment is conferred in general terms, and without restriction, the power of removal, in the discretion and at the will of the appointing power, is implied, and always exists, unless restrained and limited by some other provision of law,"—citing many cases.

The court erred in overruling the motion for judgment, for the reasons the plaintiff had no valid binding contract with the defendant, and therefore could suffer no injury by reason of defendant's refusal to perform; and no injury could result from defendant's ordering plaintiff discharged, notwithstanding the instrument is in form a contract of employment for one year.

The judgment is vacated, and the cause remanded, with instructions to dismiss.

Franklin, J., concurs.

Ross, Ch. J., dissenting:

All the learning of the majority opinion about the discharge of appellee is aside from, and foreign to, any question involved or discussed by either party to this appeal. Neither in its answer nor by its evidence does the appellant deny nor combat the discharge by it of the appellee. On the contrary, its defense is based on the theory that the contract alleged did not bind it. On the trial it was assumed by both parties that appellant had discharged the appellee and placed another in his place; the former asserting it to be within its rights to do so. The insufficiency of the evidence was not raised by appellant in his motion for a new trial, nor is it assigned as error on appeal. It was not a disputed or contested question on the trial of the cause, nor is the question properly before this court for disposition.

That the city council, as such, was charged with the duty of caring for the streets of appellant, and to that end empowered to engage the services of appellee, cannot well be questioned. He is not by virtue of such employment an "officer or agent" of the city, but a servant or em-

ployee. In 28 Cyc. 585, it is said: "Generally, an officer takes an oath of office, while a mere agent or employee does not. The duties and services of a mere employee are purely ministerial, and he is not clothed with discretion nor with power to represent or bind the corporation. A municipal agent holds a position of trust, responsibility, and discretion. His relation is fiduciary, and he may contract with third persons in the name of the corporation, but he is distinguished from an officer in the fact that his position is not permanent, but temporary, and for a special object, and this distinction is often a very important one."

There is no pretense or suggestion that there was any fraud or collusion, or that the contract was unfair or unreasonable, or that appellee was an unfit person for the work, or that he was not faithfully performing his part of the contract. His employment to sprinkle and clean the streets did not deprive the incoming council of its rights of superintendence over such work. If he faithfully performed his engagement, the council's duty to the public was as well performed through him as it could be through any other person. It is not a case of personal or professional service entitling the council to choose for itself persons to whose professional honesty, skill, and ability are to be delegated or confided important functions of the council. It is merely to drive a sprinkling wagon and clean the garbage from the streets under the supervision of the supervisor of the streets. He had done this for the year ending May 31, 1912. The new council was not to take office until June 13, 1912. The council, regardless of its personnel, had the power to employ someone to do this work of sprinkling its streets and caring for its garbage. I do not think this power was necessarily limited to the thirteen unexpired days of their term, so long as they acted in good faith and for the best interests of the city.

In *Manley v. Scott*, 108 Minn. 142, 29 L.R.A. (N.S.) 652, 121 N. W. 628, the following question was answered in the affirmative: "Has the board of county commissioners the power to make a contract with an employee which extends beyond the expiration of the terms of office of certain members of the board?"

The court said: "While there is some apparent conflict in the authorities, it is reasonably clear that the weight of authority is to the effect that the board has such power."

After discussing and distinguishing many of the decided cases for and against the proposition, the court concludes with this statement: "The morgue keeper is an employee, and not a public officer. His selec-

tion and employment for a definite and reasonable term in no manner interfere with the proper discharge of the duties of the board of county commissioners, nor does it deprive the board of full power and proper control over the things and matters submitted to its care by the statutes. It is conceded that the person employed by the board on December 31, 1908, was and is a suitable person to perform the duties required to be performed by him. Having the power at that time to employ a morgue keeper, there is no implied limitation upon that power which restricts the possible term of employment to the time when any member or members of the board shall go out of office. The contract made in this instance was fair and reasonable, and no question of fraud or collusion is even suggested. Such being the facts, we can conceive of no principle of public policy which is violated by the contract in question. The contract being thus valid, the board, after the new members qualified, had no power to revoke or rescind it without cause being shown."

Petition for rehearing denied June 12, 1915.

—
CALIFORNIA SUPREME COURT.
(Department No. 2.)

THOMAS LYNN, Appt.,
v.

J. W. GOODWIN, Respt.

(— Cal. —, 148 Pac. 927.)

Automobile — riding with drunken chauffeur — negligence.

One is negligent in riding in an automobile with knowledge that the chauffeur is drunk, so as to prevent his holding the driver of another automobile liable, because of the speed at which he was driving, for injury to him by a collision between the two cars, if the injury was caused by the act of the driver of the car in which he was riding.

(April 28, 1915.)

APPEAL by plaintiff from a judgment of the Superior Court for Santa Clara County, in defendant's favor, and from an order denying a new trial in an action

Note. — The question as to contributory negligence of one riding in an automobile driven by another, precluding recovery against a third person for an injury, including both the question of imputed and actual negligence of the passenger, is treated in the note to *Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co.*, L.R.A.1915B, 953; and see references therein to other notes. L.R.A.1915E.

brought to recover damages for personal injuries occasioned by a collision between defendant's automobile and one in which plaintiff was riding. Affirmed.

The facts are stated in the opinion.

Messrs. Rogers, Bloomingdale, & Free, for appellant:

Defendant's automobile was being driven at an unlawful rate of speed, and this, in itself, constitutes negligence *per se*, and renders him at least prima facie liable for damages occasioned to the plaintiff by reason of the collision of his automobile with the machine in which plaintiff was riding.

Siemers v. Eisen, 54 Cal. 418; *Orcutt v. Pacific Coast R. Co.* 85 Cal. 291, 24 Pac. 661, 11 Am. Neg. Cas. 216; *Driscoll v. Market Street Cable R. Co.* 97 Cal. 553, 33 Am. St. Rep. 203, 32 Pac. 591, 11 Am. Neg. Cas. 186; *McKune v. Santa Clara Valley Mill & Lumber Co.* 110 Cal. 480, 42 Pac. 980; *Bresee v. Los Angeles Traction Co.* 149 Cal. 131, 5 L.R.A.(N.S.) 1059, 85 Pac. 152; *Fenn v. Clark*, 11 Cal. App. 79, 103 Pac. 944; 21 Enc. L. & P. 478, and notes; 29 Cyc. 436.

It was the duty of the driver of defendant's automobile to operate his machine at such reasonable rate of speed, even less than the maximum rate of 20 miles an hour, as not to endanger the life or limb of any person.

7 Thomp. Neg. § 1340f; *Gregory v. Slaughter*, 124 Ky. 345, 8 L.R.A.(N.S.) 1228, 124 Am. St. Rep. 402, 99 S. W. 247; *Christy v. Elliott*, 216 Ill. 31, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 74 N. E. 1035, 3 Ann. Cas. 487.

The negligence of the driver is not imputable to a passenger in a vehicle.

1 Thomp. Neg. § 502; *Bresee v. Los Angeles Traction Co.* 149 Cal. 131, 5 L.R.A.(N.S.) 1059, 85 Pac. 152; *Fujise v. Los Angeles R. Co.* 12 Cal. App. 207, 107 Pac. 317; *Lininger v. San Francisco, V. & N. Valley R. Co.* 18 Cal. App. 411, 123 Pac. 235; *Wilson v. Puget Sound Electric R. Co.* 52 Wash. 522, 132 Am. St. Rep. 1044, 101 Pac. 50; *Sheffield v. Central U. Teleph. Co.* 36 Fed. 164; *Union P. R. Co. v. Lapsley*, 16 L.R.A. 800, 2 C. C. A. 149, 4 U. S. App. 542, 51 Fed. 174.

Messrs. Louis Oneal, James P. Sex, and Wright & Wright & Stetson, for respondent:

No recovery can be had by plaintiff, the evidence being clear that the injury would not have happened except for the negligence of plaintiff concurring with that of defendant.

Pennsylvania R. Co. v. Aspell, 23 Pa. 147, 62 Am. Dec. 323, 6 Am. Neg. Cas. 225; *Richmond & D. R. Co. v. Pickleseimer*, 85 Va. 798, 10 S. E. 44, 7 Am. Neg. Cas. 15;

Grand Trunk R. Co. v. Ives, 144 U. S. 408, 429, 36 L. ed. 485, 493, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; Clark v. Chicago & A. R. Co. 127 Mo. 197, 29 S. W. 1013.

Whether the intoxication of a person injured was such as to contribute to the injury is a question of fact for the jury.

Houston & T. C. R. Co. v. Sympkins, 54 Tex. 615, 38 Am. Rep. 632.

The intoxication in any degree of a person injured is proper to be considered, in an action for damages for the injury, in determining the question of his contributory negligence.

Alger v. Lowell, 3 Allen, 402; Hankinson v. Charlotte, C. & A. R. Co. 41 S. C. 1, 19 S. E. 206; Houston & T. C. R. Co. v. Waller, 56 Tex. 331; Northern P. R. Co. v. Craft, 16 C. C. A. 175, 29 U. S. App. 687, 69 Fed. 124.

Plaintiff was negligent in riding with an intoxicated driver, and in not warning him of danger when about to turn from behind the brush wagon into the west side of the road.

1 Thomp. Neg. § 503; Brickell v. New York C. & H. R. R. Co. 120 N. Y. 290, 17 Am. St. Rep. 648, 24 N. E. 449; Bresee v. Los Angeles Traction Co. 149 Cal. 131, 5 L.R.A.(N.S.) 1059, 85 Pac. 152; Meenagh v. Buckmaster, 26 App. Div. 451, 50 N. Y. Supp. 85; Read v. New York C. & H. R. R. Co. 123 App. Div. 228, 107 N. Y. Supp. 1068; Brommer v. Pennsylvania R. Co. 29 L.R.A.(N.S.) 924, 103 C. C. A. 135, 179 Fed. 581; Smith v. New York C. & H. R. R. Co. 38 Hun, 33; Union P. R. Co. v. Lapsley, 16 L.R.A. 800, 2 C. C. A. 149, 4 U. S. App. 542, 51 Fed. 174; Davis v. Chicago, R. I. & P. R. Co. 16 L.R.A.(N.S.) 424, 88 C. C. A. 488, 159 Fed. 10; Dryden v. Pennsylvania R. Co. 211 Pa. 620, 61 Atl. 249; Evensen v. Lexington & B. Street R. Co. 187 Mass. 77, 72 N. E. 355; Kane v. Boston Elev. R. Co. 192 Mass. 386, 78 N. E. 485; Cotton v. Willmar & S. F. R. Co. 99 Minn. 366, 8 L.R.A.(N.S.) 643, 116 Am. St. Rep. 422, 109 N. W. 835, 9 Ann. Cas. 935; Hanson v. Manchester Street R. Co. 73 N. H. 395, 62 Atl. 595; Lake Shore & M. S. R. Co. v. Boyts, 16 Ind. App. 640, 45 N. E. 812; Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 531; Rock Island v. Vandalsschoot, 78 Ill. 485.

Henshaw, J., delivered the opinion of the court:

Plaintiff sought damages for personal injuries to himself arising out of an automobile collision. The case was tried before the court without a jury, and the findings of the court were that P. W. Metcalf was

driving the car in which plaintiff was seated; that Metcalf approached a wagon with a large load of brush; that the load of brush was 9 feet or more in width and obstructed the view of Metcalf and plaintiff, and prevented them from seeing the roadway in front; that they turned to the left to pass this load of brush and collided with defendant's automobile. This automobile was in all respects being carefully and prudently handled, saving that it was being driven at a speed of about 25 miles an hour. Metcalf was driving his automobile at about 20 miles an hour. The collision would probably have taken place if defendant's automobile had been traveling at a rate of speed of 20 miles an hour. The collision would not have taken place if Metcalf had not driven his automobile to the extreme westerly side of the road and across the pathway which was being followed by the automobile of defendant. The automobile of defendant was at the extreme right-hand part of the road, where it should have been. Metcalf's recklessness in driving was the direct, proximate, and primary cause of the collision, and Metcalf when so driving, and when the accident occurred, was under the influence of liquor and was drunk. Plaintiff, his companion, knew this, and a reasonably prudent person would not have ridden in the automobile with Metcalf in his condition of inebriety.

Evidence of Metcalf's intemperate habits was admitted, and also evidence that in times past he had frequently driven in an intoxicated condition and had been subject to seizures when at the wheel which temporarily made him helpless and unable to control his machine. It is argued that the admission of this evidence was incompetent. Without passing upon this question, suffice it to say that it was not injurious, for the evidence was abundant that, at the time of the accident, Metcalf was under the influence of liquor, and plaintiff must have known it.

While it is true that in general the negligence of the driver of a vehicle is not imputable to a passenger so as to bar that passenger's right of recovery (Bresee v. Los Angeles Traction Co. 149 Cal. 131, 5 L.R.A.(N.S.) 1059, 85 Pac. 152), yet the conduct of the plaintiff in riding and in continuing to ride in an automobile when he must have known that the driver was intoxicated established independent negligence upon the plaintiff's part, apart from the driver's negligence, barring the right of recovery (Bresee v. Los Angeles Traction Co. supra, 149 Cal. 137; Meenagh v. Buckmaster, 26 App. Div. 451, 50 N. Y. Supp. 85; Read v. New York C. & H. R. R. Co. 123 App. Div.

228, 107 N. Y. Supp. 1068; Brommer v. Pennsylvania R. Co. 29 L.R.A.(N.S.) 924, 103 C. C. A. 135, 179 Fed. 581).

The judgment and order appealed from are therefore affirmed.

We concur: **Melvin, J.; Lorigan, J.**

KANSAS SUPREME COURT.

W. H. COX

v.

FRED F. CHASE et al., Appts.

(95 Kan. 531, 148 Pac. 766.)

Agistment — duty to furnish water.

1. A contract to pasture certain cattle during the season in a named pasture, which the owners of the cattle had never seen, im-

Headnotes by WEST, J.

Note. — Duty of agister to supply water.

For the construction of agistment contracts generally, see note to Sawyer v. Wilkinson, L.R.A.1915B, 302.

And as to loss or injury in cases of agistment, see note to Stone v. Case, 43 L.R.A. (N.S.) 1186.

While the duty of one to provide cattle with food and shelter is involved in Pieper v. Krutzfeldt, 155 Iowa, 716, 136 N. W. 904, there is a fair inference in that case that a person who merely rents his field to another for the purpose of placing cattle therein is under no obligation to supply water in the absence of an agreement to care for the cattle, even though there is a statute requiring persons owning or having the care or control of animals to provide them "with proper food, drink, shelter, or protection from weather."

In Crawford v. Cashman, 82 Mo. App. 554, an action to recover the contract price of pasturing cattle, in which a counterclaim was set up for damage arising from the removal of the cattle from one pasture to another because of the lack of water, the court said that the removal of the cattle under the circumstances could not be treated as a negligent act; that to have done otherwise and kept them where there was no water would have been negligence.

Under a contract to pasture cattle for a term not longer than eight months, the owner of the cattle reserving the right to move them at any time that they might be liable to loss for lack of grass or water, paying for the time expired, it was held in Meuly Bros. v. Corkill, 75 Tex. 599, 12 S. W. 1005, that the owner of the pasture was not bound to furnish pasture for the full eight months, but only up to the time of removal of the cattle. The court said: "We think it clear that plaintiff did not

plied an agreement to supply water as well as grass.

Same — care required.

2. Under the contract in question, the plaintiff owner is held for ordinary care to keep such pasture supplied with water, and to give the defendants timely notification in case of its failure.

Trial — jury — care.

3. Such ordinary care was a question for submission to the jury upon competent evidence under proper instructions.

Same — deductions from compensation.

4. Failure of water rendered the pasture valueless, and worked a failure of consideration which, together with any damage properly shown, should be deducted from the contract price of the pasture for the season.

(May 8, 1915.)

A PPEAL by defendants from a judgment of the District Court for Chase County in plaintiff's favor in an action brought to

bind himself to furnish pasture for the cattle for the full period of eight months, or any longer than he in fact did furnish it. There is nothing in the record to indicate that the situation and condition of the pasture were not open to the observation of defendants, or not known to them in all respects when they made the contract. The evidence shows that the pasture, all the time that it was occupied by defendants' cattle, contained both grass and water. The contract did not make plaintiff responsible for the continuance of the supply of either, but on the contrary defendants expressly reserved to themselves the right of determining as to these things, and of protecting themselves from such loss by withdrawing their cattle at any time. They as expressly agreed that when they did exercise their right of withdrawing their cattle, they would pay the stipulated price for the time they permitted them to remain in the pasture."

Where an owner sought to recover damages for failure to furnish cattle sufficient grass and water under a contract to pasture the same, the court in Hines v. Shafer, — Tex. Civ. App. —, 74 S. W. 562, held admissible evidence offered by defendant that an unprecedented drought prevailed throughout the country where the cattle were situated, burning the grass and rendering the pasturage very poor and scant, and in consequence whereof cattle throughout such section became very poor and weak, and that all persons pasturing cattle in that section lost heavily by the death of cattle during the period covered by the contract.

An agister was held liable in Vaughn v. Bixby, 24 Cal. App. 641, 142 Pac. 100, for the loss of horses which died for the want of water, where the water supply was sufficient, but inaccessible to the horses.

J. D. C.

recover a balance alleged to be due upon a contract for the pasturage of certain cattle. Reversed.

The facts are stated in the opinion.

Messrs. **W. L. Huggins and Humbert Riddle**, for appellants:

The contract was one of agistment.

2 Cyc. 315.

It is the duty of the agister "to take such care of agisted cattle as a reasonably prudent man would take of his own cattle."

2 Cyc. 321; *Cloyd v. Steiger*, 139 Ill. 41, 28 N. E. 987; *Murray v. Rhodes*, 3 Lack. Jur. 123; *Ransom v. Getty*, 37 Kan. 75, 14 Pac. 487; *Calland v. Nichols*, 30 Neb. 532, 46 N. W. 631, 1 Am. Neg. Cas. 460; *Mattern v. McCarthy*, 73 Neb. 228, 102 N. W. 468; *Darr v. Donovan*, 73 Neb. 424, 102 N. W. 1012; *Sargent v. Slack*, 47 Vt. 674, 19 Am. Rep. 136; *Cecil v. Preuch*, 4 Mart. N. S. 256, 16 Am. Dec. 171, 1 Am. Neg. Cas. 449.

Messrs. **W. N. Smelser, R. M. Hamer, and H. E. Ganse**, for appellee:

Defendants got what they contracted for.

Brown v. St. John Trust Co. 71 Kan. 134, 80 Pac. 37.

West, J., delivered the opinion of the court:

This was an action to recover an alleged balance due for pasturing cattle for the season of 1913. The substantial part of the contract is as follows:

"Witnesseeth, that the said party of the first part this day agrees to pasture for the said parties of the second part, in his pasture known as the 'Hume' pasture, 4 miles east of Bazaar, Chase county, Kansas, 903 head of cattle [verbally changed to 923 later]; that said first party agrees to receive all of said cattle at the station in Bazaar, Chase county, Kansas, and to deliver the same to said parties of the second part in any number they may desire at said station during said pasture season or at the end thereof; that when said season closes, said first party agrees to be responsible to second party for all cattle lost during said pasture season, and agrees to pay them for such lost cattle what said steer or steers that may be lost cost second parties, together with the freight added; in case any cattle die, then first party shall keep the brand and shall not be liable for all cattle that may die during said season. Said first party shall keep salt at all times in said pasture for said cattle."

"In consideration of the covenants set forth above, second parties agree to pay first party \$8 per head for the pasturing of said cattle, to be paid when said cattle are taken out of said pasture, but should said cattle be kept in said pasture to any date L.R.A.1915E.

later than October 1, 1913, then second parties agree to pay said party all of said rent on the 1st day of October, A. D. 1913."

The answer admitted the execution of the contract and the delivery to plaintiff of 923 cattle, and the agreement to pay \$8 a head for the pasturage thereof; also alleged: That the plaintiff was an agister, and it was his duty to give the cattle such care and attention as an ordinarily prudent man would under similar circumstances give his own cattle, and to keep the defendants informed of the condition of the pasture and of the cattle. That, when the cattle were delivered, the plaintiff orally stated to the defendants that he would take care of them as if they were his own. That they knew him to be a capable cattleman of long experience, and depended on him to take prudent care of their cattle. That about the 15th of August the water began to fail, and the employee of the plaintiff who looked after the pasture for him notified him on the 6th of August of the failing condition of the water, and within a few days thereafter the plaintiff went from his home to this employee and remained there until after the cattle were shipped; that the water continued to decrease and became wholly inadequate, the plaintiff wholly failing to advise the defendants thereof, but on the 19th of August, after the water had failed, he notified them by letter that there was an adequate supply of water in the pasture. A copy of this letter contained a statement that, while the grass and water were plenty, the cattle kept the latter stirred up and in bad shape and would soon shrink if not changed. "Will keep you posted as to the cattle." That the plaintiff neglected to take reasonable precaution to furnish a more adequate supply of water, and that, with reasonable precaution, an adequate supply could have been furnished, and that about the 25th of August, long after the supply had failed, the plaintiff notified the defendants of such failure, whereupon they were compelled to ship the cattle, they being in such shape from lack of water that damage was suffered in the sum of \$6,810, for which judgment was asked. In reply after a general denial, it was alleged that in his pasturage of such cattle the plaintiff exercised ordinary care in keeping them, and such care as an ordinarily prudent man would use in the performance of the same duty towards his own property; that the plaintiff notified the defendants on August 5th of the failure of water and again on August 26th, and that he, without consideration, drove the cattle to water a distance of 4 miles, and scraped out the holes in the creek in an effort to conserve the water supply; and that in the

summer of 1913 there was a severe and prolonged drouth, and that all the lack of water complained of was unavoidable and an act of God, and not the result of any fault of the plaintiff, who did everything within his power to alleviate the condition. A supplemental answer was filed setting up the loss of one month's pasturage in the sum of \$1,316.20.

The plaintiff testified to receiving the cattle and to returning them on account of the defendants, and that there remained unpaid the sum of \$2,408.

The defendants offered to show that, at the time the contract was executed, the defendants had never seen the pasture in question, but that the plaintiff described it as one of the best in Chase county, stating that there was an abundant water supply, and that, if he took the cattle, he would look after them as he would after his own. They offered to prove that for a small expense the plaintiff could have fenced the ponds and prevented the cattle from wading in them, and could have put in tanks and pipes and used other means to secure water; also that other cattlemen in the vicinity used such means successfully, and that such is the custom in that vicinity observed by the owners of the pastures in order to furnish water; also that, prior to the making of the contract, the plaintiff stated that he was charging the price he did because of the excellency of the pasture, its abundant grass and water, and on account of the extra care he was to give the cattle.

Testimony was introduced to the effect that on August 28th one of the defendants had a conversation with the plaintiff over the telephone in which it was stated that the cattle were out of water; that the defendants did not want them driven 4 miles for water every day, and, if the plaintiff could not get water for them, he supposed they would have to ship the cattle out; that the next day cars were ordered. It was also testified by one of the defendants that there was a shrinkage of 50 cents a hundred pounds in their value, and by the other that it was from 15 to 25 cents a hundred pounds.

The trial court denied the offers to prove, and directed a verdict for the amount sued for, thus holding in effect that the plaintiff had complied with his contract, which, in the course of the trial, the judge remarked that he did not regard as a lease, but as an agreement to pasture so many head of cattle on that pasture.

The plaintiff claims that about August 7th in a letter he offered to scrape the bottom of the creek and increase the water if the defendants wished him to, and it appears that near that date one of the defend-

ants wrote him that it would be a big help if the water was getting low. It was also testified that on the 28th the plaintiff and his fence rider stated that arrangements had been made to drive the cattle to water for two or three days, but not longer. It was further testified that the cattle were shipped out because they could not be watered, and because the plaintiff and his employee said they would have to be taken out; also that they were driven to water a few times, and that they were seen "walking the fence" at various times by several witnesses.

The case has been presented and argued by the plaintiff on the theory that he had done all he contracted to do, and by the defendants on the theory that the contract was one of agistment, requiring ordinary care on the part of the plaintiff to keep the pasture supplied with water, and that they were erroneously precluded from showing want of such care.

A careful examination of the contract and all the conditions and circumstances shown has led to the conviction: (1) That the contract is essentially one for the pasturage of cattle, and is not a lease; (2) that, as a pasture without grass would be an impossibility, so one without water would be without value; (3) that the contract carries the implication that the pasture should have necessary water as well as necessary grass, and that the plaintiff is held for ordinary care to keep the pasture supplied with water, at least to the extent of using due diligence to conserve the natural resources of the place, and to give the defendants timely notification in case of its failure; (4) that such ordinary care was a question for the jury to determine for competent evidence under proper instructions; and (5) that the failure of water rendered the pasture valueless thereafter, and to this extent the consideration failed, and the defendants are entitled to deduct from the total contract price such damages and failure of consideration as may be properly shown.

In the case of *Brown v. St. John Trust Co.* 71 Kan. 134, 80 Pac. 37, relied on by the plaintiff, the parties went over the pasture and examined it before contracting, while here the defendants had never seen the pasture, and had a right to assume that it would supply water as well as grass for their cattle.

The defendants alleged a want of ordinary care, and in reply the plaintiff alleged the exercise thereof, thus making it an issue on which both parties had a right to offer competent evidence.

Authorities directly in point have not been cited or found, but the following are

more or less in support of some of the conclusions reached, all of which conclusions appear to rest upon principles of reason and fairness: *Calland v. Nichols*, 30 Neb. 532, 46 N. W. 631, 1 Am. Neg. Cas. 460; *Mattern v. McCarthy*, 73 Neb. 228, 102 N. W. 468; *Darr v. Donovan*, 73 Neb. 424, 102 N. W. 1012; *Hines v. Shafer*, — Tex. Civ. App. —, 74 S. W. 562; *Scovill v. Melton*, 38 Tex. Civ. App. 351, 85 S. W. 463; *J. B. Wallis & Co. v. Wallace*, — Tex. Civ. App. —, 92 S. W. 43; *Arrington Bros. v. Fleming*, 117 Ga. 449, 97 Am. St. Rep. 169, 43 S. E. 691; *Crawford v. Cashman*, 82 Mo. App. 554.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith.

Petition for rehearing denied.

KENTUCKY COURT OF APPEALS.

P. B. REYNOLDS et al., Appts.,

v.

SUDIE SEVIER et al.

(165 Ky. 158, 176 S. W. 961.)

Will — effect of loss of sight by attending witness.

1. Inability of an attending witness to identify the will and his signature thereto, because of failure of sight, does not defeat probate, if he testifies to the proper execution and attestation of a will, and the other attesting witnesses, besides giving similar testimony, identify the will offered as the one attested by such witness.

Same — undue influence — sufficiency of evidence.

2. Undue influence to make a will in favor of cousins with whom testator has made his home practically all his life, to the ex-

clusion of half brothers and their descendants, is not shown by the fact that he is shown to have deferred on occasions to the wishes of one of the cousins, in that he gave her a horse, to the inconvenience of his business, gave her some gold money when she tried to secure some by exchanging with a stranger, after telling her she did not need it, took her advice rather than the physician's with respects to screens for his sick room, and conveyed land to her brother for a home.

(June 1, 1915.)

APPEAL by contestants from a judgment of the Circuit Court for Clay County, sustaining the will of William H. Sevier, deceased, in a proceeding for its probate. Affirmed.

The facts are stated in the opinion.

Messrs. A. T. Manning, H. C. Faulkner, and G. M. Manning for appellants.

Messrs. John D. White and Wehle & Wehle, for appellees:

The due execution of a will may be proved by one of the subscribing witnesses testifying to the compliance with some, and another subscribing witness to the compliance with other, requirements of § 4828, Kentucky Statutes.

Gwin v. Radford, 2 Litt. (Ky.) 137.

Unless the testimony offered by the proponders concerning the execution of the will is contradicted by witnesses for the contestants, the question whether there was a due execution of the will must be decided by the court, and not by the jury.

Word v. Whipps, 16 Ky. L. Rep. 403, 28 S. W. 151; *Bramel v. Bramel*, 101 Ky. 64, 39 S. W. 520.

Otherwise where the genuineness of handwriting is attacked by witnesses for contestants.

Note. — Wills: loss of eyesight of attesting witness preventing his identification of instrument or signature.

There is very little in the books upon proof of wills by attesting witnesses who have lost their eyesight. The decision in *REYNOLDS v. SEVIER* can be supported by that in *Jackson ex dem. Henry v. Thompson*, 6 Cow. 178, an action in ejectment, where it was held that a will was sufficiently proved by the testimony of a subscribing witness, who, from old age, could not see to read, and could not identify his signature on the trial (but it was also held that the will was properly receivable without proof, as it had been proved in the surrogate's office more than forty years before, since when there had been possession under it). The court said: "The will was properly admitted in evidence. Its execution was sufficiently proved by Richardson, one of the subscribing witnesses. He testified,

positively and distinctly to every fact necessary to show a valid execution of the will. His recollection, as to every circumstance, was clear. Being more than ninety years of age, he could not see to read, and, therefore, could not testify upon the trial to his signature as a witness. But he swore that he had seen the will in the surrogate's office and that he then read and recognized his signature as genuine. As to the identity of the will produced on the trial, and that which the witness had seen in the surrogate's office, there was no dispute."

In *Gillis v. Gillis*, 96 Ga. 1, 30 L.R.A. 143, 51 Am. St. Rep. 121, 23 S. E. 107, the will was admitted where one of the attesting witnesses had signed by mark and could not identify it, and had no recollection of witnessing the will, the court holding that the time not of probate, but of attestation, was referred to by the statute which provided that "a witness may attest by his mark, provided he can swear to the same,"

McNamara v. Coughlin, 159 Ky. 810, 169 S. W. 555.

There is no scintilla of evidence of undue influence, and the court should not submit the question of undue influence to the jury.

Hildreth v. Hildreth, 153 Ky. 597, 156 S. W. 144; Childers v. Cartwright, 136 Ky. 498, 124 S. W. 802; Crump v. Chenault, 154 Ky. 187, 156 S. W. 1053; Clark v. Young, 146 Ky. 377, 142 S. W. 1032.

Proof of mere yielding by the testator to the devisee in unimportant matters having no connection with the making of the will is not a scintilla of evidence.

In all cases cited by counsel for contestants to sustain the scintilla rule in will cases, there had been proved some of the elements of undue influence both regarding the mental incapacity of the testator and the undue influence of devisee, as in—

Holliday v. Holliday, 161 Ky. 500, 171 S. W. 156; Walls v. Walls, 30 Ky. L. Rep. 948, 99 S. W. 969; Lischy v. Schrader, 104 Ky. 657, 47 S. W. 611; Fry v. Jones, 95 Ky. 148, 44 Am. St. Rep. 206, 24 S. W. 5; Bramel v. Crain, 157 Ky. 671, 163 S. W. 1125; Meuth v. Meuth, 177 Ky. 784, 164 S. W. 63; Barber v. Baldwin, 138 Ky. 715, 128 S. W. 1092.

Clay, C., filed the following opinion:

In this contest over the will of W. H. Sevier, deceased, there was a directed verdict sustaining the will. The contestants appeal.

The contestants ask a reversal on the following grounds: (1) Execution of the will was not properly proven; (2) the trial

and said: "Suppose he should die, or become blind or insane, . . . must the will fail? . . . Can it be possible that it was intended to revolutionize the law on the subject, and make the validity of a will depend upon the life, the eyesight, the continued sanity, the integrity, the memory, or the accessibility of witnesses? No court should so hold, unless constrained by the plainest language to do so."

In Major v. Esneault, 7 La. Ann. 51, where the partial deafness of a witness to the will appears to have been disclosed on his cross examination, the court construed the statute declaring that persons insane, deaf, dumb, or blind are absolutely incapable of being witnesses to testaments as not relating to persons whose sense of hearing or seeing is defective, and said: "We do not think that the witness, Favre, can be considered as laboring under this incapacity, at the time of his being a witness to this will. We think the contrary results from his testimony."

It may be noted that in Simmons v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280, it was held that a will was not sufficiently executed where the name of the of the witnesses was signed at the request

court erred in not submitting the question of undue influence to the jury.

1. The evidence bearing on the execution of the will is as follows: The attesting witness Samuel Arnett stated that at the request of the testator he went to the home of John D. White on August 8, 1894, the date the will purports to have been executed. The testator told Mr. White that he wanted him to write a will. Witness saw the will written and heard it read, and then signed it as a witness. When he signed the will the testator and Mr. Morgan were present. He also saw Morgan sign the will. The testator and John D. White also signed it. Witness was unable to identify his handwriting on the will, because his eyesight had failed. John D. White, an attorney, testified that he wrote the will under the following circumstances: The testator came to his house on August 8, 1894. Testator was accompanied by Samuel Arnett. Testator requested the witness to prepare the will. The will was written and read to the testator. William H. Sevier signed his name in the presence of witness. Samuel Arnett was sitting in the room at the time, and he signed it as a witness. He was not sure that James Morgan heard the will read over before it was signed. (At this point the will was read by the witness to the jury.) Witness stated the will was exactly as he had written it. The will, as read, was signed by the testator in his presence, and witness attested it in the testator's presence. Both Samuel Arnett and James Morgan attested it in witness's presence. James Morgan, the other

of such witness by the principal devisee, as he was so nearly blind he could not write, there being nothing on the will to show that he had not signed in person, no mark being made by him, and he not having the will in his hands, nor did he know whether the testatrix had signed it (no one stated she had done so), nor did he hear it read or know its contents.

As to loss of eyesight of witness to a deed, see the note to Garrett v. Hanshue, 35 L.R.A. 336.

As to the question whether the competency of an attesting witness to a will is to be determined as of the time of attestation or of probate, see the note to Bruce v. Shuler, 35 L.R.A.(N.S.) 686.

As to proof of will where attesting witnesses have forgotten circumstances attending its execution, see the note to Re Carey, 51 L.R.A.(N.S.) 927.

As to signing or attesting will by mark, see the note to Re Guilfoyle, 22 L.R.A. 372.

As to proof of signature of will by mark when attesting witnesses thereto are dead or cannot remember the transaction, see the note to Wienecke v. Arbin, 44 L.R.A. 142.

B. B. B.

attesting witness, stated that he was present on the occasion in question. Mr. Sevier came to Mr. White's house to have a will drawn up. He witnessed the will. The will was shown to him, and he identified the will as the one in question. He attested the will in Mr. Sevier's presence. Though not positive about it, he thinks he saw the testator sign the will. He also thought that he saw Mr. White and Samuel Arnett sign the will.

It will be seen from the foregoing statement of the testimony that, though Arnett was unable to identify his handwriting on the will, because his eyesight had failed, he testified very clearly to the fact that the will was written and read over in testator's presence and in the presence of witnesses; that he signed it as a witness in the presence of the testator, and also saw the testator, White, and Morgan sign it. White says that he saw Arnett sign the will, and Morgan says that he thinks he saw both White and Arnett sign it. Arnett was unable to identify the will. Both White and Morgan did identify it. But it is insisted that, as Arnett was not dead or incapable of testifying, but was present as a witness, it was not competent to prove by other witnesses that he attested the will. In the early case of *Gwinn v. Radford*, 2 Litt. (Ky.) 137, it was held that the statute did not require the fact of attestation to be established alone by the testimony of the subscribing witnesses, but that such fact might be ascertained by any evidence competent for the purpose. In discussing the question the court said: "It is certainly true that the statute requires a will in such a case to be attested by two witnesses subscribing their names in the presence of the testator; but it is equally true that it does not require the fact that it was so attested to be established by the testimony of the subscribing witnesses only, and that it leaves the fact to be ascertained by any evidence competent for the purpose. It has accordingly been held, where the subscribing witnesses have died, or become insane, or are otherwise incapable of testifying, that the fact of their having subscribed their names in the presence of the testator may be established by proof of their handwriting; and wills have been established even in opposition to the wilful denial of their signatures by the subscribing witnesses, when called upon to testify. The point in controversy, then, resolves itself into a mere question of fact, whether the witness who is unable to recollect the mode of his attestation did subscribe his name in the presence of the testator."

The same doctrine was applied and followed in the cases of *Pate v. Joe*, 3 J. J. Marsh, 113; *Tudor v. Tudor*, 17 B. Mon. 383; and in *Montgomery v. Perkins*, 2 Met. (Ky.) 448, 74 Am. Dec. 419. In the last-mentioned case the court said: "If one or both of the subscribing witnesses had died or become insane, or otherwise incapable of testifying before the trial, evidence of the fact of their having subscribed the will as witnesses would have been admitted, no doubt, without objection. Why may not the same fact be established by the same evidence, and for the same purpose—that of identifying the paper—even in opposition to their vague opinions and their uncertain recollections touching the fact of identity, a fact concerning which their opinions must, in the very nature of the case, be entitled to but little weight, when considered in connection with the explicit and satisfactory statements of another witness who was present at the same time, who wrote the paper, and whose opportunities and capacity to know and to remember the material facts in dispute have not been questioned?"

Clearly, under the above rule, it was competent for both White and Morgan to identify the will as the one signed by Arnett, and prove that he attested it in the presence of the testator. While it may be that neither the testimony of Arnett nor of Morgan is sufficient of itself to show proper execution and attestation, yet the evidence of each supplemented by the evidence of the other, and by the evidence of White, shows conclusively that the will was signed by the testator in the presence of at least two credible witnesses, and that they subscribed the will with their names in his presence; and there being no evidence to the contrary, the trial court properly held, as a matter of law, that the execution of the will was properly proven.

The will in question was executed August 8, 1894. The testator did not die until the year 1913, and the will was probated in December of that year. While the testator was quite young his father died. His mother subsequently married a man by the name of Reynolds. Of this union there were born several children. These children and the children of those who are dead, who are the half brothers and nieces and nephews of the testator, are the contestants. The testator devised his property to his cousin Sudie Sevier, and her brother's two children. It is shown by the contestants that their relations with the testator were pleasant, though for many years prior to his death there was no particular intimacy between them. Upon the marriage of his mother many years ago the testator went to live with his aunt, the mother of Sudie

Sevier.

Sevier. The testator never married, but continued to live in the home of his aunt until his death. Though a number of witnesses testified for contestants, not a single witness stated that the testator was mentally incapable of making a will. To support the charge of undue influence the following evidence is relied on: P. B. Reynolds, one of the contestants, testified that about thirty-five years ago he thought a whole lot of the devisee, Sudie Sevier. They had a misunderstanding, but why she got mad at him he never knew. Since that time he had never been to her house but once. Prior to that time he and the testator had some business arrangements. Two or three months after Sudie quit speaking to him, these relations were terminated. After that time he and the testator talked only of business matters, and did not have much to say to each other. However, their relations were friendly. After that witness went to Horse Creek and married. Thereafter the testator frequently invited witness to come and see him. Three or four years before the testator's death witness went to see him. Sudie came into the other room, and when he saw she was not coming in where he was he got up and left. Witness also stated that on one occasion, about thirty-five years ago, testator traded a mule which he needed in his business for a horse for Sudie because Sudie wanted a horse to ride.

Another witness testified that in the year 1889 or 1890 testator deeded some land to Charles Sevier, Sudie's brother, and testator stated to witness that he wanted to deed it to Charlie so he would have a home. On being asked the leading question if the testator did not say that Sudie wanted him to make the deed to Charlie so that Charlie would have a home, witness replied: "It strikes me there was some statement something like that made; Sudie's name was mentioned in the connection."

The physician who attended the testator in his last illness testified that he recommended that fly screens be gotten for the room which the testator occupied. In referring to the matter the testator said that he and Sudie had discussed it, and she thought they were not necessary. It developed on cross-examination, however, that very few of the houses or rooms in that section of the country were screened.

Joseph Smith testified that on one occasion the testator bought some cattle from him. Testator then stated that he was dissatisfied with his will, and would write another next week unless he should become

better satisfied with it. Another witness testified that on one occasion, in 1912 or 1913, he paid some money to testator. The money was paid in gold, and witness had some gold left. Miss Sudie spoke about exchanging some other money for the gold. The testator insisted she did not need it. His recollection was that testator handed to Sudie the gold which he paid him.

Here, then, we have a case where the testator bought Sudie Sevier a horse because she wanted it, handed her some gold on one occasion, and stated that he did not get screens for his room because she objected to it. In addition to these facts, P. B. Reynolds, who seems to have been very fond of Sudie, had a misunderstanding with her. After that they did not speak. This, however, did not affect his relations with the testator. On another occasion the testator conveyed a tract of land to Sudie's brother, and the witness thinks that Sudie's name was mentioned in connection with it. Fifteen witnesses testified for the contestants, and their testimony covers a period of thirty-five or forty years.

These are the only circumstances relied on to show undue influence. There was an utter failure to show that the testator was not mentally capable of making the will. It is not shown that any of the devisees were present when the will was executed, or even suggested its execution. It is not shown that the testator was a weak character, or that he was easily influenced by others. It is not shown that any efforts were made by the devisees to prejudice the mind of the testator against his other relatives, or that any scheme was resorted to, to prevent their having intercourse with the testator. The circumstances relied on merely show that the testator was fond of Sudie, and paid some deference to her wishes. They are altogether consistent with the theory that they were the natural outcome of the affection which he bore for one in whose home he had spent the greater part of his entire life, and are by no means sufficient to show that, in the making of the will in favor of the devisees, his free agency was destroyed, or he was constrained to do against his will what he otherwise would have refused to do. It follows that the trial court properly refused to submit the question of undue influence to the jury. *Hildreth v. Hildreth*, 153 Ky. 597, 156 S. W. 144; *Childers v. Cartwright*, 136 Ky. 498, 124 S. W. 802; *Crump v. Chenault*, 154 Ky. 187, 156 S. W. 1053; *Clark v. Young*, 146 Ky. 377, 142 S. W. 1032.

Judgment affirmed.

OKLAHOMA SUPREME COURT.

W. W. DE LONG, Plff. in Err.,
v.
CITY OF OKLAHOMA CITY.

(— Okla. —, 148 Pac. 701.)

Highway — unguarded excavation — liability.

Where a city, in bringing a street to grade, excavates such street to a depth of several feet at a point where it intersects with a well-established road which has been constantly traveled for years (although such road has not been laid out as a street), and by such excavation creates and leaves a place of danger, unguarded and without bar-

Headnote by BLEAKMORE, J.

Note. — Ways for defects or obstructions in which a municipality is liable.

This note is supplementary to subdivision VII. of the note to *Elam v. Mt. Sterling*, 20 L.R.A. (N.S.) 553.

It is apparent that, to present the question treated in the present note and in that part of the earlier note which it supplements, it must be assumed that the defect or obstruction complained of was such that the municipality would be liable therefor if there were no question as to the character or status of the street or way in which it existed. Hence, the question what amounts to an obstruction or defect which will render the city liable, assuming that it is responsible at all for the condition of the street or way in question, is not within the scope of the present note. For that question, see the other portions of the note in 20 L.R.A. (N.S.) 513. So the question as to the width of the street or way which must be maintained free from obstructions or defects is not within the scope of the present note. Sidewalks and crosswalks are, however, for the purposes of this note, treated as separate ways, and therefore included.

As to liability for injury by defect or obstruction in space between sidewalk and carriage way, see note to *Barnesville v. Ward*, 40 L.R.A. (N.S.) 94.

As to the duty of a municipality as to the condition of rural highways within the city or village limits, see notes to *Neidhardt v. Minneapolis*, 29 L.R.A. (N.S.) 823, and *Sundell v. Tintah*, 38 L.R.A. (N.S.) 1127.

As to the liability of a county, town, or municipality for obstructions or defects outside of the traveled portion of a highway, see note to *Blankenship v. King County*, 40 L.R.A. (N.S.) 182.

Generally.

Supplementing 20 L.R.A. (N.S.) 553.

Where a municipality owned a tract of land along a bluff on the seashore, and divided it into house lots and ways with a view to leasing the lots to persons who might erect summer cottages, and the ways, including the place where the accident oc-

urred, had not been leased, nor was it intended by the municipality that they should be, it was held liable as a private owner of the property for an injury occurring upon a sidewalk constructed along one of the ways. *Davis v. Rockport*, 213 Mass. 279, 43 L.R.A. (N.S.) 1139, 100 N. E. 612.

(June 30, 1914.)

ERROR to the Oklahoma County Court to review a judgment in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. John H. Wright, for plaintiff in error:

Defendant is liable for the injury to plaintiff from falling into the excavation.

currer, had not been leased, nor was it intended by the municipality that they should be, it was held liable as a private owner of the property for an injury occurring upon a sidewalk constructed along one of the ways. *Davis v. Rockport*, 213 Mass. 279, 43 L.R.A. (N.S.) 1139, 100 N. E. 612.

A strip of land laid out by the park commissioners of the city, as part of a public park although it was of such appearance as to lead an ordinarily observant traveler to suppose it was a public highway, was not a way opened and dedicated to public use, so as to render the city liable for failure to maintain it in a perfect condition for travel as a street. *Jones v. Boston*, 201 Mass. 267, 87 N. E. 589.

The question of title, locality, etc.

Supplementing 20 L.R.A. (N.S.) 554.

In an action against a municipality for injury received by falling through a sidewalk into an areaway extended under the sidewalk by an abutting owner, it is immaterial whether the fee of the street was in the city or in the abutting lot owner. *Sherwin v. Aurora*, 257 Ill. 458, 43 L.R.A. (N.S.) 1116, 100 N. E. 938, 4 N. C. C. A. 87.

Opening and improvement of ways.

Supplementing 20 L.R.A. (N.S.) 556.

It is not the duty of a municipality to keep streets and alleys open, in repair, and free from nuisances, until it opens the same to public travel, or in some other manner invites the public to use the same for street and alley purposes, notwithstanding such streets and alleys have been dedicated by a private owner to public use, and such dedication has been accepted by the council of a municipality. *Dayton v. Rhotehamel*, — Ohio St. —, 106 N. E. 967.

A city is not liable for an injury occurring on an alley, which had never been used or treated as a public highway, although it was on a map of the city, and had been dedicated and intended as a public alley. *Lipscomb v. Bessemer*, 161 Ala. 173, 49 So. 872.

Although a road which had been opened by a real estate company was within the

Ormie v. Richmond, 79 Va. 86; *O'Malley v. Parsons*, 191 Pa. 612, 71 Am. St. Rep. 778, 43 Atl. 384; *Omaha v. Randolph*, 30 Neb. 699, 46 N. W. 1013; *Kirkham v. Kansas City*, 89 Kan. 651, 132 Pac. 160; *Bean v. Portland*, 109 Me. 467, 84 Atl. 981; *Burnham v. Boston*, 10 Allen, 290; *Oklahoma City v. Meyers*, 4 Okla. 686, 46 Pac. 552; *Sweet v. Poughkeepsie*, 97 App. Div. 82, 89 N. Y. Supp. 618; 5 Thomp. Neg. § 6056.

Mr. J. W. Johnson for defendant in error.

Bleakmore, J., delivered the opinion of the court:

This is an action for damages occasioned by the plaintiff driving into an excavation

limits of a city, the city was not liable for the condition of it, where there was no evidence that it had authorized the opening of the road or the placing of signboards, but, on the contrary, it was shown that the city had refused to open the road or to improve it. *Ottolengui v. Seattle*, 59 Wash. 37, 109 Pac. 206.

Though a city has accepted a street, it is not obliged to put any part of it in repair for travel by vehicle or pedestrians, that being a matter of governmental discretion; so, where no sidewalks have been put down along one side of the street, there being merely a narrow path, in great part through grass and weeds, with cinders over its surface, there was no excuse for anyone thinking such path was a sidewalk put down by the city, or that it was such a walk constructed by property owners and recognized or intended as such by the city, and the city would not be liable for injury to persons traveling along such a path. *Curran v. St. Joseph*, 143 Mo. App. 618, 128 S. W. 203.

The fact that a contract between a city and a railroad company required the latter to keep a certain street in repair, will not relieve the city from liability for an injury sustained by a person from a defect in the street which renders it unsafe for use by the traveling public. *Louisville v. Bott*, 151 Ky. 578, 152 S. W. 529.

Dedication and acceptance.

Supplementing 20 L.R.A.(N.S.) 558.

To impose upon a municipality the duty of maintaining as a public road or street, a way which was laid out and platted by an individual, it is necessary that there should be an acceptance by the public of the dedication. *Ivey v. Birmingham*, — Ala. —, 67 So. 506.

So, where a city had not in any way accepted a certain street or taken control of it, it was not responsible for its condition. *Raines v. East Tennessee Teleph. Co.* 150 Ky. 670, 150 S. W. 830.

And a nonsuit was properly entered in a suit for injuries upon a street laid out by L.R.A.1915E.

in a street. A demurrer to the petition was sustained, and plaintiff appeals.

It is alleged in the petition that the defendant is a city of the first class, and that the block and streets described in the petition are all within its corporate limits; that a block of ground which is bounded by Lottie street on the west, Kate street on the east, Ninth street on the north, and Eighth street on the south was, and for a number of years next before the injury complained of had been, open, unimproved, and without buildings thereon, and that there was a roadway running diagonally from a northeasterly direction extending southwest into and intersecting Eighth street, near the middle of said block; that said roadway was level and had been constantly and gen-

a land company where there was no proof of the acceptance of the street by the borough. *Grant v. Dickson City*, 235 Pa. 536, 84 Atl. 454.

A count in a declaration for damages resulting from injuries received upon a sidewalk, which charged that an individual owned the land and laid out the street, and that he kept it open for public use and gave the city full and complete use and joint possession of it, does not amount to an averment that the individual dedicated and the city accepted the land over which a street was laid as a public highway, and without such an averment the count was bad upon demurrer. *Richmond v. Marseilles*, 154 Ill. App. 345. (See *infra*, for same case on later appeal, 190 Ill. App. 227.)

Where there was no evidence of a dedication of a strip of land upon which plaintiff was injured, or of an acceptance of it as a street by the municipality, and from all that appeared in the evidence the use of the strip as a secret was simply permissive and for the benefit of an adjoining lumber yard as a private way, the municipality was not liable. *Krisch v. Chicago*, 150 Ill. App. 197.

But the duty of a municipality to keep its streets and bridges in a safe condition for public travel is not confined to streets which had been formally ordained and opened, but extends to streets dedicated to public use and accepted by the municipality; and as against a municipality which disclaims all duty in connection with a way, the dedication by the owner not being disputed, acceptance may be shown by proof of public use for a period much shorter than the statutory period required for such proof as against the original owner. *Ackerman v. Williamsport*, 227 Pa. 591, 76 Atl. 421; *Brobst v. Williamsport*, 227 Pa. 596, 76 Atl. 422.

So, the fact that a road way between fences had been used by the public for more than fifteen years, manifestly with the knowledge and acquiescence of the city, implies an acceptance by the city, and imposes a duty on it to maintain in a reasonably safe condition that portion of the street

erally traveled for a number of years by the public, and was so connected with said Eighth street as to make a continuous roadway, which, for a number of years, had been the best and most accessible way for public travel from the northeast into that part of the city, being worn down and well established as a public roadway and used by the plaintiff and public generally as such; that the defendant, a number of weeks prior to the injury complained of, excavated a part of said Eighth street between Lottie and Kate streets to a depth of 8 feet lower than the roadway across said block, and left at the point where said roadway intersected Eighth street an excavation some 8 feet in depth; that defendant put up no barriers or signals of any character to

warn travelers coming into the city and using the roadway over and across said block of said excavation, either at the place where the roadway intersected Eighth street and said excavation existed, or at the point where said roadway entered said block on the north side thereof; that, in the nighttime, the plaintiff, ignorant of the existence of said excavation, was traveling said roadway, and, upon reaching the point where the same intersected with Eighth street, was precipitated into said excavation, injured, and thereby damaged.

It is not alleged that in bringing the street to grade the defendant was negligent, nor that the condition of the street itself was defective, and therefore the liability of the city is dependent solely upon its failure

kept open to the traveling public. *Ballew v. St. Joseph*, 163 Mo. App. 297, 146 S. W. 454.

And, where a road had been for many years a public thoroughfare, and so remained and was used by the public generally at all times after it came within the corporate limits of defendant city, although the city was liable for an injury occurring thereon it never accepted the dedication of the road or formally undertook to exercise supervision or control over it, where after the road came within the city limits, the city never undertook to close it, nor tried to divert traffic from it. *Oakdale v. Sanders*, 155 Ky. 352, 159 S. W. 812, rehearing denied in 156 Ky. 224, 160 S. W. 952.

Improvement, repair, and other acts of recognition as affecting.

Supplementing 20 L.R.A. (N.S.) 560.

Where a borough council had never taken any action in relation to a street, and there was no general and long-continued public use from which an acceptance of the street could be implied, a bare offer of proof that work had been done on the street by the street commissioner before the accident was properly rejected there being no offer to show that the commissioner was acting in his official capacity, or that his action was at the instance of or with the knowledge of the borough council, or that there had been a prior authorization or subsequent ratification of it. *Grant v. Dickson City*, 235 Pa. 536, 84 Atl. 454.

The mere use by the public of a sidewalk will not charge a municipal corporation with liability for damage arising from its defective condition or obstructions on it; so, where there was no evidence of the establishment or recognition by the council of a street, or evidence that a street commissioner ever worked it, or evidence of any control of it by authorities, the city was not liable to a person injured upon the sidewalk, due to some brick lying thereon. *Michaelson v. Charleston*, 71 W. Va. 35, 75 S. E. 151.

In *Atkinson v. Nevada*, 133 Mo. App. 1, L.R.A.1915E.

112 S. W. 1022, an action for injury to plaintiff's horse by coming in contact with a barbed-wire fence along the side of a street which had been laid out, it was held that neither the dedication of the street to public use by the owner of the addition platted, nor the use of the street by the public as a thoroughfare, had the effect of imposing on the city the duty of keeping it in a safe condition for travel, where the only act of the city which evidenced an intention to accept jurisdiction over the streets in the addition was the passing of an ordinance establishing the grade of the various streets.

In *Colton v. Kansas City*, 162 Mo. App. 429, 145 S. W. 494, the court says that a city is not bound to keep by-paths in unimproved and unrecognized parts of streets in good sidewalk condition for travel, but the city was held liable in that case, for an injury to a pedestrian by stepping on an insecure cover to a catch basin which had been constructed by the city, when she stepped upon it from the improved part of the street to avoid an automobile which was approaching.

The fact that municipal authorities improved a part of a street which had been platted by an individual, assessing the cost against adjoining property, is susceptible of no other explanation than that the city adopted it as a public street and exercised jurisdiction over it. *Ivey v. Birmingham*, — Ala. —, 67 So. 506.

Where defendant municipality offered no evidence, and did not undertake to rebut the plaintiff's testimony going to show that the city had exercised the power conferred upon it to open and improve the street where an injury occurred, except to show by cross examination that the street ran through an open way in a fence, that the fence stood near to the edge of the sidewalk, and that signs were posted on the fence, stating that the road was private property of a railroad company, it was error to direct a verdict for the defendant. *Sutton v. Bessemer*, 7 Ala. App. 483, 60 So. 954.

Although the act extending the limits of a city provided that the city "shall not be

to erect and maintain barriers or signals warning plaintiff of the existence of the excavation at the place of his injury.

The question for this court to determine is whether the defendant, a city of the first class, owed any duty to the plaintiff, as a member of the traveling public, in the way of warning him of the danger necessarily to be encountered at the intersection of the street and roadway, by one approaching such point from the roadway, unaware of said excavation. It is the contention of defendant that it owed no duty to travelers entering its streets from any point save the regularly established entrances at cross-streets or alleys, and in sustaining the demurrer to the petition the trial court so held.

liable in any amount for any failure to keep in repair any of the roads or alleys in said territory unless the same shall have been first selected, named, and laid out as streets or alleys," the city was liable for an injury occurring upon the streets of the annexed territory where, for the nine years following the annexation, the city had worked the streets and kept them in order and exercised full jurisdiction and authority over the territory as a part of the city, although there never had been any affirmative act on the part of the city by which they selected, named, and laid out as streets or alleys, the streets and alleys in the territory. *Macon v. Leonard*, 13 Ga. App. 387, 79 S. E. 241.

Where several witnesses testified that the accident in question occurred within the corporate limits of the city, that the street had been in use for fifteen or more years by the public, and that the city employed the persons who built the sidewalk, there was a sufficient showing that the injury occurred upon a public street within the city. *Nicholson v. Clinton*, 163 Ill. App. 559.

Where a city for a considerable length of time prior to the accident had assumed the duty of constructing and keeping in repair the sidewalk upon which plaintiff was injured, and had treated the same as a public sidewalk, it was liable for damages for an injury resulting from its failure to exercise reasonable care to keep the sidewalk in a reasonably safe condition for travel, irrespective of whether title to the street had been legally acquired by condemnation, grant, prescription, or dedication. *Wikel v. Decatur*, 146 Ill. App. 51.

So, in *Richmond v. Marseilles*, 190 Ill. App. 227, where there was evidence that the city did work upon the walk both before and after the accident, the court said a city is liable for injuries resulting from defective sidewalks constructed on private property, if they are treated by the city as public walks and permitted to be used as such. (See *supra*, for same case on earlier appeal).

In *Worrell v. Bloomfield*, 148 Iowa, 691, L.R.A.1915E.

While the holding of the court below is sustained by a very respectable number of cases, yet, in declaring the law of this state, we stand on what we believe to be the better reasoning as well as the weight of authority, and hold to the opposite view. However, it must be remembered that the roadway in question, though not laid out or dedicated as a street, was a well-worn and established way and had been used by the public generally for years.

The rule laid down in 28 Cyc. 1384 is: "While a municipal corporation is generally under no obligation to guard dangerous approaches from private property to its streets, yet it is bound to provide guards or signal lights to prevent persons from receiving injuries in entering a street by

127 N. W. 1082, where it appeared that a city had dedicated a square to the county for courthouse purposes, and that part of the square had been enclosed by a fence, leaving a strip 25 feet wide between the fence and the street, in which hitching posts were placed, there being nothing visible indicating the true line of the street as distinguished from the line of hitching posts and the sidewalk and the courthouse fence, and there being evidence tending to show the exercise by the city of jurisdiction over the strip between the street and the hitching posts, it was held that there was sufficient evidence to warrant a finding that the strip in question had been used as a part of the street and as an appurtenance thereto, and the city was held liable for injury to plaintiff's horse, from a defect therein, while it was tied to one of the hitching posts.

Where a street was opened and constructed by a railroad company upon an order of the city authorities and as a condition to the use by the railroad company of part of another street, and after it was opened it was used by the public generally as a street, it was as much a public street as if it had been laid out and dedicated by the owner of the ground, and accepted on the part of the city in a formal way. *Louisville v. Bott*, 151 Ky. 578, 152 S. W. 529.

Testimony that a street has been graded by the city is sufficient to show acceptance of it and the exercise of jurisdiction over it, and to render the municipality liable for failure to keep it in repair. *Scheffer v. Hardin*, 140 Mo. App. 13, 124 S. W. 569.

Long, continuous, and notorious usage of streets by the public as highways, manifestly known to and approved by the city government, together with the fact that the city had constructed a public sewer and a lighting system along the streets, unquestionably constituted an acceptance of them, and an invitation to the public to use them as public thoroughfares, which the city had undertaken to maintain in a reasonably safe condition for travel. *Twedell v. St. Joseph*, 167 Mo. App. 547, 152 S. W. 432.

A way in a city may become a public

a commonly traveled road, although such road is in fact a private way, and has never been laid out as a highway or street. There is no duty, however, to erect barriers or maintain lights to prevent injury to persons entering a street where there is no traveled way either public or private, and nothing to put the city on notice that such entrance is likely to be attempted."

In *Elliott on Roads and Streets*, vol. 2, § 1138, it is said: "The right to recover, in cases of negligence, rests upon a breach of legal duty, and, where there is no duty, there is no cause of action. . . . But it is not necessary, in order to establish a legal duty, to do more than prove the facts out of which the duty springs; for, where the facts are established, the law will fix

the duty. The duty is created by the law, but the facts must exist in order to give force or relevancy to the legal principles. In order to establish negligence, it must be shown that the corporation did what it ought not to have done, or omitted something that it was its duty to do."

In *Kingfisher v. Altizer*, 13 Okla. 121, 74 Pac. 107, 15 Am. Neg. Rep. 173, a bridge located within the corporate limits of the city upon a roadway traveled by the public generally, but not regularly laid out or established as a street, was out of repair; and a team driven by plaintiff became frightened at a hole therein and backed off the bridge, precipitating the plaintiff into a creek and injuring him. Plaintiff recovered, and the court, in affirming the

street by a valid common-law dedication, but before the city can be charged with the duty of maintaining it in repair, there must be some proof that the city has recognized or accepted it as a city street; but where there were houses properly numbered, built along the street, and the street was included in the regular beat of a city policeman, and he reported defects along the street, some grading had been done, and a sidewalk had been built along another part of the street, in continuation of the walk on the part where an accident occurred, it was sufficient to justify the jury in finding that there was an implied invitation on the part of the city to use the street. *Drimmel v. Kansas City*, 180 Mo. App. 339, 168 S. W. 280.

In *Curran v. St. Joseph*, — Mo. —, 175 S. W. 584, the court says: "While the mere act of the dedication of a street and approval thereof, by a municipality, does not, without more, impose upon it the duties as to maintenance and repair which are cast upon a city by law, whenever it appropriates a street to the use of the public, yet these obligations do arise the instant a city, which or without such formalities, devotes a highway to the uses of the public by recognizing it as open for travel, or invites the public to use it as a street."

Evidence that the overseer of streets, an official of the city, had, by direction of the street committee and the street commission, repaired and taken control of the street where the accident occurred, and that for some years it had been used as a public street of the city, was sufficient to show that the city had assumed control of the street so as to make it liable for defects therein. *Gilbreath v. Greensboro*, 153 N. C. 397, 69 S. E. 268.

Particular ways and classes of ways—sidewalks.

Supplementing 20 L.R.A.(N.S.) 565.

As to the duty of a municipality as to the condition of a sidewalk which extends over the true street line, see note to *Post v. Clarksburg*, 52 L.R.A.(N.S.) 773. L.R.A.1915E.

Where, by the statutory authority under which a municipality is organized, it is given exclusive control of the streets, such control includes the sidewalks, and where it has assumed to exercise such control, it will be liable for its negligence concerning such sidewalks, resulting in injury to a pedestrian. *Haskell v. Barker*, — Tex. Civ. App. —, 134 S. W. 833.

A city is liable for injuries caused by dangerous obstructions permitted on its sidewalks. *Stanley v. Chicago*, 177 Ill. App. 245.

The duty of a city to keep a sidewalk reasonably safe for public use extends to all of the sidewalks intended for travel by the public as a thoroughfare, and is not confined to keeping in a safe condition a special part only of the sidewalk, which happens to be most generally used. *Atlanta v. Hampton*, 139 Ga. 389, 77 S. E. 393.

Where a sidewalk is situated within the corporate limits of a city along a street at the usual place for a sidewalk, a city cannot escape liability for neglecting to repair such walk, by showing that it was on the outskirts of a city, and not frequently used by the public. *O'Laughlin v. Pawnee City*, 88 Neb. 244, 129 N. W. 271.

In *Hemphill v. Morehouse*, 162 Mo. App. 566, 142 S. W. 817, the city was held liable for an injury to plaintiff upon a sidewalk along an extension of a street, although there had been no dedication of the street as a public street, and prior to the happening of the accident the city had not undertaken to exercise control over the street or its sidewalks, but for over ten years, prior to the happening of the accident, the ground, which was the extension of a street that was platted, had been used by the public, both for the passage of vehicles and for foot travel, and sidewalks had been constructed along it by the several owners of the adjacent lots over which the public had traveled without question, for that length of time.

If a municipality has notice of a defect in a sidewalk used by the public it is its duty to act promptly and see that the defect is removed, and it cannot exculpate

judgment, stated: "The evidence, also, is amply sufficient, in our opinion, to prove that the bridge was within the corporate limits of the city. And it further appears to us that there is sufficient evidence to show that the city for a number of years had exercised supervision of the bridge in question, and had recognized it as a part of the public streets of the municipality. This alone would be sufficient to require the city authorities to keep the bridge in a proper condition of repair, and for failure to do so it is liable for damages resulting from its negligence. 2 Dill. Mun. Corp. 4th ed. § 1009."

In *Oklahoma City v. Meyers*, 4 Okla. 686, 46 Pac. 552, it is said in the syllabus: "Where a city negligently permits an excavation to be made in such close proximity to a street as to endanger the traveling public, and a person, without fault, is injured by falling into such excavation, a recovery may be had for such injury."

In *Burnham v. Boston*, 10 Allen, 290, the supreme court of Massachusetts, in a case very like the one at bar, in the syllabus

itself from liability to a person who is injured in using the walk on the ground that it had notified the abutting lot owner of the defect, and had been waiting for him to remove it. *Fleming v. Wilmerding*, 223 Pa. 295, 72 Atl. 624.

A city is bound to keep a street in reasonable repair, although it had never graded or otherwise attempted to improve it, and had no part in providing the plank, which was used as a sidewalk, upon which plaintiff was injured. *James v. Seattle*, 68 Wash. 359, 123 Pac. 472.

Where a sidewalk is constructed in a city along a public street in the usual place, under the direction of the city, and is afterwards controlled by it, and used by the public, it should be repaired by the city, and the city may be liable for damages resulting from negligence in failing to do so, though the sidewalk is not within the limits of the street as originally platted. *O'Loughlin v. Pawnee City*, supra.

—bridges.

Supplementing 20 L.R.A.(N.S.) 571.

Where a city laid a bridge 3 or 4 feet wide over a gutter or ditch alongside one of the public streets of the city, such bridge not being a crosswalk at the intersection of two streets, but evidently built by the city for the use and convenience of the public who desired to go from the street to the sidewalk, and it appeared that the public made use of the bridge for that purpose, the city was liable to pedestrians for injuries received because of the defective condition of such bridge. *Hardin v. Corinth*, 105 Miss. 99, 62 So. 6.

Where there was ample proof of the construction and maintenance by the city of L.R.A.1915E.

held: "If a traveled way, either public or private, over lots adjoining a public street in a city and leading into that street, for a long time before and after the existence of an excavation in the street, has been so much used by persons having occasion to pass as to become known as a common way for travel and to make it reasonably necessary for the city, in the exercise of due and proper care, to provide a barrier for the purpose of preventing travelers, who pass over such way from the adjacent lots into the street and use due care, from falling into the excavation, and the city have unreasonably omitted to erect such barrier, they are guilty of negligence and are liable for an injury happening to a traveler in the street by reason thereof."

And in the body of the opinion says: "Certainly it cannot be said that it is *per se* negligence for a person to enter from adjoining houses or lands on a defective and dangerous part of a way, who has no knowledge of the defect or want of repair, nor any notice that it had been closed against public travel by barriers erected in another

a wooden culvert in the roadway of a street with knowledge of its use by the public as a footbridge, it ought to be required to respond to the consequences of its negligence in maintaining it. *Browning v. Aurora*, — Mo. App. —, 177 S. W. 685.

—crossings.

Supplementing 20 L.R.A.(N.S.) 572.

A crosswalk, while not technically a street or a sidewalk, is a public place where people walk in crossing from one street to another, and in respect to which the city sustains the same relation it does as to streets and sidewalks. *Graham v. Rockford*, 238 Ill. 214, 87 N. E. 361.

—alleys.

Supplementing 20 L.R.A.(N.S.) 573.

The fact that the place in controversy was an alley does not absolve the city from keeping it in reasonably safe condition for travel. *Asbury v. Kansas City*, 161 Mo. App. 496, 144 S. W. 127; *Mehan v. St. Louis*, 217 Mo. 35, 116 S. W. 514.

Where an alley was designed especially for the use and accommodation of the owners of abutting property, and could in no proper or legal sense be considered as a highway designed for general travel, and was not in actual use as a way for travel, the city was not liable for the death of a child which fell into a ditch, dug along the alley. *Athey v. Tennessee Coal, Iron & R. Co.* — Ala. —, 68 So. 154.

—park paths.

Supplementing 20 L.R.A.(N.S.) 574.

A city that constructs and maintains walks and footpaths in its parks which are

place to prevent the use of the way by those coming upon it either in the line of direct travel or from intersecting streets. Nor can it be maintained that a city or town would in all cases fulfil the duty incumbent on it by law by merely placing barriers across a street or way to protect travelers from injury by an existing defect or want of repair, without adopting any measures to guard against accident to those who might have occasion lawfully to come on the dangerous portion of the way from private lands adjoining and lying within the limits which were closed against travelers approaching in other directions. Doubtless in many cases it would be a proper exercise of due and reasonable care to place a single barrier across a way or street which was defective and dangerous, sufficient to stop persons from passing over it by the usually traveled path. Such a precaution, for example, would be an adequate protection against accident on a highway in the country, which was not wrought for travel throughout its entire limits, or in places where the adjoining lands were so fenced

by the owners, or natural obstacles were so interposed that access to the way laterally was either unusual or difficult. But a very different standard of diligence would be applicable where a way or street was within the limits of a populous city or town, and was prepared for travel and actually used in every part, and to which constant access was had from private ways over lands of adjacent proprietors, entering it at the side. The truth is that due and reasonable care cannot be defined by any abstract proposition which will be appropriate and applicable to every case which may arise. It must necessarily vary with the circumstances under which the duty of exercising it is imposed. Nor is there any positive rule of law which requires a person to enter on a highway in any particular manner or at any fixed place, or which prescribes the exact mode in which he shall travel upon it. The right of a traveler to use it, and the duty of a city or town to protect him from danger and accidents, are regulated and measured by a like standard. Each must use such reasonable care as is

used as thoroughfares in passing from one part of the city to another is liable for injuries resulting from the dangerous condition of such walks, caused by the negligence of its employees. *Ackeret v. Minneapolis*, 129 Minn. 190, L.R.A.1915D, 1111, 151 N. W. 976.

The fact that a highway in a municipality is within or passes through an enclosed public park does not change the rule as to the liability of the municipality for injury received because of defects or obstructions negligently permitted therein. *Ankenbrand v. Philadelphia*, 52 Pa. Super. Ct. 581.

Streets in annexed territory.

Supplementing 20 L.R.A.(N.S.) 575.

If that part of the street upon which an injury occurred had been completely impressed with the character of a highway, and the territory in which it had been laid out was annexed to the city, then the municipal authorities, by bringing it within the corporate limits and leaving it open for travel, became bound to exercise reasonable care to keep it in safe condition. *Ivey v. Birmingham*, — Ala. —, 67 So. 506.

When territory is lawfully annexed to a city the new area becomes a part of the city for all municipal purposes, and the public highways therein become streets of the city, and the city becomes chargeable with the duty of using reasonable diligence in seeing that they are placed and kept in a reasonably safe condition. *Macon v. Morris*, 10 Ga. App. 298, 73 S. E. 539.

A plea to an action for injury upon a defective sidewalk to the effect that the annexed territory where the accident occurred was taken into the city when it was L.R.A.1915E.

too late to subject the same to taxation for that year, and that the city could not improve the walk in question without spending more money than was levied for public improvements, presented no defense, as the charter of the city gave it the right to construct or reconstruct its sidewalks and assess the cost thereof against the property of the abutting landowners. *Mayfield v. Hughley*, 135 Ky. 532, 122 S. W. 838.

But, by annexing outlying territory, a city does not assume an obligation to at once put a path, which was at most a temporary one which travelers used for their own convenience, most of them going instead in the middle of the street, in as good condition for public travel as sidewalks in the main part of the city. *Quinn v. New York*, 145 App. Div. 195, 129 N. Y. Supp. 1028.

And as to defects existing in a highway at the time of its annexation to a city, a city does not become chargeable with liability until it has discovered them, or, in the exercise of ordinary and reasonable diligence, should have discovered them, and until it has then had a reasonable opportunity to remedy them. *Macon v. Morris*, *supra*.

Abandonment and closing.

Supplementing 20 L.R.A.(N.S.) 575.

Although the changes in the surface of a street were being made under the authority of a statute providing for the abolition of grade crossings, the statutory liability of the municipality to protect the public travel still remained, inasmuch as no order was made by the proper authorities of the city formally closing the street to public travel. *Hurley v. Boston*, 202 Mass. 68, 88 N. E. 586. R. L. S.

adapted to the time, place, and circumstances under which the right is to be exercised and the duty performed."

In *Orme v. Richmond*, 79 Va. 86, the city had lowered the grade of a street, leaving a precipice of 8 feet at the intersection of two streets where there was an old and constantly used pathway over adjoining lots entering into those streets. The city had placed barriers at the ends of the streets, but none to warn users of the pathway. Mrs. Orme, at nighttime, walked along the pathway, and, being ignorant of the excavation, was precipitated into it and injured. In holding her petition good as against demurrer, the court said: "Where a municipal corporation acts in the exercise of powers, or the discharge of duties, in no wise discretionary or governmental, but purely ministerial in their character, it incurs, like a private person, the common-law liability for the acts of its servants or agents."

The court in that case also held that the city was bound to use all necessary measures to guard against the injury of persons entering its streets from private ways and adjoining streets.

In *Dennis v. Elmira Heights*, 59 App. Div. 404, 70 N. Y. Supp. 312, a case in which the facts were similar to those in this case, the court said: "If a road, apparently, though not in fact, a public highway, is commonly used by the public, and a municipality, in the exercise of its right in improving an intersecting street, leaves the approach from the road in a dangerous condition, the duty of the municipality to the public requires the exercise by it of reasonable care to the prevention of such accidents as may reasonably be anticipated to happen to those traveling upon the road with due care and in ignorance of the danger."

In *Omaha v. Randolph*, 30 Neb. 699, 46 N. W. 1013, it is said: "The plaintiff, in driving into the city of Omaha after dark, followed from Twenty-Eighth to Twenty-Seventh street a public way that had been used by the public for years, although it had never been laid out as a road. The city was at the time grading Twenty-Seventh street, and had excavated the same perpendicularly to a depth of 3 feet at the intersection of this road, but placed no barriers or lights at or near the same. It being dark, the plaintiff was unable to see the condition of the street, and his team was precipitated into the excavation, causing the plaintiff to receive permanent injuries. Held, that the city was guilty of negligence."

In *Covington v. Bryant*, 7 Bush, 248, it is held that when, in grading a street, a L.R.A.1915E.

deep cut is made below the sidewalk, it is the duty of the city, by barricades or otherwise, to guard all prudent persons against unnecessary danger therefrom; and the city is liable for injuries resulting from a failure to perform this duty.

See also *Kirkham v. Kansas City*, 89 Kan. 651, 132 Pac. 160; *O'Malley v. Parsons*, 191 Pa. 612, 71 Am. St. Rep. 778, 43 Atl. 384.

There is no provision in the statute requiring actual notice to a city of the condition of its streets or the approaches thereto. And inasmuch as it is alleged in the petition that the roadway over which the plaintiff was driving to its intersection with the street was an old, well-established, and constantly used way of public travel, and the best and most accessible way from the northeast into that part of the city, the legal inference is that the city knew and permitted the use of such roadway by the public generally and as a means of entrance into Eighth street; and, when the defendant saw proper to bring said street to grade, it could not create and leave unguarded a place of danger to the public accustomed to travel said roadway and street, with no warning of such danger, without incurring liability to one lawfully traveling along said way who was unsuspectingly precipitated into such dangerous place and injured.

It follows, in view of the foregoing, that the judgment of the trial court should be reversed, and the cause remanded, with instructions to overrule the demurrer and further proceed in the cause consistently with the conclusions herein reached.

All the justices concur.

Petition for rehearing denied May 11, 1915.

ARIZONA SUPREME COURT.

CHARLES DAVIS, Appt.,
v.

W. A. TWAY.

(— Ariz. —, 147 Pac. 750.)

Easement — parol license — expenditure of money.

No easement is created by constructing an irrigation ditch under parol license

Note. — As to acquisition of easement by prescription where original use was under license, see note to *Holm v. Davis*, 44 L.R.A. (N.S.) 89. The burden of showing that use was permissive, and not under claim of right, is treated in the note to *Barber v.*

across land of the licensor where the licensee was given a permanent right of way until the reclamation service should provide other means for conducting water to the land of the licensee.

(April 17, 1915.)

A PPEAL by defendant from a judgment of the Superior Court for Maricopa County, enjoining him from interfering with the use of an irrigation ditch by plaintiff, and from obstructing and destroying the same. Reversed.

Statement by Ross, Ch. J.:

Appellant is the owner of land intervening between the Eastern canal (reclamation service canal) and 40 acres of land owned by appellee. To irrigate his 40 acres appellee, according to his complaint and evidence, obtained parol permission or license from appellant to make temporary ditches over and across the land of appellant. Two of such ditches were made and used for a short time, when appellant revoked the license. Whereupon the ditch involved in this suit was constructed. In regard to the understanding concerning this last ditch the appellee alleges: "That if the plaintiff would construct a ditch along the new right of way, to be designated by the defendant, the plaintiff should have a permanent right of way along the new route, until the reclamation service should provide other means for conducting irrigation water to the said land of plaintiff over the said property of defendant."

It is alleged that the route of ditch was staked out by appellant and constructed by appellee across the former's land some time after February, 1911, at the appellee's sole cost, with a carrying capacity of 300 miner's inches, and was for the benefit of both parties. About August 30, 1912, appellant on his own land obstructed said ditch by filling it for a space of 10 rods, and forbade appellee from its further use. It is shown that appellee had growing crops on his land, and that appellant would continue to obstruct the ditch unless restrained, and that the reclamation service had not provided other means of conveying irrigation water to the premises of appellee. Upon this showing a temporary restraining order was issued. The appellant answered by demurrer, by denials, and by pleading the statute of frauds, in that the license or easement claimed was not evidenced by any

writing signed by appellant or his agent. Upon final hearing the temporary injunction was made permanent, in the following form: "That the plaintiff be and he hereby is granted a right of way for conducting irrigation water over and across the land of defendant, to wit: [here description of land] through the irrigation ditch built by the plaintiff and as now located and constructed across said land, and to enter upon said ditch for the purpose of cleaning and repairing the same, until such time as the United States reclamation service shall provide other means of conducting irrigation water from the canal adjoining said lands to the lands of the plaintiff."

Messrs. M. J. Dougherty and F. M. Ward, for appellant:

Plaintiff had no right to clean or enlarge the ditch, and the judgment awarding such a right has no foundation in law or equity.

Colegrove Water Co. v. Hollywood, 151 Cal. 425, 13 L.R.A.(N.S.) 904, 90 Pac. 1053; Winslow v. Vallejo, 148 Cal. 723, 5 L.R.A.(N.S.) 851, 113 Am. St. Rep. 349, 84 Pac. 191, 7 Ann. Cas. 851.

A naked continuing license may be revoked regardless of whether or not expenditures have been made on the strength of it, regardless of the time for which given, and regardless of whether or not a consideration has been paid therefor.

Hicks Bros. v. Swift Creek Mill Co. 133 Ala. 411, 57 L.R.A. 720, 91 Am. St. Rep. 38, 31 So. 947; Howes v. Barmon, 11 Idaho, 64, 69 L.R.A. 568, 114 Am. St. Rep. 255, 81 Pac. 48; Woodward v. Seely, 11 Ill. 157, 50 Am. Dec. 445; St. Louis Nat. Stock Yards v. Wiggins Ferry Co. 112 Ill. 384, 54 Am. Rep. 243; Seidensparger v. Spear, 17 Me. 123, 35 Am. Dec. 234; Cook v. Stearns, 11 Mass. 533; Minneapolis, St. P. & S. Ste. M. R. Co. v. Marble, 112 Mich. 4, 70 N. W. 319; Johnson v. Skillman, 29 Minn. 95, 43 Am. Rep. 192, 12 N. W. 149; Beck v. Louisville, N. O. & T. R. Co. 65 Miss. 172, 3 So. 252; Pitzman v. Boyce, 111 Mo. 387, 33 Am. St. Rep. 536, 19 S. W. 1104; Great Falls Waterworks Co. v. Great Northern R. Co. 21 Mont. 487, 54 Pac. 963; Houston v. Laffee, 46 N. H. 505; Babcock v. Utter, 1 Keyes, 115; Crosdale v. Lanigan, 129 N. Y. 605, 26 Am. St. Rep. 551, 29 N. E. 824; Cronkhite v. Cronkhite, 94 N. Y. 323; McCracken v. McCracken, 88 N. C. 272; Rodefer v. Pittsburg, O. V. & C. R. Co. 72 Ohio

Bailey, 44 L.R.A.(N.S.) 98. As to revocability of license to maintain burden on land after licensee has incurred expense in reliance thereon, see notes to Pifer v. Brown, 49 L.R.A. 497; Yeager v. Tuning, 19 L.R.A.(N.S.) 700; and Munch v. Stelter, 25 L.R.A. L.R.A.1915E.

(N.S.) 727. And see also Salinger v. North American Woolen Mills, 39 L.R.A.(N.S.) 350. As to right to compensation upon revocation of license with respect to real property, see note to Johnson v. Bartron, 44 L.R.A.(N.S.) 557.

St. 272, 70 L.R.A. 844, 74 N. E. 183; Foster v. Browning, 4 R. I. 47, 67 Am. Dec. 505; Hathaway v. Yakima Water, Light & P. Co. 14 Wash. 469, 53 Am. St. Rep. 874, 44 Pac. 896; Pifer v. Brown, 43 W. Va. 412, 49 L.R.A. 497, 27 S. E. 399; Fryer v. Warne, 29 Wis. 511; Morgan v. United States, 14 Ct. Cl. 319; Goddard, Easements, p. 472; 1 Reeves, Real Prop. p. 326; Cooley, Torts, p. 113.

The license is temporary in its nature, and for that reason revocable.

Rerick v. Kern, 14 Serg. & R. 267, 16 Am. Dec. 497; Metcalf v. Hart, 3 Wyo. 513, 31 Am. St. Rep. 122, 27 Pac. 900, 31 Pac. 407; Heyl v. Philadelphia, W. & B. R. Co. 51 Pa. 469; Thoenke v. Fiedler, 91 Wis. 391, 64 N. W. 1030; Jackson & S. Co. v. Philadelphia, W. & B. R. Co. 4 Del. Ch. 188; Stratton's Independence v. Midland Terminal R. Co. 32 Colo. 499, 77 Pac. 247; Minneapolis Mill Co. v. Minneapolis & St. L. R. Co. 51 Minn. 313, 53 N. W. 639; Kinney, Irrigation & Water Rights, 982.

Mr. G. W. Silverthorn, for appellee:

Title to an easement may be obtained without a written instrument by adverse user, estoppel, or by part performance of a parol agreement.

1 Wiel, Water Rights in the Western States, 3d ed. p. 556; Maple Orchard Grove & Vineyard Co. v. Marshall, 27 Utah, 215, 75 Pac. 369; Shaw v. Proffitt, 57 Or. 192, 109 Pac. 584, 110 Pac. 1092, Ann. Cas. 1913A, 63; Rerick v. Kern, 14 Serg. & R. 267, 16 Am. Dec. 497; Miller v. Kern County Land Co. 154 Cal. 785, 99 Pac. 179; Bree v. Wheeler, 4 Cal. App. 109, 87 Pac. 255; Flickinger v. Shaw, 87 Cal. 126, 11 L.R.A. 134, 22 Am. St. Rep. 234, 25 Pac. 268; Huff v. McCauley, 53 Pa. 206, 91 Am. Dec. 203, 9 Mor. Min. Rep. 268; Raritan Water Power Co. v. Veghte, 21 N. J. Eq. 463; DeGraffenried v. Savage, 9 Colo. App. 131, 47 Pac. 902; Wickersham v. Orr, 9 Iowa, 253, 74 Am. Dec. 348; Wilson v. Chalfant, 15 Ohio, 248, 45 Am. Dec. 574; Turner v. Stanton, 42 Mich. 506, 4 N. W. 204; Lee v. McLeod, 12 Nev. 280; Angell, Water-courses, § 318.

Plaintiff had an easement upon the property of the defendant.

Hancock v. Board of Education, 140 Cal. 554, 74 Pac. 44; Carter v. Lothian, 133 Cal. 451, 65 Pac. 962; Clopton v. Meeves, 24 Idaho, 293, 133 Pac. 907; Pennsylvania-Coeur D'Alene Min. Co. v. Gallagher, 19 Idaho, 101, 112 Pac. 1044; Merchants' & P. Ins. Co. v. Crane, 36 Okla. 160, 128 Pac. 260; Ennis Brown Co. v. Hurst, 1 Cal. App. 752, 82 Pac. 1056; Doherty v. California Nav. & Improv. Co. 6 Cal. App. 131, 91 Pac. 419.

The easement which the plaintiff claims L.R.A.1915E.

was granted to him by the defendant is in the nature of an easement by necessity.

14 Cyc. 1194; Cassin v. Cole, 153 Cal. 677, 96 Pac. 277; Hahn v. Baker Lodge, 21 Or. 30, 13 L.R.A. 158, 28 Am. St. Rep. 723, 27 Pac. 166; Stoner v. Zucker, 148 Cal. 516, 113 Am. St. Rep. 301, 83 Pac. 808, 7 Ann. Cas. 704; Metcalf v. Hart, 3 Wyo. 513, 31 Am. St. Rep. 122, 27 Pac. 900, 31 Pac. 407.

Ross, Ch. J., delivered the opinion of the court:

Appellant assigns numerous errors, but as the question involved is fundamental, we will disregard all complaints except the one which is embodied in this question: Was the license granted irrevocable by reason of the improvements and expenditures made and laid out by the appellee in the construction of the ditch?

The question is one of first impression in this jurisdiction. Looking to the decisions of other courts, we find there is a lack of uniformity of agreement, it being held on the one hand that an executed parol license involving the expenditure of time and money under certain circumstances will ripen into an easement, and others holding that an interest in land such as an easement can only be acquired by deed or by prescription. The latter rule preserves in full force and effect the statute of frauds, but sometimes its strict enforcement instead of preventing fraud, would be the efficient instrument of working a fraud, in which case and to avoid such a result the courts have oftentimes invoked equitable estoppel. A slight excursion into the evidence in this case convinces us that equitable estoppel should not apply. In the first place, the appellee's complaint shows that the license given him was only temporary,—as we read it,—and he must have so understood it. The allegation, "that the plaintiff should have a permanent right of way, until the reclamation service should provide other means for conducting irrigation water to said land of plaintiff," is contradictory, in that it could not be "permanent" unless the limitation of time therein implied is without meaning. The evidence is to the effect that the reclamation service had, at the time of granting the license to appellee by appellant, already surveyed a ditch along its right of way to provide appellee water for irrigating his land. The construction of this contemplated ditch in thirty days, in six months, in one year, according to his allegations, would have automatically terminated his license. It was not, by the very terms of his license, as given by himself, in the contemplation of either of the parties that he should have a

permanent right of way. Its determination was dependent upon the happening of a stipulated event,—upon the action of an agency over which, so far as the record is concerned, neither party had any control. It can only be inferred from the record that the reclamation service might, at some time in the future, immediate or distant, as its own convenience, whim, or ability should dictate, conclude to construct a ditch for appellee's land. It is not shown to be under any obligation, legal or otherwise, to connect appellee's land with the source of his water supply. Should the reclamation service refuse or fail to provide appellee with a ditch, he would, under the decree of the court, have a permanent easement over appellant's land against his expectation, and certainly by virtue of no agreement to that effect by appellant. Viewed from any aspect, appellee was given only a temporary use of a right of way over appellant's land, and, that being true, any outlay made by him in improvements was at his peril. 2 Kinney, Irrigation & Water Rights, § 982, says: "A temporary right of way over the lands of others for ditches and canals may also be acquired by permission of the land-owners, without any consideration and with no definite limitation as to time, in which case the right is a mere license, which may be revoked at any time. Where the privilege granted is simply permissive, it may be revoked at any time, though money has been expended thereon by the licensee. Such a licensee is conclusively presumed, as a matter of law, to know that a license is revocable at the pleasure of the licensor; and, if he expends money in connection with his entry upon the land of the latter, he does so at his peril. Such a license creates no interest in land."

The privilege or license pleaded by appellee has "no definite limitation as to time," but, on the contrary, it appears very indefinite, depending on the action of a third party over whom neither appellee nor appellant had any control so far as we are advised.

We would have it understood that we do not disapprove, but rather approve, that large line of cases holding that an easement may be acquired under a verbal license where the licensee has taken possession and at considerable expense and trouble made permanent improvements with assurances, either express or implied, from the licensor of a continuous license. In such cases, it will be found that the conditions and circumstances under which the license was granted invariably were of a character to lead the licensee to make his improvements believing that his occupancy was to be a continuous one, and not pending L.R.A.1915E.

the will of the landowner or any third party. One of the leading cases of this kind is *Maple Orchard Grove & Vineyard Co. v. Marshall*, 27 Utah, 215, 75 Pac. 369, cited by appellee. The court said: "In such case the license to construct a particular thing on the licensor's land, and to enjoy the same *without limit as to time*, followed by the expenditure of money on the faith of it, will, when, as here, fully executed, be regarded and treated in equity as a binding contract, and is then irrevocable." (Italics ours.)

Another case cited by appellee is *Stoner v. Zucker*, 148 Cal. 516, 113 Am. St. Rep. 301, 83 Pac. 808, 7 Ann. Cas. 704, in which the court held the license irrevocable, saying that "from the very nature of the license given, it was to be continuous in use." Another case relied upon by appellee is *Shaw v. Proffitt*, 57 Or. 192, 109 Pac. 584, 110 Pac. 1092, Ann. Cas. 1913A, 63. In this case it appears that the licensee acted upon the following letter from the licensor: "I have just . . . found your letter of the 19th inst., asking for a right of way through my land. . . . Would say, go ahead, the more ditches you build the better it will quit me."

Pursuant to this license a ditch was constructed over the licensor's land at an expense of \$6,000 or \$7,000. The court said: "A permanent way appears to have been the intention of the parties, and such intention must control." This court quotes with approval from *Metcalf v. Hart*, 3 Wyo. 513, 551, 31 Am. St. Rep. 122, 27 Pac. 900, 914, 31 Pac. 407, as follows: "Each case stands upon its own circumstances. . . . When we have traveled through the mass of decisions, cloudy and conflicting at times, and have arrived at the principle that equity will relieve where there is fraud, actual or constructive, we have arrived at a principle in regard to which there is no conflict. And courts of equity . . . are very generally agreed that the revocation of a parol license to *permanently occupy and improve* realty after any considerable expense has been incurred on the faith of such license, under circumstances such that the parties cannot be placed *in statu quo*, is either actual or constructive fraud." (Italics ours.)

In the license pleaded in the instant case, the intention was not a permanent, continuous occupancy, but a temporary makeshift, and the appellee did not acquire an easement in the land of appellant.

The evidence is conflicting as to the terms of the license, the appellant testifying that it was limited to October, 1911, in which he was corroborated by at least one other witness, a tenant of the land to be irri-

gated from the ditch in question. Before decreeing a licensee an interest in the realty of the licensor on the ground of estoppel, upon a verbal license, in derogation of the statute of frauds, the evidence should be clear and convincing that it was the intention of the owner of the servient estate to grant a permanent right of way, and that the licensee had a right to proceed in the making of his improvements upon that theory.

The judgment is reversed, with directions that the complaint be dismissed.

Franklin and Cunningham, JJ., concur.

Petition for rehearing denied.

KENTUCKY COURT OF APPEALS.

CHARLES HOLLIN, Appt.,

v.

COMMONWEALTH OF KENTUCKY.

(158 Ky. 427, 165 S. W. 407.)

Indictment — murder — conviction for aiding and abetting.

Proof of aiding and abetting a murder

Note. — Indictment: conviction upon proof of aiding and abetting under indictment simply charging the crime without reference to aiding or abetting.

The scope of this note is limited to the question decided in *HOLLIN v. COM.*, i. e., whether proof of aiding and abetting another to commit the crime charged in the indictment will sustain a conviction of the substantive offense, the principal offender according to the testimony not being jointly prosecuted or named in the indictment. The distinction here made between the principal offender and the aider and abettor is that made at common law between principals in the first and in the second degree. The distinction between principal and accessory raises an entirely different situation, and the mode of indicting an accessory is not here considered.

In Wharton, Criminal Law, 11th ed. vol. 1, § 259, it is said: "The distinction between principals in the first and second degree, it has been said, is a distinction without a difference; and therefore it need not be made in indictments. Such is only the case, however, where the punishment is the same for both degrees, but where by particular statute the punishment is different, then principals in the second degree must be indicted specially, as aiders and abettors." The author cites many cases sustaining his text, which, however, is broader than the scope of this note. The court in *L.R.A.1915E.*

will not support a conviction on an indictment charging one alone with murder, with no reference to aiding and abetting the commission of such crime.

(April 17, 1914.)

APPPEAL by defendant from a judgment of the Circuit Court for Clark County, convicting him of voluntary manslaughter. Reversed.

The facts are stated in the opinion.

Messrs. J. M. Stevenson, F. H. Haggard, and C. T. Spencer for appellant.

Messrs. James Garnett, Attorney General, and O. S. Hogan, Assistant Attorney General, for the Commonwealth:

The part of the instruction which charges the jury as to aiding and abetting is not prejudicial to the substantial rights of the appellant, and, under the state of case here presented, was entirely unnecessary, and mere surplussage.

Caudill v. Com. 155 Ky. 578, 159 S. W. 1149.

Miller, J., delivered the opinion of the court:

The appellant, Charles Hollin, was indicted for the murder of Louis Brandenburg, and appeals from a verdict and judgment convicting him of vountary manslaughter.

HOLLIN v. COM. admits the principle thus stated, but claims an exception thereto where the aider or abettor is indicted alone. This note is limited to the exception, the necessity for which seems to be very questionable.

If the exception is sound, it constitutes also an exception to the general rule that an allegation of the legal effect of an act is generally good as an indictment unless there is some special reason why the outward form should be used instead. In view of the fact that in practically all jurisdictions there are provisions for a preliminary hearing, if demanded by the accused, the main purpose of which is to thoroughly acquaint him and his counsel with the character of the evidence that may be produced and to reveal the nature of the crime charged, there would seem to be no real danger of injustice arising out of the use of this form of alleging crime. In the absence of a provision for a hearing, an arbitrary dismissal of a motion for a bill of particulars would, no doubt, constitute ground for reversal of the verdict for conviction unless it clearly appeared that no injustice had been perpetrated, even though generally the order on a motion for a bill of particulars is not reviewable on appeal, because the matter is discretionary with the trial court. So, it would seem that the exception to the general rule must be purely technical, and that its adoption generally would not further the ends of substantial justice. On the other hand, the

Briefly stated, the facts in connection with the homicide are as follows: On Saturday, September 27, 1913, Hollin and Ben White, both being young men about twenty-one years of age, went from White's farm to the city of Winchester, where they spent the greater portion of the night drinking and carousing. From Winchester they proceeded to the home of Shelby White, near Indian Fields, where they remained until Sunday morning. On Sunday morning they left Shelby White's, riding in a no-top buggy, for Ben White's farm, about 10 miles distant. Whitehall Church is located on the road upon which they were traveling to Ben White's, and on that Sunday an all-day meeting was in progress. When Ben White and Hollin arrived at the church, White, finding some of his friends there, decided to remain and take dinner with them; and Hollin, being in the same buggy with White, remained with him. They attended the morning services, took dinner with White's friends, and early in the afternoon they departed on their journey to Ben White's home. The deceased, Louis Brandenburg, and his wife, were also at the Whitehall Church. Brandenburg was a construction boss, engaged in the building of the railroad between Winchester and Irvine. He had been in Clark county only

a short time, and was a stranger to both White and Hollin, who did not see Brandenburg until after they had left the church and had started home. White and Hollin were under the influence of liquor while at the church, to such an extent that some of the witnesses described their condition by saying they were leading each other about the premises. Hollin also says that White ate something that made him sick. Hollin assisted White into his buggy, and, after they had gone a short distance, Hollin fell out of the buggy. He explained this by saying that the horse became scared and made a sudden turn, which threw him out of the buggy, bruising and cutting his head and face. While Hollin was in the road, Brandenburg and his wife drove up in a no-top buggy drawn by a mule. As Brandenburg passed Hollin, he asked him if he was hurt, and Hollin answered that he was not hurt very much. Shortly thereafter, White and Hollin overtook Brandenburg. They were driving very fast, and one of them was hanging out of the buggy, while the other was driving the horse in a run. In passing Brandenburg they struck his buggy and frightened his mule to such an extent that Brandenburg got out of the buggy and went to the mule's head to quiet him. After White and Hollin had gone a

exception, if generally adopted, would seem to constitute a mere technicality by means of which the accused in many cases would be able to delay, if not defeat, the enforcement of the penal laws. The facts involved in *HOLLIN v. COM.* make the case typical. The defendant was properly charged with committing the crime. He knew, or is presumed to have known, that the legal effect of his aiding and abetting his comrade in its commission was to make him also guilty of the substantive crime. His testimony shows that he had sufficient knowledge of all the facts to enable him to anticipate that the state would attempt to prove any facts the legal effect of which would be to make him guilty of the crime charged; but see wording of the Kentucky statute as quoted, *infra*, which may account for the position taken by the court.

1 Starkie, *Crim. Pl.* 2d ed. 81, is quoted in *Bishop's New Criminal Procedure*, 2d ed. vol. 3, chap. 96, § 3, as follows: "So A and B, if present, aiding and abetting, may be convicted, though C, a person not named in the indictment, committed the act. *Rex v. Borthwick*, 1 Dougl. K. B. 207; *Rex v. Plummer*, J. Kelyng, 109;" and in the footnote the writer says. "The case of *Mulligan v. Com.* 84 Ky. 229, 1 S. W. 417, not well considered, seems contrary to this doctrine. Bennett, J., at p. 236, observes: 'In Mr. Bishop's *Criminal Procedure*, vol. 2, p. 3, he states that the aider and abettor may be indicted and tried without naming the principal in the indictment. He refers L.R.A.1915E.

to but one case to support that view, to wit: *Rex v. Borthwick*, *supra*. That case does not treat of the question at all, but by inference it is an authority against the view taken by Mr. Bishop.' The reader will observe, what the learned judge overlooked, that the authority to which Bishop here refers is not *Rex v. Borthwick*, but the treatise of Starkie, which is always regarded as sufficient authority for anything. Bishop does not rely on *Rex v. Borthwick*, or on *Rex v. Plummer*, both of which Starkie cites, and I felt it just to Starkie to retain his citations. But it is immaterial whether or not these cases sustain his text; since no author's text is wrong simply if it is not supported by what he cites, as it may rest on other authority or on irrefragable reason. And Starkie is an authority of himself. Still, if what he sets down here is not abundantly supported by the authorities which I have given in the preceding paragraphs of this chapter, nothing in the law has the support of authority. If, as it is held in all pleadings, civil and criminal, you may allege a thing according to its legal effect instead of its outward form unless something special forbids, you may charge as doer one who is such only because his mind contributed to another's doing, you are not obliged to name the other, or in any way to notice him. Such is an allegation after the legal effect. The reader will observe that we are here considering the form of charge against the principal of the second degree, not against the accessory

short distance beyond Brandenburg, Hollin's hat fell off or blew off. White and Hollin stopped their horse, and Hollin went back down the road for his hat. Brandenburg had not seen the hat, and, when he met Hollin going back for it, Brandenburg asked him why he came back; whereupon Hollin replied that he came to get his hat. Brandenburg then called Hollin's attention to the fact that he and White had run into Brandenburg's buggy, and Hollin replied that he did not mean to do it. Hollin claims that Brandenburg used some rough language to him on this occasion. White and Hollin proceeded on the road in advance of Brandenburg until they reached the house of Johnson, where they stopped. White remained in the buggy while Hollin went into Johnson's house for the purpose of washing the blood from his face. While they were at Johnson's, Brandenburg passed them and proceeded on his journey up the road; but almost immediately thereafter Hollin returned from the house and got into the buggy with White and followed Brandenburg, driving very fast. They soon overtook Brandenburg and his wife. Mrs. Brandenburg says that, as Hollin and White came up behind them, she heard the noise of the buggy and turned to look back; that she saw Hollin and White in the rig; and that Hollin had a pistol in his hand, and

drawn upon Brandenburg; that Brandenburg also had a pistol, but that she did not see him draw it, and did not see him have it pointed at White and Hollin. She says Hollin first fired at Brandenburg; that immediately thereafter a fusillade of shots came from the buggy in which Hollin and White were riding; and that Brandenburg returned the fire. Brandenburg was shot three times and fell from the buggy into the road. And as Hollin and White drove away, and while Brandenburg was lying in the road, and raising himself on his arms, Hollin and White fired another shot striking him near the eye. Brandenburg died almost immediately. White was shot through the body and died the following day. The only other eyewitness of the tragedy was Hollin, who testified that, when he and White came upon Brandenburg the last time, Brandenburg had stopped his buggy on the side of the road, and, turning on the seat and facing backwards, Brandenburg drew his pistol on White and fired immediately, striking White in the abdomen; and that immediately White drew his pistol and began firing at Brandenburg, Hollin joining in it. The testimony of Hollin substantially agrees with that of Mrs. Brandenburg in every material detail of the case, except, perhaps, upon two points. She says Brandenburg did not use the rough

before the fact in felony, which is altogether a different thing. And see *Dir. & F.* §§ 115, 116; *People v. Bliven*, 112 N. Y. 79, 8 Am. St. Rep. 701, 19 N. E. 638; *Albritton v. State*, 32 Fla. 358, 13 So. 955; *State v. Patterson*, 52 Kan. 335, 34 Pac. 784."

It will be observed that the *Mulligan Case* is one of the two Kentucky cases cited by the court in *HOLLIN v. COM.* as having settled the question in that state, and that the court did not cite any authority except its own prior decisions. The statute involved as quoted in the *Mulligan Case* provides that the indictment must contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." No doubt the Kentucky courts would permit the commonwealth to insert two counts in the indictment, one alleging the commission of the crime by the defendant as principal in the first degree, and the other charging him as second-degree principal (*Com v. West*, — Ky. —, 113 S. W. 76). So, the compulsion to elect before trial between the two allegations could be avoided in this way by the commonwealth. The literal wording of the statute favors the construction that the courts have given it.

In 1 *Archbold's Crim. Pr. & Pl.* 64, it is said: "But although a principal in the second degree may be convicted and punished."

ished upon an indictment charging him as having committed the offense, yet, as a grand jury, ignorant of this rule of law, may, by mistake, imagine in such a case that the evidence does not support the indictment, and ignore the bill, it may be thought convenient in some cases to indict the aider and abettor in felony, as such." This statement is followed by a special form of indicting an individual as principal in the second degree according to the outward form.

In a footnote to *Rex v. Borthwick*, supra, as reported in 99 Eng. Reprint, 136, it is said: "If several are indicted, A as giving the mortal blow, and the others as present, aiding, etc., evidence that one of the others gave the blow, and that A was only present, etc., will maintain the indictment. 1 Hale, P. C. 437, 438. So, if the evidence be that J. S., not named in the indictment, or even that a person unknown, gave the blow, and that A, B, and C, named therein, were present, aiding and abetting. 1 East, P. C. 350."

In *Williams v. State*, 47 Ind. 568, it was directly held that "a person who is thus present, aiding and abetting in the commission of a felony, is a principal, and not an accessory. He is a principal in the second degree, but may be indicted as a principal in the first degree, and the indictment will be sustained by proof of his being principal in the second degree."

J. W. M.

language attributed to him by the appellant when he came back in the road to get his hat, while Hollin claims he did use such language; and, secondly, she says appellant fired the first shot, while Hollin claims that Brandenburg fired first, and first drew his pistol.

A reversal is asked upon the ground that the court erred in giving instructions 1 and 2, the second instruction being the converse of the first, which reads as follows: "If the jury believe from the evidence beyond a reasonable doubt that in Clark county, and before the finding of the indictment, the defendant, Charles Hollin, at a time when it not reasonably appeared to him to be necessary as explained in the second instruction, wilfully shot and killed Louis Brandenburg, or was present wilfully aiding or abetting Ben White in wilfully shooting and killing said Brandenburg, the jury should find the defendant guilty of murder, if the jury believe from the evidence beyond a reasonable doubt that such shooting was done with malice aforethought, and with intent to kill said Brandenburg, or guilty of voluntary manslaughter, if the same was done in sudden affray or in sudden heat and passion without previous malice."

The indictment reads as follows: "The grand jury of Clark county in the name and by the authority of the commonwealth of Kentucky accuse Chas. Hollin of the crime of murder, committed as follows, viz.: That said Chas. Hollin on the 2d day of October, 1913, in the county aforesaid did unlawfully, wilfully, feloniously and with malice aforethought kill and murder Louis Brandenburg by shooting him with a pistol, against the peace and dignity of the commonwealth of Kentucky." It will be seen that the indictment was against Hollin alone, and did not charge that he was an aider or abettor; or that he was a principal, and that some other person was aiding and abetting him; or that he aided and abetted in connection with another person in the killing of Brandenburg.

Appellant contends that by the terms of this indictment he was called upon to defend himself against the charge of murder committed by himself alone, and that the court erred in instructing the jury to find him guilty if he was present, wilfully aiding and abetting Ben White in killing Brandenburg.

Appellant relies upon *Mulligan v. Com.* 84 Ky. 229, 1 S. W. 417, in support of his contention. In that case, Mulligan was indicted alone for rape, and the trial court instructed the jury that he was guilty if he aided and abetted others in detaining the woman against her will. In sustaining *Mul-* L.R.A.1915E.

ligan's contention that the trial court erred in the instruction given, and in reversing that ruling, this court said: "The object of the indictment is to make known to the accused with what particular crime he is charged, and that the commonwealth will attempt to prove it as charged. So to indict both the principal and aider and abettor as principals, they are notified that the commonwealth can and will attempt to prove, in order to make out their crime, that one did the principal act and the other aided and abetted, and may prepare their defense accordingly. Or if the commonwealth does not choose to indict the principal in the first degree, or for any reason cannot do so, but wishes to indict the aider, and will set forth in the indictment the name of the principal, together with his acts or participation in the crime, then it can be said that defendant is given a statement of the acts constituting the offense charged against him. On the other hand, to indict him as the only perpetrator of the crime, and then on the trial be permitted to prove that he was not guilty of the crime as charged,—the actual perpetrator of it,—but that someone else was guilty, not named in the indictment, and thus secure a conviction, would certainly violate the rule." In concluding the opinion upon this point, the court further said: "We conclude therefore: First, that the commonwealth may, if it chooses, indict both principal and aider and abettor jointly as principals, and secure a conviction against both without violating the rule of the Code supra, because they are then furnished with a statement of the facts constituting their crime; or, second, the aider and abettor may be indicted alone; but in that case he ought to be furnished with a statement of the acts constituting the crime. This can only be done by setting out in the indictment the acts of the principal actor. By this course the commonwealth cannot be wronged, and the defendant cannot be taken unawares or by surprise, because the commonwealth has informed him by a full statement of the facts of which he is charged."

In *Evans v. Com.* 11 Ky. L. Rep. 573, 12 S. W. 768, 769, Evans was jointly indicted with two other persons upon the charge of house burning. This was done under the first rule laid down in the *Mulligan Case*, and in affirming the conviction the court said: "The indictment charges the accused with the burning. It does not speak of aiding or abetting. If, however, the torch was applied by a codefendant of the accused, and he was then present, aiding and abetting, he was, under our law, a

principal, and the indictment therefore authorized such an instruction."

Likewise, in *Benge v. Com.* 92 Ky. 1, 17 S. W. 146, Benge and Hampton and others were jointly indicted for murder; Hampton being charged as principal, and Benge and the other defendants as aiders and abettors. The court instructed the jury that they could find Benge guilty as the principal, notwithstanding he was indicted as an aider and abettor only; and Benge complained of this instruction, upon the ground that he, having been indicted as aider and abettor only, could not be convicted as the actual perpetrator of the crime. The court, however, declined to take Benge's view of the case, and held that, inasmuch as there was only one crime charged in the indictment, the separate parts performed by each defendant constituted, in legal contemplation, the joint act of all; and that, although the aider and abettor's share in the crime was a dependent part, he was, in law, a principal and criminally responsible for the act of the principal as well as for his own act. It will be noticed, however, that the indictment was a joint indictment against the principal and the aiders and abettors, and necessarily showed upon its face the name of the principals and the crime charged, thus bringing it within the rule laid down in the *Mulligan Case*.

Again, in *Reed v. Com.* 125 Ky. 128, 100 S. W. 856, Day, Patrick, and Reed were jointly indicted for murder; Day being charged as principal, and Patrick and Reed as aiders and abettors. The court quoted with approval from the opinions in the *Benge Case*, *supra*, and *Evans v. Com.* above quoted. And after reviewing those and other cases, the opinion pointed out the distinction between the rulings in those cases and the rule announced in the *Mulligan Case*, as follows: "The opinion in the case of *Mulligan v. Com.* 84 Ky. 229, 1 S. W. 417, does not conflict with any conclusion expressed in the authorities *supra*. *Mulligan* was indicted alone for the crime of detaining a woman against her will, with the intent to have carnal knowledge of her. The evidence conduced to prove that the crime was committed by three persons, and more strongly tended to show that the appellant was only an aider and abettor, in view of which this court held that, in order to convict one as an aider and abettor in committing the crime of rape, the principal must be indicted jointly with him, or, if he be indicted alone, the indictment must disclose the name of the principal and give a description of his acts. The opinion in *Mulligan v. Com.* was also written by Judge Bennett, and in *Benge v. Com.* *supra*, it is referred to and distinguished from *L.R.A.* 1915E.

that case. In the case at bar, as in the *Benge Case*, the person charged as principal, as well as the aider and abettor, was indicted, and his alleged acts set forth in the indictment, which acts are in law also the acts of the aider and abettor."

In *Taylor v. Com.* 28 Ky. L. Rep. 823, 90 S. W. 581, John and Ed Taylor and James Garfield Smith were jointly indicted as principals for the murder of William Moore. An instruction upon the subject of Taylor's aiding and abetting in the murder of Moore was given, although the indictment failed to name the persons whom the proof showed the accused had aided and abetted. In condemning that instruction, the court said: "By failing to name the person or persons supposed to have been aided and abetted, it failed to inform the defendant with what he stood charged. In order to convict one of aiding and abetting another with a crime, it is necessary either to charge the principal with him in the indictment; or, if this be not done, then the name of the principal should be stated if known, or, if unknown, that fact should appear, and the facts of the aiding and abetting sufficiently set forth."

In *Steeley v. Com.* 129 Ky. 524, 112 S. W. 655, the appellant and her son Granville Steeley were jointly indicted for the murder of Snyder. Mrs. Steeley contended that the jury should have been peremptorily instructed to find her not guilty, upon the ground that the proof showed that the killing was done by her son Granville. The court, however, overruled this contention, and held it was without merit, because, she having been indicted as a principal, and the evidence showing that she may have been guilty as an aider and abettor, she might have been convicted under the indictment which charged her as a principal. The opinion relied upon the cases of *Evans v. Com.* and *Reed v. Com.* *supra*, saying that it had been expressly decided that, although one is indicted as a principal, he may be convicted on the showing that he was committing, counseling, aiding, advising, or assisting the real perpetrator thereof.

In none of these cases, however, except in the *Mulligan Case*, was there presented the precise question which we have before us, where the indictment charges the defendant alone with the crime. But the reason for the rule laid down in the *Mulligan Case*, and in the other cases above quoted, where the parties were either jointly indicted as principals, or as aiders and abettors, applies with equal, if not greater, force in the case at bar, where the defendant was alone indicted. He was called upon to answer the charge of murder; there

was no intimation given by the indictment that he might be called upon to defend the charge of having been the aider and abettor of some other or perhaps unknown person in committing the murder.

The precise question before us was, however, presented and decided in *Terhune v. Com.* 144 Ky. 370, 138 S. W. 274, which has not been cited by counsel upon either side. In that case, Terhune was indicted for robbery, and the evidence was conflicting as to whether Terhune or Tompkins committed the crime. The court instructed the jury to find Terhune guilty if he committed the robbery, or was present and aided and assisted Tompkins in the robbery. After quoting with approval from *Com. v. Carter*, 94 Ky. 528, 23 S. W. 344; *Taylor v. Com.*; *Mulligan v. Com.*; *Benge v. Com.*; and *Reed v. Com.*—*supra*, the court said: "The Reed Case reviews the cases and points out the distinction between those cases wherein the aider and abettor is jointly indicted with the principal, and where he is indicted alone for the crime. In the last class of cases, which includes the case at bar, he cannot be convicted of aiding and abetting the commission of the crime."

It will thus be seen that the question now presented for decision has been squarely decided in *Mulligan v. Com.* and in *Terhune v. Com.* *supra*; and in both cases contrary to the ruling of the circuit court.

Judgment reversed, and cause remanded for further proceedings.

KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, Appt.,
v.

BYRD WILLIAMS, by Next Friend.

(165 Ky. 386, 176 S. W. 1186.)

Master and servant — heat prostration — assumption of risk.

1. One employed to remove the cinders from a pit into which they are dumped from railroad engines assumes the risk of injury from heat prostration by working on a sultry night, if he is not required to do more than the customary amount of work, and

he increases the hazard by imprudence in the use of ice water.

Evidence — of change after accident.

2. Evidence of the increase of the number employed to perform a particular piece of work, after one so employed was overcome by heat in the performance of his duties, is not admissible in an action to hold the employer liable for the injury so caused.

(June 11, 1915.)

APPEAL by defendant from a judgment of the Circuit Court for Knox County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Black, Black, & Owens and Benjamin D. Warfield, for appellant:

The master is not required to prevent his servant from becoming overheated at his work. The servant alone can and must judge of that matter.

The jury should have been peremptorily instructed to find for defendant.

Seaboard Air. Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; *Lamson v. American Axe & Tool Co.* 177 Mass. 144, 83 Am. St. Rep. 267, 58 N. E. 585, 9 Am. Neg. Rep. 55; *Leary v. Boston & A. R. Co.* 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115; *Pren-tiss v. Kent Furniture Mfg. Co.* 63 Mich. 478, 30 N. W. 109; *Louisville & N. R. Co. v. Morton*, 121 Ky. 398, 89 S. W. 243; *Louisville & N. R. Co. v. Stewart*, 131 Ky. 665, 115 S. W. 775; 1 Fed. Stat. Anno. Supp. 1912, p. 114; *Louisville & N. R. Co. v. Scalf*, 155 Ky. 280, 159 S. W. 804; *Wilson v. Chess & W. Co.* 117 Ky. 567, 78 S. W. 453; *Bollington v. Louisville & N. R. Co.* 125 Ky. 186, 8 L.R.A. (N.S.) 1045, 100 S. W. 850; *American Tobacco Co. v. Adams*, 137 Ky. 414, 125 S. W. 1067; *Louisville & N. R. Co. v. Bryant*, 15 Ky. L. Rep. 181, 22 S. W. 606; *Louisville & N. R. Co. v. Boone*, 138 Ky. 700, 128 S. W. 1087; *Ohio Valley R. Co. v. Copley*, 159 Ky. 38, 166 S. W. 625.

Whether or not the risk of injury from heat prostration is assumed by an employee depends, therefore, in a large measure, upon the nature of the employment in which he is engaged.

LOUISVILLE & N. R. Co. v. WILLIAMS is in strict accord with the one other case which a careful search has disclosed as passing upon this question. In *Stockwell v. Chicago & N. W. R. Co.* 106 Iowa, 63, 75 N. W. 665, 4 Am. Neg. Rep. 380, it is held that a locomotive fireman assumes the risk

Note. — Master and servant: assumption of danger of heat prostration.

The assumption of risk doctrine requires a servant or employee on accepting employment to assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knows, or may in the exercise of reasonable care know, to exist, unless there is some agreement to the contrary. 26 Cyc. 1479.

L.R.A.1915E.

Messrs. J. B. Wall and Sawyer A. Smith for appellee.

Settle, J., delivered the opinion of the court:

The appellee, Byrd Williams, an infant nineteen years of age, suing by his next friend, recovered against the appellant, Louisville & Nashville Railroad Company, in the Knox circuit court, a verdict and judgment for \$1,500 by way of damages for personal injuries resulting, as alleged in the petition, from the negligence of appellant in permitting him to become overheated while at work for it in a cinder pit in the city of Corbin, this state, June 4, 1913. Appellant complains of the judgment and by this appeal seeks its reversal.

The answer of the defendant traversed the averments of the petition, pleaded that the injuries sustained by appellee incidentally resulted from his assumption of an ordinary risk of the work at which he was engaged and of which he had full knowledge, and that he was guilty of contributory negligence, but for which he would not have been injured. The affirmative pleas of the answer were controverted by reply.

The appellant has its terminals of three divisions of its railroad system at Corbin, and it there maintains as an appurtenant of its terminals a cinder pit, into which cinders and ashes from the pans of its engine are emptied. The cinder pit is 80 to 100 feet in length, 40 to 50 feet in width, and contains concrete sides 4 or 5 feet in height. The engines are run upon a track extending out over the pit, and, while thus situated, men called "knockers" empty the ash pans, remove the clinkers, and start new fires in the engines preparatory to their going out upon one of the divisions of appellant's railroad. The cinders and clinkers that are removed from the engines fall into the cinder pit underneath and alongside the track, and are removed from the cinder pit by employees of appellant known as "shovelers," who, with shovels, load them into cars. But before the shovelers begin the work of loading the cinders and ashes into the cars, they cool them by throwing water upon them in the pit with an ordinary hose.

At the time of receiving his injuries, appellee was a night shoveler at the cinder

pit, and while engaged in loading cinders into a car on a warm sultry night, June 4, 1913, was overcome by heat, which, according to the evidence introduced in his behalf, caused him to become subject to "spells" at intervals, practically made him a confirmed invalid, and permanently impaired his ability to earn money.

It is insisted for appellant that the judgment should be reversed for error committed by the trial court: (1) In admitting incompetent evidence; (2) in failing to properly instruct the jury; (3) in failing to give a peremptory instruction directing a verdict for the appellant, which instruction was asked by it following the introduction of appellee's evidence, and again at the conclusion of all the evidence. The third contention will be considered first.

By his own admission appellee had worked for appellant as a shoveler at the cinder pit at intervals, beginning six months before he was injured, and had served in that capacity fully three months all together; and it is apparent from his further admission, as well as other evidence in the case, that he was an experienced shoveler, and had, with one other shoveler, kept the pit clear of cinders during the three months of his work for appellant. According to all the evidence, while there were times when as many as twenty or twenty-five engine ash pans were emptied in the cinder pit in a single night, oftener the number was less; and there were frequent periods throughout the night when the shovelers had nothing to do, during which they rested or employed their time as they chose; furthermore, that there had never been a time when more than two shovelers were required, day or night, to perform the work of removing cinders from the pit. There was no contrariety of evidence as to the fact that the two shovelers were not required to have all the cinders that were dumped into the pit on any night loaded on the cars when they quit work at 6 o'clock in the morning. They were only required to load what they could during the night, leaving the remainder to be loaded by the day shovelers, just as the day shovelers would often leave, for the night shovelers to load, whatever cinders they were unable to remove from the pit during the day.

of being overcome by the heat while in a position over the boiler which he is obliged to assume when oiling the machinery by hand, while the automatic lubricator is in a defective condition. In each case exposure to the heat was one of the ordinary risks of the employment.

The following cases are concerned merely with the question whether or not injury

from heat prostration is an accident within the meaning of a workmen's compensation act, and are not therefore within the scope of this note: *Davies v. Gillespie*, 105 L. T. N. S. 494, 28 Times L. R. 6; *Morgan v. The Zenaida*, 25 Times L. R. 446; *Ismay v. Williamson*, 24 Times L. R. 881; *Robson, E. & Co. v. Blakey*, 49 Scot. L. R. 254.

W. W. A.

There was no evidence whatever conducing to prove that either the day or night shovelers were ever ordered to get any quantity of work done before quitting time, or within any other time. It is not claimed by appellee that he was, on the night in question or at any time, hurried in his work or ordered to do a given quantity of work in a given time. He testified, however, that on the night of receiving his injuries he was told by appellant's yard foreman, Mitchell, "to get the cinders out," and that when he complained to Mitchell that two men could not do the work, the latter replied: "If I could not keep it up, I could go home."

It is argued by appellee's counsel that this statement of the foreman was equivalent to an order to appellee and his fellow shoveler that they were to get all the cinders in the pit loaded before they quit work at 6 o'clock the following morning. The foreman denied making the statement attributed to him, but, if made, did its language intend or manifest any such meaning as counsel attempts to give it? It certainly did not convey, as argued, an implied threat that appellee and his helper, or either of them, would be discharged, if they did not get all the cinders out of the pit before quitting work the next morning. In view of the fact that the work at which appellee and his helper were engaged had always been done by two men, the reasonable inference would be that, if the foreman made the statement attributed to him, his meaning was that, if appellee could not do the work as he had previously done it, he could quit. Appellee makes no claim that the foreman expressed any opinion as to the ability or inability of himself and helper to do the work at the cinder pit; or that two men could do it without danger of either becoming overheated; or that the foreman made any promise to provide a third man to assist in the work. We can see nothing in the statement of the foreman that was calculated to force appellee to any greater effort in accomplishing his work, or to mislead him into incurring a risk or danger that had not previously appertained to such work.

It is shown by the evidence that appellee and his fellow shoveler were allowed to pursue their own methods in the performance of their work. They cooled the cinders by throwing water on them in the pit, and it was left to their judgment to determine when the cinders were sufficiently cooled to be loaded on the cars. The cooling of the cinders was required for two reasons: First, because it was necessary to enable the shovelers to safely handle them; second, to prevent them from igniting and

burning the cars into which they were loaded.

Appellee admitted that when he began to work in the cinder pit he was instructed by appellant's yard foreman how to water the cinders; that neither art nor skill was required to perform that duty properly; that one in handling the hose could stand at a distance of 30 or 40 feet from the pit and throw the water upon the cinders and thereby keep out of the fog and steam produced by the contact of the water with them; and, further, that any person of ordinary intelligence could tell when the cinders had been sufficiently cooled by the water to permit the loading of them on the cars. Appellee claimed, however, that he was never shown how to use the shovel in loading the cinders on the cars, but admitted that he knew how to do that work without instruction.

Appellee's evidence fails to show that his injuries were caused by the negligence of appellant. He was not entitled to recover upon the theory that appellant failed to furnish him a reasonably safe place to perform the work required of him as a servant, for the place of work was reasonably safe, as were the appliances with which the work was required to be performed. The only danger that could have attended the performance of the work was such as arose out of the extreme heat of the weather, or might have arisen from an attempt by appellee to load the cinders on the cars without properly cooling them. It is admitted by appellee that the heat of the weather was as well known to him as it was to appellant's foreman; and that such danger as might have arisen from an attempt to load the cinders on the cars without sufficiently cooling them was one with which he was familiar, and which did not cause his injuries.

It is further evident that appellee was not entitled to recover on the ground that his injuries were caused by the negligence of appellant in imposing upon him and his fellow shoveler more work than the two, in view of the prevailing heat of the weather, could with reasonable safety perform; or that they were caused by any negligence on the part of its foreman in requiring appellee to do the work in a manner that rendered its performance dangerous to a person of his age and experience. As previously remarked, the work was such as had always, according to the evidence, been performed by two shovelers, regardless of the weather, and what had been safely done by appellee and one other shoveler for as much as three months of the time he was in the appellant's employ. There was nothing required in the manner of its perform-

ance on the night appellee received his injuries that differed in any way from its previous performance by him and his fellow shoveler, and though Mitchell, appellant's foreman, may have said to appellee, as the latter testified, if he could not keep up his work he could go home, the statement merely advised him that if he thought himself unequal to the work it was his right to quit and go home. If the statement had contained a promise to make appellee's work lighter, or an assurance that the work was safe, a state of case would have been presented that is not now before us; but, judging from the words employed by the foreman, the statement could have had no other effect than to inform appellee that there would be no change in conditions, that the work would be continued by two shovelers, as previously at all times performed, and that it was left to him to decide whether he would go on with his part of it or quit the job.

If the unusually hot weather prevailing the night appellee was injured added a risk or danger he had not previously encountered in the performance of his work, the danger was admittedly known to him, as he experienced the heat before he was overcome by it, and was, in addition, together with other employees in and about the cinder pit, warned early in the night by the foreman, Mitchell, of the danger to be apprehended from the extreme heat. This warning was given in the form of an admonition to them that, as the heat was unusual, they should be careful not to get too hot or to drink too much of the ice water supplied for their use. It conclusively appears from the admissions found in appellee's own testimony, and the testimony of numerous other witnesses, that his injuries were caused by the excessive heat of the weather and his own imprudence or negligence in drinking too great a quantity of ice water. According to the statements of the witnesses, the drinking dipper used by appellant's employees was a large one and held as much ice water as it was safe for a laboring man to drink at one time in hot weather; yet it appears from the testimony of appellee that he drank of the ice water three or four times that night before he became ill, and that his illness occurred within thirty minutes after the last drink. Other witnesses said he drank oftener than three or four times; and two of them, who saw him drink of the ice water a half hour before they heard of his illness, said that he then drank three full dippers of the water and started on a fourth.

The master is under no duty to prevent his servant from becoming overheated at his work, resulting from atmospheric or

weather conditions, as they are matters entirely beyond his control. In such case, while the servant may not always certainly know how to keep himself within the limits of safety, he is better able to judge than anyone else how much heat he can safely stand, how it affects him, and when his endurance reaches a point beyond which he ought not, for his own safety, to continue at work. For these reasons it is for him, and not the master, to determine whether he shall engage in the work at all; or, if so, how energetically, and when he should rest or quit. If this were not true, an employer could never afford to employ a laborer to do work at which there was any probability of his becoming overheated; and it is not to be overlooked that in operating furnaces, engines, and other heat-producing machinery or appliances, there is always more or less danger to the operatives of becoming overheated, and the same is likewise true of farming and other occupations which compel the laborer to be exposed to the heat of the sun.

It does not appear from appellee's own testimony that he worked any faster or harder than it suited him to work, or that when he found himself getting too warm he asked or was refused leave to rest. On the contrary, when he felt himself getting unduly warm, he said nothing about it, but continued working and drinking large quantities of ice water. He alone was capable of knowing whether he was getting overheated, and it was his duty to govern himself accordingly, and, if necessary for the preservation of his health, to stop work, or even throw up the job.

There being in this case no defect in the place, appliances, or material in or with which appellee worked, or danger in the manner in which he was required to perform the work, there can be no just complaint that there was a failure on the part of the appellant to use ordinary care to furnish him a reasonably safe place to work. The facts therefore authorized the application of the doctrine of assumed risk, for the injuries he sustained were such as resulted from no fault of appellant or its foreman, but from a cause or causes purely incidental to the risk he assumed by continuing the work. *Louisville & N. R. Co. v. McMillen*, 142 Ky. 257, 134 S. W. 185; *Dow Wire Works v. Morgan*, 29 Ky. L. Rep. 854, 96 S. W. 530; *Cumberland Teleph. & Teleg. Co. v. Graves*, 31 Ky. L. Rep. 972, 104 S. W. 356; *Mize v. Louisville & N. R. Co.* 127 Ky. 496, 16 L.R.A.(N.S.) 1084, 105 S. W. 908; *Avery v. Lung*, 32 Ky. L. Rep. 702, 106 S. W. 865; *Fuller v. Illinois C. R. Co.* 138 Ky. 42, 127 S. W. 501; *Louis-*

ville & N. R. Co. v. Carter, — Ky. —, 112 S. W. 904.

The assumption of risk is a rule of the common law and is based on contract and, by implication, on the servant's act in voluntarily exposing himself to danger. As said in *Wilson v. Chess & W. Co.* 117 Ky. 567, 78 S. W. 453, where a laborer was injured from falling into a vat of boiling water, because of ice around the vat where he had to stand in dipping staves into the boiling water: "The duty of the master to furnish a safe, or reasonably safe, place in which the laborer may do his work, is frequently either misunderstood or misapplied. In the first place, the master is not required to furnish an absolutely safe place. If the work is in and of itself dangerous, the master does not insure against such danger. On the contrary, there is nothing better settled than that the servant assumes the ordinary risks and hazards incident to the character of his work. Whatever may be the moral obligation resting upon those who employ people in hazardous work to furnish them the safest possible means to protect them from injury, the law does not forbid a laborer's undertaking a hazardous employment with full knowledge of its dangers, if he wants to. If he does, the law leaves the risk upon him, for he has assumed it. There is no feature of the law of negligence better settled than this. The contrivance in use in this case was of the simplest kind. It was merely a large vat or tub, plainly open at the top. The lowest order of intelligence of a rational man would have comprehended that boiling water would scald the flesh if it came in contact with it, and that ice was slippery. The conditions were openly visible to the laborer. He had only to use his eyes and his most common experience and his earliest instincts, to fully appreciate the danger of his position. There was no assurance by the master of the safety of the place, even if such assurance, under the circumstances, could have shifted the liability. There was no promise by the master to provide other appliances of greater safety, — no promise to repair. Under these circumstances, the servant assumed the dangers of his employment. He cannot therefore recover from the employer damages growing out of them."

It is, however, insisted for appellee that, as he was only nineteen years of age, the same care required of an adult in protecting himself against danger cannot be required of him. This view of the matter does not obtain in this jurisdiction. Appellee had at least three months' experience in performing the work at which he was engaged at the time of receiving his injury.

The work being of the simplest kind, it may well be said that this period of service ought to have furnished, and did furnish, appellee with all the experience necessary to give him a thorough understanding of such work and the risks attending its performance.

In *Cincinnati, N. O. & T. P. R. Co. v. Finnell*, 108 Ky. 135, 57 L.R.A. 266, 55 S. W. 902, 7 Am. Neg. Rep. 439, a boy seventeen years old was fatally injured while assisting a railroad brakeman, at the latter's request, in loading a piano on a train, and it was sought to hold the receiver of the railroad company liable for his death. There was a recovery in the circuit court. In reversing the judgment we in part said: "Under these authorities, there can be no recovery for the injury to the intestate, unless the fact that he was an infant takes this case out of the rule. He was seventeen years of age, and well grown for his years. The danger from the fall of a piano was apparent, and there is nothing in the record to warrant the conclusion that he had not sufficient discretion to be held responsible for the consequences of his acts. The rule is that a minor in entering a service assumes, like the adult, the risks of that service, unless too young to appreciate the peril to which he is exposed. 1 Shearm. & Redf. Neg. § 218."

In *Bollington v. Louisville & N. R. Co.* 125 Ky. 186, 8 L.R.A.(N.S.) 1045, 100 S. W. 850, we affirmed a judgment whereby a demurrer to the petition had been sustained and the petition dismissed. The facts were that Bollington, who was nineteen years old, was set to making whitewash. While he was performing this work by pouring water upon the lime, an explosion occurred which threw the lime and water in his eyes, causing the loss of the sight of one of them and material injury to the other. It was contended for the plaintiff that the defendant knew that lime and water, when confined in mixing, would explode; but that the plaintiff, being only nineteen years of age and having little or no experience in handling or mixing lime and water, did not know it would explode, for which reason the defendant was guilty of negligence in failing to warn or instruct him as to the danger of the work; but we held that, under the rule that a servant assumes all the risk ordinarily incident to his employment in accepting service, he not only assumes the risk reasonably to be anticipated as incident to it, but also assumes that he has capacity to understand and know the extent of such service and the requisite ability to perform it, and, further, that the use of water and lime in making whitewash, and the effect of water on lime when applied

to it, are such commonplace and daily transactions that any person of nineteen years of age, who had ordinary intelligence and capacity, would or ought to know the danger attending such mixture, and such person, acting as a servant, cannot recover of the master for an injury from a risk so assumed.

In *Louisville & N. R. Co. v. Boone*, 138 Ky. 700, 128 S. W. 1087, it was held that a boy seventeen years of age, injured by the falling upon him of a heavy piece of iron in a shop while he was carrying bolts, was not entitled to recover damages for the injuries thereby sustained, because the danger was incident to the method of the work, and the risk one that was assumed by him in entering defendant's employment. To the same effect are the following cases: *Louisville & N. R. Co. v. Bryant*, 15 Ky. L. Rep. 181, 22 S. W. 606; *Clifton v. Chesapeake & O. R. Co.* 31 Ky. L. Rep. 431, 102 S. W. 247.

In the cases cited, the doctrine of assumed risk was applied, notwithstanding the master's knowledge, or opportunities by the use of ordinary care of knowing, of the existence of the conditions or danger out of which the injuries arose. Whereas, in the instant case the appellant did not know, and could not, by the exercise of any sort of care, have known, what amount of heat appellee could endure, or how much ice water he could drink without injury to his health. The latter alone could know or judge of these things.

As, according to the evidence, the appellee's injuries were not caused by the negligence of appellant or its foreman, Mitchell, but resulted solely from the excessive heat of the weather, constituting an ordinary risk or danger incident to the service in which he was employed, and which he assumed in accepting such employment, the trial court erred in refusing to give the peremptory instruction directing a verdict for appellant, as requested by it at the close of all the evidence. This being our conclusion, consideration of the instructions that were given by the trial court is deemed unnecessary, because none of them should have been given.

In considering appellant's complaint of the evidence, we were able to find none that we regard incompetent, except that furnished by two or three witnesses to the effect that, since appellee's injuries were sustained, appellant employs three men to perform the work in the cinder pit that had theretofore been done by two. This testimony was not only incompetent, but also very prejudicial to the appellant. We have repeatedly held that evidence of the repair of a defect, or the making of a change in

conditions, after the occurrence of an injury caused by such defect or the former conditions, is prejudicial error authorizing a reversal. *Louisville & N. R. Co. v. Morton*, 121 Ky. 398, 89 S. W. 243; *Louisville & N. R. Co. v. Stewart*, 131 Ky. 665, 115 S. W. 775.

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial consistent with the opinion.

NEBRASKA SUPREME COURT.

JOHN J. DINNEEN, Admr., etc., of John Kennelly, Deceased, Appt.,

v.

AMERICAN INSURANCE COMPANY OF THE CITY OF NEWARK, NEW JERSEY.

SAME, Appt.,

v.

DELAWARE INSURANCE COMPANY OF PHILADELPHIA.

(— Neb. —, 152 N. W. 307.)

Insurance — ordinances — effect.

1. When writing insurance on a building situate within the fire limits of a city, the insurance company is bound by the laws and ordinances of the city, and such laws and ordinances should be considered as a part of the policy.

Same — total loss — inability to repair.

2. When an insured building is injured by fire to such an extent as to destroy its use as a building, and require it to be demolished or removed, the insured will be entitled to recover as for a total loss. Such construction of the valued policy law does not deprive the insurance company of its property without due process of law.

Same — provision for partial payment.

3. In such case any condition in the policy providing for the payment of a less sum than the amount of the insurance as written therein is void under the provisions of the valued policy law.

New trial — motion — timeliness.

4. On the trial the court made special

Headnotes by BARNES, J.

Note. — Constructive total loss of insured building.

The earlier cases on this subject are discussed in the note to *Monteleone v. Royal Ins. Co.* 56 L.R.A. 784, and that to *Springfield F. & M. Ins. Co. v. Homewood*, 39 L.R.A. (N.S.) 1182.

In *Kinzer v. National Mut. Ins. Asso.* 88 Kan. 93, 43 L.R.A. (N.S.) 121, 127 Pac. 762, property is held to be regarded as having been wholly destroyed or as being a total loss, within the meaning of an insurance contract, no matter how great a portion thereof may remain unconsumed, if it is

findings of fact without rendering a general verdict. The court discharged the jury, with consent of the parties, and took the case under advisement. The plaintiff excepted to the special findings, and immediately filed a motion to set them aside and for a new trial. After considering the matter of law for some days, the court rendered a judgment in substance as requested by the defendant. The plaintiff within three days filed a motion for a new trial. Held, that such motion was in time, and was a sufficient compliance with the rule.

(Fawcett and Rose, JJ., dissent.)

(April 3, 1915.)

APPEAL by plaintiff from judgments of the District Court for Douglas County in defendants' favor in consolidated actions brought to recover the amount alleged to be due on two separate fire insurance policies. Reversed.

The facts are stated in the opinion.

Messrs. James B. Kelkenney and John E. Quinn, for appellant:

Plaintiff sustained a total loss of the insured property, for which a recovery may be had.

Insurance Co. of N. A. v. Bachler, 44 Neb. 549, 62 N. W. 911; German Ins. Co. v. Eddy, 36 Neb. 461, 19 L.R.A. 707, 54 N. W. 856; Larkin v. Glens Falls Ins. Co. 80 Minn. 527, 81 Am. St. Rep. 286, 83 N. W. 409; Hamburg-Bremen F. Ins. Co. v. Garlington, 66 Tex. 103, 59 Am. Rep. 113, 18 S. W. 337; Brady v. Northwestern Ins. Co. 11 Mich. 425; Monteleone v. Royal Ins. Co. 47 La. Ann. 1563, 56 L.R.A. 784, 18 So. 472; 4 Joyce, Ins. § 3170; Palatine Ins. Co. v. Nunn, 99 Miss. 493, 55 So. 44.

Plaintiff's loss being total he must, under the law, have judgment for the amount of the insurance written in his policies, as this amount is conclusively the true value of the property insured and the true amount of loss and measure of damages, regardless of what may have been the actual value of the material of the building actually burned.

Insurance Co. of N. A. v. Bachler, 44 Neb.

so injured that it must be torn down or that it cannot be utilized in reconstructing the building without incurring a greater expense than if it were not so utilized.

As a test of total loss, as stated in *Aurora v. Fireman's Fund Ins. Co.* 180 Mo. App. 263, 165 S. W. 357, it must be ascertained whether the building is so far destroyed that the ruins are worthless and cannot be utilized for reconstruction so that the property when rebuilt shall be in as good condition as before the fire.

In *Teter v. Franklin F. Ins. Co.* — W. Va. —, 82 S. E. 40, it is stated that, not-L.R.A.1915E.

549, 62 N. W. 911; *German Ins. Co. v. Eddy*, 36 Neb. 461, 19 L.R.A. 707, 54 N. W. 856.

Any provisions or stipulations in contracts made by all policies of insurance upon real property, which in any way tend to change the liability of the insurer from that fixed by the law of the state, are void.

German Ins. Co. v. Eddy, supra.

Messrs. Baldrige, Keller, & Keller, for appellees:

Such errors as counsel desire to take advantage of must be brought to the attention of the court in a motion for a new trial filed within three days after the trial, and such errors as are not brought to the attention of the court by being embraced in said motion for a new trial are in law waived.

Fitzgerald v. Brandt, 36 Neb. 683, 54 N. W. 992; *Gullion v. Traver*, 64 Neb. 51, 89 N. W. 404.

Where a question is submitted to a jury after the request of a party for its submission, such party cannot complain that a finding is adverse to him, or is not sustained by the evidence.

Farmers' Bank v. Garrow, 63 Neb. 64, 88 N. W. 131.

Defendants were not bound by condemnation of the property damaged by fire, because they had no notice of the proceedings of the building authorities of the city.

8 Cyc. 1095; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Betancourt v. Eberlin*, 71 Ala. 461; *Bostwick v. Isbell*, 41 Conn. 305; *Boyd v. Ellis*, 11 Iowa, 97; *Wynkoop v. Cooch*, 89 Pa. 450; *Dodge v. Omaha & S. W. R. Co.* 20 Neb. 276, 29 N. W. 936.

The parties having contracted that the loss should fall upon the insured, and not upon the insurer, the agreement should be enforced.

Hewins v. London Assur. Corp. 184 Mass. 177, 68 N. E. 62; *McCready v. Hartford F. Ins. Co.* 61 App. Div. 583, 70 N. Y. Supp. 778.

Barnes, J., delivered the opinion of the court:

John Kennelly brought two suits in the district court for Douglas county on sepa-

withstanding the four walls of a brick building are standing and the metal roof is on it, still if the walls are so injured by the fire that a prudent man would not use any part of them as a basis of repairs, and they would have to be torn down and rebuilt the loss would be total. It is further stated in this case that it matters not that portions of the material in the building can be utilized in rebuilding; that it is not the material composing the building that is insured, but the building itself, and if its remnant cannot be used as a basis of repair or restoration the loss is total. W. A. F.

rate fire insurance policies, but died before the cases were tried. The actions were revived in the name of John J. Dinneen, administrator, and were subsequently consolidated.

It appears that each of the two defendants insured Kennelly against loss by fire to the extent of \$1,500 on a three-story frame building situated within the fire limits of the city of Omaha. The insured property was damaged by fire on March 19, 1908. The city of Omaha, pursuant to an ordinance, prevented the repair of the building, and the owner was required to demolish it. Out of what remained after the fire insured realized \$210. Allowing credit for that sum he demanded from each of the defendants \$1,395. Before the loss occurred the value of the building was \$5,000. The fire damaged the insured property to the extent of \$1,200. Each of the policies contained the following provisions: "Defendant company shall not be liable for loss caused . . . by order of any civil authority." "This company shall not be liable for . . . for loss . . . beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings."

In giving effect to these provisions of the policy, the district court rendered judgment against each of the defendants for \$640.81, and from those judgments the plaintiff has appealed, claiming that, within the meaning of the contract of insurance and the valued policy act, the property was wholly destroyed, and that he was entitled to recover as for a total loss. Rev. Stat. 1913, § 3210.

Plaintiff contends that, where the property insured is realty, and is wholly destroyed without criminal fault on the part of the owner, the amount of the insurance written in the policy should be taken conclusively to be the true value of the property insured and the true amount and measure of damages. He argues that the statute eliminates from the insurance contract in controversy the conditions of the policies relating to loss occasioned by city ordinances regulating the construction or repair of buildings. It is also argued that existing laws and ordinances are parts of the insurance policies; that the building was damaged by fire beyond repair; and that, as a result, the insured property was totally destroyed. There is a stipulation in the record which recites, among other things, the following: "That on the 19th day of March, 1908, while said contracts of insurance were in full force and effect, said building was burned and damaged by fire to such an extent as to require that it should be repaired before being fit for habi-

tation; that said building was located within the fire limits of the city of Omaha; that Charles H. Withnell, building inspector of the city of Omaha, refused to grant plaintiff's application for a permit to repair said building, because, by reason of said fire, he claimed said building had depreciated in value to an extent greater than 50 per cent of its original value, said building being a frame structure and within the fire limits of the city of Omaha; that the said building inspector recommended to the city council of the city of Omaha that said building be torn down, and on the 17th day of July, 1908, upon a hearing on said recommendation, said building was condemned and ordered torn down by said city council, because, in its opinion, said building was in bad condition and depreciated in value to an extent greater than 50 per cent of value of similar buildings above foundation by reason of said fire; that plaintiff obeyed the order of the council, and notified defendants of this fact; that plaintiff notified defendants of the refusal of the building inspector to grant a permit to repair said building, and of the condemnation proceedings of the city council."

* It was further stipulated, in substance, that the city ordinances pertaining to buildings within fire limits, as published in Thomas's Revised Ordinances 1905, were in effect at the time of the issuance of the policies herein, at the time of the said fire, and at the time of the building inspector's refusal to grant said permit to repair, and the condemnation proceedings of the city council were in full force and effect. It is a well-established rule that a policy insuring against loss or damages by fire covers loss occasioned by a law prohibiting the repair of a building partially destroyed by fire. *Hewins v. London Assur. Corp.* 184 Mass. 177, 68 N. E. 62; *Brady v. Northwestern Ins. Co.* 11 Mich. 425; *Larkin v. Glens Falls Ins. Co.* 80 Minn. 527, 81 Am. St. Rep. 287, 83 N. W. 409; *Monteleone v. Royal Ins. Co.* 47 La. Ann. 1563, 56 L.R.A. 784, 18 So. 472; *Hamburg-Bremen F. Ins. Co. v. Garlington*, 66 Tex. 103, 59 Am. Rep. 613, 18 S. W. 337; *Palatine Ins. Co. v. Nunn*, 99 Miss. 403, 55 So. 44.

In *Larkin v. Glens Falls Ins. Co.* 80 Minn. 527, 81 Am. St. Rep. 287, 83 N. W. 409, it was said: "The parties are presumed to know of the ordinances. They directly and materially affect their rights in case of a loss under the policy, and should govern and control in the adjustment and settlement of such loss. 4 Joyce, Ins. § 3170."

In *Hamburg-Bremen F. Ins. Co. v. Garlington*, 66 Tex. 103, 59 Am. Rep. 613, 18 S. W. 337, it was held: "That, the parties

having contracted in view of the city ordinance, . . . the fire must be deemed the proximate cause of the loss, and the loss total."

In *Palatine Ins. Co. v. Nunn*, 99 Miss. 493, 55 So. 44, it was said: "A building insured against fire is a 'total loss' where, though only partly burned, it is rendered unfit for the purpose for which it was constructed, and there is an ordinance or law prohibiting reconstruction."

In the note to *Monteleone v. Royal Ins. Co.* supra, as reported in 56 L.R.A. 784, 793, it is said: "Whenever, by reason of the existence of local ordinances or regulations, it is rendered impossible to repair a partially destroyed building, the insured is liable as for a total loss."

Such is the rule in this state. *German Ins. Co. v. Eddy*, 36 Neb. 461, 19 L.R.A. 707, 54 N. W. 856; *Home F. Ins. Co. v. Bean*, 42 Neb. 537, 47 Am. St. Rep. 711, 60 N. W. 907; *Insurance Co. of N. A. v. Bachler*, 44 Neb. 549, 62 N. W. 911. In the two cases last cited it was said: "Where real property is wholly destroyed by fire, any provision of a policy of insurance covering such property which in any manner attempts to limit the amount of the loss to less than the sum written in the policy is in conflict with the statutory rule, invalid, and will not be enforced."

The principal question in dispute in this case is whether an insurance company may embody provisions in the policy which provide that it shall not be liable for loss occurring by reason of any ordinance regulating the construction or repair of buildings. This precise point was considered and determined in *New Orleans Real Estate Mortg. & Securities Co. v. Teutonia Ins. Co.*, 128 La. 45, 54 So. 466, and in *Palatine Ins. Co. v. Nunn*, supra, and it was held that such provisions were invalid under a valued policy law. Considering the effect of our former decisions as to what constitutes a total loss, and also giving the valued policy law the weight and effect it seems to us that the legislature intended it to have, we must hold that the conditions of the policy limiting the amount of loss are invalid, and that the building was a total loss to the insured. The Massachusetts case (*Hewins v. London Assur. Corp.* 184 Mass. 177, 68 N. E. 62) relied upon is not based upon a valued policy law, and is not applicable.

It appears that a jury was impeded to try the case, and at the conclusion of the testimony the plaintiff requested the court to direct a verdict in his favor for the amounts prayed for in his petitions. The court refused the request, and thereupon L.R.A.1915E

the jury were required to answer the following interrogatories:

(1) To what extent was the property in dispute injured or damaged by reason of the fire itself of March 19, 1908? The jury answered: \$1,200.

(2) What was the value of the building insured immediately prior to the fire of March 19, 1908? The jury answered: \$5,000.

Thereupon they were discharged without having rendered a general verdict. The parties then agreed that the legal questions should be reserved for the decision of the court. The plaintiff at once filed a motion to set aside the findings of the jury and for a new trial, and the court took the case under advisement. On May 27, 1912, the court rendered the judgments of which the plaintiff complains. On the 29th day of May a motion for a new trial was filed and overruled, and the plaintiff thereupon perfected his appeal. As we view the record, the court erred in refusing plaintiff's request for a directed verdict as prayed for in his petitions, and defendants' contention that plaintiff failed to file his motion for a new trial within the time provided by statute cannot be sustained.

Finally, it is contended by the defendants that they were not brought before the building inspector or the city council at the time the orders were made refusing the plaintiff the right to repair the building and requiring the same to be demolished. Therefore to require them to pay the amount of the insurance named in the policies is, in effect, taking their property without due process of law.

The stipulation shows that defendants had knowledge of the proceedings, but it is true that no summons or other written notice was ever served upon them requiring them to appear and defend against said finding and order. The ordinance contains no provisions for the service of such a notice. At most, the findings and order were mere ministerial or administrative acts, and were within the reasonable discretion of the city authorities. If the injury to the building by fire was so slight, and the repairs necessary so trifling, that the action of the authorities in condemning the property was beyond all reason, they might have been restrained by a court of equity. Therefore this contention is not well founded.

It follows from what has been said that the conditions contained in the policies limiting the recovery to an amount less than is provided by the valued policy law are void. The trial court should have rendered judg-

ment for the amounts claimed in plaintiff's petitions.

The judgment of the District Court is reversed, and the cause is remanded for further proceedings.

Letton, J., concurring:

We have held in this state repeatedly that it is not essential that a structure be totally destroyed in order to make the company liable for a total loss; it is enough that it be destroyed as a building. Other courts upon good reason have held that, when it was destroyed as a building by reason of the restrictions of building ordinances, it was a total loss. Our valued policy act provides: "The amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages." Rev. Stat. 1913, § 3210.

The insurance company had knowledge of this act when it made the contract, and might have adjusted, and perhaps did adjust, its premium rate to meet the liability.

It seems to me that the provision written in the policy to the effect that the amount of insurance written shall not be taken to be the true amount of loss violates this statute.

Fawcett, J., dissenting:

I have no quarrel with the rule announced in the first paragraph of the syllabus of the majority opinion, that, "when writing insurance on a building situated within the fire limits of a city, the insurance company is bound by the laws and ordinances of the city, and such laws and ordinances should be considered as a part of the policy;" but I think the rule should work both ways, and hold that the owner of a building situated within such fire limits should also be bound by the ordinances of the city, and that such ordinances should be considered as a part of the policy he accepts from the insurance company. He knows as well as the company that, when a frame building situate within the fire limits is damaged 50 per cent of its value, it cannot be repaired, but will be ordered torn down and removed. Both the insurance company and the assured, therefore, in entering into a contract of insurance, have the ordinance before them, and the simple question in this case is: May they enter into a contract binding upon both, that the assured will assume the risk of having his building torn down after it has suffered a partial loss by fire, and that the insurance company will assume the risk of loss actually caused by the fire, but will not assume the risk of loss or damage to the building over and above that

caused thereby, which may be occasioned by the action of the city authorities in ordering the building destroyed? Each of the contracting parties understands fully the part which fire may play in the destruction of such a building and the part which the ordinance of the city may play in causing such destruction. The company assumes the risk of the former, and the assured of the latter. Is such a contract prohibited by the valued policy act (Rev. Stat. 1913, § 3210)? I think not. In such cases I think the rule is, and should be, that insurance against damage by fire protects the insured against loss resulting from the enforcement of an ordinance prohibiting the repair of his building after its partial destruction by fire, in the absence, and only in the absence, of an agreement to the contrary. *Hewins v. London Assur. Corp.* 184 Mass. 177, 182, 68 N. E. 62. The provision in controversy relates to the causes of loss and the character, as well as the extent, of the insurer's risk or liability. On these matters parties may make their own agreements, unless they are hampered by valid legislation. A statute restricting the right of contract, as the valued policy law, should not be extended by implication or construction beyond its import and purposes as disclosed by the language of the lawmakers. The purpose of the valued policy act is to prevent insurance at an overvaluation, and to deter insurers from taking reckless risks, by prohibiting them, after a total loss, from claiming that, at the time of issuing the policy, the value of the insured property was not equal to the amount of the insurance. Here the value of the property when the policy was issued and when the fire started is not questioned. The question here is the character of the risk assumed by the company. The statute by its own terms applies to insurance on property wholly destroyed. Where there is only a partial loss by fire, and the damaged building is for that reason demolished under police ordinances enacted to protect the public against future fires, the character of the risk to be assumed by an insurance company is a lawful subject of contract. If a property owner desires insurance limited to fire alone, intending to carry his own risk in so far as a city may prevent him from repairing a building partially destroyed by fire, how can he procure such indemnity if he cannot make a lawful contract including those terms? They are not inconsistent with the valued policy act, and there is nothing in the policy indicating a purpose to violate the law or to mislead or defraud the insured. It is a plain, straightforward, honest contract, voluntarily entered into between the parties, and the

district court was right in enforcing it as the parties had made it.

Rose, J., joins in dissent.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

**ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA, Appt.,
v.
PENNSYLVANIA RAILROAD COMPANY.**

(125 C. C. A. 629, 207 Fed. 897.)

Nuisance — operation of railroad.

1. The consequential, incidental, and unavoidable annoyance or injury resulting to occupants of land adjacent to a duly authorized railroad, by its non-negligent and careful operation, does not constitute an actionable nuisance.

Eminent domain — operation of railroad — injury to abutting property.

2. The injury to property abutting on a duly authorized railroad track, by smoke and cinders due to the non-negligent operation of the road, is not a taking for which compensation must be made.

(August 25, 1913.)

APPEAL by complainant from a decree of the District Court of the United States for the District of New Jersey, John Rellstab, Judge, dismissing a bill filed to enjoin defendant from operating its railroad locomotives and engines so as to cause black smoke from them to fall upon complainant's premises in such quantities as to interfere with the reasonable use and enjoyment thereof, and to obtain an award of damages. Affirmed.

The facts are stated in the opinion.

Argued before Gray, Buffington, and McPherson, Circuit Judges.

Mr. Frank M. Hardenbrook for appellant.

Messrs. Vredenburg, Wall, & Carey, with Mr. James B. Vredenburg for appellee.

Gray, Circuit Judge, delivered the opinion of the court:

This is an appeal from a decree of the court below dismissing a bill in equity asking for an injunction and an award of damages. The bill of complaint alleges that complainant is a religious corporation and has been active as such since 1884, upon the lands and premises described in the bill.

That the defendant was incorporated in 1846 as a common carrier, with authority to lease, hold, and operate a line of railway in the states of Pennsylvania and New Jersey, "and as such, at all the times hereinafter mentioned, has maintained and operated, and still maintains and operates, a railroad, with its main and side tracks, locomotives, freight and passenger cars, upon what is known as Sixth street, in Jersey City, Hudson county, New Jersey."

That on the 20th day of September, 1884, the complainant became the owner of three lots in Jersey City, county of Hudson, and state of New Jersey, fronting on the westerly side of Monmouth street. (No map of the premises having been presented on either side, we assume that Monmouth street runs at right angles to Sixth street, and that the lots in question are situate in a block bounded on the south by Sixth street, on the east by Monmouth street, on the north by Seventh street, and on the west by Brunswick street.) How far these lots were from Sixth street, nowhere appears. That immediately thereafter, it caused to be erected thereon, at a large cost, a church edifice, since which time it has held continuously religious services therein.

That on the 10th day of May, 1893, complainant became the owner of a lot of land in the said city of Jersey City, situate on the north side of Sixth street, 100 feet west from the northwest corner of Sixth and Monmouth streets, and in the same block as the aforementioned lot. That complainant caused to be erected thereon, at a large cost, a residence for the officiating priests attached to and connected with said church, since which time the same has been continuously occupied as a home by said priests.

That on June 11, 1898, complainant be-

Note. — The general subject of the liability of railroads for creating nuisances is treated in the notes to *Missouri, K. & T. R. Co. v. Mott*, 70 L.R.A. 579; *Louisville & N. Terminal Co. v. Lellyett*, 1 L.R.A. (N.S.) 49, and *Terrell v. Chesapeake & O. R. Co.* 32 L.R.A. (N.S.) 371. See also later cases, *State v. Erie R. Co.* 46 L.R.A. (N.S.) 117; *Matthias v. Minneapolis, St. P. & S. Ste. M. R. Co.* 51 L.R.A. (N.S.) 1017, and *Richards v. Washington Terminal Co.* L.R.A. 1915A, 887.

As to right, under constitutional provision L.R.A. 1915E.

sion against "damaging" private property without compensation, to compensation for consequential injuries to property no part of which is taken, from smoke, noise, dust, etc., incident to the ordinary operation of a railroad, see notes to *Tidewater R. Co. v. Shartzer*, 17 L.R.A. (N.S.) 1054, and *Hyde v. Minnesota, D. & P. R. Co.* 40 L.R.A. (N.S.) 48. See also later cases, *Choctaw, O. & G. R. Co. v. Drew*, 44 L.R.A. (N.S.) 38, and *Taylor v. Chicago, M. & St. P. R. Co.* post, 634.

came the owner of four certain lots of land in said city, and in the same block as the lots above referred to, fronting on Brunswick street 100 feet, but how far from Sixth or Seventh street does not appear. That immediately thereafter, complainant caused to be erected thereon a parochial school for educational purposes, since which time the same has been continuously used as a school for upwards of 1,100 children.

That on August 8, 1902, complainant became the owner of a lot of land on the northerly side of Sixth street, in said city, in the same block as the lots aforementioned. That immediately thereafter, it caused to be erected thereon an addition to the residence of the officiating priests connected with the complainant's said church.

. That on March 20, 1905, complainant became in like manner the owner of a lot of land on the southerly side of Seventh street, in the said city, in the same block as the aforementioned lots, and that immediately thereafter, it caused to be erected thereon, at large expense, a home and residence for the sisters and female teachers connected with said church and school; since which time it has been continuously so used and occupied.

That the buildings so erected are of substantial and costly construction, and, except for the acts of the defendant complained of, convenient, pleasant, and healthful, and adapted and used for the respective purposes aforesaid; and that the immediate neighborhood has long been and now is thickly populated and exclusively a residential one.

That the said defendant, for upwards of six years last past, in the operation of its said railroad, has maintained and operated upon said Sixth street, and immediately to the south of said lands and premises and structures of complainant, a line of railroad track upon which it operates a great number of freight and passenger trains, cars, switches, engines, and locomotives, which continuously, at all hours of the day and night, pass upon said tracks, each making its characteristic noises, which locomotives attached to said trains are now burning, and for upwards of the past six years have continuously burned, vast quantities of what is known as soft or bituminous coal, and from the burning and partial combustion of which there arises, and continuously for upwards of the past six years, there has arisen, large and dense volumes of black smoke, soot, cinders, carbon, ashes, particles of unconsumed coal, coal dust, and noxious, unwholesome gases, offensive odors and vapors, which are carried to, over, into, upon, and through the lands, premises, and structures of complainant, so owned, used, and occupied by it as aforesaid; by reason of which, the buildings of said complainant are seriously injured, and their use, for the purposes aforesaid, seriously interfered with, to the great inconvenience and discomfort of those occupying said buildings and worshiping in said church.

The bill then charges that the said acts of the defendant have taken from the complainant property consisting of the easement of light and air, and deprives it of the same without due process of law and without just compensation, or any compensation whatever, "and that such act of the defendant in such interference with and appropriation of said property of your orator has been and now is a violation of the provisions of the Constitution of the United States."

The bill then avers that the aforesaid acts, use, occupation of, and appropriation by the defendant, as aforesaid, constitute and are a nuisance and of special injury to the complainant, "and are unnecessary, avoidable, and unreasonable, and not necessarily connected with the construction or a reasonable operation of said railroad, and which acts are continuous and will cause great and irreparable loss to your orator, and subject your orator to the prosecution of a multiplicity of suits for damages, unless the defendant be restrained by injunction from the commission thereof."

The bill then concludes with the averment that the complainant is remediless in the premises, under and by the strict rules of the common law, and can only have relief in a court of equity. The bill therefore prays that defendant may be deemed to pay to complainant the sum of \$50,000 damages suffered by it, by reason of the premises, and that there be granted to complainant "a writ of injunction, commanding the said defendant, its agents, servants, and employees, to absolutely desist and refrain from so operating its said railroad locomotives and engines as to cause or permit black smoke, particles of unconsumed carbon, soot, cinders, ashes, coal dust, and noxious and unwholesome gases and offensive odors and vapors from its said engines and locomotives, to fall upon or enter into the premises and structures of your said orator, in such appreciable quantity as to interfere with the reasonable use thereof, and render uncomfortable the reasonable enjoyment of the same by your orator, and the priests connected therewith and persons using the said respective structures of your orator." The bill then concludes with a prayer for a subpoena and answer by the defendant, without oath.

The answer of the defendant denies that

The answer of the defendant denies that

it had ever maintained or operated a railroad on Sixth street in Jersey City.

It alleges that, as lessee, it has maintained and operated, since 1871, an elevated railroad with five tracks on the duly authorized right of way of the United New Jersey Railroad & Canal Company, on land between Fifth and Sixth streets, but not on any part of Sixth street.

The defendant, further answering, avers that the legislature of the state of New Jersey, by an act entitled "An Act to Incorporate the New Jersey Railroad & Transportation Company," passed March 7, 1832 (P. L. p. 96), created a body politic and corporate, to exercise all the powers and privileges pertaining to corporate bodies and necessary for the purposes of said act; with all the rights and powers necessary to the construction of a railroad, with as many sets of tracks as they may deem necessary, from a point in the city of New Brunswick to a point in the Hudson river opposite the city of New York, and to take possession of lands needed for the site of the said road, and to acquire the same by purchase or condemnation, in fee simple, and to charge and collect tolls, etc.

That immediately after the passage of said act, the said New Jersey Railroad & Transportation Company surveyed and filed the route of their railroad from the city of New Brunswick to Jersey City, opposite the city of New York, and acquired the land and constructed a railroad thereon, in accordance with the terms of the act, and in September, 1834, opened said railroad as a public highway for the transportation of property and persons, and maintained and operated said railroad up to the time of the execution of the lease thereafter mentioned.

That the state of New Jersey, by an act entitled "An Act to Enable the United Railroad & Canal Companies to Increase Their Depot and Terminal Facilities at Jersey City," approved March 30, 1868 (P. L. p. 551), empowered the said New Jersey Railroad & Transportation Company, and the United Delaware & Raritan Canal Company, and the Camden & Amboy Railroad & Transportation Company, to acquire from the state the land under water in Harsimus Cove, in Jersey City, lying between tide water mark on the west, the deep water of the Hudson river on the east, the center of South Second street on the north, and the center of South Seventh street on the south, in the name of the New Jersey Railroad & Transportation Company, and to fill up and improve the same by erecting wharves, piers, car and engine houses, and other buildings, and to build a branch railroad, not exceeding 100 feet in

width, from said property, so purchased as aforesaid, to some point in the present line of the New Jersey railroad, eastward of the deep cut in Bergen Hill, with as many separate tracks and rails as shall be deemed necessary, with power to procure the right of way for such branch railroad, either by purchase or by condemnation, in the manner prescribed by the original charter, and to construct the same as an elevated railroad, so as to pass over the streets of said city at least 12 feet in the clear above the same, in consideration of a sum of money to be paid out by said companies to the state of New Jersey, the amount of which was to be ascertained by the attorney general and three commissioners to be appointed by the supreme court. Subsequently, and agreeably to such an ascertainment, the New Jersey Railroad & Transportation Company and the other companies paid to the state of New Jersey the sum of \$500,000, and thereafter made a survey of its said branch line, and filed the route thereof in accordance with law, and at great expense acquired from the owners thereof, for the purpose of such branch railroad, as provided by said act, a route 100 feet wide from a point in the New Jersey railroad, in the deep cut in Bergen Hill, to said lands in Harsimus Cove, and constructed and built on said route the elevated branch road authorized by the act; that thereafter the companies erected on the said lands in Harsimus Cove a terminal yard in connection with said branch railroad, with wharves, sheds, and a grain elevator, warehouses, and tracks, all at great expense. That the defendant commenced to operate the said branch railroad and said terminal yard on or about the 1st day of May, 1872, with the full knowledge of and without objection from the owners of any of the lands set forth in the bill of complaint.

That on or about the 30th day of June, 1871, the Delaware & Raritan Canal Company, the Camden & Amboy Railroad & Transportation Company, and the New Jersey Railroad & Transportation Company (commonly called the United Railroad & Canal Companies), by indenture bearing date that day, did grant and demise unto the Pennsylvania Railroad Company, the defendant, all their railroads and appurtenances, and real and personal property, including said Harsimus Cove property and the said branch line leading thereto, for the full term of 999 years. That said lease was validated and confirmed between the companies and the Pennsylvania Railroad Company by an act of the legislature of the state of New Jersey, approved March 27, 1873.

That defendant has been in possession of

the property so leased, including the said land at Harsimus Cove and the said branch line from Harsimus Cove to the main line from the Bergen Cut, as lessee thereof, since the year 1871, and is now in such possession under said lease, and has been during all that time and still is using and operating the same for the transportation of goods and passengers in and across the state of New Jersey, from the city of Philadelphia to the city of New York.

That the land for the said route to Harsimus Cove was acquired by the New Jersey Railroad & Transportation Company prior to the year 1873, in accordance with the terms of their said charter, and that some of the persons from whom they acquired said land were at that time also the owners of the lands set forth in the bill of complaint, and that the said lands were granted to the said New Jersey Railroad & Transportation Company by said owners for use in operating and maintaining a railroad thereon, in the way and in the manner in which said railroad is now maintained and operated; and that from the year 1873 up until the present time, the defendant has, by force of the franchises above mentioned, derived from the above mentioned public grants, maintained and operated its railroad and run its trains along said route, doing no more damage to the lands adjacent to said route than that which incidentally and necessarily results from the transaction of such acts and business.

The answer also avers that the defendant has, for over thirty years, and since the said legislative grant, had actual possession of the lands on said route uninterruptedly, and has uninterruptedly continued to operate its trains, cars, switch engines, and locomotives over the said railroad on said route, in the same way and manner as it now maintains and operates the same, and that there has been acquired, both by statute and prescription, the right so to do.

And defendant finally denies that it has in any wise infringed upon the rights of the complainant, as alleged in the said bill of complaint.

These allegations of the answer, for the most part, especially those in regard to the legislative history and operation of the railroad during the period since 1871, are not denied, and from the answer and evidence we may also take, as undisputed, the following facts:

In 1887, an embankment 100 feet wide, with stone retaining walls on each side, was substituted for the trestle. The top of this embankment is generally 18 feet above the level of Sixth street. The whole of the embankment is to the south of Sixth street, L.R.A.1915E.

and of the tracks on the embankment, no portion of the same, or of the embankment, is located on that or any other street, but entirely on the land or right of way of the defendant company.

There has been no change in the number of tracks on this embankment since 1887.

From 1873 to 1905, the use of these tracks in transportation increased, but since 1905, has remained stationary.

The locomotives by which the trains are moved have always burned bituminous coal, from the burning of which characteristic smoke arose from the smoke stacks, and the cinders and dust forming this smoke were carried from this right of way to the adjacent land in different directions and different distances, depending upon the force and direction of the wind. The church of complainant fronts on Monmouth street, not on Sixth street. A four-story brick building, 25 feet in width, neither owned by nor in possession of the complainant, intervenes between the church property and Sixth street. All other property within an equal distance from the railroad must be similarly affected by the operation of the same.

It is also admitted that, owing to the nearness of this portion of the branch road to the freight terminal at Harsimus Cove, the road having been built to connect the said Harsimus Cove with the main line at Bergen Cut, the tracks on the south side of Sixth street, between Monmouth and Brunswick streets, are much occupied by shifting engines and in the making up of trains, incident to terminal operations.

It is admitted that no portion of the railroad is on Sixth street, as alleged in the bill of complaint, but is situated on a strip of land 100 feet wide, south of Sixth street, and running parallel therewith, and we shall consider the bill as if amended in that important respect.

The charge of the complainant, as set forth in its bill, is twofold:

(1) That the acts of the defendant have taken from the complainant its property, consisting of the easement of light and air, to which it is legally entitled, and deprives it of the same without due process of law and without just compensation, or any compensation whatever, in violation of the Constitution of the United States.

(2) That the aforesaid acts, use, occupation of, and appropriation by the defendant, as aforesaid, constitute and are a nuisance of special injury to complainant, and are unnecessary, avoidable, and unreasonable, and not necessarily connected with the construction or a reasonable operation of the said railroad.

The latter paragraph seems to suggest, although it does not charge, negligent man-

agement by the defendant of its locomotives, and that the injury complained of was the result of such negligence. On page 66 of his brief, counsel for complainant says: "While this action is not based upon any allegation of negligence, yet the acts of nuisance of which the plaintiff complains are due to negligence."

On page 70 of his brief, complainant's counsel makes the following statement: "The allegations of the plaintiff's bill, that the acts of the defendant are unreasonable and unnecessary, do not charge that they are negligently done, as they may have been committed after the exercise of all the care and caution possible."

On this ground, he distinguishes the present case from the case of *Bunting v. Pennsylvania R. Co.* (C. C.) 189 Fed. 551, saying that that was an action based entirely upon negligence, which, being alleged, it became the duty of the plaintiff to establish, and in failing to do this, the plaintiff did not make out a case. So, also, on this ground, the present case is distinguished by counsel for the complainant, from *Jenkins v. Pennsylvania R. Co.* 67 N. J. L. 331, 57 L.R.A. 309, 51 Atl. 704, 11 Am. Neg. Rep. 464, in which the action at law was brought against the defendant company for negligently operating its locomotives in such manner as to cause them to emit smoke denser and greater in volume than was reasonably required for the proper operation of the railroad.

These positions of the complainant are somewhat confusing, as a number of pages of its brief are devoted to showing that the defendant was guilty of negligence in its use of bituminous coal, and in so firing its engines as to produce more smoke than was necessary for the proper operation of the road.

But the gravamen of complainant's argument rests on two propositions:

First, that the emission of smoke from the engines of the defendant while operating its road on its own land parallel with Sixth street and in the block between Brunswick and Monmouth streets, in such quantities as to enter into and upon complainant's premises, constituted of itself an actionable nuisance and a taking and appropriation of the complainant's property, to wit, its easement of light and air, without due process of law and without compensation, in violation of the Constitution of the United States and of the state of New Jersey in that behalf.

Second, that the complainant is entitled to an award of damages and to an injunction inhibiting such conditions, without regard to whether the smoke, gases, and noises were occasioned by any negligence on L.R.A.1915E.

the part of the defendant, or resulted after the exercise of all care and caution possible on its part.

The defendant relies upon the fact that it is a quasi public corporation, and as such has been authorized by the legislature in its charter to locate its railroad as a highway for the transportation of passengers and commodities between the two definite points, Harsimus Cove and Bergen Cut, and that as a public corporation it has been clothed with the right of eminent domain, without which such a necessary improvement as a turnpike road or a railroad could not be constructed for the accommodation and convenience of the public.

It is not denied that the railroad of the defendant, as here complained of, was lawfully located as authorized by the legislature of New Jersey, and for the public purposes stated in its charter. To fulfil these public purposes, it was authorized, among other things, to use steam for the propulsion of its engine and the movement of its trains. Steam, of course, cannot be created except by the combustion of fuel, and the combustion of fuel inevitably produces more or less smoke. These usual and normal results of the operation of a railroad, like the noises created by the movement of its trains, are necessarily contemplated and taken into account by the legislature that authorizes its construction. They enter into the common experience of modern life and are recognized as necessary accompaniments of the convenience and advantages which railroad transportation brings to the public. Their sufferance is one of the penalties of living in a large community like a city. The annoyance and inconvenience occasioned thereby are to be viewed from the same legal standpoint as are the annoyance and inconvenience necessarily suffered by those who live along a turnpike or other highway. Some dust and noise arising from the traffic along such highways are the necessary and unavoidable incidents of the authorized and lawful use thereof. The same may be said of the noise of street cars. It is an undoubted annoyance to the people living along their route. To many people, it is a serious annoyance, often interfering with sleep and quiet home life. As said by Judge McPherson in the case of *Bunting v. Pennsylvania R. Co.* supra, the perfectly proper use of these vehicles constitutes an annoyance from which people suffer and sometimes seriously, but this inconvenience is an injury for which there is no redress.

It may be stated, therefore, as a principle well established by reason and authority, that the consequential, incidental, and unavoidable annoyance or damage resulting to

the occupiers of land adjacent to a duly authorized railroad, from its non-negligent and careful operation, does not constitute an actionable nuisance. It is also equally well established that, where such damages are the result of the want of due care and skill in the conduct and operation of the railroad, the defendant company is liable to those injured thereby.

The correctness of these propositions seems to be recognized by the complainant, as the stress of its argument, as we have pointed out, is not placed upon any contention that the damage complained of was caused by the negligent operation of its railroad by the defendant, but that the coming of the smoke and cinders upon the complainant's premises, without regard to whether such coming was the result of negligence of the defendant in the operation of its road, or was consistent with the utmost care and skill in such operation, was a taking of complainant's property without due process of law or just compensation, and was within the constitutional inhibition in that regard.

This point is urged with much plausibility of argument by counsel for complainant, and the cases cited in its support require careful consideration.

There must be something peculiar and exceptional in the situation, to warrant the contention that the normal result of the careful operation of a railroad authorized by law is the taking of private property for public use, within the inhibition of the Constitution. A careful examination of the cases cited and quoted from in the brief of the counsel for the complainant justifies this assumption. We refer now to a few of those which seem to be most relied upon, and the opinions in which are most largely quoted from in complainant's brief.

The first of these, *Chicago G. W. R. Co. v. First M. E. Church*, 50 L.R.A. 488, 42 C. C. A. 178, 102 Fed. 85, was a case in which the defendant company, by virtue of the right granted by a municipality to operate and maintain a railroad on a public street, claimed the right to erect a water hydrant in the middle of said street for the use of its locomotives, opposite the center of the church building of the plaintiff, and 35 feet distant therefrom, and a depot or station on the opposite side of the street, 60 feet distant from said church. The gravamen of the complaint, as stated by the court, was that, by reason of the location of said depot and the erection of said water tank, the engines of the defendant company were constantly going backwards and forwards in front of the church, on Sundays and other days, for the use of said water hydrant, and by the noise, smoke, cinders, etc.,

L.R.A.1915E.

interfered with and impaired the easement of the complainant as an abutting owner on said street. In reference to these facts, the court of appeals for the eighth circuit said: "Whatever the fact may be, no complaint is made in the petition in this case on account of the mere movement of trains over the defendant's track in the street. It is the consequences flowing from the use of the street and its track for other purposes than merely moving its trains, that is complained of. . . . Granting, therefore, that the defendant had a right to run its trains over the track on Choctaw street, and that it was not liable for any damages unavoidably resulting therefrom, this concession falls far short of supporting the defense in this action. It did more than run its trains over its track. It erected a station at which its passenger trains stopped, and a water hydrant in the middle of the street, under the very windows of the church, at which all its trains, freight and passenger, stopped to take water. . . . It was not competent for the city to make a grant to the railroad company, which would exempt it from liability to the abutting owner for maintaining such a private nuisance. But the city made no such grant, either expressly or by implication. The rule that no one will be heard to complain of the proper exercise of a lawful authority cannot be invoked to shield the defendant in this case. The railroad company had no authority to erect its water hydrant where it did. . . . Conceding that the noise, vibrations, and inconveniences and annoyances which are unavoidable in the lawful running of trains over a railroad track, and which are common to the whole public and to all the abutting owners of property on the street, are not actionable injuries, the plaintiff's right of action is not affected thereby."

The language quoted by counsel in his brief, from this opinion, refers to this unlawful occupation of the street in front of complainant's property, which, together with the noises, smoke, etc., incident thereto, constituted a nuisance and invasion of the easement of the complainant upon said street, as an abutting owner thereon.

The acts complained of were not necessary to the authorized operation of defendant's road. It is in this respect not unlike the leading case of *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, cited by the complainant and recently considered by this court in the case of *Bunting v. Pennsylvania R. Co.* The hydrant and station, the sources of the injury complained of, were not necessary to the operation of the road. Like the repair shop in the *Fifth Baptist Church Case*, they concerned the rights and

conduct of the defendant in its private capacity, and they could have been located in some other convenient place, where the annoyance therefrom would not have constituted either a private or public nuisance.

So, in the well-considered case of *Muhler v. New York & H. R. Co.* 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522, cited by complainant. Plaintiff sued to enjoin the use of a certain elevated railroad structure on Park avenue, in the city of New York, in front of his premises, unless upon payment of the fee value of certain easements of light, air, and access, and other rights appurtenant to property abutting on said public street. It appears that, in pursuance of legislative authority prior to the erection of the elevated railroad complained of, the road ran partly on the surface of the street and partly in a cut or trench, the latter being flanked by walls 3 feet high. Pursuant to an act of the legislature of the state of New York, of 1892, there was constructed along said Park avenue, in front of plaintiff's premises, a new permanent elevated railroad structure of iron and steel, about 59 feet wide, with four tracks laid on a solid roadbed, having a mean elevation of about 31 feet above the surface of said avenue. It was contended by the defendant company that this was a mere change of its railroad from the surface to the elevated structure, and within the general powers granted to it by the legislature. The court held, however, that the new structure was a new taking of private property rights, to wit, the easement of light and air of an abutting owner on the street above the surface thereof, Mr. Justice McKenna saying in the course of his opinion on behalf of the court: "It is impossible for us to conceive of a city without streets, or any benefit in streets, if the property abutting on them has not attached to it as an essential and inviolable part, easements of light and air as well as of access."

The abutting owner, subject to the right of the public in the street as a highway, had a well-recognized property right in the easement of light and air and access in and to such street. This property right was clearly invaded, if not destroyed, by the change made by defendant from a surface or sunken road to the permanent physical structure of the elevated road complained of, and by the smoke and other annoyances incident to the operation thereof. But it will be observed that the smoke annoyance was only considered as part of and incident to the unlawful taking by the permanent structure, and part of the consequences of an unlawful act, and there is no intimation that it would have been considered by itself

an actionable nuisance or unlawful taking, as incident merely to the surface or sunken road.

The importance, if not the paramount authority, of the New Jersey decisions in this regard, must not be overlooked, and it is recognized by counsel for the complainant, who relies strongly for the support of his contention upon the supposed authority of *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432. The facts as disclosed in the opinion of the court in that case, are that the complainants were owners and occupants of a dwelling house on the southerly side of Bridge street, between Second and Third streets, in the city of Camden. The defendant's tracks ran through the central part of Bridge avenue, in front of complainant's dwelling, across Second street, into its terminal yard, which extends from the westerly side of Second street to the Delaware river. The bill averred that the defendant used its tracks in front of complainant's house for the purpose of distributing cars and making up trains in its freight and passenger business, and that it kept locomotives and cars laden with live stock standing there, so that, by reason of the stenches, noises, smoke, steam, and dirt thereby occasioned, the comfort of complainant's home was seriously impaired. And an injunction was prayed for.

The defendant's justification was rested upon the ground that the legislature and the common council of Camden had authorized the defendant to use Bridge avenue for its business; that its business required such use as the defendant had hitherto made, and therefore the use could not be, in a legal sense, injurious. The court said: "There are two sufficient answers to this claim. The first is that neither the legislature nor the common council has attempted to grant so extensive a privilege as is here set up. The charter of the Camden & Amboy Railroad Company [the lessor of the defendant], passed February 4th, 1830, authorized it to construct and operate a railroad, with all necessary appendages, within limits embracing the locality now under consideration. In 1834, the Camden common council, by resolution, authorized that company to use Bridge avenue for the purposes of its roadway. . . . In 1862 the city council, by 'an ordinance to afford facilities to the Camden & Amboy Railroad Company for the running of their trains through the city of Camden,' gave its consent, and authority to the company to lay side tracks running obliquely from a point on the railroad, along Bridge avenue, between Second and Third streets, to and upon the company's depot property lying west

of Second street. From these laws and regulations arise whatever rights the defendant, which is the lessee of the Camden & Amboy Railroad Company, appears to have in Bridge avenue in front of complainants' house. In our judgment, they indicate that those rights are such as pertain to the use of the avenue for the purposes of a way, not for the purposes of a station yard. The primary privilege given is that of passage; this and its reasonable incidents cover the whole scope of the grant.

But when, in the ordinary course of its business, the company devotes a portion of its roadway to station purposes, it goes beyond express legislative sanction, and can support itself, if at all, only as a private individual might. This is what the defendant did in Bridge avenue. Having a right of passage there, it used its tracks as though they were within its terminal yard, and so used them constantly in its everyday concerns. For this there is no legislative or municipal authority. But, secondly, an act of the legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners."

Of course, this language must be taken in connection with the facts of this case, as discussed in the previous part of the opinion. It had just been decided that neither the legislature nor the common council, by authorizing the defendant to build its road on Bridge avenue, had authorized it to create a terminal yard or station on that avenue, and that the location and buildings of such yard and station must be taken to be done in the private individual capacity of the defendant, and therefore not incident to the public purposes for which a passageway for its tracks was granted along Bridge avenue. It was therefore in the second place properly and logically argued that neither the legislature nor the common council of Camden could authorize the use of the street for these private purposes of the corporation, as distinguished from its public purposes, to the detriment of the owners and occupants of dwellings abutting on said avenue, without making compensation therefor. This is the doctrine in *Baltimore & P. R. Co. v. Fifth Baptist Church*, viz., that in the location and erection of a repair shop, the company was acting in its private capacity, and it was not necessary for its public purposes that such shop should be erected on the particular site chosen. The opinion concludes: "It must not be gath-

ered from these propositions that all those inconveniences which are the necessary concomitants of the location of railroads in populous neighborhoods are to be considered civil injuries. That railways shall be so constructed and operated is required by the unanimous consent of the community, and the annoyances thence unavoidably arising are not of sufficient importance to be regarded as invasions of those rights of property which society recognizes and protects. They must be classed rather among those limitations which the social state imposes upon the enjoyment of private property for the common good."

We cannot, however, agree with the closing sentence of this paragraph, quoted by complainant's counsel, if it means, as argued by him (which we do not assume that it does), that the liability of the defendant can be made to depend upon the degree of the annoyance caused by the operation of the road, without regard to whether that operation be conducted negligently or with the utmost skill and care. If, by the exercise of due care, such annoyances are avoidable, of course the defendant company should be held liable therefor. What we have said, however, as to the facts and opinion in this case, is sufficient to show that its *ratio decidendi* does not touch the issues in the case now before us.

This judgment of the court of errors and appeals was made in 1886. In 1888, the supreme court of New Jersey delivered its opinion, by Chief Justice Beasley, in the case of *Beseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164.

The suit was for damages alleged to have been done to the houses and lands of the plaintiff, by the running of defendant's trains. The defendant was the same as the defendant in the present case, and the part of the road on which it is alleged the injuries complained of originated is the same as that involved in the present suit, to wit, that part of the road between Harsimus Cove and Bergen Cut which runs on an elevated structure south of Sixth street and parallel therewith.

The declaration, in substance, alleged that the plaintiff was the owner of certain lots of land in Jersey City, fronting on Fifth street, on each of which lots there were dwelling houses on the front and rear, and that the defendant, on the 1st of January, 1874, built an elevated track for a railroad (the same which is now complained of), running at the rear of said lots and very near, to wit, within 10 feet, to the rear of the dwelling houses situated on the rear of said lots, and has so used said elevated track for the passage of locomotives and cars in the transportation of cattle, sheep,

swine, etc., as to render said dwelling houses of said plaintiff unfit for habitation, and of no use or value to said plaintiff whatever, and that said defendant, during all the time aforesaid, both on the day named and at all hours of the nighttime, has wrongfully allowed its cars, so loaded, emitting noisome and unhealthy odors, to stand upon said track within close proximity, to wit, the distance of 10 feet, to the dwelling houses on the rear of said lots, and has then and there shifted and distributed its cars and blown the whistle of its locomotives, and started its trains of cars, and suddenly stopped and backed them, and started them again, causing great and unusual noises in the neighborhood of said dwelling houses, and causing divers noxious, offensive, and unwholesome vapors, fumes, smoke, smells, and stench to flow, arise, and surround said dwelling houses, and thereby also jarring the doors and walls of said dwellings and breaking plaster upon the walls, and by means aforesaid has driven the tenants from said houses and has rendered the same untenable and unfit for use, etc.

The first plea was the general issue. The second was a special traverse, in which the defendant set out its chartered right to build this elevated road between Fifth and Sixth streets in Jersey City, and parallel therewith; that after its construction, the defendant, in order to carry into effect the objects of the incorporation, used the same in the prosecution of its business as a common carrier of passengers and freight, during the time mentioned in the declaration, as it lawfully might do, by reason of the authority aforesaid, and that the noises arising from the passage, shifting, and distribution of its cars and blowing of the whistles of its locomotives, and the smoke from its engines, complained of by the plaintiff, were necessarily created in the careful and skillful operation of its road, and were the supposed grievances of which the plaintiff in her declaration complained; "without this," etc.

On the demurrer to this plea, Beasley, Chief Justice, speaking for the court, said among other things: "Its [defendant's] position is that for such incidental and unavoidable damage it is not responsible. The plaintiff occupies the opposite ground, claiming that with respect to private property a railroad is, *per se*, a nuisance whenever it throws a detriment such as would be actionable at common law on such property. That this proposition, on which the plaintiff's case rests, is a most momentous one, is at once apparent. If it should be sustained, an illimitable field of litigation would be opened. If a railroad, by the L.R.A.1915E.

necessary concomitants of its use, is an actionable nuisance with respect to the plaintiff's property, so it must be as to all other property in its vicinity. It is not only those who are greatly damaged by the illegal act of another to whom the law gives redress, but its vindication extends to every person who is damaged at all,—unless, indeed, the loss sustained be so small as to be unnoticeable by force of the maxim, *De minimis non curat lex*. The noises and other disturbances necessarily attendant on the operation of these vast instruments of commerce are wide spreading, impairing, in a sensible degree, some of the usual conditions upon which depend the full enjoyment of property in their neighborhood; and consequently, if these companies are to be regarded purely as private corporations, it inevitably results that they must be responsible to each person whose possessions are thus molested. Such a doctrine would make these companies, touching such landowners, general tortfeasors; their tracks run for miles through the cities of the state, and every landowner on each side of the track would be entitled to his action; and so in the less populated districts, each proprietor of lands adjacent to the road would have a similar right, and thus the litigants would be numbered by thousands. It is questionable whether the running of railroads would be practicable if subjected to such a responsibility."

The whole of this opinion must be read to appreciate the clearness of its reasoning and the broad statesmanship, as well as the judicial acumen of its conclusions. In the course of his opinion, the chief justice refers to the case of *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, upon both of which counsel for the plaintiff relies. "Neither of these decisions," he says, "is in point, and the principles of law declared in the latter is (*sic*) directly adverse to the proposition laid as the basis of this suit. The former of these precedents presented to the court the naked proposition whether the railroad company, the defendant in the proceeding, should be restrained from doing certain acts which were obviously *ultra vires*. . . . The decision of the Supreme Court of the United States, just referred to, rested on the same basis. A railroad company had located its repair shop and engine house next to a church, to which it was a nuisance by reason of the noises occasioned by the business carried on at the place. The court declared that the company could not justify the maintenance of such a nuisance. The propriety of this re-

sult seems unquestionable. The railroad company, in selecting a place for repair shops, acted altogether in its private capacity. Such location was a matter of indifference to the public, and consequently, with respect to such an act, the corporation stood on the footing of an individual and was entitled to no superior immunities. But in this same case Mr. Justice Field, in his opinion, is careful to emphasize the difference in legal results between those damages which are the necessary product of the running of a railroad and those which are not of that character, for he says: 'Undoubtedly a railway over the public highways of the district, including the streets of the city of Washington, may be authorized by Congress, and if when used with reasonable care it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation.'"

The opinion in the Beseman Case then disposes of the constitutional question as to the taking of private property without compensation, on the reasoning hereinbefore indicated. We have dwelt upon this case at such length, because of the importance and authority it has attained as a leading case in the jurisprudence of this country. We have been referred to no decision of the Federal or state courts, in which its reasoning and conclusions have been directly controverted. This judgment of the supreme court of New Jersey was afterwards unanimously affirmed by the court of errors and appeals, for the reasons given by the supreme court. 52 N. J. L. 221, 20 Atl. 169.

Many cases in other states have been cited by counsel for the defendant, in which Beseman v. Pennsylvania R. Co. is approvingly referred to. The principle established has also been affirmed by so many decisions in the courts of New Jersey that it may now be considered as the settled law of that state, as shown in the following list of cases cited by counsel for the defendant: Church of Holy Communion v. Paterson Extension R. Co. 46 N. J. Eq. 376, 20 Atl. 169; Grey ex rel. Simmons v. Paterson, 60 N. J. Eq. 385, 48 L.R.A. 717, 83 Am. St. Rep. 642, 45 Atl. 995; Methodist Episcopal Church v. Pennsylvania R. Co. 48 N. J. Eq. 445, 22 Atl. 183; Stockton v. Central R. Co. 50 N. J. Eq. 72, 17 L.R.A. 97, 24 Atl. L.R.A.1915E.

964; Hayes v. Waverly & P. R. Co. 51 N. J. Eq. 350, 27 Atl. 648; Ridge v. Pennsylvania R. Co. 58 N. J. Eq. 176, 43 Atl. 275; Sayre v. Newark, 60 N. J. Eq. 362, 48 L.R.A. 722, 83 Am. St. Rep. 629, 45 Atl. 985; Thompson v. Pennsylvania R. Co. 51 N. J. L. 43, 15 Atl. 833; Costigan v. Pennsylvania R. Co. 54 N. J. L. 236, 237, 23 Atl. 810; State, Roebeling, Prosecutrix, v. Trenton Pass. R. Co. 58 N. J. L. 674, 33 L.R.A. 129, 34 Atl. 1090; Church of the Holy Communion v. Paterson Extension R. Co. 68 N. J. L. 410, 53 Atl. 449, 1079; Jenkins v. Pennsylvania R. Co. 67 N. J. L. 332, 57 L.R.A. 309, 51 Atl. 704, 11 Am. Neg. Rep. 464.

In some of these cases, it is expressly pointed out that the judgment in Beseman v. Pennsylvania R. Co. in no wise conflicts with that in Pennsylvania R. R. Co. v. Angel, which fact is apparent from the examination already made of the two cases. It would unduly extend this opinion to discuss the numerous decisions cited by counsel on either side, in their respective briefs. Many of them distinctly support the position here taken, and none of them seriously controvert or oppose it.

We have carefully examined the so-called "New York Elevated Railroad Cases," referred to and relied upon by complainant, to wit: Lahr v. Metropolitan Elev. R. Co. 104 N. Y. 268, 10 N. E. 528; Story v. New York Elev. R. Co. 90 N. Y. 122, 43 Am. Rep. 146; Bohm v. Metropolitan Elev. R. Co. (Somers v. Metropolitan Elev. R. Co.) 129 N. Y. 576, 14 L.R.A. 344, 29 N. E. 802; Sperr v. Metropolitan Elev. R. Co. 137 N. Y. 155, 20 L.R.A. 752, 32 N. E. 1050. We have already indicated the grounds upon which they should be distinguished from the present case, in our examination of the decision of the Supreme Court in Chicago G. W. R. Co. v. First M. E. Church, 50 L.R.A. 488, 42 C. C. A. 178, 102 Fed. 85, as also in what has been said as to the principle involved in the decision of the Supreme Court in Baltimore & P. R. Co. v. Fifth Baptist Church, supra.

It only remains to again note, in regard to these cases, that the decisions therein proceeded upon the ground so clearly stated in one of them (Story v. New York Elev. R. Co. 90 N. Y. 122, 43 Am. Rep. 146) by Danforth, J., speaking for the court of appeals. After stating the relative rights of the public and abutting owners in the street in question, he says: "It is conceded to be a public street. But besides the right of passage, which the grantee, as one of the public, acquired, he gained certain other rights as purchaser of the lot, and became entitled to all the advantages which attached to it. The official survey, its filing

in a public office, the conveyance by deed referring to that survey and containing a covenant for the construction of the street and its maintenance, make as to him and the lot purchased a dedication of it to the use for which it was constructed. The value of the lot was enhanced thereby, and it is to be presumed that the grantee paid, and the grantor received, an enlarged price by reason of this added value. There was thus secured to the plaintiff the right and privilege of having the street forever kept open as such. For that purpose, no special or express grant was necessary; the dedication, the sale in reference to it, the conveyance of the abutting lot with its appurtenances, and the consideration paid were of themselves sufficient. *Wyman v. New York*, 11 Wend. 487; *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80. The right thus secured was an incorporeal hereditament; it became at once appurtenant to the lot, and formed 'an integral part of the estate' in it. It follows the estate and constitutes a perpetual encumbrance upon the land burdened with it. From the moment it attached, the lot became the dominant, and the open way or street the servient, tenement. *Child v. Chappell*, 9 N. Y. 246; *Hills v. Miller*, 3 Paige, 256, 24 Am. Dec. 218; *Watertown v. Cowen*, 4 Paige, 514, 27 Am. Dec. 80. Nor does it matter that the acts constituting such dedication are those of a municipality. The state, even, under similar circumstances, would be bound, and so it was held in *Oswego v. Oswego Canal Co.* 6 N. Y. 257. . . . But what is the extent of this easement? What rights or privileges are secured thereby? Generally, it may be said, it is to have the street kept open, so that from it access may be had to the lot, and light and air furnished across the open way."

In *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268, 10 N. E. 528, we quote these paragraphs from the syllabus: "An elevated railroad in a street of a city, supported by columns placed along the outer line of the sidewalks, and operated by steam power, is a perversion of the use of the street from the purposes originally designed, and is a use which neither the city authorities nor the legislature can legalize or sanction without providing compensation for the injury inflicted upon property of abutting owners. Abutters upon a public street of a city, claiming title to their premises by grant from the municipal authorities, which grant contains a covenant that a street to be laid out in front of such property shall continue forever thereafter as a public street, acquire an easement in the bed of the street for ingress and egress to and from their premises, and, also, for

the free and uninterrupted passage and circulation of light and air."

No one can carefully read these important and much discussed cases, without at once perceiving the peculiar conditions with reference to which they were decided, which distinguished them from cases such as the present. The bills of complaint in these cases were framed to logically meet the contention that the building of the elevated railroad on the street and in front of the houses occupied by the complainants was a physical taking of property without compensation, and the prayer was in the alternative for the payment of such damages assessed by a referee duly appointed, or an injunction to restrain further building or operation of the road until such damages were paid. All this is clearly pointed out by the author in *Pomeroy's Equity Jurisprudence*, vol. 5, § 470.

Notwithstanding the disclaimer of complainant's counsel, that the action below was based upon any allegation of negligence, the prayer of the bill and a part of the argument of counsel compel us to turn to that aspect of the case as to which claim is made for an injunction and damages, on the ground that the nuisance produced by the smoke, vapors, and noises emanating from defendant's railroad was due to its negligent operation.

A careful examination of the testimony in this case does not permit us to find that the annoyance complained of (and we do not doubt that it was serious in its character) was due to negligence on the part of the defendant. That an unnecessary amount of black smoke may at times, from particular engines, have been emitted, is quite probable, but there is no evidence to convince the court that the road was operated without due care in respect to the firing of its locomotives. There is no charge, as in the *Bunting Case*, much less any evidence amounting to proof, that the defendant was negligent in not using other fuel than bituminous coal, or that it was possible to have used such other fuel and successfully have carried on the business of the railroad. Nor was there any direct evidence on the part of the complainant of such negligence in the operation of the road and the firing of the engines as would account for the nuisance complained of. On the contrary, the evidence of the defendant, consisting of the various printed instructions given to its firemen at different times, and the testimony of Alfred W. Gibbs, its chief mechanical engineer, shows the efforts made by the defendant to so manage its locomotives as to minimize the emission of smoke, and would seem to dispose of the

suggestion of liability on the ground of negligence.

Moreover, the prayer of the bill, as framed, does not ask for such definite and specific exercise of injunctive relief, as would be reasonably enforceable. There is no specific allegation or proof of the particular conduct or practices which constitute such negligent operation of the road as cause the annoyance in question, and which, if established, should be enjoined. There is no allegation and no showing that other fuel could reasonably have been used by the defendant for the lessening of the smoke, upon which a mandatory injunction could be asked requiring the use of such fuel, or a direct injunction on that ground against the use of soft or bituminous coal.

No specific act or acts of misfeasance or nonfeasance, constituting negligence on the part of the defendant, and as such the cause of the grievance complained of, have been so sufficiently alleged or proved as would enable a court of equity effectively to prevent its continuance. Of course, if complainant's principal contention (presumably founded upon the mistaken allegation that defendant's road was maintained and operated upon Sixth street) had been established, the existence of the road itself on Sixth street would, so far as the property of complainant situated on that street was concerned, and such property alone, have been a taking of complainant's property without compensation, and entitled it to an injunction against the operation of such road until such compensation had been duly ascertained and paid, conformably to the doctrine of the New York Elevated Railroad Cases, as above referred to.

The prayer of the bill, as we have seen, asks for an injunction commanding the defendant, its servants, etc., to absolutely desist and refrain from so operating its said railroad locomotives and engines as to cause or permit black smoke, etc., from its said engines and locomotives, to fall upon or enter into the premises and structures of complainant "in such appreciable quantities as to interfere with the reasonable use and enjoyment thereof."

We have already shown that no case has been made out for such a general injunction as this. In the absence of any determination in a suit at law as to the fact of negligence by the defendant in the operation of its road in the respect referred to, a court of equity would be embarrassed in undertaking by its decree to enjoin the defendant against the issuing of more soot and cinders than was necessary to the careful and proper operation of its road. Such a decree would be futile and unenforceable.

Assuming, however, that the bill had

been duly amended in the important respect we have pointed out, to wit, the location of the road on the route acquired by the defendant south of Sixth street, and not on Sixth street itself, and that sufficient averments of negligence, general and specific, were contained in the bill, we are constrained to find that the record fails to disclose sufficient evidence to amount to proof of such negligence, or that the acts of defendant, in the operation of its railroad, have constituted, and do now constitute, an actionable nuisance and are so unnecessary, avoidable, and unreasonable as to warrant the issuing of an injunction restraining the defendant from the commission of such acts.

Without at all minimizing the annoyance and discomfort suffered by the complainant, as set out in its bill of complaint, this case cannot be taken from without the operation of the principles which we have already discussed, and which were so clearly announced in the case of *Beseman v. Pennsylvania R. Co.* In the absence of clear proof of negligence on the part of the defendant, the right of action or the right to equitable relief cannot be made to depend upon the greater or less degree of the annoyance complained of. As said in the *Beseman Case*: "When property has been incidentally injured, no matter to what extent, as an unavoidable result of a public improvement, such loss has always been deemed remediless, and it has never been supposed that the property so injured was taken, in the constitutional sense, for the public use."

In the view here taken, it is unnecessary that we should express any opinion as to the defenses of "laches" and "prescription," urged by defendant's counsel.

For the reasons stated, the decree of the court below, dismissing the bill of complaint is hereby affirmed.

Dismissed by the Supreme Court of the United States, June 1, 1915, in 237 U. S. 575, 59 L. ed. —, 35 Sup. Ct. Rep. 729.

WASHINGTON SUPREME COURT. (Department No. 1.)

F. M. TAYLOR and Wife, Appts.,
v.

CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY, Respt.

(— Wash. —, 148 Pac. 887.)

Railroad — injury by operation — liability.

Injury to neighboring property by the ordinary operation of a railroad without

negligence, caused by jar and the casting thereon of smoke, soot, dust, and sparks, is not within the operation of a constitutional provision of compensation for property damaged for public use, since it is *damnum absque injuria*.

(May 27, 1915.)

APPEAL by plaintiffs from a judgment of the Superior court for Spokane County in defendant's favor, in an action brought to recover damages for injury to plaintiffs' property alleged to have been caused by the "ordinary operation" of defendant's railway. Affirmed.

The facts are stated in the opinion.

Mr. George H. Armitage, with Messrs. Nuzum, Clark, & Nuzum, for appellants:

Plaintiffs had the right to compensation for injury to their property by the operation of defendant's road.

Keil v. Grays Harbor & P. S. R. Co. 71 Wash. 163, 127 Pac. 1113; Kincaid v. Seattle, 74 Wash. 622, 134 Pac. 504, 135 Pac. 820; Chicago & E. I. R. Co. v. McAuley, 121 Ill. 160, 11 N. E. 87; Roulston v. Chesapeake & O. R. Co. 21 Ky. L. Rep. 1507, 54 S. W. 2; Little Miami R. Co. v. Hambleton, 40 Ohio St. 496; Stickley v. Chesapeake & O. R. Co. 93 Ky. 323, 20 S. W. 261; Zimmerman v. Kansas City N. W. R. Co. 75 C. C. A. 424, 144 Fed. 622; Fordyce v. Kansas City & N. Connecting R. Co. 145 Fed. 566; Smith v. St. Paul, M. & M. R. Co. 39 Wash. 355, 70 L.R.A. 1018, 109 Am. St. Rep. 889, 81 Pac. 840; Farnandis v. Great Northern R. Co. 41 Wash. 486, 5 L.R.A.(N.S.) 1086, 111 Am. St. Rep. 1027, 84 Pac. 18; Patrick v. Smith, 75 Wash. 407, 48 L.R.A.(N.S.) 740, 134 Pac. 1076, 6 N. C. C. A. 108; 1 Lewis, Em. Dom. 3d ed. § 357, p. 654; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719.

Messrs. F. M. Dudley, G. W. Korte, and F. M. Barkwill, for respondent:

The court rightfully entered judgment of dismissal.

De Kay v. North Yakima & Valley R. Co. 71 Wash. 648, 129 Pac. 574; Randle v. Pacific R. Co. 65 Mo. 333; Carroll v. Wisconsin C. R. Co. 40 Minn. 168, 41 N. W. 661; Bennett v. Long Island R. Co. 181 N. Y. 431, 74 N. E. 418; Thomason v. Seaboard Air Line R. Co. 142, N. C. 318, 55 S. E. 205; Atchison, T. & S. F. R. Co. v. Armstrong, 71 Kan. 366, 1 L.R.A.(N.S.) 113, 114 Am. St. Rep. 474, 80 Pac. 978; Jones v. Erie & W. Valley R. Co. 161 Pa. 30, 17 L.R.A. 758, 31 Am. St. Rep. 722, 25 Atl. 134; Georgia R.

& Bkg. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315; Kilcoyn v. Chicago, St. L. & N. O. R. Co. 141 Ky. 237, 132 S. W. 438; Hieber v. Spokane, 73 Wash. 125, 131 Pac. 478; Pennsylvania R. Co. v. Marchant, 119 Pa. 541, 4 Am. St. Rep. 659, 13 Atl. 690; Austin v. Augusta Terminal R. Co. 108 Ga. 671, 47 L.R.A. 755, 34 S. E. 852; Hanlin v. Chicago & N. W. R. Co. 61 Wis. 515, 21 N. W. 623; Rainey v. Red River, T. & S. R. Co. — Tex. Civ. App. —, 80 S. W. 95; Hyde v. Minnesota, D. & P. R. Co. 29 S. D. 220, 40 L.R.A.(N.S.) 48, 136 N. W. 92; Booth v. Rome, W. & O. Terminal R. Co. 140 N. Y. 267, 24 L.R.A. 105, 37 Am. St. Rep. 552, 35 N. E. 592; Cogswell v. New York, N. H. & H. R. Co. 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537; Atchison & N. R. Co. v. Garside, 10 Kan. 567; Pennsylvania R. Co. v. Lippincott, 116 Pa. 472, 2 Am. St. Rep. 618, 9 Atl. 871; Romer v. St. Paul City R. Co. 75 Minn. 211, 74 Am. St. Rep. 455, 77 N. W. 825; Rigney v. Chicago, 102 Ill. 80; Aldrich v. Metropolitan West Side Elev. R. Co. 195 Ill. 456, 57 L.R.A. 237, 63 N. E. 155; Peel v. Atlanta, 85 Ga. 138, 8 L.R.A. 787, 11 S. E. 582; Rude v. St. Louis, 93 Mo. 408, 6 S. W. 257; Jordan v. Benwood, 42 W. Va. 312, 36 L.R.A. 519, 57 Am. St. Rep. 859, 26 S. E. 266; Smith v. St. Paul, M. & M. R. Co. 39 Wash. 360, 70 L.R.A. 1018, 109 Am. St. Rep. 889, 81 Pac. 840; Henry Gaus & Sons Mfg. Co. v. St. Louis, K. & N. W. R. Co. 113 Mo. 308, 18 L.R.A. 339, 35 Am. St. Rep. 706, 20 S. W. 658; Roman Catholic Church v. Pennsylvania R. Co. ante, 623, 125 C. C. A. 629, 207 Fed. 904; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 331, 27 L. ed. 739, 744, 2 Sup. Ct. Rep. 719; Chicago, G. W. R. Co. v. First M. E. Church, 50 L.R.A. 488, 42 C. C. A. 178, 102 Fed. 91; Richards v. Washington Terminal Co. 233 U. S. 546, 554, 58 L. ed. 1088, 1091, L.R.A. 1915A, 887, 34 Sup. Ct. Rep. 654; Parrot v. Cincinnati, H. & D. R. Co. 10 Ohio St. 630; Beseman v. Pennsylvania R. Co. 50 N. J. L. 235, 13 Atl. 164; Thompson v. Pennsylvania R. Co. 51 N. J. L. 42, 15 Atl. 833; Costigan v. Pennsylvania R. Co. 54 N. J. L. 233, 23 Atl. 810; Adams v. Chicago, B. & N. R. Co. 39 Minn. 286, 1 L.R.A. 493, 12 Am. St. Rep. 644, 39 N. W. 629; Fisher v. Seaboard Air Line R. Co. 102 Va. 363, 46 S. E. 381, 1 Ann. Cas. 622; Taylor v. Seaboard Air Line R. Co. 145 N. C. 400, 122 Am. St. Rep. 455, 59 S. E. 129; Willson v. New York C. & H. R. Co. 146 N. Y. Supp. 214; Fink v. Cleveland, C. C. & St. L. R. Co. 181 Ind. 539, 105 N. E. 116; Staton v. Norfolk & C. R. Co. 111 N. C. 278, 17 L.R.A. 838, 16 S. E. 181; Wunderlich v. Pennsylvania R. Co. 223 Pa. 114, 72 Atl. 247; Matthias v. Minneapolis, St. P.

Note. — As to damage to neighboring property by operation of a railroad, see footnote to Roman Catholic Church v. Pennsylvania R. Co. ante, 623. L.R.A.1915E.

& S. Ste. M. R. Co. 125 Minn. 224, 51 L.R.A. (N.S.) 1017, 146 N. W. 353; Re Fifth Ave. 62 Wash. 224, 113 Pac. 762.

Parker, J., delivered the opinion of the court:

The plaintiffs commenced this action in the superior court for Spokane county, seeking recovery of damages which they claim result to their property situated in the city of Spokane from the "ordinary operation" of the defendant's line of railway in close proximity thereto. The cause was disposed of in favor of the defendant by judgment of dismissal rendered in the superior court upon motion for judgment upon the pleadings. From this disposition of the cause, the plaintiffs have appealed to this court.

The cause comes to us presenting the same questions as if demurrer to appellants' complaint for want of facts therein alleged constituting a cause of action had been sustained by the trial court, and appellants had elected to stand upon their complaint, and declined to plead further. No contention is made that by this manner of disposition of the cause appellants were deprived of opportunity to amend their complaint. The question then is: Does the complaint state facts constituting a cause of action against respondent? The controlling facts as disclosed by the allegations of the complaint may be summarized as follows:

Respondent is a common carrier owning and operating lines of steam railways in the state of Washington and the Northwestern states, one of which lines runs through the city of Spokane past the property of appellants. Appellants' property claimed to be damaged is at its nearest point to the track of respondent's railway approximately 60 feet therefrom. The cause, nature, and extent of appellants' claimed damage is alleged in their complaint to be as follows: "That in the ordinary operation of said road the said defendants use large and heavy engines and trains of cars, the motor power of said engines being steam, said steam being generated by the use of coal, and that in the operation of said road the said engines of the said defendants emit large volumes of smoke, cinders, sparks, and soot, and that the running of the trains of the defendants, as aforesaid, over said road as aforesaid, raises great clouds of dust and dirt, jars the surrounding property, and especially the property of these plaintiffs, so that large cracks have appeared in the ceilings and walls of the houses situate on the property of the plaintiffs and owned by plaintiffs, and the doors and windows of said houses rattle, the dishes and other things on the shelves in the houses of plaintiffs rattle, and the jar

is so great that it awakens persons from sound sleep while occupying beds in the houses of plaintiffs situate on the property aforesaid; that the prevailing winds in the city of Spokane, wherein the property of plaintiffs is situated, as aforesaid, and wherein the railroad of the defendants is operated, as aforesaid, are from southwest to northeast, and the smoke, cinders, and soot so emitted from the engines of the defendants herein, and the dust and dirt raised by the ordinary operation of the road of the defendants' herein, as aforesaid, has and does penetrate into the houses of the plaintiffs, covering the furniture, walls, ceilings, carpets, and curtains in said houses; that said smoke, cinders, soot, sparks, dirt and dust cover the lawn surrounding the said houses of plaintiffs, and cover the property of plaintiffs herein described, and frequently fires are started upon the property of the plaintiffs herein described from sparks emitted from said engines of said defendants; that said smoke, cinders, soot, sparks, and fires so started therefrom injure the trees, shrubbery, gardens, and vegetation in the yards of the plaintiffs on their said lot, as aforesaid; that gases coming from the operation of said engines of defendants penetrate through the buildings on said property, as aforesaid, and render the same uninhabitable."

The complaint contains no allegations pointing to any negligence on the part of respondent in the operating of its railway. It is not claimed—indeed, we think it could not be with any show of reason in the light of these allegations—that respondent has ever used other than the commonly used facilities of steam railways, or that it has ever negligently used such facilities, or that the injury to appellants' property is other than a result necessarily incidental to the proper operation of respondent's railway.

Our decision in *De Kay v. North Yakima & Valley R. Co.* 71 Wash. 648, 129 Pac. 574, it seems to us, is decisive of this case in respondent's favor, unless the holding there announced is to be overruled. We there held, in effect, that the casting of smoke and cinders from the locomotives of the railway company on the adjoining property of *De Kay* and the jarring of his property and buildings by the operation of the railway company's trains, all of which resulted in depreciating the value of his property, was, in the absence of negligence on the part of the railway company, *damnum absque injuria*. Our conclusion reached in that decision was rested upon the doctrine announced in the last paragraph, commencing with the word "but," of the following quotation from the decision in *Smith v. St. Paul, M. & M. R. Co.* 39 Wash. 355, 361, L.R.A.1915E.

70 L.R.A. 1018, 109 Am. St. Rep. 889, 81 Pac. 840, 842: "The jarring of the earth of respondents' lots and the casting of soot and cinders thereupon, and the emission of smoke, physically injuring property, are injurious physical effects to the corpus of respondents' property, which, we think, come within the scope of the term 'damaged,' as used in the constitutional provision. If a railroad company cannot carry on its business upon its own property without necessarily disturbing the physical conditions of other property, it is evident that such company has not acquired sufficient property for the conduct of its business, and it should be required to pay such damages as the actual physical disturbance of the neighboring property entails thereupon. But the ringing of bells, sounding of whistles, rumbling of trains, and other usual noises, and the emission of smoke, gases, fumes, and odors, are necessarily incidental to the proper operation of the road, and, when not resulting from negligence, are such consequential injuries as must be held to have been anticipated by anyone acquiring property in or about such a city, and are regarded as *damnum absque injuria*."

Counsel for appellants now insist that our decision in the De Kay Case should be limited in its effect by the observation made by the court in the first part of the above quotation from the Smith Case, or that the holding in the De Kay Case should be overruled, in so far as it denies the right of recovery of damages resulting from the jarring of adjoining property or the casting of physical substance thereon in the nature of soot or cinders. We may concede that our decision in the De Kay Case is somewhat out of harmony with the first part of the above quotation from the Smith decision, and to that extent the De Kay decision was, in effect, an overruling of the Smith decision. The above-quoted language from the Smith decision, when read as a whole, we now regard as somewhat unfortunate. Upon reflection we think it will readily appear that the rule announced in the first portion of the above-quoted language is inconsistent with that announced in the latter portion thereof; the latter announcing the rule upon which we rested our decision in the De Kay Case. The learned writer of the decision in the Smith Case seems to have regarded damages resulting from the jarring of adjoining property and the casting of soot and cinders thereon recoverable because of the physical nature of such substance and the resulting physical injury to such property, and thus to distinguish the right of recovery for such injury from injuries caused by the things mentioned in the last paragraph of his observations above L.R.A.1915E.

quoted. We find, however, mentioned in the last paragraph as causes of damages for which recovery may not be had "smoke," "gases," and "fumes." But manifestly these are no less physical, either in their composition or effect, than "soot" or "cinders," nor is their effect less of a physical nature than that of the jarring of adjoining property. It seems to us that the problem in its last analysis is to be solved, not by the nature of the cause or the result of the injury, but by the proper answer to the question of whether or not the injury is necessarily the result of the proper operation of the railway. It is not so much the nature or extent of the injury resulting to appellants' property as it is the right of the railway company to do the things resulting in the injury complained of. Respondent acting within its rights, and being free from negligence, the resulting injury to adjoining property does not give rise to an actionable wrong in favor of the owner of such property. The authorities reviewed and extensively quoted from in the Smith decision support this view. For instance, there is quoted in that decision with apparent approval, from *Bennett v. Long Island R. Co.* 181 N. Y. 431, 74 N. E. 418, the following: "The rumble of trains, the clanging of bells, the shriek of whistles, the blowing off of steam, the discordant squeak of wheels in going around the curves, the emission of smoke, soot, and cinders, all of which accompany the operation of steam cars, are undoubtedly nuisances to the neighboring dwellings in the popular sense, but as they are necessarily incident to the maintenance of the road, they do not constitute nuisances in the legal sense, but are regarded as protected by the legislative authority which created the corporation and legalized its corporate operations. Nor does the legal nature of such annoyances change as traffic increases them in volume and extent."

Quotations of similar import are made in the Smith decision from *Aldrich v. Metropolitan West Side Elev. R. Co.* 195 Ill. 456, 57 L.R.A. 237, 63 N. E. 155; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, 4 Am. St. Rep. 659, 13 Atl. 690; *Pennsylvania R. Co. v. Lippincott*, 116 Pa. 472, 2 Am. St. Rep. 618, 9 Atl. 871; and *Austin v. Augusta Terminal R. Co.* 108 Ga. 671, 47 L.R.A. 755, 34 S. E. 852. In *Carroll v. Wisconsin C. R. Co.* 40 Minn. 168, 41 N. W. 661, dealing with claimed damages of the nature here sought to be recovered for, the court observed: "Railroads are a public necessity. They are always constructed and operated under authority of law. They bring to the public great benefits; to some persons more; to other persons less. The

operating them in the most skilful and careful manner causes to the public necessary incidental inconveniences, such as noise, smoke, cinders, vibrations of the ground, interference with travel at the crossings of roads and streets, and the like. One person may suffer more from these than another. For instance, one whose premises lie within 100 feet of the railroad will feel the inconveniences in a greater degree than one whose premises are at the distance of 1,000 feet; and one who has to pass many times a day along a street crossed by a railroad suffers more inconvenience from it than one who seldom has occasion to pass. But the difference is only in degree, not in kind. Such inconveniences are common to the public at large. If each person had a right of action because of such inconveniences, it would go far to render the operating of railroads practically impossible."

In *Beseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164, dealing with a similar problem, Chief Justice Beasley, speaking for the court, observed: "That this proposition, on which the plaintiff's case rests, is a most momentous one, is at once apparent. If it should be sustained, an illimitable field of litigation would be opened. If a railroad, by the necessary concomitants of its use, is an actionable nuisance with respect to the plaintiff's property, so it must be as to all other property in its vicinity. It is not only those who are greatly damaged by the illegal act of another to whom the law gives redress, but its vindication extends to every person who is damaged at all, unless, indeed, the loss sustained is so small as to be unnoticeable by force of the maxim, *De minimis non curat lex*. The noises and other disturbances necessarily attendant on the operation of these vast instruments of commerce are wide-spreading, impairing in a sensible degree some of the usual conditions upon which depend the full enjoyment of property in their neighborhood; and consequently, if these companies are to be regarded purely as private corporations, it inevitably results that they must be responsible to each person whose possessions are thus molested. Such a doctrine would make these companies, touching such landowners, general tortfeasors; their tracks run for miles through the cities of the state, and every landowner on each side of the track would be entitled to his action; and so in the less populated districts each proprietor of lands adjacent to the road would have a similar right, and thus the litigants would be numbered by thousands. It is questionable whether the running of railroads would be practicable if subjected to such a responsibility." *Randle v. Pacific R. Co.* 65 Mo. L.R.A.1915E.

325; *Thomason v. Seaboard Air Line R. Co.* 142 N. C. 318, 55 S. E. 205; *Atchison, T. & S. F. R. Co. v. Armstrong*, 71 Kan. 366, 1 L.R.A.(N.S.) 113, 114 Am. St. Rep. 474, 80 Pac. 978; *Hyde v. Minnesota, D. & P. R. Co.* 29 S. D. 220, 40 L.R.A.(N.S.) 48, 136 N. W. 92.

Nor is this doctrine fraught with any such injustice as a superficial view thereof might suggest. Let us suppose for a moment that there were no railroads in or near the city of Spokane. What, then, it may well be asked, would appellants' property which is here claimed to be injured be worth? The logic of appellants' contention, given its ultimate effect, would, in all probability, destroy what is probably the greatest single potency which lends value to their property. Without railroads it is highly probable that the value of all the property within the present limits of the city of Spokane would only be that of a comparatively small town or village. While the ordinary operation of such railways may seemingly damage much adjoining property, it is to be remembered that, in the vast majority of cases, railways are the most potent influence lending value to such property. A more nearly correct view probably is that appellants' property, by reason of the presence of this and other railways in and through the city of Spokane, is measurably less benefited by the presence of such railways than some other property within the city which may be so situated as to reap the benefits and not suffer the inconveniences which, in a measure, also attend the presence of the railways. A thought akin to this was expressed by us in *Larned v. Holt*, 74 Wash. 274, 46 L.R.A.(N.S.) 635, 133 Pac. 460, where we said, touching the inconvenience and injury to property caused by carrying on of a street improvement: "It is apparent to the most casual observer that property and business locations in our centers of population are desirable and derive well-known advantages from being so situated. The density of population which renders such locations valuable also renders the more necessary public improvements of the nature here involved, to the end that such advantages may be more fully enjoyed. The making of such public improvements necessarily results in more or less temporary inconvenience, and even damage, to property and business in their neighborhood while being constructed. Aside from acts of negligence on the part of the public authorities in constructing such improvements, owners of property and business so temporarily inconvenienced or even damaged must bear such burdens as an incident to the enjoy-

ment of the advantages which their locations give them."

See also *Hieber v. Spokane*, 73 Wash. 122, 131 Pac. 478.

Some contention is made rested upon the eminent domain provision of our Constitution that "no private property shall be taken or damaged" without just compensation. Counsel seem to proceed upon the theory that appellants are, in effect, simply seeking compensation from respondent by reason of its exercising the right of eminent domain, and that therefore the word "damaged," as used in our Constitution, gives them a right of recovery for the injuries they here claim to have received. This problem seems to have been well answered in *Austin v. Augusta Terminal R. Co.* 108 Ga. 671, 47 L.R.A. 755, 34 S. E. 852, where, dealing with a similar problem under an eminent domain constitutional provision in substance the same as ours, and where damages were claimed of the same nature as those here claimed, Chief Justice Simmons, speaking for the court, said: "Plaintiff insists that, as the market value of her lot has been diminished in consequence of the operation of the railroad, she is entitled to recover therefor by virtue of the provision in the Constitution that 'private property shall not be taken or damaged, for public purposes, without just and adequate compensation being first paid.' [Civ. Code, § 5729.] In a popular sense, the word 'damage' does frequently mean depreciation in value, whether such depreciation is caused by a wrongful or a lawful act; but in statutes or other legal instruments giving compensation for 'damages' the word always refers to some actionable wrong,—some loss, injury, or harm which results from the unlawful act, omission, or negligence of another. In this sense, and as a well-defined law term, it was used in the Constitution to give the owner of private property compensation for the actionable wrong whereby his property had been damaged, but it did not give him compensation for depreciation in value caused by any legal act; since in law such an act was innocent, and therefore harmless, or, if not actually harmless, *damnum absque injuria*. There is nothing in the language of the Constitution or in the debates or in the proceedings of the convention which shows any intent to enlarge its definition, or to make it mean more than it had always meant as a law term."

In *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, 4 Am. St. Rep. 659, 13 Atl. 690, where a similar problem was involved under a constitutional provision like ours, except that it used the word "injury," instead of "damages," Justice Paxson, speaking for the court, said:

"The language of the Constitution is not equivocal and is entirely free from ambiguity. The framers of that instrument understood the meaning of words, and many of them were among the ablest lawyers in the state. Two of them occupy seats upon this bench. Hence, when they extended the protection of the Constitution to persons whose property should be injured or destroyed by corporations in the construction or enlargement of their works, we must presume they meant just what they said; that they intended to give a remedy merely for legal wrongs, and not for such injuries as were *damnum absque injuria*. Among the latter class of injuries are those which result from the use and enjoyment of a man's own property in a lawful manner, without negligence and without malice."

It is worthy of note that this language from the Georgia and Pennsylvania courts is quoted with approval in *Smith v. St. Paul, M. & M. R. Co.* 39 Wash. 355, 361, 70 L.R.A. 1018, 109 Am. St. Rep. 889, 81 Pac. 840, 842. In the late case of *Hyde v. Minnesota, D. & P. R. Co.* 29 S. D. 220, 40 L.R.A.(N.S.) 48, 136 N. W. 92, the question was reviewed at length in the light of the provision of the Constitution of South Dakota, in substance the same as ours, and a conclusion reached in harmony with the Georgia and Pennsylvania decisions. We are of the opinion that this eminent domain constitutional provision does not change or lessen the force of the doctrine of *damnum absque injuria*.

Counsel for appellants call our attention to, and place some reliance upon, our former decision in *Farnandis v. Great Northern R. Co.* 41 Wash. 486, 5 L.R.A.(N.S.) 1086, 111 Am. St. Rep. 1027, 84 Pac. 18; *Kiel v. Grays Harbor & P. S. R. Co.* 71 Wash. 163, 127 Pac. 1113, and *Patrick v. Smith*, 75 Wash. 407, 48 L.R.A.(N.S.) 740, 134 Pac. 1076, 6 N. C. C. A. 108. None of these decisions have any reference to the ordinary operation of a steam railway and the incidental damage resulting to abutting property therefrom. The *Farnandis* Case deals with a question of damage resulting from the sinking and subsiding of the earth, caused by the construction of a tunnel by a railway company, and not with injuries resulting from the operation of the railway. The *Kiel* Case deals with the question of the building of a steam railroad in a public street as being an additional burden, to the injury of abutting property. There was not involved any question of injury to abutting property of the nature here involved, but only the right of the railroad company to occupy the street as against the rights of abutting property.

The right of the property owner involved was not different in principle than as if the railroad were being actually built over his property. The Patrick Case dealt with the question of damage resulting from blasting in the construction of a railway. That decision was rested upon the practically uniform holdings of the authorities that the casting of *débris* upon the land of another by blasting, and damage resulting therefrom, gives the landowner a right of action therefor, regardless of negligence in the doing of the blasting.

We conclude that the correct rule is announced in *De Kay v. North Yakima & Valley R. Co.* 71 Wash. 648, 129 Pac. 574, and the conclusions there reached are controlling in favor of respondent as to all the claims of damages made against it in this case, in view of the fact that no act of respondent is charged to have been accompanied by negligence, nor is it charged with any act other than is necessarily incidental to the proper operation of its railway. In so far as observations made in the decision in *Smith v. St. Paul, M. & M. R. Co.* supra, are inconsistent with this conclusion, we must now regard them as no longer controlling.

The judgment is affirmed.

Morris, Ch. J., and Holcomb, Mount, and Chadwick, JJ., concur.

ALABAMA SUPREME COURT.

STATE OF ALABAMA EX REL. HUGO L. BLACK, Appt.,

v.

W. C. DELAYE.

(— Ala. —, 68 So. 993.)

Statute — forbidding advertisements of liquors — territorial operation.

1. A statute forbidding the circulation of advertisements of intoxicating liquors throughout the state applies in counties in which the sale of liquors is legal under the local option law.

Note. — The power of a state to prohibit the circulation in the state of newspapers or magazines published in other states, containing advertisements of intoxicating liquors, has not been passed upon in any case other than *STATE EX REL. BLACK v. DELAYE*.

The question was raised in *State ex rel. West v. Journal Co.* 25 Okla. 180, 105 Pac. 655, but, the action there being for an injunction against the publishing of such advertisement, a form of action which the court held would not lie, the court did not pass upon the question, but merely denied L.R.A.1915F.

Commerce — forbidding circulation of advertisements — validity.

2. A statute forbidding the circulation within the state of newspapers and magazines containing advertisements of intoxicating liquors does not, even with respect to papers and magazines published in other states and shipped into the state, infringe the commerce clause of the Federal Constitution so far as it is made to apply to sales from broken packages on the news stands, in view of the Wilson act enlarging the power of the states over interstate transactions in intoxicating liquors.

Constitutional law — police power — prohibition of advertisements.

3. The police power extends to the prohibition of advertisements of intoxicating liquors for sale.

(May 13, 1915.)

APPEAL by complainant from an order of the City Court of Birmingham denying an injunction to restrain defendant from circulating newspapers, periodicals, and magazines in violation of the anti-advertising liquor law. Reversed.

The facts are stated in the opinion.

Messrs. Samuel D. Weakley and William L. Martin, Attorney General, for appellant:

The Alabama anti-advertising law is valid, and is a proper exercise of the police power.

State v. J. P. Bass Pub. Co. 104 Me. 288, 20 L.R.A.(N.S.) 495, 71 Atl. 894; *Zinn v. State*, 88 Ark. 273, 114 S. W. 227; *State ex rel. West v. Capital State Co.* 24 Okla. 260, 103 Pac. 1021.

The advertisements set forth in the bill as having appeared were nothing more than solicitations for orders for whisky; and since the Wilson act it is competent for the states to forbid such solicitation or advertising without infringing the commerce clause of the Federal Constitution.

State v. J. P. Bass Pub. Co. 104 Me. 288, 20 L.R.A.(N.S.) 495, 71 Atl. 894; *Delamater v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733; *Phillips v. Mobile*, 208 U. S. 472, 52 L. ed. 578, 28 Sup. Ct. Rep. 370, affirming 146 Ala. 158, 121 Am. St. Rep.

the right of the state to the relief asked in the case.

The power of the state to forbid the publication within its limits of advertisements of the keeping for sale of intoxicating liquors at places in other states is sustained in *State v. J. P. Bass* Pub. Co. 104 Me. 288, 20 L.R.A.(N.S.) 495, 71 Atl. 894, and *State ex rel. West v. State Capital Co.* 24 Okla. 252, 103 Pac. 1021. See discussion of these cases in the note to *R. M. Rose Co. v. State*, 36 L.R.A.(N.S.) 443.

17, 40 So. 826; *Keith v. State*, 91 Ala. 2, 10 L.R.A. 430, 8 So. 353; *Dorman v. State*, 34 Ala. 216; *State v. Robinson*, 39 Me. 150; *State v. Gurney*, 37 Me. 149; *Cleveland v. State*, 86 Ala. 1, 5 So. 426.

Defendant has not shown how or in what manner the particular newspapers were brought into the state; nor has he shown that he, himself, was the importer or the agent of the importer; nor has he shown that the papers sold constituted original packages of commerce.

Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; *Cook v. Marshall County*, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233, 119 Iowa, 384, 104 Am. St. Rep. 283, 93 N. W. 372; *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44.

Unlawful advertising may be forbidden.

Com. v. Clapp, 5 Pick. 41; *Com. v. Hooper*, 5 Pick. 42; *People v. Kennedy*, 176 Mich. 384, 142 N. W. 771; *Fifth Ave. Coach Co. v. New York*, 221 U. S. 467, 55 L. ed. 815, 31 Sup. Ct. Rep. 709; *Levy v. State*, 133 Ala. 190, 31 So. 805; *Mills v. State*, 148 Ala. 633, 42 So. 816.

Delamater's Case has been everywhere followed since its decision.

McCollum v. McConaughy, 141 Iowa, 173, 119 N. W. 539; *People v. Swenson*, 162 Mich. 397, 127 N. W. 302; *State v. Davis*, 84 S. C. 516, 66 S. E. 875; *State v. Miller*, 66 W. Va. 438, 66 S. E. 522, 19 Ann. Cas. 604; *Crigler v. Shepler*, 79 Kan. 834, 23 L.R.A.(N.S.) 500, 101 Pac. 619; *State ex rel. Jackson v. William J. Lemp Brewing Co.* 79 Kan. 712, 29 L.R.A.(N.S.) 44, 102 Pac. 504; *State v. Heckox*, 64 Kan. 650, 68 Pac. 35; *Hayner v. State*, 83 Ohio St. 194, 93 N. E. 900; *State v. Holmes*, 68 Wash. 7, 122 Pac. 345; *Stevens v. State*, 61 Ohio St. 597, 56 N. E. 478; *Williams v. State*, 5 Okla. Crim. Rep. 208, 114 Pac. 624; *Kirkpatrick v. State*, 138 Ga. 795, 76 S. E. 53; *Re Anixter*, 22 Cal. App. 117, 134 Pac. 193; *State v. Ascher*, 54 Conn. 299, 7 Atl. 822; *Hart v. State*, 87 Miss. 171, 112 Am. St. Rep. 437, 39 So. 523.

Messrs. Banks, Deedmeyer, & Birch and Benjamin S. Gross, for respondent:

The Denson anti-advertising liquor bill, so far as it attempts to prohibit the circulation of newspapers and magazines published in another state and shipped into this state, is void.

Newspapers are legitimate articles of interstate commerce.

Since the state cannot interfere with the importation of a legitimate article of commerce by direct prohibition, it cannot accomplish the same result by denying the right to sell it when it comes into the state.

Re *Barber*, 39 Fed. 641; *Minnesota v. L.R.A.* 1915E.

Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Haskell v. Cowham*, 109 C. C. A. 235, 187 Fed. 407; *People v. Hawkins*, 157 N. Y. 1, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; *Louisville & N. R. Co. v. F. W. Cook Brewing Co.* 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189.

Soliciting sales or orders for sales is an essential feature of interstate commerce.

Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; *Robbins v. Taxing Dist.* 120 U. S. 480, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *International Textbook Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; *Adams Exp. Co. v. Kentucky*, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. Rep. 633; *Palmer v. Southern Exp. Co.* 129 Tenn. 116, 165 S. W. 240; *Moog v. State*, 145 Ala. 75, 41 So. 166; *Ex parte Murray*, 93 Ala. 78, 3 Inters. Com. Rep. 574, 8 So. 868; *Stratford v. Montgomery*, 110 Ala. 625, 20 So. 127; *Lee v. LaFayette*, 153 Ala. 679, 45 So. 294; *Bessemer v. Smith*, 155 Ala. 157, 46 So. 467; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

This statute is not a valid exercise of the police power of the state.

State v. Redmon, 134 Wis. 89, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; *Eidge v. Bessemer*, 164 Ala. 607, 26 L.R.A.(N.S.) 394, 51 So. 246.

Gardner, J., delivered the opinion of the court:

The bill in this cause was filed by the state of Alabama upon the relation of Hugo L. Black, solicitor for Jefferson county, and alleged, in substance, as follows: That W. C. Delaye, a resident of Birmingham, Alabama, and over the age of twenty-one years, was in charge of and conducted a news stand in said city, and that he had been from time to time, at least since February 10, 1915, selling various newspapers, magazines, and periodicals at such news stand to the purchasers who applied therefor.

In ¶ 3 of the bill it is alleged that the said Delaye since February 10, 1915, when what is known as the "anti-advertising liquor law" took effect in this state, sold various and sundry newspapers, magazines, and periodicals containing advertisements

of whisky, and it may be other beverages embraced within the term "prohibited liquors," as defined in the law of Alabama. It is further alleged that on March 8, 1915, the said Delaye at said news stand did personally circulate and sell a newspaper called the "Inquirer," of Cincinnati, Ohio, of date March 7, 1915, containing two advertisements of whisky, one of them being an advertisement of "Sandy River" and the other of "Magnolia" whisky. The prices at which "Sandy River" whisky might be obtained were stated with a commendation of the said liquors, and in solicitation of mail orders it was said: "This department is on the job; all goods carefully packed and sealed in plain packages without unnecessary marking."

The bill contains, with more or less detail, a description of the several advertisements above referred to, but which it is unnecessary to notice further. In the conclusion of ¶ 3 it is alleged that the said Delaye has stated since the 10th of February, 1915, that he intends to continue to sell newspapers and periodicals containing advertisements of whisky, and to pay no attention to the statutes of Alabama in relation to liquor advertisements, or words to that effect.

Application was made to Hon. J. H. Miller, judge of the city court of Birmingham, for an injunction, whereupon he ordered that the same be set down for hearing, as authorized by § 4528 of the Code of 1907. On April 5, 1915, the said judge entered an order denying the injunction as prayed for, reciting in the order, however, due notice to the defendant and his appearance at the hearing, and that none of the averments of the bill were by him denied. The order was accompanied by an opinion of the judge, which is copied in the record, and which discloses that he entertained the view that the complainant was not entitled to the writ for the reason that the bill showed that the enforcement of the statute there sought, under the facts as alleged in the bill, would burden interstate commerce and violate the Federal Constitution in that respect.

From the order denying the writ the complainant prosecutes this appeal, as provided by § 4531 of the Code of 1907. It is seen from the foregoing that this appeal involves the question of the validity of the act of the legislature of February 10, 1915 (Laws 1915, p. 37), commonly referred to in this record as the "anti-advertising liquor law." It is first insisted, however, that the writ was properly denied, upon the ground that the law is not now effective in the city of Birmingham, for the reason that, by virtue of an election under what is known as the

"local option law," the sale of liquors in said city was thereby legalized, and that, this being true, the law in question is not effective in Birmingham at this time.

In the case of *Western R. Co. v. Capital Brewing & Ice Co.* 177 Ala. 149, 59 So. 52, it was held by this court that, under the general law and policy of this state, intoxicating beverages, including whisky, were prohibited to be sold, even after the enactment of the local option laws, and that the effect of said local option laws was merely to ingraft an exception in particular cases on the general prohibition law of the state. The opinion also clearly demonstrates what was meant by the use of the words "prohibited liquors" in the act there under review.

The above authority is directly in point in this case, and is opposed to the contention of the appellee. In addition to this, however, this question relates solely to what was the intention of the legislature. The title of the act is as follows: "To Further Promote Temperance and Suppress the Evils of Intemperance; to Prevent the Advertising or Solicitation of Orders for Alcoholic, Spirituous, Vinous, or Malt Liquors, Such as Brandy, Whisky, Wine, Rum, Gin, Beer, and Other Intoxicating Liquors and Beverages Prohibited by the Laws of Alabama to Be Manufactured, Sold, or Otherwise Disposed of in This State; to Provide for the Removal of Advertisements in Defined Cases, and to Provide for the Prevention of the Continuation and Repetition of the Acts Hereby Made Unlawful; and to Prescribe Remedies, Procedure, Penalties, and Punishment."

The preamble of the act reads as follows: "Whereas, it is the public policy of this state to discourage the use and consumption of prohibited liquors and beverages, and to secure the strict enforcement of the laws against the manufacture, sale, keeping for sale, or other disposition thereof within this state; that is to say, alcoholic, spirituous, vinous, or malt liquors," etc.

And the body of the act, as to matters therein prohibited and the punishment therefor, and the authority given to the sheriff and police officers to remove such prohibited advertisements, etc., all speaking in the present tense, contains no exception as to any part of the state, and gives no indication of any postponement of the time when it is to become effective. On the contrary, the concluding section of the act reads: "Sec. 5. That this act shall take effect from and after its final passage and enactment into law, the public welfare requiring it."

We think it too clear for further discussion that the act became effective over the

entire state immediately upon its passage, without any exception as to any particular locality, and that therefore it had application to the city of Birmingham, where this respondent was engaged in business.

In the case of *Re Rahrer*, 140 U. S. 554, 35 L. ed. 574, 11 Sup. Ct. Rep. 866, Chief Justice Fuller, speaking for the court, said: "The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity is a power originally and always belonging to the states, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive."

That the regulation of the manufacture and sale of intoxicating liquors is a proper subject of the exercise of police power is a proposition which is now so universally recognized as to have passed beyond the pale of controversy. As said by this court in *State ex rel. Meyer v. Greene*, 154 Ala. 249, 46 So. 268: "That the police power of a state may be appropriately exercised in the prohibition of dealings in intoxicants has been too long settled to now admit of further consideration with a view to its denial." Indeed, this principle is not here controverted.

It is insisted by counsel for appellee that, as the bill shows that the particular newspaper alleged to have been circulated and sold by the respondent was published in Cincinnati, Ohio, the law which attempts to prohibit its circulation is void for the reason that it is violative of § 8, art. 1, of the Constitution of the United States, commonly called the "commerce clause," which delegates to the national Congress alone the power to regulate commerce between the states. It is to be noted that ¶ 3 of said bill does not confine the acts of the respondent to the circulation of the one paper, the Cincinnati Inquirer, but it alleges that he sold various and sundry newspapers and magazines containing advertisements of whisky; and that no answer was filed to the bill, nor other pleading or affidavit denying the averments thereof.

In view of the pleading, therefore, it may be doubted that the denial of the writ in its entirety was justified, irrespective of the constitutional question above noted. That question, however, is also presented; and, in view of its importance and of the consequent desirability of its early determination by the court, we treat it as the question of prime importance on this appeal, and it is necessarily decisive of all others here presented.

It is insisted that, because of the commerce clause of the Federal Constitution, L.R.A.1915E.

this state is without power to pass a law which would prevent the respondent from selling at his news stand in Birmingham a newspaper or magazine printed in another state and containing advertisements of prohibited liquors, as defined in the act of February 10, 1915, and that such an act would be an unwarranted interference with the commerce between the states.

There is nothing in the bill, and therefore nothing in the record before us, to show that defendant laid claim to the consideration of any principle involved in what are commonly called the "Original Package Cases," which would be a matter defensive in its nature, and which is not required to be negative in the bill. *Keith v. State*, 91 Ala. 2, 10 L.R.A. 430, 8 So. 353.

There can be no question, however, that when the newspapers are received by the defendant from without the state, either by mail or in bulk or in a bundle, by express or freight, upon the breaking of the bundle and placing them upon the newsstand for sale, they would become commingled with the mass of property in this state, and would be subject to its police laws; and that such a single newspaper or periodical sold would not be an original package within the meaning of the law as stated in the decisions of the United States Supreme Court in the cases of *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44, and *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132. In the latter case, in discussing this question and how, under the guise of this principle of the "Original Package Cases," many evasions of state laws have been attempted, the following extract from Schollenberger's Case, 156 Pa. 201, 22 L.R.A. 155, 4 Inters. Com. Rep. 488, 36 Am. St. Rep. 32, 27 Atl. 30, was quoted with approval: "One who plants his feet squarely upon the police laws of this state and defies its officers to suppress or to punish his unlawful trade must show a clear legal right to take and maintain his position as a public enemy, or suffer the penalty of the broken law. To hold otherwise would make it impossible for the people of any state to protect themselves from evils that, by common consent throughout the civilized world, need to be restrained and removed by suitable legislation. It would also strike a blow of absolutely crushing weight at the existence of the police power in the several states, and render all attempts at its exercise ineffectual and useless."

There can be no question that the newspapers and periodicals placed on the news stand of the respondent for sale to the public became mixed and mingled with the

mass of property in Alabama, and thus subject to its police laws.

Does the fact that the newspaper was published in another state, and that the advertisement concerned liquors to be shipped from another state, exempt the respondent from the operation of the anti-advertising liquor law, which prohibits the circulation of newspapers carrying such advertisements within this state? We are of the opinion that this question is answered in the negative in the case of *Delamater v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733. It must be conceded that advertising an article for sale is in reality but a solicitation of business; the reason for the advertisement being found in the fact that it stimulates business. *State v. J. P. Bass* Pub. Co. 104 Me. 288, 20 L.R.A.(N.S.) 495, 71 Atl. 894. The facts of the *Delamater* Case, as briefly stated in the opinion, are as follows: "A firm established in St. Paul, Minnesota, which was engaged in dealing in intoxicating liquors, employed *Delamater*, the plaintiff in error, as a traveling salesman. As such salesman, *Delamater*, in the state of South Dakota, carried on the business of soliciting orders from residents of that state for the purchase, from the firm in St. Paul, of intoxicating liquors in quantities of less than 5 gallons. The course of dealing was this: The orders were procured in the form of proposals to buy, and when accepted by the firm the liquor was shipped from St. Paul to the persons in South Dakota who made the proposals, at their risk and cost, on sixty days' credit. At the time *Delamater* engaged in South Dakota in the business just stated, the law of that state imposed an annual license charge upon 'the business of selling or offering for sale' intoxicating liquors within the state, 'by any traveling salesman who solicits orders by the jug or bottle in lots less than 5 gallons.' A violation of the statute was made a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. *Delamater*, not having paid the license charge, was prosecuted under the statute. At the trial, although the uncontradicted proof established the carrying on of business within the state, as above mentioned, *Delamater* requested a binding instruction to the jury in his favor, on the ground that the statute did not apply, and, if it did, that it was void because repugnant to the commerce clause of the Constitution of the United States."

As that case is, in our opinion, conclusive of every constitutional question here insisted upon, frequent quotations from the opinion will be indulged. In the outset Mr. Justice White (present chief justice) ex-L.R.A.1915E.

pressly states that, as the subject dealt with is intoxicating liquors, the decisions of that court touching on the subject of interstate commerce, but dealing with the subjects to which such commerce is generally applied, and not to intoxicating liquors, or, if concerning intoxicating liquors, relating to controversies originating before the enactment of what is known as the "Wilson law" (act Aug. 8, 1890, chap. 728, 26 Stat. at L. 313, Comp. Stat. 1913, § 8738), are laid out of view as being inapplicable to the case under consideration. The opinion proceeds: "The general power of the states to control and regulate the business of dealing in or soliciting proposals within their borders for the purchase of intoxicating liquors is beyond question. With the existence of this general power we are not therefore concerned."

After quoting the Wilson act, it is pointed out that its purpose was to allow the states, as to intoxicating liquors, the subject of such interstate commerce, to exert ampler power than could have been exercised before the enactment of the statute; and that, in effect, by the Wilson act Congress adopted a special rule enabling the states to extend their authority as to such liquors shipped from other states before they became commingled with the mass of property in the state by a sale in the original packages. Continuing, the opinion says: "The proposition relied upon, therefore, when considered in the light of the Wilson act, reduces itself to this: Albeit the state of South Dakota had power within its territory to prevent the sale of intoxicating liquors, even when shipped into that state from other states, yet South Dakota was wanting in authority to prevent or regulate the carrying on within its borders of the business of soliciting proposals for the purchase of liquors, because the proposals were to be consummated outside of the state, and the liquors to which they related were also outside the state. This, however, but comes to this: That the power existed to prevent sales of liquor, even when brought in from without the state, and yet there was no authority to prevent . . . the carrying on the accessory business of soliciting orders within the state. Aside, however, from the anomalous situation to which the proposition thus conduces, we think to maintain it would be repugnant to the plain spirit of the Wilson act."

The writer of the opinion then proceeds to answer some of the arguments of counsel, to the effect that, as that court had held that the Wilson act did not authorize state power to attach to liquor shipped from one state into another before its arrival and

delivery in the state of its destination, therefore the power of the state could not attach to the carrying on of the business of soliciting proposals, as none of the liquor covered by the proposals in that case had arrived and been delivered within the state of South Dakota. The court said: "The business of soliciting proposals in South Dakota was one which that state had a right to regulate, wholly irrespective of when or where it was contemplated the proposals would be accepted or whence the liquor which they embraced was to be shipped. Of course, if the owner of the liquor in another state had a right to ship the same in South Dakota, as an article of interstate commerce, and, as such, there sell the same in the original packages, irrespective of the laws of South Dakota, it would follow that the right to carry on the business of soliciting in South Dakota was an incident to the right to ship and sell, which could not be burdened without directly affecting interstate commerce. But, as by the Wilson act the power of South Dakota attached to intoxicating liquors, when shipped into that state from another state after delivery, but before the sale in the original package, so as to authorize South Dakota to regulate or forbid such sale, it follows that the regulation by South Dakota of the business carried on within its borders of soliciting proposals to purchase intoxicating liquors, even though such liquors were situated in other states, cannot be held to be repugnant to the commerce clause of the Constitution, because directly or indirectly burdening the right to sell in South Dakota,—a right which by virtue of the Wilson act did not exist."

Answering the argument made by counsel that, as, under the decisions of that court, a resident of one state had the right to contract for liquors in another state and receive the same in the state of his residence for his own use, and that therefore the agent of the nonresident dealer had the right to go into South Dakota and solicit orders from residents of that state to be consummated by the acceptance of the proposals of the nonresident dealer, the opinion points out that this insistence ignores the broad distinction between the want of power of a state to prevent a resident from ordering from another state liquor for his own use, and the plenary authority of the state to forbid the carrying on within its borders of the business of soliciting orders for liquor situated in another state. The opinion states that "the distinction between the two is not only obvious, but has been foreclosed by a previous decision of this court."

Reference is made to the case of Nutting L.R.A.1915E.

v. Massachusetts, 183 U. S. 553, 46 L. ed. 324, 22 Sup. Ct. Rep. 238, wherein the court was called upon to consider "the power of the state on the one hand to forbid the making within the state of contracts of insurance with unauthorized insurance companies, and the right of the individual on his own behalf to make a contract with such insurance companies in another state as to property situate within the state of residence."

The right of the individual to obtain insurance for himself outside the state of his residence did not sanction the contract of the insurance broker in carrying on the business of soliciting unauthorized insurance. The following is quoted by the writer from the Massachusetts case: "While the legislature cannot impair the freedom of McKie to elect with whom he will contract, it can prevent the foreign insurers from sheltering themselves under his freedom in order to solicit contracts which otherwise he would not have thought of making. It may prohibit not only agents of the insurers, but also brokers, from soliciting or intermeddling in such insurance, and for the same reasons."

Applying, then, the principle to the case at hand, the opinion concludes as follows: "The ruling thus made is particularly pertinent to the subject of intoxicating liquors and the power of the state in respect thereto. As we have seen, the right of the states to prohibit the sale of liquor within their respective jurisdictions in and by virtue of the regulation of commerce embodied in the Wilson act is absolutely applicable to liquor shipped from one state into another after delivery and before the sale in the original package. It follows that the authority of the states, so far as the sale of intoxicating liquors within their borders is concerned, is just as complete as is their right to regulate within their jurisdiction the making of contracts of insurance. It hence must be that the authority of the states to forbid agents of nonresident liquor dealers from coming within their borders to solicit contracts for the purchase of intoxicating liquors, which otherwise the citizen of the state would not have thought of making, must be as complete and efficacious as is such authority in relation to contracts of insurance, especially in view of the conceptions of public order and social well-being which it may be assumed lie at the foundation of regulations concerning the traffic in liquor."

In the Delamater Case, from which we have so freely quoted, the right of the agent of a nonresident dealer to solicit business was involved, and it was held that, under the Wilson act, this agent was not

entitled to the protection of the commerce clause of the Constitution, and that he could not find refuge behind the right of the individual to order liquor for his own use. The principle there decided is absolutely conclusive upon the question here involved. Advertising, as before stated, is in reality but the solicitation of business, and the principle here involved is identical with that of the Delamater Case. In that case the nonresident dealer could not send his agent into South Dakota to solicit business in defiance of state law, and seek protection under the commerce clause of the Constitution. In the case at hand, applying the same principle, the nonresident dealer is not authorized to send his agent, whether in person or by newspaper or periodical advertisements, which in effect are the same, into this state, and, by means of the distribution of such newspapers or periodicals containing such advertisements, solicit business in defiance of the act here under review. The Delamater Case and this case cannot be distinguished in principle. The question involved is a Federal one and one upon which the decision of the United States Supreme Court is conclusive and binding, and the result here may well rest upon that authority. Indeed, that the Delamater Case decides in principle the case at hand seems not to be denied by the learned counsel for appellee; but it is insisted that, while that case has not been overruled by that court, yet it is inconsistent and in conflict with subsequent decisions of that court, namely, *Louisville & N. R. Co. v. F. W. Cook Brewing Co.* 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189, and *Crenshaw v. Arkansas*, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294.

We are unable to discover that these authorities are at all in conflict with the Delamater Case. The *Crenshaw* Case dealt with an act of the state of Arkansas which undertook to regulate the sale of stoves, ranges, etc., and applied a question of interstate commerce to articles of like kind. Cases of like character have frequently been before that court and bear no analogy whatever to the instant case nor to the principles involved in the Delamater Case. The case of *Louisville & N. R. Co. v. F. W. Cook Brewing Co.* supra, involved the carriage and delivery by the common carrier of liquors shipped from one state to a resident of another state, wherein it was held that the Wilson act did not apply to interstate shipments of liquor until delivery to the consignee. It is clear that this case in no wise conflicts with the Delamater decision, wherein material distinction is drawn between the right of the individual to receive liquors in the state of his resi-

dence, for his own use, and the right of the nonresident liquor dealer to go into that state and carry on the business of soliciting orders for liquor from the residents.

Much argument of counsel is devoted to a criticism of the Delamater Case. We do not share in this criticism, but on the contrary consider the opinion entirely sound and logical and as containing a full answer to the arguments here presented against it. We have examined with much care the following authorities pressed upon our attention by counsel for appellee: *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *People v. Hawkins*, 157 N. Y. 1, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; *Haskell v. Cowham*, 109 C. C. A. 235, 187 Fed. 407,—as well as other cases cited in brief. We do not consider them applicable to the case at hand, and they therefore need no separate treatment here.

Counsel for appellee insist that the Delamater Case is in conflict with the decision of this court in *Moog v. State*, 145 Ala. 75, 41 So. 166. This we admit. As a Federal question was involved in that case, our court, being without precedent directly in point, was seeking its solution by way of anticipation as to what view that court would entertain upon the subject, as is clearly shown by the opinion. That case was decided May 9, 1906. The Delamater Case was decided by the Supreme Court of the United States nearly a year later, on March 11, 1907.

Other states have found themselves likewise situated, as, for instance, Iowa. The supreme court of that state in the case of *McCollum v. McCaughy*, 141 Iowa, 174, 119 N. W. 540, referring to a case decided by it prior to the Delamater Case, said: "It is evident . . . that the controlling consideration in reaching the conclusion that the statute was unconstitutional was the interpretation which it was thought the Supreme Court of the United States had given to the interstate commerce clause of the Federal Constitution as affecting the validity of the statute, and that, if the recent decision had then been announced, and had been considered by this court as applicable to the legislation in question, a contrary decision would have been reached."

Reference may also be had in this connection to *State v. Miller*, 66 W. Va. 436, 66 S. E. 522, 19 Ann. Cas. 604; *State v. Davis*, 84 S. C. 512, 66 S. E. 875; *Hart v. State*, 87 Miss. 171, 112 Am. St. Rep. 437, 39 So. 523; *Kirkpatrick v. State*, 138 Ga. 795, 76 S. E. 53; *State v. Adams Exp. Co.* L.R.A. —, —, 219 Fed. 794; *People v. Swenson*, 162 Mich. 397, 127 N. W. 302.

As previously stated, a Federal question

being involved, the decision of the Supreme Court of the United States is final and conclusive, and the *Moog Case*, supra, having been decided prior to the *Delamater Case* and merely in anticipation of what the United States Supreme Court would decide, it now becomes necessary, in the light of that authority and following in its wake, to overrule the *Moog Case*.

While it is insisted by counsel that the anti-advertising liquor law is also void under our Constitution as not being a proper exercise of police power, we are of the opinion that this insistence is so clearly without merit under the authorities as to need but passing notice. Anti-advertising laws do not appear to be either new to modern times or confined to this state. Two cases involving the advertisement for sale of lottery tickets are found reported in the decisions of the supreme judicial court of Massachusetts as far back as 1827. See *Com. v. Clapp*, 5 Pick. 41, and *Com. v. Hooper*, 5 Pick. 42. And recently the supreme court of Michigan sustained a conviction under an act of that state entitled "An Act to Prohibit Certain Classes of Immoral Advertising and to Provide Punishment for the Violation Thereof," and which act dealt with advertisements for the cure of venereal diseases and questions of like character. *People v. Kennedy*, 176 Mich. 384, 142 N. W. 771. The constitutionality of this act was assailed, but without avail; the court saying: "The act appears to be a reasonable police regulation." Other cases of interest in this connection are *Fifth Ave. Coach Co. v. New York*, 221 U. S. 467, 55 L. ed. 815, 31 Sup. Ct. Rep. 709, and *Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877. An act of a somewhat similar character to that presented in the Michigan case, supra, was reviewed by the supreme court of Tennessee in *Kirk v. State*, 126 Tenn. 7, 150 S. W. 83, Ann. Cas. 1913D, 1239; and a number of cases are cited in the opinion. The case of *Zinn v. State*, 88 Ark. 273, 114 S. W. 227, and *State ex rel. West v. State Capital Co.* 24 Okla. 252, 103 Pac. 1021, as well as the *Bass Pub. Co. Case*, 104 Me. 288, 20 L.R.A.(N.S.) 495, 71 Atl. 894, dealt with laws of similar character to the one under review, and were upheld as being a proper exercise of police power. In the last-mentioned case the following language found in the opinion is pertinent here: "The statute in this case is but a part of the legislation of this state upon the subject matter of the sale and keeping for sale of intoxicating liquors, and is to be construed, so far as its language will fairly and reasonably allow, in harmony with what appears from that legislation to be the legislative policy and purpose." L.R.A.1915E.

104 Me. 292, 20 L.R.A.(N.S.) 496, 71 Atl. 896.

There has long been a statute in this state prohibiting the solicitation of orders for liquors, and which has been applied and sustained by this court. *Levy v. State*, 133 Ala. 190, 31 So. 805; *Mills v. State*, 148 Ala. 633, 42 So. 816. In the latter case it was said: "The statute is a police regulation, and one act will constitute a violation of it." Code 1896, § 5087; Code 1907, § 7373.

We are cited by counsel to the case of *Edge v. Bessemer*, 164 Ala. 599, 26 L.R.A.(N.S.) 394, 51 So. 246, which, however, dealt with a question of bearing no analogy to that here presented, and nothing therein contained militates against the conclusion we have here reached.

The *Delamater Case* has not only not been overruled by the Supreme Court of the United States, nor its holding shaken by any subsequent decision of that court, but it has been cited with approval in *Phillips v. Mobile*, 208 U. S. 472, 52 L. ed. 578, 28 Sup. Ct. Rep. 370, in which case the following expressions are of interest here: "The police powers of a state form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government, all of which may be most advantageously exercised by the states themselves. . . . The sale of liquors is confessedly a subject of police regulation. Such sale may be absolutely prohibited, or the business may be controlled and regulated by the imposition of license taxes, by which those only who obtain licenses are permitted to engage in it."

The following quotation from the case of *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44, also finds application here: "That the state, in the exercise of its police power, may prohibit the selling of intoxicating liquors, is undoubted. . . . It is also well established that, when a state exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that, because a transaction separately considered is innocuous, it may not be included in a prohibition, the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. . . . With the wisdom of the exercise of that judgment, the court has no concern; and, unless it clearly appears that the enactment has no substantial relation to a proper purpose, it

cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature,—a notion foreign to our constitutional system." See also *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, and *Feibelman v. State*, 130 Ala. 122, 30 So. 384.

The conclusion we have here reached, in the light of the *Delamater Case*, is without any consideration of the recent act of Congress known as the "Webb-Kenyon bill," passed in March, 1913 (act March 1, 1913, chap. 90, 37 Stat. at L. 699, Comp. Stat. 1913, § 8739, Fed. Stat. Anno. Supp. 1914, p. 208), but which act it must be confessed adds strength and confirmation to the well-reasoned opinion of that case.

The advertisements forbidden by this law are in reality but solicitations for business, and this state, possessing the unquestioned authority under its police power to prevent or regulate the sale of liquors within its borders, has also the authority, under the same police power, to prevent or regulate the carrying on of the accessory business of soliciting orders within the state.

We therefore conclude that the anti-advertising liquor law here under review does not contravene any of the provisions of the state and Federal Constitution, is a proper exercise of the police power of the state, and is valid and now effective throughout the entire state. The law provides for the mode of procedure here followed, and which authorizes injunctive relief as a means of obtaining the end in view. It follows, therefore, in our opinion, that the writ of injunction should have been granted by the learned judge below, and his order denying the same is hereby reversed, and one will be here entered granting the temporary injunction as prayed for in the bill.

Reversed and rendered.

All the Justices concur.

KANSAS SUPREME COURT.

JAMES CLESTER et al., Appts.

v.

IDA M. CLESTER et al.

(90 Kan. 638, 135 Pac. 996.)

Trust — conveyance between relatives.

1. The mere fact that a conveyance is between husband and wife or parent and child, or between persons occupying similar intimate relationships, and that no valuable

consideration passes, is not sufficient to raise a trust by implication. There must be fraud, active or constructive, some betrayal of a confidence reposed, or some breach of duty imposed by such relation. Neither character of fraud will be presumed from the fact alone that the relationship of the parties is such as to suggest that a fiduciary relation might have existed.

Same — constructive — inequitable transaction.

2. A constructive trust will arise whenever the circumstances under which the property was acquired make it inequitable that it should be retained by the person who holds the legal title; but equity has no power to declare a trust and enforce it to prevent injustice, merely because the transaction results inequitably to other parties.

Same — conveyance to second wife — rights of children.

3. However harsh or unjust or inequitable it may appear for a husband to make a gift to his second wife of his real estate, and thus deprive the children of his first marriage of all interest therein, even though he acquired the real estate from moneys derived from their mother's separate property, equity is powerless to raise a trust by implication and enforce it, on the ground that it is necessary to prevent a failure of justice.

Husband and wife — conveyance — gift.

4. A conveyance of real estate by the husband to the wife, or a purchase in her name, the consideration being furnished by him, is presumed to be a gift; and the burden rests upon those who assert that the transaction was intended as a conveyance of the legal title to the wife, to be held in trust for the husband.

Same — rights of heirs.

5. A husband may make a gift of his real estate to his wife, when no rights of creditors interfere, and it will be upheld as against his heirs, notwithstanding they were, at the time the conveyance was made, and continued to be, dependent upon him for subsistence and support.

Evidence — trust — sufficiency.

6. Upon the facts and circumstances shown in the evidence in the present case, it is held that a constructive trust was not established, and that the evidence was not sufficient to overcome the presumption that certain conveyances to the wife were intended by the husband as gifts to her, and therefore that the demurrer to the evidence was rightly sustained.

(April 12, 1913.)

Note. — Gratuitous conveyance as raising implied, resulting, or constructive trust in favor of the natural objects of the bounty of the grantor or donor.

Comparatively few of the cases in which it was sought to raise a trust out of an absolute conveyance are without some claim of an oral promise on the part of the

APPEAL by plaintiffs from a judgment of the District Court for Sumner County sustaining a demurrer to their evidence in an action for partition of certain real estate and to recover possession of a portion thereof. Affirmed.

The facts are stated in the opinion.

Messrs. C. E. Elliott and W. T. McBride, for appellants:

The facts proven show a constructive trust, or an implied trust, or a trust *ex maleficio*, and neither the statutes of frauds, nor the statute relating to trusts and powers, prevents decreeing such a trust.

39 Cyc. 169, 184-187; Pom. Eq. Jur. §§

grantee. The subject of the grantee's oral promise to grantor to hold in trust as giving rise to a constructive trust is fully treated in the note to Lafayette Street Church Soc. v. Norton, 39 L.R.A.(N.S.) 906. The scope of the present note is confined, therefore, to cases resting upon the form of the conveyance, with extrinsic evidence other than that of an agreement or promise on the part of the grantee.

Reference may also be made to the following notes: The note to Vickers v. Vickers, 24 L.R.A.(N.S.) 1043, entitled, "Will donor's expectation that the donee will allow him to share in the benefit of the property raise and implied trust to that effect;" note to Logan v. Brown, 20 L.R.A.(N.S.) 298, as to parol agreement to take title to real property, sell the same, and account for the proceeds, as affected by the statute of frauds; note to Johnson v. Hayward, 5 L.R.A.(N.S.) 112, as to the statute of frauds as affecting right to equitable relief against one who has purchased land in his own name in violation of his agreement to purchase it for and in the name of another; note to Crossman v. Keister, 8 L.R.A.(N.S.) 698, as to impressing share of heir, devisee, or legatee with constructive trust, because of his fraud in frustrating decedent's intention to give the property to a third person; note to Winder v. Scholey, 33 L.R.A.(N.S.) 996, as to the question whether a constructive trust may be based upon an undertaking to hold, for the benefit of another, property received through devise or inheritance, where no actual testamentary intention has been frustrated.

It is not intended in general to include cases where the consideration was paid by one party, and the deed, at the direction of such party, was made to another, whether the trust claimed was for the benefit of the payor or others, nor cases where the trust alleged was for the benefit of the grantor, though two or three cases of these kinds are cited. Cases of actual fraud are also excluded.

General principles.

The reader will remember that if a resulting or constructive trust arises at all, it must be at the time of the conveyance. See L.R.A.1915E.

1053, 1055; Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; 1 Story, Eq. Jur. §§ 258, 307; Huguenin v. Baseley, 14 Ves. Jr. 273, 9 Revised Rep. 148, 270, 6 Eng. Rul. Cas. 834, 2 Lead. Cas. in Eq. (White & T.) pt. 1, p. 598; 15 Am. & Eng. Enc. Law, 1195; Gemmel v. Fletcher, 76 Kan. 577, 92 Pac. 713, 93 Pac. 339; Dorman v. Dorman, 187 Ill. 154, 79 Am. St. Rep. 210, 58 N. E. 235.

Mr. James Lawrence, for appellees:

Under § 1 of the act in regard to trusts and powers, plaintiffs failed to establish an agreement, and the testimony falls short of establishing one by implication of law.

Chance v. Graham, — Or. —, 148 Pac. 63 (where the court held that, on the evidence, it was clearly shown that there was no constructive trust).

The facts that an instrument is made from father to daughter, and that it is without consideration, do not in themselves raise a presumption of fraud, nor suffice to raise a trust in favor of other children of the grantor. Smith v. Mason, 122 Cal. 426, 55 Pac. 143.

So, in Luckhart v. Luckhart, 120 Iowa, 248, 94 N. W. 461, it is said that a conveyance by father to son, even if there is no valuable consideration, is good as a gift or advancement based on love and affection, and no trust will arise.

See also CLESTER v. CLESTER.

Generally speaking, a trust cannot be established by showing, as against a deed reciting a consideration, the receipt of which is acknowledged, that there was in fact no consideration paid. Luckhart v. Luckhart, supra, where, however, there was evidence of payment of a consideration.

Absence of agreement in general.

The mere receipt of an absolute deed from mother to daughter is no agreement to reconvey. Moore v. Jordan, 65 Miss. 229, 7 Am. St. Rep. 641, 3 So. 737, where a son-in-law induced his mother-in-law to convey the property to his wife and her sister by a deed stating the consideration of natural love and affection and of the sum of \$1, the intent being that the property should be reconveyed after a certain matter was concluded, and the wife of such son-in-law did thereafter reconvey to her mother, but the other daughter declined to do so. It was held that there was nothing to show that the daughter so declining had made any agreement about the matter at all except to receive the conveyance, and that she would not be ordered to reconvey.

See also, as to conveyances to sons-in-law, infra, Noe v. Roll, 134 Ind. 115, 33 W. E. 905; Thompson v. Thompson, 18 Ohio St. 73; Dilts v. Stewart, 1 Sadler (Pa.) 230, 1 Atl. 587.

In Rawson v. Morris, 93 Minn. 499, 101 N. W. 970, it was held that there was no trust for the benefit of a son by his mother's

Morrall v. Waterson, 7 Kan. 199; Knaggs v. Mastin, 9 Kan. 532; Gee v. Thraillkill, 45 Kan. 173, 25 Pac. 588; Ingham v. Burnell, 31 Kan. 333, 2 Pac. 804; Rogers v. Richards, 67 Kan. 700, 74 Pac. 255; Blackwell v. Blackwell, 88 Kan. 495, 129 Pac. 173; Beavers v. McKinley, 50 Kan. 602, 32 Pac. 363, 33 Pac. 359; Rayl v. Rayl, 58 Kan. 585, 50 Pac. 501; 13 Enc. Ev. 124, 125; Kelly v. Short, — Tex. Civ. App. —, 75 S. W. 877; Agricultural, Mechanical & Bloodstock Asso. v. Brewster, 51 Tex. 257; 39 Cyc. 192, 193; Tiedeman, Eq. Jur. § 311, p. 355; Horder v. Horder, 23 Kan. 392, 33 Am. Rep. 167.

deed to her daughter (the form of which is not given), although there was some evidence that the mother supposed that if she devised the son's share to him, it would be subject to foreign judgments against him.

In Luse v. Reed, 63 Minn. 5, 65 N. W. 91, where the husband's mother, at his solicitation, conveyed property to his wife, it was testified by the mother that, before making the deed, the grantee informed her that she had no children and nobody but the son of the grantor; there was some evidence that the mother knew at the time that the woman was a mere adventuress, and it appeared in the case that she had a son; the court declined to reverse the action of the trial court in finding that neither the grantor nor her son were induced to make such deeds or any of them to the grantee, or to cause the title to said lands to be placed in her name by any agreement of the grantee, but stated that the trial court might have found otherwise.

In Lodewyck v. Lacroix, 115 Mich. 590, 73 N. W. 897, where the form of the deeds is not given, the court declined on the evidence to impose any trust in favor of an invalid daughter as to property conveyed by her mother to one of her other daughters, as such intention was not clearly made out; it appeared that the daughters other than the grantee, including the invalid, had already received considerable advancements.

While without the scope of this note, reference may here be made to Colegrove v. Colegrove, 89 Ark. 182, 131 Am. St. Rep. 82, 116 S. W. 190, where it was held that no trust arose under a deed by a man to his step-son, made in consideration of the conveyance of other property to the grantor by the wife of the grantee. In that case the husband said he wanted the property put in his name, because he thought that if his wife should die, he would be kicked out of the house by his children, and the wife told him that she did not want to do it, but that in order to keep down hard feelings, she would consent to it. Some years later, in her last sickness, she asked her husband to transfer the property to her two children, so that in case he should ever marry again, the children would be protected, but he did not do so, and married again, and later succeeded in inducing his second wife, by

Porter, J., delivered the opinion of the court:

This is an appeal from a judgment sustaining a demurrer to plaintiffs' evidence. The action was in ejectment and for partition of certain real estate.

The appellants, who were plaintiffs below, are the children of John Clester, deceased, who removed to Kansas from Ohio in 1878; his first wife, the mother of appellants, having died before the family left there. The legal title to the real estate in controversy is in the name of Ida M. Clester, the second wife, and the other appellees are children the second marriage.

fraudulent representations, to join him in a conveyance of the property to a third party, who later made a deed back to the husband for life, with the remainder to the children by his first wife, thus committing a fraud on his second wife's right to dower and homestead. It was held that the deed so made in fraud of his second wife would be set aside, and that there was no trust in the first deed.

In Spradling v. Spradling, 101 Ark. 451, 142 S. W. 848, it was held that the presumption that a husband holds the legal title to property in trust for his wife, when the conveyance is taken in her name and the property is actually paid for by her, or has come to her by inheritance, may be overcome by clear proof. So that where, at the request of the wife, on a division of property between herself and her coheirs, certain land was deeded by the other heirs to her husband, and later she and her husband conveyed the same property to her husband through a third party, it being shown that it was her intent to give him the property, it was held that the only son of such wife by the marriage could not fasten a trust on the property for his benefit, to the exclusion of children of a later marriage of such husband, or of such husband himself. The action was originally brought against the husband, who had mortgaged the property, but during the action he died intestate, leaving not only the plaintiff, but also children by his second marriage. It was also held that the statement by the wife, at the time of the deed, that she made the deed to her husband, so that her relations should not get it, in case she should die without children, having none at the time, did not show that there was any intent that the husband should hold it in trust for anybody.

In Ohio, where the 7th section of the statute of frauds had not been enacted, it has been held that a deed from a man and his wife to their son in consideration of natural love and affection and \$5.00 (a receipt for which was on the back of the deed), conveying property "to and for the only proper use, benefit, and behoof of the said grantee," imports an absolute conveyance, and the fact that the consideration money may not have been paid would be immaterial in this respect. Miller v. Stokely,

It is the claim of appellants that John Clester, at the time of his death, was the equitable owner of all the real estate. There was evidence tending to show that the mother of appellants inherited from her father a sum of about \$2,000; and this money was brought to Kansas and invested in farm land in Sumner county by John Clester; that the family lived on the farm for six or seven years, when it was sold and the proceeds invested in 200 acres of other land in the same county, a part of which is the land involved in this action. Three years afterwards, in 1887, John Clester married Ida M. Clester, and the family con-

tinued to occupy the 200 acres as a home. In 1889 John Clester conveyed a part of the land directly to Ida M. Clester; the consideration named in the deed being \$1 and love and affection. In 1890 the rest of the tract was conveyed to her; a deed being made first to a son-in-law, who soon afterwards conveyed to Ida M. Clester. The evidence tended to show that Ida M. Clester paid nothing for either conveyance; that she possessed no means of her own, and there was some evidence that subsequent to the conveyances she made statements and admissions to the effect that she held the title in trust; that she stated at one time

5 Ohio St. 195, where the deed was thirty years old at the time it was attacked as subject to a trust in favor of the grantors and their heirs, and where the court said: "An implied or resulting trust cannot be shown against an absolute deed, in consideration of natural love and affection. The case, therefore, must turn upon the question whether the proof has established the existence of an express trust. To establish an express trust in the case of a conveyance by deed absolute on its face, it is requisite that the evidence should be clear, certain, and conclusive, in proof not only of the existence of the trust, and that, too, at the time of the conveyance, but also as to its terms and conditions. A deed for the conveyance of lands, absolute in its terms, and in consideration of natural love and affection, is repugnant to the existence of a trust. And if, in opposition to the terms of such a deed, an express trust, coupled with an interest, could be set up and proven by circumstantial evidence, predicated on a supposed concealment or fraud, after the lapse of thirty years, it is essential that the evidence be so certain and conclusive as to exclude every rational hypothesis to the contrary, with the certainty of a positive written declaration of the trust."

Deeds to son-in-law.

Generally speaking, an absolute deed to a son-in-law raises no trust.

Land conveyed by a father of a daughter to her husband, as an advancement to her, raises no trust in her favor; such advancement may well be made by a gift to her husband. *Meredith v. Meredith*, 150 Ind. 299, 50 N. E. 29.

A deed by a father-in-law to his son-in-law, expressed to be for a certain consideration in dollars, passes an absolute estate to the son-in-law, and it will not be disturbed by proof that he paid nothing for the property, and that the amount of the consideration was charged against the daughter as an advancement in land in the settlement of her father's estate. *Rogers v. Rogers*, 52 S. C. 388, 29 S. E. 812.

In *Hileman v. Hileman*, 85 Ind. 1, where the form of the deed is not stated, it was L.R.A.1915E.

held that there was no principle of law which raised a promise to pay, nor of equity which either created a trust in the wife's favor in the land, or made the husband liable for so much money received in trust for her, from the fact that a husband purchased a tract of land of his wife's father, and that, as a gift or advancement to the wife on her share in her father's estate, the price of the land was made less by a certain sum than otherwise it would have been, as the transaction amounted to a gift to the husband.

A son-in-law has been held to take an absolute fee by a deed from his father-in-law or parents-in-law—

—made "in consideration of the mutual love and affection he bears to his daughter," "the wife of said Stephen, and the further consideration of one dollar," "to have and to hold unto the said Stephen and unto his heirs forever," *Higbee v. Higbee*, 123 Mo. 287, 27 S. W. 619 (where the extrinsic evidence was not of any particular weight);

—made "for and in consideration of the sum of one thousand and fifty dollars, five hundred of said sum the said parties of the first part give to their daughter, Clarinda Morris, wife of the said James Morris, and the other five hundred and fifty dollars to them in hand paid, the receipt of which is hereby acknowledged," and stating that they "have granted, bargained and sold and by these presents do grant, bargain and sell unto the said James Morris, his heirs and assigns," *Morris v. Clare*, 132 Mo. 232, 33 S. W. 1123 (no other evidence of any trust was offered other than the deed itself and such inferences as it is supposed to carry);

—made in consideration of \$1 as well as the natural affection of the grantor to his daughter, the wife of the grantee, granting the property to the grantee, his heirs and assigns, and warranting the title to him and his heirs forever (none of the circumstances being stated except the deed), *Mosely v. Mosely*, 87 N. C. 69 (a jurisdiction where the statute of frauds as to the declaration of trusts had not been enacted);

—made "for and in consideration of the sum of \$400 as an advancement to his [i. e., the grantee's] wife, Polly Cornelia, and also for the further sum of \$400 in hand paid by the said" grantee, stating that

that she knew that the money with which the land was purchased came from the first wife; again, that she said it was her intention some time to pay to the appellants their mother's share. There was evidence that after the conveyances John Clester continued to exercise the same control and management of the lands as before, and a witness testified to having heard him say that he intended to fix matters so that appellants would get the land. This, in substance, was the testimony relied upon by appellants.

They contend that the evidence and the fair inferences to be drawn from all the circumstances proven establish *prima facie* that the land belonged, in equity, to John Clester; that the question whether his in-

tention was to make a gift to Ida M. Clester and to ignore the rights of the children by the first wife should have been submitted to the jury. It is broadly claimed that the evidence shows a constructive trust, or a trust *ex maleficio*.

The weakness in appellants' claim is the absence of any testimony to show an agreement at the time the conveyances were made by which Ida M. Clester was to hold the land in trust for the husband. Had there been testimony that such was the agreement, the case might be said to fall within the provisions of § 8 of the act relating to trusts and powers (§ 9701, Gen. Stat. 1909); and even though the agreement had been oral, it would lie within the province of equity to raise a trust to pre-

the grantor did grant, etc., unto the said grantee, his heirs and assigns forever, etc. *Butler v. McLean*, 122 N. C. 357, 29 S. E. 416.

But in *Creswell v. Jones*, 68 Ala. 420, it was held that a deed by a woman to her son-in-law created an express trust for her daughter, where it provided: "For and in consideration of the love and affection which I bear to my daughter, Louisa W. Creswell, wife of Samuel L. Creswell, . . . and also for and in consideration of the sum of \$10 to me in hand paid by the said Samuel L. Creswell, the receipt whereof I do hereby acknowledge, have given, granted, conveyed and released, and by these presents do give," etc., "to the said Samuel L. Creswell, his heirs and assigns, as an advancement to my daughter the said Louisa W. Creswell, in part of her distributive share of my estate," "to have and to hold all and singular the said parcels of land unto the said Samuel L. Creswell, his heirs and assigns, forever," with warranty. Compare *Cole v. Thompson*, 169 Fed. 729, *infra*.

In *Hawks v. Sailors*, 87 Ga. 234, 13 S. E. 638, it was held that no trust resulted in favor of a wife by a deed from her father to her husband, declaring that it was made "for and in consideration of the sum of \$500 to him in hand paid by said Sailors, less \$200 for the love and affection the said White bears to his daughter, Martha A. Sailors, donates out of the \$500, at and before the sealing and delivery of these presents," and which conveyed the property to the husband and warranted the same to him, and declared the use "to him and their heirs, to his and their own proper use, benefit and behoof forever in fee simple," and that parol testimony of the purpose of the grantor in such deed was inadmissible in an action of ejectment, although the court said that if the suit had been to reform the deed and make it declare the true intention of the parties at the time it was made, parol testimony would have been admissible for that purpose; there does not seem to have been any allegation of fraud.

In *Stonehill v. Swartz*, 129 Ind. 310, 28 L.R.A.1915E.

N. E. 620, it was held that equity would not enforce an express parol trust, and that the conveyance was absolute, where a father-in-law told his son-in-law that, if he and his daughter would move on land owned by the father-in-law, he would later convey the same to his daughter as an advancement, and they moved on the land and had children and the wife died, and the son-in-law, after he had married again, had an interview with his father-in-law, who told him to live on the land for his own continued comfort, that he would give him the land with the understanding that he was to have the use of it during his life, and at his death it was to go to the children of his first wife, and did give him an absolute deed for it, mentioning a consideration which was not paid; but it seems that the statute of limitations had long since run, and there had been at least more or less acquiescence by those seeking to enforce the trust.

In *Noe v. Roll*, 134 Ind. 115, 33 N. E. 905, where the form of the deed is not reported, it was held that equity would raise no trust from the fact, as alleged, that a father seeking to make an advancement to his daughter, conveyed certain land to her husband, to hold in trust for her, and for her use and benefit, and that he paid no consideration for said land, except that he went into possession of said land, with the intention to execute such trust, that he afterwards, with her consent and knowledge, sold the land and with the proceeds purchased other land, and that all the conveyances were made without fraud and in good faith; for there was no agreement shown or alleged, and fraud was expressly disclaimed.

The rule also has been held to apply in Ohio, where the 7th section of the statute of frauds had not been enacted. Thus, in *Thompson v. Thompson*, 18 Ohio St. 73, it was held that a deed conveyed an absolute estate to the grantor's son-in-law, which provided that "whereas the said Thompson has heretofore intermarried with Sarah Jones, the daughter of said party of the first part, and for and in consideration of

vent a failure of justice. *Rayl v. Rayl*, 58 Kan. 585, 589, 50 Pac. 501, and cases cited in the opinion. But there was no testimony showing any promise or agreement or understanding at the time the conveyances were made that she should hold in trust for him.

It is true that trusts by implication frequently arise in transactions between persons occupying such intimate relationships as that of husband and wife or parent and child; but the mere fact that the transaction is between husband and wife or parent and child, and that no valuable consideration passes, is not sufficient to raise a trust by implication. *Brown v. Brown*, 62 Kan. 666, 675, 64 Pac. 599. There must be fraud, active or constructive, and neither char-

acter of fraud will be presumed from the fact alone that the relationship of the parties is such as to suggest that a fiduciary relation may have existed; there must be some betrayal of a confidence reposed, or some breach of duty imposed by such relation. When either of these is shown, equity is expressly authorized, under the exceptions stated in § 8, *supra*, to raise a trust by implication, and to enforce it in furtherance of justice and to prevent fraud. See *Kennedy v. Taylor*, 20 Kan. 558, 561.

It is said: "The test of such a trust is the fiduciary relation and a betrayal of the confidence reposed, or some breach of duty imposed under it." 39 Cyc. 184.

"The existence of the relation, and a subsequent abuse of the confidence bestowed

the premises and the natural love and affection which the party of the first part has and entertains for his said daughter and said Thompson, and for the purpose of advancing said Thompson in life, the party of the first part has bargained and sold, and by these presents doth bargain and sell, transfer, and convey to said" grantee, "to have and to hold said property, with its appurtenances, rights, and privileges, unto said Thompson, his heirs, and assigns forever," although the grantor many years afterwards testified that he supposed that his daughter would be protected in the case of the death of the grantee, who was a lawyer, but he also testified that he was a noble young man for whom he would have done anything. This case eventually was one of hardship to the daughter, inasmuch as her husband died intestate and his only son died a minor, and the husband's collateral heirs claimed the property.

In the briefly reported case of *Stump v. Stump*, 26 Ohio St. 169, it is stated that a man conveyed a piece of property to his son-in-law for a certain stated consideration, part of which was released to the son-in-law by way of an advancement to his wife; that with her consent the deed was made to her husband; that the property was afterwards conveyed by the husband back to his father-in-law for a consideration partially payable in notes; and that after the death of the son-in-law, and before the notes were paid, the daughter's action against the son-in-law's administrator to recover the said advancement was dismissed. The form of the deed does not appear.

In *Fisher v. Fisher*, 30 Ohio C. C. 606, it was held upon the authority of the two foregoing cases that "the giving by a father to a son-in-law of a tract of land, and payment by the father to the son-in-law of a part of the purchase price of another tract of land, and the son-in-law and daughter uniting in a receipt of the property by way of advancement," did not constitute an implied or a resulting trust under the law. The facts of the case, however, are not stated in detail.

L.R.A.1915E.

In *Cole v. Thompson*, 169 Fed. 729, where there seems to have been little if any evidence but the deed, it was held that in West Virginia a trust would not be established except by full, clear, and satisfactory evidence between the parties privy to a deed stating that, in consideration of love and affection, it conveyed to a son-in-law of the parties of the first part certain land, which was to be taken and considered as an advancement of a distributive interest of the son-in-law's deceased wife's heirs in the estate of the grantor, and to be estimated and conveyed at a certain amount of money advanced to such heirs, naming infant sons of the deceased daughter. The court pointed out that it was held in *Rogers v. Rogers*, 52 S. C. 388, 29 S. E. 812, *supra*, that parol evidence was inadmissible to establish a trust in a deed to a son-in-law, as an advancement to his wife, but thought that the West Virginia cases did not go to this extent (the 7th section of the statute of frauds had not been enacted in West Virginia).

But in *Re Stanger*, 35 Fed. 238, also arising in West Virginia, the court considered that the weight of authority was against the admission of parol evidence to prove a consideration different from that expressed in the conveyance, but that in any event, in the case in question, the evidence was too slight to raise any idea of a trust, where the claim was that, besides the actual consideration, there was a further consideration different from that expressed in the conveyance, to wit, that the grantor's granddaughter, who was the wife of the grantee, was to have one half of the land.

There is some authority to the contrary.

Thus, it seems to be considered in Pennsylvania that a deed by a father-in-law to his son-in-law of an absolute estate in the land on the supposition that he could not convey direct to his daughter would make the son-in-law a trustee, although he gave a note for the land, the daughter's claim being that the note was simply to show the amount of the advancement. *Beringer v. Lutz*, 188 Pa. 364, 41 Atl. 643 (confusedly reported, and it is not entirely

under it for the purpose of acquiring the property, are alone sufficient to authorize the enforcement of the trust." *Trice v. Comstock*, 61 L.R.A. 176, 57 C. C. A. 646, 121 Fed. 620, headnote, ¶ 3.

Nor will it do to say that fraud, active or constructive, is shown the moment it appears that the transaction results inequitably to someone else. However harsh or inequitable or unjust it may appear for the father of appellants to make a gift of all his real estate to the second wife, and thus to deprive them of any interest therein, even though the land was acquired in the first place from moneys belonging to their mother, no one will contend that he might not do this lawfully. It is true courts of equity raise a trust and enforce it whenever it becomes necessary to prevent a failure of justice. Stated in another way, a constructive trust will arise whenever the circumstances under which the property was acquired make it inequitable that it should be retained by the person who holds the legal title.

It is conceded that the land belonged at one time to John Clester, and it is not claimed that he was any the less the full

owner because it was purchased in whole or in part from the proceeds of the first wife's separate property. Being the full owner of the land, he could, if he saw fit, lawfully convey it to his wife. *Olson v. Peterson*, 88 Kan. 350, 356, 128 Pac. 191. The presumption is that the conveyance directly to the wife, or a purchase in her name upon a consideration paid by him, was intended as a gift. *Ibid.* It is true that the presumption is not conclusive, and may be overturned by evidence of a contrary intention. In the present case it cannot, we think, be said that any of the evidence offered tended to overturn the presumption. There was no evidence whatever as to what the intention was, and nothing from which a fair inference can be drawn to the effect that it was intended to convey merely the legal title, to be held in trust for the husband.

The appellants' argument, in effect, is that it is unreasonable to assume that John Clester intended to convey to the second wife all the land he owned and to exclude them from any interest therein; and that from the mere unreasonableness of such an

clear that this point was necessary to the decision).

But it was held in *Dilts v. Stewart*, 1 *Sadler* (Pa.) 230, 1 *Atl.* 587, that a deed by a father-in-law and wife to his son-in-law, in consideration of "the sum of \$1, and also the love and natural affection which they have for the said Peter Dilts, their son-in-law, and Mary Dilts, wife of said Peter Dilts, daughter of said John and Lettice Ewing," vested an absolute estate in the grantee free of trust, although the grantee stated his intention that it should be for his wife, but also stated that if he did not get it in his own name, he did not want it at all.

In *Pierce v. Pierce*, 7 *B. Mon.* 433, where a father made a bond for title to his son-in-law, stating in regard to the consideration, "\$1,000 of the amount I present to my daughter," the wife of such obligee, it was held that the equity of the daughter appeared on the face of the bond, and that she was entitled to be secured as to this \$1,000, ahead of the creditors of her husband; that is to say, was entitled to be secured out of the land, or that portion of it which remained after part of it had been sold to satisfy the vendor's debts.

Miscellaneous.

In *Gould v. Lynde*, 114 *Mass.* 366, it was held that a deed by a husband to a third person, reciting a consideration in money and acknowledging its receipt, followed by a deed by such third person to the original grantor's wife, in the usual form with habendum to her free from any control, etc., L.R.A.1915E.

of her husband, vested an absolute estate in the wife free from any trust to the husband, notwithstanding it was claimed that no consideration was paid for the deed. The court said: "The rule that on a voluntary conveyance without consideration a trust results to the grantor was confined to common-law conveyances, and does not apply to modern conveyances in common form, with recital of consideration, to the use of the grantee and his heirs. Such deeds to a stranger, and *a fortiori* when the purpose of the grant is to convey to a wife, exclude any resulting trust to the grantor."

While without the scope of this note, it may be noted that in *Gammel v. Fletcher*, 76 *Kan.* 577, 92 *Pac.* 713, 93 *Pac.* 339, where a deed which should have been made to a wife, by an innocent mistake was made to the husband, he not intending it to be so made, and thereafter, shortly before her death, she told her husband that unless he would promise to convey the land to her stepson, she would have to make a will, giving it to such stepson, to which the husband replied that he would do it, and the woman died the next day without making a will, it was held that, because of the confidential relations between the two parties, the law would construe a trust in favor of the stepson.

In *Annis v. Huggins*, — *S. D.* —, 152 *N. W.* 114, it was held that where a wife had made an absolute deed to her husband, oral statements made by the husband tending to show that it was the wife's wish that all of her property should be equally divided in a certain way between other persons were not admissible, under the statute.

intention it is a fair inference that an agreement was made at the time by which Ida M. Clester was to hold the title in trust for him. The argument loses sight of the fact that, being the owner of the land, he could lawfully make a gift of it to the wife, regardless of how unreasonable such a procedure might be, or appear to be. The conveyance to her, without a valuable consideration, being presumed to have been intended as a gift, the burden rests upon appellants to establish the contrary.

If all that is required to defeat an absolute conveyance of real estate by the husband to the wife is a showing that it results in hardship and unfairness to other members of the family, then it follows that, no matter what the intention may have been, the conveyance must stand or fall upon the question of how it may appear to affect the interest of persons other than the grantor and the grantee. The husband may have intended to make a gift to the wife, but his purpose fails if a jury will say that the making of a gift to her under the circumstances was unreasonable, because it results in hardship to others. That such is not the law is too apparent to require argu-

ment or the citation of authorities. It is contended, however, that if it be conceded that there was no evidence of any agreement or understanding to the effect that Ida M. Clester should hold the title in trust for John Clester, still there was sufficient evidence of a constructive trust, and authorities from text-books and decisions are cited which declare that constructive trusts do not arise by or depend upon agreement or intention, but arise by operation of law. But before a constructive trust will be raised by implication of law, it is agreed by the authorities upon which appellants rely that fraud, active or constructive, is essential.

"Constructive trusts do not arise by agreement or from intention, but by operation of law; and fraud, active or constructive, is their essential element. Actual fraud is not necessary, but such a trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by him who holds the legal title. Constructive trusts have been said to arise through the application of the doctrine of equitable estoppel, or under the broad doctrine that

In *Willis v. Robertson*, 121 Iowa, 380, 96 N. W. 900, where a deed recited a full consideration, and was by a father and his second wife to his son, it was held that no trust by parol could be shown in relation to the property in the absence of fraud on the part of the son, inducing the conveyance, and that the wife, who joined in the conveyance, could not fasten a trust upon the land on the claim that the deed was made by fraud of her husband in order to get rid of her interest in the property, when it was shown that she had received an actual substantial consideration for the conveyance; and that residuary devisees under the will of the husband could not attack the conveyance on the ground that it was in fraud of the grantor's wife, as, if it was, the grantor was guilty of the fraud, and his heirs or devisees could not raise the question; and that there was no evidence of any relation of trust or confidence between the father and son, and no evidence that the son was trying to take advantage of the situation; and if the son had made or did make a parol promise to carry out the trust, that could not be shown orally, nor would his refusal to carry out such promise convert the conveyance into a trust, where the conveyance was not induced by his act or promise.

It may be noted that a trust was imposed in *Noble v. Noble*, 255 Ill. 629, where a woman of weak intellect and apparently no business ability made a quitclaim deed of her property to her brother, a lawyer, to whom she stood in most intimate relations, in which a life estate was reserved by her. During the remainder of her

life she received the rents of the property, and after her death the rents were divided between her three brothers, and the grantee in the deed died without making any division of the property. It was held that it was shown by parol evidence sufficiently—including the statement of the grantee of his intent to procure the conveyance for such purpose—that the purpose in taking the deed was to take care of the grantor and the interests of her heirs, no consideration being received by her for it, and that it was not intended that the deed should be an absolute one to the grantee. The form of the deed is not fully reported. The court said: "Where one obtains the legal title to property by virtue of a confidential relation and influence, under such circumstances that he ought not, in equity and good conscience, be permitted to hold it, a court of equity will raise a trust by construction, convert him into a trustee, and require the execution of the trust in such manner as to protect the rights of the real parties in interest."

In *Newis v. Topfer*, 121 Iowa, 433, 96 N. W. 905, a deed by a woman to her stepfather for \$1 and love and affection, made at the time when she was probably not capable of fully understanding the instrument by her reason of her illness, was construed to raise a trust in favor of her children, on the ground that, whether or not fraud was intended at the time, a legal fraud had been perpetrated upon her, considering the confidential relations between the parties. It would seem that the deed was clearly void, owing to the condition of the grantor.

B. B. B.

equity regards and treats as done what in good conscience ought to be done. Such trusts are also known as trusts *ex maleficio* or *ex delicto*, or involuntary trusts, and their forms and varieties are practically without limit, being raised by courts of equity whenever it becomes necessary to prevent a failure of justice." 39 Cyc. 169, and cases cited in notes.

It can hardly be claimed that there was the slightest evidence to establish the peculiar kind of constructive trust known as a trust *ex maleficio*.

"A . . . form of trust *ex maleficio* occurs whenever a person acquires the legal title to land or other property by means of an intentionally false and fraudulent verbal promise to hold the same for a certain specified purpose, as for example, a promise to convey the land to a designated individual, or to reconvey it to the grantor, and the like, and having thus fraudulently obtained the title he retains, uses, and claims the property as absolutely his own, so that the whole transaction by means of which the ownership is obtained is in fact a scheme of actual deceit." Pom. Eq. Jur. 2d ed. § 1055.

Obviously the claim of appellants that a constructive trust is established must rest solely upon the theory that the evidence is sufficient to authorize a court of equity to declare that, under all the facts and circumstances of the case, it was so unjust and inequitable for the father to make a gift to his wife of all his lands as to amount to a constructive fraud upon appellants' rights. Now John Clester owned the land, and either he possessed full dominion over it and could dispose of it as he saw fit, or it is the law that his obligation to his children, the appellants, in some manner restrained his right to dispose of it as he pleased. Some reliance seems to be placed upon the language of the court in the opinion in *Horder v. Horder*, 23 Kan. 391, 392, 33 Am. Rep. 167, where it was held that a conveyance by a husband to his wife without further consideration than love and affection was valid after his death, as against an heir who was of full age at the time of the conveyance, and who was not in any manner dependent upon the grantor for subsistence or support. In the opinion it was guardedly said by Justice Valentine: "Men of sound minds and not under guardianship should have the privilege of disposing of their property as they please, so long as they do not interfere with the rights of creditors, or persons dependent upon them for support. We have frequently had occasion to examine into the validity of sales and conveyances from husbands to wives, and we have invariably upheld the validity

of such sales and conveyances, so far as it was equitable to uphold the same," p. 392.

The opinion went no further than the peculiar facts in that case required. In the present case there was no showing as to the situation of the appellants, their ages at the time of the conveyances, or whether or not any of them were dependent upon the grantor for support. But if they had been dependent upon him for subsistence and support when the conveyances were made, and had continued to be so dependent to the time the action was brought, has equity power to hear evidence and determine whether a gift to the wife, made by the husband, who is of sound mind, shall be set aside on the ground that it deprived dependent heirs of the grantor of their support? John Clester might lawfully have devised all his real estate by will to his wife, or have sold it in his lifetime and disposed of the proceeds as he pleased without interference by courts of equity; and, subject only to the rights of creditors, he could lawfully convey it to his wife as a gift.

The fact that John Clester continued to manage and control the lands in the same manner and to the same extent after as before throws no light upon the intent with which he conveyed, or caused to be conveyed, the title to the wife. The family occupied the land as a farm, and if she had owned the title from the first he might, and probably would, have managed and controlled the business in the same way. The failure of appellants to produce evidence of some agreement on the part of Ida M. Clester to hold the title in trust for John Clester was fatal to their case. The presumption is that the conveyances were in the nature of gifts from the husband, and the burden of proving the contrary rested upon appellants.

The judgment is affirmed.

A petition for rehearing having been granted, the following *Per Curiam* response was handed down on November 8, 1913:

Upon rehearing the former judgment is adhered to.

KENTUCKY COURT OF APPEALS.

INTERSTATE BUSINESS MEN'S ACCIDENT ASSOCIATION OF DES MOINES, IOWA, Appt.,

v.

MARY GORE ATKINSON.

(165 Ky. 532, 177 S. W. 254.)

Insurance — accident — suicide when insane — liability.

1. Insurance against accidental injury

which provides that insurers shall not be liable for payment of any sum whatever, if the injury is sustained by insured when insane, does not cover suicide if it is committed when the insured is so insane that he is not able to understand the nature of his act.

Same — construction of policy — injury while insane.

2. The idea of action so as to exempt the insurers from liability only in case of mental effort is not to be read into the first exception in a provision in a policy insuring against accident, that the insurer shall not be liable, if the injury be sustained when the insured is insane, not in full possession of his faculties, engaged in any act in violation of any law or ordinance, but each ground of exception stands by itself, so that the insurer is not liable for injury to the insured while insane, although he is not capable of rational mental effort.

(Miller, Ch. J., dissents.)

(June 18, 1915.)

Note. — Construction and effect of provision against liability for injury to or death of insured while or when insane.

As indicated by its title, the present note deals only with provisions excluding liability for injury or death of the insured while or when insane, and it does not cover cases involving provisions against liability in case of suicide by the insured, sane or insane, or clauses in effect the same as those before the court in *Mutual Ben. L. Ins. Co. v. Daviess*, 87 Ky. 541, 9 S. W. 812, and other Kentucky cases cited in *INTERSTATE BUSINESS MEN'S ACCL. ASSO. v. ATKINSON*. As to effect of words "sane or insane," or other words relating to mental condition, in suicide clause in life insurance policy, see note to *Cady v. Fidelity & C. Co.* 17 L.R.A. (N.S.) 260.

The provision involved in *INTERSTATE BUSINESS MEN'S ACCL. ASSO. v. ATKINSON*, is a novel one, and the only case in which a provision similar to it appears to have been involved is *Blunt v. Fidelity & C. Co.* 145 Cal. 268, 67 L.R.A. 793, 104 Am. St. Rep. 34, 78 Pac. 729. In that case an accident policy provided that in case of injuries, fatal or otherwise, intentionally inflicted upon himself by the insured, or inflicted upon himself or received by him while insane, the insurer's liability should be a sum equal to the premium paid, and it was held that under this provision injuries to an insane person need not be intentionally inflicted to relieve the insurer from full liability, the court remarking that the effect of the clause was that the insurer did not agree to insure the policy holder against injuries from accidents received by him during such part of the time as the insured should be insane, except for the sum limited, and this regardless of whether the injuries

APPEAL by defendant from a judgment of the Circuit Court for Nelson County in plaintiff's favor in an action brought to recover the amount alleged to be due on an accident insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. Dallar, Farnsley, & Means, with Messrs. Dunshee & Haines, for appellant:

The limitation contained in the policy of insurance was not in contravention of public policy, but was a valid and binding contract.

Langdon v. Conlin, 67 Neb. 243, 60 L.R.A. 429, 108 Am. St. Rep. 643, 93 N. W. 389, 2 Ann. Cas. 834; *Licence Tax Cases*, 5 Wall. 469, 18 L. ed. 500; *Griswold v. Illinois C. R. Co.* 90 Iowa, 265, 24 L.R.A. 647, 57 N. W. 843; *Blunt v. Fidelity & C. Co.* 145 Cal. 268, 67 L.R.A. 793, 104 Am. St. Rep. 34, 78 Pac. 729; *Manhattan L. Ins. Co. v. Beard*, 112 Ky. 455, 66 S. W. 35.

Mutual Ben. L. Ins. Co. v. Daviess, 87 Ky. 541, 9 S. W. 812, does not limit the

were inflicted by himself intentionally or otherwise, or were received by him from some other cause.

The provision involved in the *ATKINSON* CASE seems to have been skilfully drawn to avoid the effect of the decisions in Kentucky and in a few other jurisdictions, that a provision excluding or limiting liability in case of suicide or death by one's own hand, "sane or insane," does not protect the insurer if the insured was so insane as not to apprehend the physical nature and consequences of the act which resulted in his death, so that an intention to kill himself was lacking. If the provision in the form involved in the *ATKINSON* CASE is upheld and given its natural interpretation, it excludes liability in case the insured was insane, even though his insanity had no connection whatever with his death, as, for instance, where he and other persons were victims of a railroad accident which he had no hand whatever in bringing about. It may be questioned whether the provision in this form is not broader than necessary to accomplish the purpose which apparently prompted its adoption, namely, the protection of the insurer in case of an injury to, or death of, an insane person in circumstances which in case of a sane person would indicate an intentional injury or self-destruction. The form of provision suggested in the dissenting opinion in *De Gogorza v. Knickerbocker L. Ins. Co.* 65 N. Y. 232, set out in the note in 17 L.R.A. (N.S.) 268, seems well calculated to accomplish this purpose without precluding recovery in case the insanity of the insured had no connection whatever with his injury or death. And see in this connection, the provision involved in *Clemens v. Royal Neighbors*, 14 N. D. 116, 103 N. W. 402, 8 Ann. Cas. 1111, set out in the note in 17 L.R.A. (N.S.) 269.

J. T. W.

force and effect of the exceptions of the policy in suit.

Messrs. N. W. Halstead, J. S. Kelley, E. N. Fulton, and G. S. Fulton, with Mr. John A. Fulton, for appellee;

The clause in this policy is not sufficient to take it out of the general rule that suicide does not defeat recovery if insured was insane.

2 Bacon, Ben. Soc. 3d ed. § 334, p. 841; St. Louis Mut. L. Ins. Co. v. Graves, 6 Bush, 268; Breasted v. Farmers' Loan & T. Co. 4 Hill, 74; Mutual Ben. L. Ins. Co. v. Daviess, 87 Ky. 541, 9 S. W. 812; Bigelow v. Berkshire L. Ins. Co. 93 U. S. 284, 23 L. ed. 918; Manhattan L. Ins. Co. v. Beard, 112 Ky. 455, 66 S. W. 35; Supreme Council, K. E. v. Heineman, 25 Ky. L. Rep. 1604, 76 S. W. 406; Masonic Life Assn. v. Pollard, 121 Ky. 349, 123 Am. St. Rep. 198, 89 S. W. 219; Metropolitan L. Ins. Co. v. Thomas, 32 Ky. L. Rep. 770, 106 S. W. 1175; Inter-Southern L. Ins. Co. v. Boyd, — Ky. —, 124 S. W. 333; Vicars v. Ætna L. Ins. Co. 158 Ky. 1, 164 S. W. 106; Sovereign Camp, W. v. Landrum, 158 Ky. 841, 166 S. W. 598; 2 Page, Contr. § 1117; Graves County Water Co. v. Ligon, 112 Ky. 775, 66 S. W. 725.

Carroll, J., delivered the opinion of the court:

The appellant, the Interstate Business Men's Accident Association of Des Moines, Iowa, is an Iowa corporation, licensed to do an accident insurance business in Kentucky. For brevity it will be called the association in this opinion.

On April 10, 1913, the association issued a certificate of membership to Allen R. Atkinson, whereby it agreed to pay the appellee, Mary Gore Atkinson, wife of Allen R. Atkinson, the sum of \$5,000 in the event Allen R. Atkinson should lose his life on account of bodily injuries sustained by him while engaged in the occupation of a court reporter, and effected directly and independently of any other contributory, concurring, or intervening cause, by external, violent, and accidental means. This action was instituted to recover upon the policy; and, after narrating the above facts, the petition, in order to raise all the questions upon demurrer, also set forth the provision of the certificate of insurance relating to excepted risks, namely: "The association shall not be liable for the payment of any sum whatsoever if such injury be sustained at a time when the member is: (1) Insane; (2) not in the present full possession and normal exercise of all his faculties; (3) engaging in any act in violation of any law or ordinance."

The petition further alleged that on February 2, 1914, Allen R. Atkinson lost his

life on account of bodily injuries sustained by him from external, violent, and accidental means; that said injuries resulted in the immediate and instantaneous death of Allen R. Atkinson; that Allen R. Atkinson shot himself through the heart with an army rifle, and "at the time of said shooting and death he was so insane, and his mind was so unbalanced, and his reason so impaired, that he was not able to understand the nature or the character of the act he was committing, and was not conscious of the fact that he was making an attempt to take his life, or that the act would result in his death."

The association demurred generally to the petition, and in support of the demurrer it insisted that by its contract the association did not insure against every, or indeed any, injury sustained by Allen R. Atkinson at a time when he was insane, or when he was not in the present full possession and normal exercise of all his faculties; and, further, that since the petition showed upon its face that Allen R. Atkinson's injuries were sustained at a time when he was insane, and not in the present full possession and normal exercise of all his faculties, it failed to state a cause of action.

The trial court overruled the demurrer to the petition, and, the association standing by its demurrer, the appellee was given judgment for the sum of \$5,000, called for by the certificate. From that judgment the association prosecutes this appeal.

The ruling of the trial court was controlled by the decisions of this court in the cases of Mutual Ben. L. Ins. Co. v. Daviess, 87 Ky. 541, 9 S. W. 812; Manhattan L. Ins. Co. v. Beard, 112 Ky. 455, 66 S. W. 35; Supreme Council, K. E. v. Heineman, 25 Ky. L. Rep. 1604, 76 S. W. 406; Masonic Life Assn. v. Pollard, 121 Ky. 349, 123 Am. St. Rep. 198, 89 S. W. 219; Metropolitan L. Ins. Co. v. Thomas, 32 Ky. L. Rep. 770, 106 S. W. 1175; Bankers' Fraternal Union v. Donahue, 33 Ky. L. Rep. 196, 109 S. W. 878; Inter-Southern L. Ins. Co. v. Boyd, — Ky. —, 124 S. W. 333; Vicars v. Ætna L. Ins. Co. 158 Ky. 1, 164 S. W. 106; Sovereign Camp, W. v. Landrum, 158 Ky. 841, 166 S. W. 598. In each of these cases it was held that, notwithstanding a clause in the policy exempting the insurer from liability if the insured, at the time he killed himself, was insane, the company would nevertheless be liable if the insanity was so complete as to destroy the capacity of the insured to understand the nature of his act. In view of the rule announced in these cases, and for the purpose of pointing out what we conceive to be a substantial difference between the "suicide clause" be-

fore the court in the cases mentioned and the "suicide clause" involved in the case now before us, it may be well to set out the exact wording of the clauses in each of the cited cases and the grounds upon which the decisions were rested.

In the *Davies Case* the clause read: "That in case the insured shall die by his own hands, . . . then this policy to be null and void, except that in case he shall die by his own hand while insane, the amount to be paid by the company on this policy shall be the amount of the premiums actually paid thereon, with the interest." And the court said that "if the insured fired the fatal shot, and had sufficient mental power at the time to know that it would take his life, and fired the pistol with that intention, the recovery in this case is limited to the premiums paid, with the interest; while, on the other hand, if the firing of the pistol was not intentional, because of the unconsciousness on the part of the insured that such an act would take his life, the recovery must be had of the principal sum. The shooting in such a case must be regarded as the result of accident, as much so as if the pistol had gone off unexpectedly to the insured and killed him."

In the *Beard Case* the policy contained this provision: "If within two years the insured die by his own act, sane or insane, this policy shall be void." In considering the liability of the company the court followed the rule laid down in the *Davies Case*.

In the *Heineman Case* the policy provided that the company should not be liable if the insured came to his death "by suicide, whether sane or insane," and the court held the company liable upon the ground that when he took his life he was so insane as not to be conscious of the nature or quality of the act.

In the *Pollard Case* the policy condition was that, if the insured should "die by his own hand or act, sane or insane," the policy should be of no effect, and the court said: "If the insured intentionally took his own life at a time when his mind was so far gone as to render him unconscious that he was taking his life, the act will not be deemed his, but will be regarded in law as an accidental killing."

In the *Thomas Case* the condition was that "if the insured, within two years from the issue hereof, die by his own hand or act, whether sane or insane," the policy should be void except to the extent of the premiums paid. Again, the court said that, if the mind of Thomas at the time he killed himself was so far gone as to render him unconscious that he was taking his own life, the company was liable.

L.R.A.1915E.

In the *Donahue Case* the provision was that "in case of the death of a member by suicide while sane or insane during the first ten years of membership" his beneficiary should be entitled to receive only one tenth of the face of the policy, and the company was held liable upon the ground that the insured at the time he killed himself was totally insane, and hence his self-destruction was accidental.

In the *Boyd Case* the policy read: "In the event of the death of the insured by self-destruction, whether sane or insane, within one year after the issuance of this policy, . . . the liability of the company shall be only for the return of the premiums actually paid thereon." And the court said that "if the insured at the time he killed himself was so insane that he did not know . . . he was taking his life, or that the act he was committing would probably result in his death, the company would be liable."

In the *Vicars Case* the policy exempted the company from liability if the insured committed suicide, sane or insane, and the court said: "We have repeatedly held that, if the insured was so insane that he did not know that he was taking his life, or that the act that he was committing would probably result in his death, there may be a recovery upon the policy, although it provides that the insured shall not be liable in case of death by suicide, whether sane or insane."

In the *Landrum Case* the condition was: "If the member holding this certificate . . . should die . . . by his own hand or act, whether sane or insane, . . . this certificate shall be null and void and of no effect." And the court said: "It is now the well-recognized rule in this state that such a suicide provision in a policy will be enforced only when the insured at the time of the self-destruction had mind enough to know that he was taking his life, or that his act would probably so result."

It will be observed that in each of these cases the question whether the company was liable or not depended on the state of the mental condition of the insured at the time he came to his death by his own hand. And in each case the court ruled that, if the mind of the insured was so unbalanced he did not know or appreciate the nature or quality of the act he was committing, the company should be held liable, on the theory that the destruction of his life was accidental; while, on the other hand, if he had mental capacity sufficient to know or appreciate the nature or quality of his act, the deed was intentional, and there could be no recovery on the policy.

But the exemption of the association

from liability in the policy now under consideration does not depend at all on the mental capacity of the insured to understand or appreciate the nature or consequences of the act of self-destruction. It provides that if the injury resulting, as in this case, in death, be sustained at a time when the member is insane, the association shall not be liable for the payment of any sum whatever. The intent of the insured in taking his life, or the want of intent, is not material, nor has his understanding or lack of understanding of the nature of the act or the consequences that might follow it anything to do with the liability or non-liability of the association.

In a suit such as we have to determine the liability of the insurer, the main inquiry is limited to the ascertainment of the mental condition of the insured at the time the injury is sustained, and not to the ascertainment of the fact whether he did or did not understand the nature and consequences of his act. If he was insane, within the meaning of the contract, when the injury was sustained, no liability is incurred, although he may not have understood or appreciated the nature or consequences of his act. Under the clauses construed in the cases cited, the liability of the insurer depended on the mental capacity of the insured to understand the nature and consequences of the act he was doing. Under the clause here in question, the liability depends on the mental condition of the insured, unaffected by his ability or lack of ability to understand what he was doing.

The suicide clauses in the policies in the cited cases, as construed by the court, related to the mental state or condition of the insured at the time he took his own life only in so far as this mental state or condition affected his ability to understand the nature of the act; while in this policy the words in the clause exempt the company from liability for all injury, whether resulting in death or not, sustained by the insured during the period of time that he is insane. In other words, the life of the policy here in question is suspended during the insanity of the insured, and, during the time this mental condition continues, there is no insurance in force. There being no insurance in force during this period, it is, of course, immaterial what cause produced the death of the insured, or whether he died by his own hand or at the hand of another person, or through or by some other agency or instrumentality, or whether his death was the result of accident or intention. The words of the clause are not fairly susceptible of any other meaning, and a condition in a policy like this is not unreasonable. L.R.A.1916E.

able, is not forbidden by law, nor is it against public policy.

As said by the Supreme Court of the United States in *Bigelow v. Berkshire L. Ins. Co.* 93 U. S. 284, 23 L. ed. 918, in commenting on the meaning and effect of a suicide clause in an insurance policy: "But the insurers in this case have gone further, and sought to avoid altogether this class of risks. If they have succeeded in doing so, it is our duty to give effect to the contract; as neither the policy of the law nor sound morals forbid them to make it. If they are at liberty to stipulate against hazardous occupations [or] unhealthy climates, or death by the hands of the law, or in consequence of injuries received when intoxicated, surely it is competent for them to stipulate against intentional self-destruction, whether it be the voluntary act of . . . [a] moral agent or not. It is not perceived why they cannot limited their" risks in any manner they see fit, provided "the assured is in proper language told of the extent of the limitation, and it is not against public policy."

It is entirely probable, as argued by counsel for the insured, that the clause here in question was written with the purpose of escaping the construction given by this and other courts to the usual suicide clause, but, if this should be admitted, it does not affect the validity of the clause. If the association had the right, as it undoubtedly did, to limit its liability to certain times or places or to certain classes of risks, we do not know of any reason that would deny it the right to use words that would make plain its intention. In this policy the association said to the insured, "We will not be liable to you for any sum on account of any injury sustained by you at a time when you are insane," and we think it plain that the association had the right to insert this condition in its contract. If the condition had read, "This association shall not be liable for any injuries sustained by the insured while he is riding on a railroad train, or while he is riding in an automobile, or while he is riding in a steamboat, or while he is traveling outside of the United States," we think no question could be raised as to its validity or meaning. And so, if it had read, "The association will not be liable if the insured dies while intoxicated or from the effect of pneumonia or tuberculosis or typhoid fever," no objection could be raised to the condition.

We do not understand counsel for the insured to insist that conditions such as we have supposed might not be legally inserted in the policy, but the argument is that there is no substantial difference between this clause and the clauses in the policies heretofore considered by this court. It is

said the difference between this policy contract and the policy contract in the *Davies* and other cases is merely verbal, and manifestly an effort to evade by phraseology the construction placed by the court on the suicide clauses in these policies. With this view we are unable to agree. The words in the clause in question mean, and were intended to mean, that the association should be exempt from all liability on account of injuries occurring during the time the insured is insane. It makes no difference how long this mental condition continues or what gave rise to it. The fact of its existence suspends during its existence the contract. This is what the contract provides, and this is what the parties to the contract agreed to.

The suicide clauses in the policies heretofore before the court were confined to acts of self-destruction by the insured, and did not purport and were not intended to exempt the company from any other accident or injury that might happen to the insured during the time he was insane. But the clause in this contract is much broader than this. The exemption from liability is not limited to acts of self-destruction or to any other particular act or injury, or to any particular cause that may have produced the injury or accident. It marks out a period of time, and provides for exemption from liability for any accident or injury that may happen during that period of time. In each of the other cases the contract attempted to exempt the company from liability only in case the insured should die by his own hand or by his own act, whether sane or insane. In other words, these contracts dealt only with an act of the insured, while this contract makes no reference to the act of the insured. It relates to anything that may happen during a described period of time. The wording of the clause is short and simple and easily understood, and we do not know of any principle of law that would authorize us to ignore the plain meaning of these words or give them a construction that would radically change their meaning. What was said by this court in *Spring Garden Ins. Co. v. Imperial Tobacco Co.* 132 Ky. 7, 20 L.R.A.(N.S.) 277, 136 Am. St. Rep. 164, 116 S. W. 234, in speaking of the right of an insurance company to limit its liability and the rules that should be applied in the construction of insurance policies, is very applicable here. In that case the court said: "The companies had the unquestioned right to insert as many reasonable provisions in the policy exempting them from liability as they thought proper or necessary. We know of no rule of law that denies to insurance companies

this privilege. They may limit the amount of insurance they will offer, may limit the species of property they will insure, may provide reasonable conditions that the insured must observe, as well as conditions that will in certain states of case operate as a forfeiture of the policies or waiver of the right of the insured to recover upon them, and may protect themselves from loss resulting from causes that they do not desire to offer indemnity against. Why, then, should these words by which the companies undertook to limit their liability be stricken from the policies or ignored in their construction? They are not obnoxious to any principle of law or public policy. They are not surplusage. They are not in conflict with any other provisions in or words of the policies. They may be read harmoniously in connection with the other and subsequent clauses, and, when so read, become a material, intelligent part of the contracts. They were inserted for a purpose, intended to have a meaning, are not of doubtful or uncertain import, and, when fairly and reasonably applied, they exempt the companies for loss by fire when the fire is caused by riot. In the construction of policies the same rule obtains as does in the construction of other contracts, with the exception that a policy will be construed in favor of the insured, so as not to defeat, without plain necessity, his claim to the indemnity which in taking the insurance it was his object to secure; and, when the words are fairly susceptible of two interpretations, that which will sustain his claim and cover the loss must by preference be adopted. It may also be said that ambiguities and words, sentences, or clauses of doubtful meaning will be construed against the insurer; and this for the reason so often declared that the companies themselves prepare the policies with great care and deliberation, and, as the insured has no election except to accept them as prepared and presented to him, it is fair that they should be construed most strongly against the insurer and most liberally in favor of the insured, so that the purpose for which the insurance was obtained may be effectuated, if this can be done without doing violence to the contract."

The supreme court of California in *Blunt v. Fidelity & C. Co.* 145 Cal. 268, 67 L.R.A. 793, 104 Am. St. Rep. 34, 78 Pac. 729, had before it for construction a clause in a policy similar to this, and in the course of the opinion the court said: "The fourth clause above quoted is not unlawful, and it cannot be eliminated on the ground that it is not expressly referred to in the application. The effect of this clause is that the defendant did not agree to insure the

policy holder against injuries from accidents received by him during such part of the time covered thereby as the insured should be insane, except to the amount of the premium paid, and this regardless of the question whether the injuries were inflicted by himself, intentionally or otherwise, or were received by him from some other cause. Insurance during such insanity, except to that extent, was simply not a part of the contract; and the agreement in that contingency was that the company should be liable only for a sum equal to the premium paid. Language could not express this idea more clearly than it is expressed in the policy. The courts have always construed in favor of the assured every ambiguity and uncertainty in contracts of insurance. But where the words are clear and free from uncertainty, and the meaning plain, the contract, as made between the parties, is beyond the power of the courts to change by a forced construction. There was good reason for the insertion of the clause. A sane man will naturally and instinctively protect himself from injury, while, if insane, he might unconsciously expose himself thereto. It is to be presumed that in fixing the amount to be paid as a premium, the company took into consideration its proposed exemption from full liability during such insanity, if it should occur, and reduced the premium accordingly. The assured received the benefit of this . . . reduced amount of the premium, and hence the contract cannot be deemed inequitable or unfair."

The further argument is made that, as the third exception in the clauses provides that the association shall not be liable for injuries sustained at a time when the member is "engaged in any act in violation of any law or ordinance," this contemplates some voluntary or intentional act or conduct upon the part of the insured. Therefore it is said that the first and second exceptions should be construed to apply only when the insured has acted; or, in other words, the word "act," in the third exception, should be read into the first and second exceptions, and the clause as a whole construed to mean that the exceptions did not apply unless the insured sustained the injury on account of some act performed by him as the result of mental effort. Of course, if this construction should be applied to this clause, the effect would be that the exception applicable to injuries sustained at a time when the insured was insane would lose its intended and natural meaning. The liability or nonliability of the association would depend on the capacity of the insured to understand his act, and not on the fact that he was laboring L.R.A.1915E.

under some mental disturbance at the time the act was committed. And the same rule of construction would necessarily be applied as was applied in the cases construing what may be termed the "old suicide clause." But we do not find any tenable ground upon which to rest this strained construction. To so construe this clause would do violence to its plain meaning, interpolate into the exceptions relating to insanity a meaning that is confined, by the very terms of the clause, to the exception relating to acts committed in violation of a law or ordinance. As applied to the facts of this particular case, the clause, as it now reads, is very plain and very simple. It is, in our opinion, susceptible of only one construction, and, according to that construction, the association was not liable to the insured in any sum, and so the judgment is reversed, with directions to dismiss the petition.

Miller, Ch. J., dissents.

OKLAHOMA SUPREME COURT.

LEE R. PATTERSON, County Treasurer,
Plff. in Err.,
v.
HELEN C. WALLACE.

(— Okla. —, 147 Pac. 1034.)

Public improvement — assessment — liability of homestead.

The provision of article 12, chap. 10, Rev. Laws 1910 (§§ 608-646), which authorizes municipal corporations to impose a penalty of 18 per cent after maturity for nonpay-

Headnote by HANDY, J.

Note. — Liability of homestead to assessment or lien for local improvement.

The weight of authority is with PATTERSON v. WALLACE in holding that a homestead is not exempt from assessment or lien for local improvements.

Thus, in Ahern v. Board of Improv. Dist. 69 Ark. 68, 61 S. W. 575, in which it was contended that a homestead was exempt from an improvement assessment by a constitutional provision exempting homesteads from judgments or executions "except such as may be rendered for the purchase money or for specific liens, laborers' or mechanics' liens for improving the same, or for taxes, etc.," the court said that the assessments, though differing in some respects from taxes for general purposes, are yet authorized under the taxing power, and therefore, so far as the mere exercise of the power is concerned, the same rule applies as in the case of taxes. In that case, however, the court

ment of any assessment for improvements, constructed under and by virtue of the provisions of said article, applies to homesteads within the improvement district, and a lien attaches thereto as to other property for such penalty, and such homestead may be sold under the provisions of said article to enforce the payment thereof.

(Brown, J., dissents.)

(March 16, 1915.)

ERROR to the District Court for Canadian County to review a judgment enjoining defendant from enforcing against

seems to consider that the question was settled by another constitutional provision that "nothing in this Constitution shall be so construed as to prohibit the general assembly from authorizing assessments on real property for local improvements in towns and cities under such regulations as may be prescribed by law."

And in the later case of Shibley v. Ft. Smith & V. B. Dist. 96 Ark. 410, 132 S. W. 444, the court, in speaking of the Ahern Case, says that that decision clearly holds, in addition to the other reasons given, that a homestead is not exempt because the lien for special assessments falls within the exception as to taxes in the homestead clause, and holds that it is obvious that the framers of the Constitution used the word "tax" in the homestead provision as meaning all assessments or impositions authorized under the taxing power.

In Perine v. Forbush, 97 Cal. 305, 32 Pac. 226, involving an assessment for a street improvement, it is held that the fact that the property against which it was sought to enforce the lien constituted the home of the defendant was no defense, as the cost of making improvements like those embraced in the contract is as much a charge against the homestead as against any other property fronting upon such improvements.

In Todd v. Atchison, 9 Kan. App. 251, 59 Pac. 676, it is held that the assessments authorized to be levied upon property benefited by paving streets are taxes within any proper, general definition of that word, and therefore come within an exception to the homestead exemption law in the case of taxes.

In Nevin v. Allen, 15 Ky. L. Rep. 836, 26 S. W. 180, it is held that the lien for street improvements upon the adjacent property applies to homestead as well as to other property, as, if homestead property was held to be exempt, the remaining property would be made subject to a greater burden, with the benefits resulting as much to the homestead as to the property required to pay for the improvements.

A judgment rendered in a proceeding to enforce a special tax bill for the cost of paving is not a personal judgment, but simply the enforcement of a lien for certain taxes which have been levied upon the property,

certain city lots any interest on the assessment for improvements over and above 7 per cent. Reversed.

The facts are stated in the opinion.

Messrs. Sam T. Robertson, and Thomas R. Reid, for plaintiff in error:

The 18 per cent interest, after the annual instalment became due on September 1st, 1911, was valid and enforceable.

Shultz v. Ritterbusch, 38 Okla. 478, 134 Pac. 961; Ritterbusch v. Havinghorst, 29 Okla. 478, 118 Pac. 138.

Property occupied and used as a homestead can be sold for the instalment of paving assessment due September 1st, 1911,

and a homestead, not being exempt from taxation, is subject to the lien of such a judgment. Robinson v. Levy, 217 Mo. 498, 117 S. W. 577.

Under a constitutional provision that the homestead exemption "shall not operate against public taxes nor debts contracted for the purchase money of such homestead, or improvements thereon," it is held that the drainage of land is an improvement, within the meaning of this provision, for which a homestead would be liable. State ex rel. Bingham v. Powers, 124 Tenn. 553, 137 S. W. 1110.

But in Higgins v. Bordages, 88 Tex. 458, 53 Am. St. Rep. 770, 31 S. W. 52, 803, it was held under a constitutional provision exempting homesteads from forced sale for the payment of all debts except for the purchase money, taxes due thereon, or work and material used in constructing improvements, that a special assessment for the cost of a sidewalk in front of the homestead was not a tax, general or special, within the meaning of the Constitution, and therefore it could not be enforced against the homestead, reversing 1 Tex. Civ. App. 43, 19 S. W. 446, 20 S. W. 184, 726, and overruling on this point Lufkin v. Galveston, 58 Tex. 545.

Higgins v. Bordages, supra, was followed by Storrie v. Cortes, 90 Tex. 283, 35 L.R.A. 668, 38 S. W. 154; Lovenberg v. Galveston, 17 Tex. Civ. App. 162, 42 S. W. 1024; and Beaumont v. Russell, 51 Tex. Civ. App. 351, 112 S. W. 950, involving assessments for street improvements made upon abutting homestead property.

However, in Kettle v. Dallas, 35 Tex. Civ. App. 632, 80 S. W. 874, it is held that an assessment for improvements levied upon property within a certain improvement district, for the improvement of streets within the district, being made in accordance with ad valorem tax provisions of the Constitution, was a tax, although a special tax, even as construed by the supreme court in Higgins v. Bordages, supra, and was therefore enforceable against a homestead.

As to liability to local assessments for benefits of property exempt from general taxation, see notes in 35 L.R.A. 33: 18 L.R.A.(N.S.) 451, and 32 L.R.A.(N.S.) 303.

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and interest on same at the rate of 18 per cent after said date, when said instalment became delinquent.

Spitzer v. El Reno, 41 Okla. 430, 138 Pac. 797.

Mr. W. M. Wallace, for defendant in error:

The legislature had no right or authority to impose an additional burden of 18 per cent interest and make the same a lien on the homestead if the assessment and interest are not paid when due.

Ex parte Whitehouse, 3 Okla. Crim. Rep. 97, 104 Pac. 372; 8 Cyc. 729; *Re Unger*, 22 Okla. 755, 132 Am. St. Rep. 670, 98 Pac. 999; *Givins v. Chicago*, 188 Ill. 348, 58 N. E. 912; *Walters v. Texas Bldg. & L. Asso.* 8 Tex. Civ. App. 500, 29 S. W. 51; *James v. Chaney*, — Tex. Civ. App. —, 154 S. W. 679.

The power to levy and collect assessments does not confer power to sell property assessed. And authority to sell land for taxes does not carry with it power to sell land for delinquent assessments.

State ex rel. Ranson v. Irey, 42 Neb. 186, 60 N. W. 601; *Chicago v. Colby*, 20 Ill. 614; *Paine v. Spratley*, 5 Kan. 525; *Allen v. Galveston*, 51 Tex. 302; *McInery v. Reed*, 23 Iowa, 410; *Holcomb v. Chicago*, R. I. & P. R. Co. 27 Okla. 667, 112 Pac. 1023; *Pond Creek v. Haskell*, 21 Okla. 711, 97 Pac. 338; *Los Angeles v. Leland*, 11 Cal. App. 302, 104 Pac. 717; *Maysville v. Smith*, 132 Ga. 316, 64 S. E. 131; *O'Connell v. McClenathan*, 248 Ill. 350, 94 N. E. 21; *State ex rel. Thompson v. Majors*, 85 Neb. 375, 123 N. W. 429; *Connors v. Pratt*, 38 Utah, 258, 112 Pac. 399.

Handy, J., delivered the opinion of the court:

Defendant in error, *Helen C. Wallace*, commenced this action in the district court of Canadian county, against plaintiff in error as county treasurer, to restrain him from selling lots 14 and 15, block 151, in the city of El Reno, for the collection of a certain special assessment with interest and penalties thereon, and alleges, in substance: That said city of El Reno, prior thereto, had caused certain paving to be done, and assessed said lots 14 and 15, in block 151, the sum of \$180.99, the first payment of which was due September 1, 1911, and 7 per cent interest on the total amount of said assessment, to said date, making \$10.14 on each lot. That said principal and interest was not paid when due, and thereafter, on the 15th of September, said assessment and interest was certified by the city clerk to the county treasurer as delinquent, and placed by said county treasurer on the delinquent list of taxes, and 18 per cent penalty or interest added there-

to, together with a charge of 10 cents per lot for listing and 10 cents per lot for advertising, making a total charge of \$29.43 for each lot. That said lots were advertised as delinquent, and plaintiff in error declared his intention of selling the same for said assessment, interest, and penalties as required by law for the sale of property for delinquent taxes. That on the 2d day of November, 1911, defendant in error tendered to said county treasurer the sum of \$28.23 on each of said lots, being the instalments due on the 1st of September, and 7 per cent interest on the total assessment to November 1st, and the legal fees for listing and advertising, which was refused, and plaintiff in error demanded the sum of \$29.43 on each lot, and defendant in error prayed an injunction restraining the county treasurer from selling or offering for sale said lots for said taxes and assessments, interest and costs. A general demurrer was interposed to this petition, which was overruled on the 7th day of May, 1912, and plaintiff in error declining to plead further, judgment was entered in said suit enjoining the plaintiff in error from enforcing against said lots any interest on the assessment over and above 7 per cent.

The question here presented is whether or not the special assessment for the improvements made by the city of El Reno may lawfully bear interest as a penalty for non-payment at the rate of 18 per cent per annum after maturity, and whether a homestead may be charged with a lien and sold to enforce the collection of said 18 per cent.

The authority of the city to prescribe this penalty is found in § 632, Rev. Laws 1910; and the validity of this legislation has already been determined by this court in *Shultz v. Ritterbusch*, 38 Okla. 478, 134 Pac. 961. In the opinion by Mr. Justice Turner, at page 492 of 38 Okla., it is said: "It is sufficient to say that the provision is clear and unambiguous, and means what it says. We can see nothing in conflict with the Constitution in the provision, in effect, that the assessments bear 1 per cent greater interest than the bonds before due and 8 per cent greater thereafter. It may be that the difference of 1 per cent between the bonds and assessment before due was intended to cover the cost of printing the bonds and of collection and remittance by the city, which, as to the amount collected on the assessments, stands in the nature of a stakeholder, and which would otherwise have to be paid out of the general funds of the city. And it may be that, in addition to those costs, said 8 per cent was intended to contribute to the expense incurred, where, as here, after assessments became due, the property owner resists payment by suit. But, be that

as it may, we are of opinion that said items of increased interest are in the nature of a penalty intended to meet conditions brought about in part by the property owner himself, and in no sense can it be said the same is exacted without due process of law."

The same question is also incidentally considered in the case of *Ritterbusch v. Havinghorst*, 29 Okla. 478, 118 Pac. 138, where it was said: "The increased interest which the assessments are made to bear after maturity was provided, no doubt, not only for the purpose of securing the prompt payment of the assessments, but also for the purpose of providing a fund with which to pay the increased rate of interest on the bonds maturing, which must occur when there is a delinquency in the payment of the assessment."

See also 1 Page & J. Taxn. §§ 473-475; *Seaboard Nat. Bank v. Woesten*, 176 Mo. 49, 75 S. W. 464; *Tipton v. Norman*, 72 Mo. 380; *Eyerman v. Blaksley*, 78 Mo. 145.

Section 634, Rev. Laws 1910, provides that said special assessments and each installment thereof, and interest thereon, are declared to be a lien against the lots assessed. Section 643 provides that, if not paid when due, said assessments shall be certified by the city clerk to the county treasurer, and by the county treasurer placed upon the delinquent tax list and collected as other delinquent taxes are collected, and paid to the city treasurer. This last section of the statute was construed and sustained in *Ritterbusch v. Havinghorst*, supra.

The remaining question is whether or not there is any distinction in the effect and operation of this lien between homesteads and other property situated within the improvement district. Section 7, art. 10, Const. (§ 272, Williams's Anno. Const. p. 136), provides: "The legislature may authorize county and municipal corporations to levy and collect assessments for local improvements upon property benefited thereby, homesteads included, without regard to a cash valuation."

It will thus be seen that, in authorizing municipal corporations to levy and collect assessments for local improvements, homesteads are expressly included in the provision, and no distinction is made between this class of property and any other property, and we cannot see any good reason why a homestead would not be liable under this section the same as any other property; for, unless all of the property within the improvement district is bound for the expenses of the improvement, constructed in the manner and proportion fixed by law, no such improvements could be made. This is manifestly apparent for the reason that in towns and cities a very large part, if not most, of

the occupied lots, are occupied as homesteads, and, if the homesteads in any town or city be eliminated from the list of property bound for these assessments, no district of any important extent could be formed in any city or town, and public improvements of this character be constructed.

The general rule is that the fact that property assessed for the cost of a local improvement is a homestead does not defeat the assessment lien or prevent a sale in satisfaction thereof. 2 Elliott, Roads & Streets, § 673; 28 Cyc. 1132; *Ahern v. Board of Improv. Dist.* 69 Ark. 68, 61 S. W. 575; *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226; *Todd v. Atchison*, 9 Kan. App. 251, 59 Pac. 676; *Nevin v. Allen*, 15 Ky. L. Rep. 836, 26 S. W. 180.

The authority of the city of El Reno to make the improvements is not denied, and no complaint is made of the regularity of the proceedings; and the assessment having been legally levied, and default having been made in the payment of same, the town might lawfully provide that they bear interest by way of penalty for nonpayment at the rate of 18 per cent per annum from maturity; and said property may lawfully be sold to enforce the payment thereof; and the action of the trial court in overruling the demurrer to the petition was error; and the case should be reversed and remanded, with instructions to the District Court of Canadian county to sustain the demurrer to the petition.

All the Justices concur, except Brown, J., who dissents.

Petition for rehearing denied April 27, 1915.

UNITED STATES SUPREME COURT.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plff. in Err.,

v.

G. A. MAXWELL.

(237 U. S. 94, 59 L. ed. —, P. U. R. 1915C, 300, 35 Sup. Ct. Rep. 494.)

Carriers — discrimination — erroneous quotation of rates.

1. A carrier which has exacted less than

Note. — *LOUISVILLE & N. R. Co. v. MAXWELL*, in holding that the carrier may recover the difference between a lesser rate and the published rate, is in accord with the other cases, as is shown in the note to *Atchison, T. & S. F. R. Co. v. Bell*, 38 L.R.A. (N.S.) 354, covering generally the questions arising out of contracts fixing rates other than those established in accordance with the interstate commerce act.

the published rate for interstate round-trip passenger tickets over the different routes, going and returning, desired by the purchaser, may, by virtue of the provisions of the act of February 4, 1887, § 6, as amended by the act of June 29, 1906, prohibiting any deviation from the published rates, recover from such purchaser the difference between the amount paid and the amount which should have been charged and collected, although he could have gone to destination and returned over other routes, going and returning, at the rate which he paid.

Appeal — error to state court — scope of review — findings of fact.

2. The findings of the state court showing that the fare paid by an interstate passenger was less than the amount due under the applicable published rates are conclusive on the Federal Supreme Court on writ of error to the state court, where the carrier's tariffs are not included in the record.

(Mr. Justice McReynolds, dissents.)

(April 5, 1915.)

ERROR to the Supreme Court of Tennessee to review a judgment which affirmed a judgment of the Court of Civil Appeals, affirming a judgment of the Circuit Court for Putnam County, which had affirmed a judgment of a Justice of the Peace in favor of defendant in a suit to recover an alleged balance due on the sale of interstate railway tickets. Reversed.

The facts are stated in the opinion.

Messrs. John B. Keeble and Ed. T. Seay, for plaintiff in error:

The railroad company may, notwithstanding the illegality of its contract, recover from the passenger or shipper the undercharge.

Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 437, 51 L. ed. 557, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 197, 57 L. ed. 1451, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315; Armour Packing Co. v. United States, 209 U. S. 56, 80, 81, 52 L. ed. 681, 694, 695, 28 Sup. Ct. Rep. 428; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 166, 56 L. ed. 1033, 1038, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Kansas City Southern R. Co. v. Carl, 227 U. S. 653, 57 L. ed. 688, 33 Sup. Ct. Rep. 391; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; A. J. Poor Grain Co. v. Chicago, B. & Q. R. Co. 12 Inters. Com. Rep. 418; Southern R. Co. v. Harrison, 119 Ala. 539, 43 L.R.A. 385, 72 Am. St. Rep. 936, 24 L.R.A.1915E.

So. 552; Louisville & N. R. Co. v. Allen, 152 Ky. 145, 153 S. W. 198.

Messrs. John A. Pitts and K. T. McConnico for defendant in error.

Mr. Justice Hughes delivered the opinion of the court:

This action was brought, before a justice of the peace in Tennessee, by the Louisville & Nashville Railroad Company, to recover \$58.30 as the amount of an alleged undercharge on the sale of railroad tickets. Judgment for the defendant was affirmed by the court of civil appeals and by the supreme court of the state. The case comes here on error.

The facts, which were said to be undisputed, were found by the state court to be as follows:

Defendant in error, G. A. Maxwell, after repeated interviews and correspondence with the representatives of the Louisville & Nashville Railroad Company in regard to rates on round trip tickets to Salt Lake City, purchased on or about the 1st day of June, 1910, "two passenger tickets from Nashville, Tennessee, to Salt Lake City, by way of Chicago, Illinois, Denver, Colorado, and routed to return by Denver, Colorado, Amarillo and Fort Worth, Texas, and Memphis, Tennessee, and paid for each ticket the sum of \$49.50.

"There were at the time, published rates under the provision of the interstate commerce act by which fares over the route actually traveled, going and coming, aggregated \$78.65 each, or \$29.15 each more than was charged and collected therefor, making a difference of \$58.30 between the amount paid by Mr. Maxwell for the tickets in question, and the amount that should have been charged and collected.

"Mr. Maxwell was informed when he first made inquiry about the tickets in January, that there were no special rate tickets at that time, but likely would be by May or June 1st. He then, and on several occasions thereafter, made known his desire to go to Salt Lake City by one route, and return by the other, and was told that he could not be furnished reduced rates except by going and coming over the same route; but after repeated inquiries, and the correspondence referred to, he was informed that he could make the trip on reduced rates one way, and return another; and when he went finally to purchase the two tickets, he stated to the agent that he wanted to go by way of Chicago and Denver, and return by way of Stamford, Texas, and was given the tickets routed as hereinbefore noted, at the rates mentioned. At the time, he in fact could have gone to Salt Lake City at the rate which he paid, but over other routes,

going and returning through Chicago and Denver, or through St. Louis and Denver, or through Memphis and Denver, or going through St. Louis and Denver and returning through Denver, Amarillo, and Memphis.

"Mr. Maxwell was in no way at fault in the matter. He did no more than tell the agent the points to which he wished to go, and make it known that he did not wish to go and return by the same route. The agent fixed the routing in the tickets and named the fare, and Maxwell paid without further question."

Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination. The act (§ 6) provides:

"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." [34 Stat. at L. 587, chap. 3591, Comp. Stat. 1913, § 8597.]

The scope and effect of the provisions of the statute as to filing tariffs (both in their present form and as they stood prior to the amendments of 1906) have been set forth in numerous decisions. *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; *Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 445, 51 L. ed. 553, 560, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Armour Packing Co. v. United States*, 209 U. S. 56, 81, 52 L. ed. 681, 694, 28 Sup. Ct. Rep. 428; *New York C. & H. R. Co. v. United States*, 212 U. S. 500, 504, 53 L. ed. 624, 627, 29 Sup. Ct. Rep. L.R.A.1915E.

309; *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 166, 56 L. ed. 1033, 1038, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; *Illinois C. R. Co. v. Henderson Elevator Co.* 226 U. S. 441, 57 L. ed. 290, 33 Sup. Ct. Rep. 176; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 653, 57 L. ed. 683, 688, 33 Sup. Ct. Rep. 391; *Pennsylvania R. Co. v. International Coal Min. Co.* 230 U. S. 184, 197, 57 L. ed. 1446, 1451, 33 Sup. Ct. Rep. 893; *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 110-113, 58 L. ed. 868, 875, 876, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526; *George N. Pierce Co. v. Wells, F. & Co.* 236 U. S. 278, 284, 59 L. ed. 576, 582, 35 Sup. Ct. Rep. 351. In the *Mugg* case, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628, it appeared that a rate, less than the lawful scheduled rate, had been quoted to the shipper by the agent of the railroad. The shipper had relied upon the quoted rate in making his shipments and sales. But it was held that he was bound to pay the established rate, and was not entitled to the delivery of the goods without such payment. This was upon the ground that it was beyond the power of the carrier to depart from the filed rates, and that the erroneous quotation of the rate by its agent did not justify it in making a different charge from that which was lawfully applicable to the shipment. As was said in *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 653, 57 L. ed. 683, 688, 33 Sup. Ct. Rep. 391: "Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be required to surrender the goods carried upon the payment of the rate paid, if that was less than the lawful rate, until the full legal rate has been paid." It was "the purpose of the act to have but one rate, open to all alike, and from which there could be no departure." *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 110-113, 58 L. ed. 868, 875, 876, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526. The rule is applicable to the transportation of passengers and their baggage. *Ibid.*

The supreme court of the state fully recognized the established principle, but stated that the majority of the court were of the opinion that it was not controlling here, for the reason that Mr. Maxwell could have gone to the point of destination, Salt Lake City, on one route, and have returned on another route, at the price actually paid for the tickets, and that, therefore, "the mere misrouting of the tickets by the railroad company" was not a discrimination.

In thus holding, the assumption was that there was an error on the part of the railroad company in the routing, by which he was misled, and that, as it is said, Mr. Maxwell "could have gone to Salt Lake City at the price paid over other routes, going and returning through Chicago and Denver, or going through St. Louis and Denver, and returning through Denver, Amarillo, and Memphis, either one of which would have met his requirements."

We are unable to reach the conclusion that this ground of decision was available under the findings of fact. A misstatement or misquotation of the rate over a given route is one thing; misrouting is a different matter. We do not think that it can be said that there is a "misrouting," in any proper sense, when the route given by the company is that requested by the shipper or passenger. See *Sprickels Bros. Commercial Co. v. Monongahela R. Co.* 18 Inters. Com. Rep. 190, 191. According to the findings of fact, it appears that, after his interviews and correspondence, Mr. Maxwell finally "stated to the agent that he wanted to go by the way of Chicago and Denver, and return by the way of Stamford, Texas." His request covered four points,—Chicago, Denver, Salt Lake City, and Stamford. It appears by the findings that he could have gone, at the rate actually paid, through St. Louis and Denver, returning through Denver, Amarillo, and Memphis, or that he could have made the trip, at that rate, "going and returning through Chicago and Denver, or through St. Louis and Denver, or through Memphis and Denver." But, according to the findings, he was not entitled at the rate which he paid to make the trip through Chicago and Denver, returning as he desired through Stamford, Texas. We are not concerned with the reasons for the differences in rates on the various routes, but merely with the fact that they existed under the applicable tariffs as filed. Under these tariffs, the findings of fact show that the amount paid was less than the amount due over the route selected.

The counsel for the defendant in error insist that as the tariffs are not included in the record, the judgment cannot be reversed. But, as we have said, we take the findings of the state court.

It is further insisted that, on reference to the tariffs, it will appear that the railroad company is mistaken in its assertion that there was an undercharge, and that the rate actually paid was, in truth, the lawful rate. The tariffs have not been submitted to us, and it is sufficient to say that if, in the further proceedings in this case, it shall appear that the defendant in error L.R.A.1915E.

is right in this contention, it will necessarily follow that the railroad company will be unable to recover. But we cannot so hold upon the case as it is now presented.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice McReynolds dissents.

ARKANSAS SUPREME COURT.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Appt.,

ANDREW JACKSON.

SAME, Appt.,

FRANK PATTERSON.

(— Ark. —, 177 S. W. 33.)

Damages — amount — assault by porter.

1. Two hundred dollars is not an excessive allowance as compensatory damages to a passenger who is assaulted and beaten by a train porter until he bleeds profusely, and then frightened by the conductor's entering the car with a drawn pistol, so that he jumps from the rapidly moving train and cuts a long gash in his head.

Same — exemplary.

2. Exemplary damages may be awarded against a railroad company for an assault by its porter upon a passenger who does not move rapidly enough when entering the car, which is renewed after the passenger has taken a seat, so that the passenger is severely beaten, where the train auditor fails to afford protection although present in the car.

Carrier — injury to passenger by pistol shot — liability.

3. A railroad company whose employees without interference permit its porter to assault a passenger and advance on him with a deadly weapon, threatening to kill him, is liable to another passenger who takes no part in the affray, for wounds inflicted by a pistol shot fired by the assaulted passenger in an endeavor to protect himself.

Damages — pistol wounds.

4. Five hundred dollars is not excessive as damages for a wound made by a pistol

Note. — Carrier's liability for assault by servant on passenger while on train.

For the earlier cases upon this question, see notes to *Davis v. Houghtelin*, 14 L.R.A. 738; *Daniel v. Petersburg R. Co.* 4 L.R.A. (N.S.) 485; and *Houston & T. C. R. Co. v. Bush*, 32 L.R.A. (N.S.) 1201.

For a general discussion of the liability of a carrier for the wilful torts of a servant

bullet in one's shoulder which requires treatment from two different doctors, and prevents the injured person from following his occupation for more than a month.

(May 10, 1915.)

APPEAL by defendant from judgments of the Circuit Court for Grant County in plaintiffs' favor in consolidated actions brought to recover damages for personal injuries alleged to have been caused by assaults made by defendant's servant. Affirmed.

Statement by Kirby, J.:

These suits are for damages for personal injuries alleged to have been caused by the

assault of an employee of the railroad company, a porter on the train, on appellees, passengers thereon. Frank Patterson and Andrew Jackson boarded the train at Pine Bluff, after purchasing tickets, the one to Dermott and the other to Noble Lake. As Patterson started into the coach, he was struck by the negro porter because he did not move rapidly enough on the crowded platform. He went on in with his bundles and packages and sat down about the center of the coach for colored passengers. After the train started, the porter came in the front door of the coach in which he was sitting, appeared to be looking for someone, walked on to where Patterson sat and began fighting him. They fought for some little time and were separated, Patterson

to passengers, see note to Gassenheimer v. Western R. Co. 40 L.R.A. (N.S.) 998.

This note does not include assaults committed in the course of ejecting a passenger. For various notes involving ejection cases, see Index to L.R.A. Notes, Carriers, §§ 30-35.

For liability for an injury to a passenger resulting from an attempted ejection of a fellow passenger, see note to Thayer v. Old Colony Street R. Co. 44 L.R.A. (N.S.) 1125.

And as to the duty of a passenger to protect himself during an affray on a train, see note to Penny v. Atlantic Coast Line R. Co. 32 L.R.A. (N.S.) 1209.

For abusive language as justification for an assault upon a passenger by a train employee, see note to Mason v. Nashville, C. & St. L. R. Co. 33 L.R.A. (N.S.) 280, and see also note in 40 L.R.A. (N.S.) 1079.

For the liability of a carrier for acts of special police officers appointed by public authorities, see notes to McKain v. Baltimore & O. R. Co. 23 L.R.A. (N.S.) 289; Pennsylvania R. Co. v. Kelly, 30 L.R.A. (N.S.) 481; Taylor v. New York & L. B. R. Co. 39 L.R.A. (N.S.) 122; New York, C. & St. L. R. Co. v. Fieback, 43 L.R.A. (N.S.) 1164; and Moss v. Campbells Creek R. Co. L.R.A.1915C, 1183.

For a carrier's liability for assault upon a passenger by strikers, mobs, or third persons, see note to Louisville R. Co. v. Dott, L.R.A.1915C, 681.

As to the liability of a carrier for an assault by a fellow passenger, see notes to Illinois C. R. Co. v. Minor, 16 L.R.A. 627; Brown v. Chicago, R. I. & P. R. Co. 2 L.R.A. (N.S.) 105; and Jansen v. Minneapolis & St. L. R. Co. 32 L.R.A. (N.S.) 1206.

As to a carrier's liability for frightening a passenger, see note to Chesapeake & O. R. Co. v. Robinett, 45 L.R.A. (N.S.) 433.

Generally, for the liability of a carrier for wrongful arrest of a passenger caused by its servant, see notes to Moore v. Louisiana & A. R. Co. 34 L.R.A. (N.S.) 299, and St. Louis, I. M. & S. R. Co. v. Tukey, ante, 320.

For the duty of a carrier to protect a passenger from arrest, see notes to Mayfield L.R.A.1915E.

v. St. Louis, I. M. & S. R. Co. 32 L.R.A. (N.S.) 525, and Thompson v. Missouri, K. & T. R. Co. 52 L.R.A. (N.S.) 791.

For liability for the arrest or false imprisonment by a servant employed as a detective, policeman, or watchman, who is not a public officer, see notes to Milton v. Missouri P. R. Co. 4 L.R.A. (N.S.) 282, and Conchin v. El Paso & S. W. R. Co. 28 L.R.A. (N.S.) 88.

In general.

A carrier is an absolute guarantor of the safety of a passenger against the unjustifiable assault of its employees while the contract of carriage is in force. Miller v. Brooklyn Heights R. Co. 124 App. Div. 587, 108 N. Y. Supp. 960.

So, in Chesapeake & O. R. Co. v. Francisco, 149 Ky. 307, 42 L.R.A. (N.S.) 83, 148 S. W. 46, 2 N. C. C. A. 636, it is held that the fact that a conductor was insane at the time that he committed an assault upon a passenger was no defense on behalf of the carrier to an action for compensatory damages, the court saying: "When acting through a conductor as its agent, it is liable for an injury inflicted by him upon a passenger, whether such injury be the result of negligence, wilfulness, or unsoundness of mind, and without regard to its inability to discover, by the exercise of reasonable diligence, that his conduct and habits or his mental capacity were such as to induce a reasonable belief that such acts would follow."

In Alexander v. New Orleans R. & Light Co. 129 La. 959, 57 So. 283, the court, in increasing the damages awarded to a passenger for an assault by defendant's conductor, said: "The obligation of defendant is to carry its passengers safely, and protect them from insult and injury, and a *fortiori* from injury at the hands of its own officers and employees."

In Huggard v. Chicago, M. & St. P. R. Co. 158 Wis. 1, 147 N. W. 1020, a carrier was held liable for an assault upon a crippled passenger committed in compelling him to go from the day coach into the smoking car,

getting back into his seat again. The porter renewed the fight, they were again separated, and the porter ran back to the front of the coach and got an iron coal shovel and started down towards Patterson again, threatening to kill him and another man who got in the way, but, before he could strike Patterson, was shot at by him. The bullet missed him however, and struck another passenger, Andrew Jackson, in the shoulder. Several of the passengers ran into the other coach where the white passengers were, saying they were killing people in the other coach. The conductor asked the sheriff, who was in that coach, to go and arrest the fighters and stop the difficulty, but he had some prisoners in charge and couldn't go, and the conductor

borrowed his pistol intending to stop it himself. By this time the porter had reached the conductor, told him of the difficulty, and started back into the car with the conductor, who had the pistol in his hand, when Frank Patterson, seeing them, ran out of the coach after a big negro, who turned out to be the brakeman, had grabbed him, threatened to cut his throat and took his pistol from him, and jumped from the fast moving train, striking the ground and cutting a long gash in his head. By the time they stopped the train and backed up to the place where he fell, he was able to get up and was assisted into the train. The bullet fired from Patterson's pistol struck Andrew Jackson in the shoulder inflicting a wound that bled considerably, was pain-

under an erroneous belief that he was intoxicated.

In *Withers v. Chicago City R. Co.* 171 Ill. App. 460, the court said that if the jury believed the testimony of the plaintiff, that when he was boarding the car, and had reached the platform prepared to pay his fare, he was assaulted by the defendant's employee, it is clear that the defendant should be held liable.

In *Georgia R. & Electric Co. v. Rich*, 9 Ga. App. 497, 71 S. E. 759, an action for injuries received by a passenger when the conductor struck another passenger and knocked him against the plaintiff, the court said that, even if the law will ever excuse a railway conductor for resenting mere opprobrious language, it had no hesitancy in saying that if in doing so he endangers and injures a passenger lawfully behaving himself upon the car, the conductor and his employer are liable for the injuries.

See also *St. Louis Southwestern R. Co. v. Mallard*, 104 Ark. 641, 148 S. W. 261; *Sweeney v. Chicago City R. Co.* 148 Ill. App. 351; and *St. Louis, B. & M. R. Co. v. Fielder*, — Tex. Civ. App. —, 163 S. W. 606, in which the courts sustained findings in favor of passengers for damages received in unwarranted assaults upon them by the servants of the carriers.

It is the duty of a street railway company to protect its passengers from any improper and unnecessary violence at the hands of its servants; so a street railway company was liable for an assault upon a passenger made by its motorman while in the discharge of his duties, without legal excuse or provocation. *Pacelli v. People's R. Co.* — Del. —, 93 Atl. 560.

Scope of authority.

Supplementing note in 32 L.R.A.(N.S.) 1202.

For a general discussion of the theory of carrier's liability for wilful torts by his servants toward passengers, see note in 40 L.R.A.(N.S.) 999.
L.R.A.1915E.

A carrier is liable for a wrongful assault upon a passenger by a brakeman, at least while such brakeman is acting within the line of his employment. *Morey v. Chicago, R. I. & P. R. Co.* 86 Kan. 73, 119 Pac. 544.

The fact that an assault upon a passenger by a brakeman was made in furtherance of a personal grudge, does not relieve the carrier from liability therefor. *Winston v. Lusk*, 186 Mo. App. 381, 172 S. W. 76.

An instruction which may have been understood by the jury to mean that, if an employee of the carrier serving it in a capacity entirely remote from the operation or control of its passenger trains, but riding as a passenger on the train, should assault one of the passengers, the carrier would be liable for such assault, even though each of its servants in charge of such train exercised the highest degree of care and caution and did everything in his power to anticipate and prevent such assault, was erroneous. *Southern R. Co. v. Crone*, 51 Ind. App. 300, 99 N. E. 762.

In *Whittington v. Philadelphia, B. & W. R. Co.* — Del. —, 92 Atl. 812, in which it does not clearly appear whether the assault occurred upon the train or after plaintiff had been ejected therefrom, it is held that averments that the person who struck the plaintiff was at the time a servant of the defendant and acting in the scope of his employment, and that the plaintiff was a passenger of the defendant company at the time, were sufficient upon demurrer.

In *Pine Bluff & A. River R. Co. v. Washington*, — Ark. —, 172 S. W. 872, the court sustained a verdict for exemplary or punitive damages against the carrier because of the wanton and malicious assault upon a female passenger made by its brakeman, because she refused to continue former illicit relations with him, the decision apparently being based upon the rule that a corporation may be held liable for exemplary damages for the acts of its servants when done within the scope of his authority.

In *Moore v. Louisiana & A. R. Co.* 99 Ark. 233, 34 L.R.A.(N.S.) 299, 137 S. W. 826,

ful, and required some time to heal. Patterson was badly bruised and battered by the blows inflicted by the porter, "bloody as a hog" one witness said, in addition to the cut on the head, resulting from his jumping from the train. The train auditor was in the coach for negro passengers when the row first began and jerked the porter around by the arm and told him to "cut it out." He then went on with the collection of fares and made no further effort to stop the difficulty.

The cases were consolidated for trial and the jury returned a verdict in Patterson's favor for \$200 actual and compensatory damages, and \$1,400 exemplary damages, and for \$500 in Andrew Jackson's case, and

from the judgments thereon the railroad prosecutes this appeal.

Messrs. E. B. Kinsworthy, W. R. Donham, and T. D. Crawford, for appellant: Only compensatory damages can be recovered in an action *ex contractu*.

Pine Bluff & A. River R. Co. v. Washington, — Ark. —, 172 S. W. 872; Forrester v. Southern P. Co. 48 L.R.A.(N.S.) 38, note; Little Rock R. & Electric Co. v. Dobbins, 78 Ark. 553, 95 S. W. 788; St. Louis, I. M. & S. R. Co. v. Dowgiallo, 82 Ark. 289, 101 S. W. 412; St. Louis, I. M. & S. R. Co. v. Robertson, 103 Ark. 361, 146 S. W. 482; Dillingham v. Anthony, 73 Tex. 47, 3 L.R.A. 634, 15 Am. St. Rep. 753, 11 S. W. 139.

If a servant steps aside from his master's

involving the liability of a carrier for the act of a servant in causing the arrest of a passenger, the court says that a carrier of passengers is an insurer of their safety against wilful assaults by, and intentional ill treatment from, its servants and agents in charge of the train, and is so responsible for such conduct upon the part of any servant, whether in charge of the train or not, the performance of whose duties relates to the comfort or safety of the passengers and furnishes opportunity or requires him to come in personal contact with them.

In Baltimore & O. R. Co. v. Reed, 31 Ohio C. C. 521, it is held that where a conductor, while in charge of his train, makes an assault upon a passenger who is in a seat on the train, and not violating any rule of the company, the conductor would be held, as matter of law, to be acting within the scope of his authority, so as to render the carrier liable not only for compensatory damages, but for punitive damages under proper circumstances.

To the contrary, however, see Rohrbach v. Pennsylvania R. Co. 244 Pa. 132, 90 Atl. 557, denying recovery to a passenger for an assault committed upon him by a Pullman porter, on the ground that the assault was a wilful act without other purpose than to inflict injury and punishment for personal insult, and therefore could not have been done in the discharge of any duty owing to his employer.

And in Win v. Atlantic City R. Co. 248 Pa. 134, 93 Atl. 876, nonsuit was sustained to an action for an assault by a brakeman upon a passenger while upon defendant's car, on the ground that all that appeared from the evidence was that the brakeman committed a wilful and malicious assault, but there was nothing shown from which it could be reasonably inferred by a jury that it had been committed in the discharge of any duty to his employer.

Assault continued off the car.

Supplementing note in 32 L.R.A.(N.S.) 1203.

L.R.A.1915E.

If the assault complained of was committed by defendant's conductor upon plaintiff after he had left the car, and ceased to be a passenger, defendant would not be liable, but if the conductor assaulted him while he was on the car, or on the steps of the car, and afterwards jumped from the car and continued to beat him, then plaintiff would be entitled to recover. Alabama City, G. & A. R. Co. v. Sampley, 4 Ala. App. 104, 58 So. 974.

So, where a conductor continued his assaults after he had knocked a passenger off the platform to the ground, the carrier was yet liable, as the passenger was still entitled to the protection the defendant owed him. Sterneman v. Springfield Traction Co. 178 Mo. App. 64, 163 S. W. 258

Punitive damages.

Supplementing note in 32 L.R.A.(N.S.) 1203.

For the general question as to a master's liability to exemplary damages for the acts of its servant, see notes to Voves v. Great Northern R. Co. 48 L.R.A.(N.S.) 35.

For the liability of a carrier for mental suffering of a passenger for mere verbal abuse unaccompanied by other breach of duty, see notes to St. Louis, I. M. & S. R. Co. v. Taylor, 13 L.R.A.(N.S.) 159, and Bleecker v. Colorado & S. R. Co. 33 L.R.A.(N.S.) 386; and as to the amount of damages that may be awarded for insulting language, see note to Yazoo & M. Valley R. Co. v. May, 44 L.R.A.(N.S.) 1138.

Exemplary damages may be awarded for an assault by a carrier's employee upon a passenger, if the injuries were wantonly and maliciously inflicted. White v. South Covington & C. Street R. Co. 150 Ky. 681, 150 S. W. 837; Southern R. Co. v. Crone, 51 Ind. App. 300, 99 N. E. 762.

So, in Winston v. Lusk, 186 Mo. App. 381, 172 S. W. 76, an award of \$700 for punitive damages was sustained for a peculiarly unwarranted assault made by defendant's brakeman for revenge only.

business, for however short a time, to commit a wrong not connected with such business, the relation of master and servant is for the time being suspended, and therefore the master is not liable for the wrong.

Stephenson v. Southern P. Co. 93 Cal. 558, 15 L.R.A. 475, 27 Am. St. Rep. 223, 29 Pac. 234; *Bowler v. O'Connell*, 162 Mass. 319, 27 L.R.A. 173, 44 Am. St. Rep. 359, 38 N. E. 498; *Mott v. Consumers' Ice Co.* 73 N. Y. 543; *Linck v. Matheson*, 63 Wash. 593, 116 Pac. 282; *Cofield v. McCabe*, 58 Minn. 218, 59 N. W. 1005; *Illinois C. R. Co. v. Latham*, 72 Miss. 32, 16 So. 757; *Western U. Teleg. Co. v. Mullins*, 44 Neb. 732, 62 N. W. 880; *Andrews v. Green*, 62 N. H. 436; *Stringer v. Missouri P. R. Co.* 96 Mo. 299, 9 S. W. 905; *Rahmel v. Lehn-dorff*, 142 Cal. 681, 65 L.R.A. 88, 100 Am. St. Rep. 154, 76 Pac. 659, 16 Am. Neg. Rep. 7; *Lynch v. Florida C. & P. R. Co.* 113 Ga. 1105, 54 L.R.A. 810, 39 S. E. 411, 10 Am. Neg. Rep. 257; *Garretzen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 405; *M'Manus v. Crickett*, 1 East, 106, 5 Revised Rep. 518; *Williams v. Jones*, 3 Hurlst. & C. 256, 33 L. J. Exch. N. S. 297; *Houston & T. C. R. Co. v. Bush*, 104 Tex. 26, 32 L.R.A. (N.S.) 1201, 133 S. W. 245; *Burt v. Advertiser Newspaper Co.* 154 Mass. 238, 13 L.R.A.

In *Dawson v. Metropolitan Street R. Co.* 157 Mo. App. 642, 138 S. W. 665, the court apparently approved the awarding of exemplary damages against the defendant, because of an assault by its motorman upon a passenger, a girl of fifteen years of age, although the cause was reversed and remanded on other grounds.

In *Mills v. Metropolitan Street R. Co.* 157 Mo. App. 529, 137 S. W. 1006, the court sustained a verdict for compensatory and exemplary damages because of an unwarranted and vicious assault made by defendant's conductor upon a passenger.

In *Germann v. Great Northern R. Co.* 117 Minn. 310, 135 N. W. 750, where it appeared that after a fight between a passenger and defendant's cook was ended, as to which the evidence was conflicting concerning who was to blame therefor, and plaintiff had gone into another car, the cook made a second malicious and vicious assault upon the plaintiff, an award of exemplary damages was sustained.

If a conductor, in repelling an attack by a passenger upon him, uses more force than was reasonably necessary to repel the attack, and in doing so acted in a wilful, wanton, and offensive manner, punitive damages may be awarded. *Louisville R. Co. v. Frick*, 158 Ky. 450, 165 S. W. 649.

In *St. Louis Southwestern R. Co. v. Mallard*, 104 Ark. 641, 148 S. W. 261, in discussing the amount of damages awarded by a jury for an unwarranted assault on a passenger by defendant's conductor, the L.R.A. 1915E.

97, 28 N. E. 1; *Penny v. Atlantic Coast Line R. Co.* 153 N. C. 296, 32 L.R.A. (N.S.) 1209, 69 S. E. 238, 3 N. C. C. A. 379; *Illinois C. R. Co. v. Gunterman*, 135 Ky. 438, 122 S. W. 514; *Chicago, R. I. & P. R. Co. v. Brown*, 111 Ark. 288, 163 S. W. 525.

Messrs. Nixon & Levine and H. K. Ton-ey, for appellees:

The damages were not excessive.

St. Louis Southwestern R. Co. v. Myzell, 87 Ark. 127, 112 S. W. 203; *Pine Bluff & A. River R. Co. v. Washington*, — Ark. —, 172 S. W. 872.

Kirby, J., delivered the opinion of the court:

Appellant contends that the verdict of the jury awarding compensatory damages in the *Patterson Case* is excessive, and that exemplary damages cannot be recovered in any event for the malicious tort of its servant, acting it is claimed without the scope of his employment. Some instructions are also complained of that will be discussed later.

The passenger *Patterson* was thrice fiercely assaulted and without provocation, as the jury might have found, by appellant's train porter after he had taken his seat in the car, and bruised and beaten until he

court said that if it could construe the verdict to include a direct finding for exemplary damages, it would uphold it in some amount.

If a conductor commits an unlawful and justifiable assault upon a passenger, accompanied with wrongful, abusive, and insulting language applied by him to the passenger, the jury will be authorized to award the passenger exemplary damages. *Birmingham R. Light & P. Co. v. Coleman*, 181 Ala. 478, 61 So. 890.

See also *Baltimore & O. R. Co. v. Reed*, 31 Ohio C. C. 521, under "Scope of authority."

But in *Southern R. Co. v. Grubbs*, 115 Va. 876, 80 S. E. 749, an instruction which permitted the jury to award punitive damages against a carrier for an unwarranted and wanton assault by its conductor was held to be erroneous where there was no evidence that the conduct of the conductor was authorized, or that it was ratified or approved by the defendant, approval of such conduct not being shown by failure to discharge the conductor.

And in *Voves v. Great Northern R. Co.* 26 N. D. 110, 48 L.R.A. (N.S.) 30, 143 N. W. 760, it is held that punitive damages were not recoverable as against a carrier for an assault committed by its conductor, which it neither participated in nor approved of, either before or after its commission, although the circumstances of the assault were such that punitive damages were justifiable against the conductor personally.

was "as bloody as a stuck hog," as some of the witnesses expressed it. In addition he was so frightened by the conductor of the train coming into the coach with a pistol in his hand, accompanied by the porter, to quell the disturbance, that he jumped from the moving train and struck on his head on the ground, cutting a gash therein 3 or 4 inches long to the skull. He was treated by two or three physicians for the severer injury, one of whom testified that the wound on the head suppurated and did not heal rapidly.

It is claimed that the jury might have made the excessive award of compensatory damages because instruction numbered 4 mentioned what might be taken into consideration by them where the injury appears to be of a permanent or continuing character. We do not think this instruction open to the objection that it submitted to the jury the question of damages for a permanent injury, and if it did no prejudice could have resulted therefrom, since the verdict was returned for only \$200, an amount which the jury might well have allowed for the beating alone, without taking into consideration the serious gashing of appellee's head.

The jury found that this passenger was

not negligent in jumping from the train, under the existing conditions, and necessarily the railroad company was liable for damages for injury occasioned thereby, and an allowance of \$200 is not only not excessive, but small compensation for the injuries suffered.

The porter assaulted and struck this passenger before he got into the coach, and without reasonable provocation disclosed by the testimony, and later, after the passenger had seated himself in the coach and the train had departed from the station, and without any provocation whatever, resumed the difficulty, and thrice assaulted and beat the passenger, finally procuring a heavy iron coal shovel and threatening to kill him therewith, after having advanced with his drawn weapon to within striking distance of him. The train auditor only once spoke to the porter, upon the first separation of the combatants, and told him to "cut it out," and then continued the collection of tickets and made no further effort to prevent the difficulty or to protect the assaulted passenger, notwithstanding he was in the coach during the whole time. A flagrant case of wanton abuse of a passenger and disregard of its duties to render him protection against the wilful misconduct and as-

Self-defense.

Supplementing note in 32 L.R.A. (N.S.) 1203.

A carrier is civilly liable for an assault committed by its conductor upon a passenger by pointing a pistol at the passenger, unless the conductor was free from fault in bringing on the difficulty, and unless also, at the time he pointed the pistol, it reasonably appeared to him that it was necessary for him to do so, to protect his own person from a battery at the hands of plaintiff. *Birmingham R. Light & P. Co. v. Coleman*, 181 Ala. 478, 61 So. 890.

So, where a motorman assaulted a passenger by pointing a pistol at him and compelling him to leave the car, when the assault was not necessary to defend another passenger, or to eject plaintiff because of his conduct toward other passengers, or to defend himself, the carrier was held liable. *Birmingham R. Light & P. Co. v. Tate*, 7 Ala. App. 517, 61 So. 32.

There was no error in charging that if defendant's conductor arrested the plaintiff, as he had authority to do if he was acting in a disorderly manner, and while plaintiff was under arrest, the conductor struck him or inflicted upon him a personal injury, defendant would be liable unless the act of the conductor was justifiable to prevent any attempt which the plaintiff made to inflict injury upon him. *Georgia R. & Electric Co. v. Wheeler*, 141 Ga. 363, 80 S. E. 993.

An assault and battery need not be actually commenced before proper resistance

thereto may be made; so, where the conduct of plaintiff was such that it could not be said as matter of law that his conduct, in speech and action, did not indicate an immediate assault and battery upon the conductor, a peremptory instruction directing a verdict for the plaintiff for compensatory damages in some amount, was error, where the claim of the defendant was that the conductor acted in self-defense. *Hancock v. Missouri & K. Interurban R. Co.* 163 Mo. App. 259, 146 S. W. 807.

If a conductor uses force greatly in excess of that which was necessary, or would appear to a reasonably prudent person, under like circumstances, to be necessary, in repelling an attack made on him by a passenger, the carrier is liable. *White v. South Covington & C. Street R. Co.* 150 Ky. 681, 150 S. W. 837; *Louisville R. Co. v. Frick*, supra.

A plea that plaintiff and defendant's servant were engaged in a difficulty, as to which the servant was without fault, and that the servant attempted to repel or prevent an attack on him, using no more force than was reasonably necessary, states the essential element of self-defense, and is not subject to demurrer. *Beyer v. Birmingham R. Light & P. Co.* 186 Ala. 56, 64 So. 609.

But where the proof is that the alleged self-defender was not, in fact, being assaulted, it is necessary for him to show reasonable grounds for apprehending a present assault and his honest belief therein. *Ibid.*

R. L. S.

sault from its servant, whose duties related to the comfort and safety of the passenger, is disclosed by the testimony.

In *Pine Bluff & A. River R. Co. v. Washington*, — Ark. —, 172 S. W. 872, a case where exemplary damages were awarded to a passenger who was shot by the brakeman while seated in the car, because she declined to agree to stop over at another station than her destination and spend the night with him, the court announced its approval of the following general rule of liability for allowance of exemplary damages for torts committed by servants of corporations: "A corporation may be held liable to exemplary or punitive damages for such acts done by its agents or servants acting within the scope of their employment as would, if done by an individual acting for himself, render him liable for such damages,"—and, after reviewing our own cases, said: "It may therefore be taken as settled law in this state that punitive damages may be awarded against a railway corporation for the wanton and malicious torts of its servants, although the corporations, aside from the conduct of its servants, may be entirely blameless."

The porter's duty required him to come in contact with the passengers and related to their safety and comfort, and the railway company was liable for his wrongful and wanton conduct, which cannot be said to have been beyond the scope of his employment. *Moore v. Louisiana & A. R. Co.* 34 L.R.A.(N.S.) 299, 99 Ark. 235, 137 S. W. 826; *St. Louis, I. M. & S. R. Co. v. Tukey*, — Ark. —, ante, 320, 175 S. W. 403.

In the *Jackson Case*, it is contended that the court erred in giving, over appellant's objection, instruction numbered 5, which tells the jury: "That if Jackson was a passenger upon the defendant's train and the porter precipitated or brought on a row with another passenger, which caused a fight to take place between the porter and said other passenger, during which said other passenger fired a shot with a pistol at said porter, wounding the plaintiff in his shoulder, and that this plaintiff had nothing to do with said conflict between the porter and the other passenger, then your verdict will be for the plaintiff in this case," etc.

Carriers of passengers, it is true, are not absolute insurers of the safety of their passengers against injury and ill treatment from other passengers. *Chicago, R. I. & P. R. Co. v. Brown*, 111 Ark. 288, 163 S. W. 525; *St. Louis, I. M. & S. R. Co. v. Dowgiallo*, 82 Ark. 289, 101 S. W. 412; *Goddard v. Grand Trunk R. Co.* 57 Me. 202, 2 Am. Rep. 39, 8 Am. Neg. Cas. 316; *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546, 42 Am. Rep. L.R.A.1915E.

33, 8 Am. Neg. Cas. 181; *Penny v. Atlantic Coast Line R. Co.* 153 N. C. 296, 32 L.R.A. (N.S.) 1209, 69 S. E. 238, 3 N. C. C. A. 379. Such is not the rule, however, in case of injury resulting to the passenger from the misconduct of its servants; it being an insurer of the safety of the passenger against wilful assaults and intentional ill treatment of its servants, for whose acts it is responsible. *St. Louis & S. F. R. Co. v. Kilpatrick*, 67 Ark. 47, 54 S. W. 971; *St. Louis, I. M. & S. R. Co. v. Dowgiallo*, 82 Ark. 289, 101 S. W. 412.

The testimony herein shows that the porter assaulted and beat the other passenger without provocation, the fight lasting for some time with intermissions; that finally the porter renewed it the third time, advancing with an iron coal shovel to within striking distance of the passenger and threatening to kill him, when the passenger, to protect himself, fired the shot that inflicted the injury upon the plaintiff in this case. The auditor of the train was in the coach during the whole time, and, but for saying, upon the first separation of the combatants, to the porter, "cut it out," made no effort to stop the difficulty and protect the assaulted passenger nor the other passengers in the coach.

It is not to be expected that a passenger will submit to continued violent and unprovoked assaults from the servant of a railway corporation, and the servants in charge of the train knew of the difficulty and should have anticipated that injury might result to other passengers because of the conduct of the porter, and the carrier's duty required it to protect such other passengers from resultant injury whether inflicted by its servants in the assault, or unintentionally by the assaulted passenger in protecting himself against the wrongful assault of the servant. In other words, the wilful assault and intentional ill treatment of the passenger Patterson by the porter may be said to have been the proximate cause of the injury resulting to the passenger Jackson, who was accidentally shot by Patterson while trying to protect himself against such wrongful assault, for which the railroad company was liable. *St. Louis, I. M. & S. R. Co. v. Dowgiallo*, supra.

It is apparent that other passengers might be injured by shooting in the coach in which all were riding, and the train operatives were bound to anticipate that such would be the result, and take the steps necessarily required to prevent it. Not having done so, the railroad company is liable for the injury inflicted upon Jackson by the misdirected shot that failed to reach the porter, who provoked the difficulty. The court did not err in giving said instruction.

Neither do we think the amount of damage awarded is excessive. The bullet buried itself in Jackson's shoulder and, although it was picked out by him, inflicted a wound that was painful, which required treatment from two different doctors, and prevented his following his accustomed occupation for more than a month.

We find no prejudicial error in the record, and the judgments are affirmed.

CALIFORNIA SUPREME COURT.
(Department No. 2.)

STATE SAVINGS & COMMERCIAL BANK,
Appt.,
v.

ALDEN ANDERSON et al., Respts.

(165 Cal. 437, 132 Pac. 755.)

Bank — seizure of property by state — due process of law.

1. A bank is not deprived of its property

Note. — Constitutionality of statute authorizing officer to take charge of assets of bank upon suspicion of insolvency.

STATE SAV. & COMMERCIAL BANK v. ANDERSON was affirmed by the Supreme Court of the United States in 238 U. S. 611, 59 L. ed. —, 35 Sup. Ct. Rep. 792, *per curiam*, "upon the authority of *Engel v. O'Malley*, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487."

The *Engle Case* involved private bankers. In the *Haskell Case*, sustaining the Oklahoma statute directing an assessment upon banks, by the state banking board, of a percentage of deposits for the purpose of creating a guaranty fund for depositors of insolvent banks, the court said: "We cannot say that the public interests to which we have averted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary, we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe."

The authorities sustain the decision in **STATE SAV. & COMMERCIAL BANK v. ANDERSON**, that a statute authorizing a state officer to take charge of a bank which he concludes to be in an unsafe condition, and providing also for a judicial review of such action, is within the police power of the state, and does not deprive any person of his property without due process of law, nor deny to any the equal protection of the laws.

Such a provision does not deny to a bank the equal protection of the laws, as banks are to such a degree responsible for the L.R.A.1915E.

without due process of law by proceedings under a statute authorizing the bank superintendent to take possession of its assets whenever he shall have reason to conclude that it is in an unsound condition, or that it is unsafe or inexpedient for it to continue business.

Constitutional law — arbitrary limitation period — class legislation.

2. Limiting the right of a bank whose property has been summarily seized because the bank superintendent deemed it to be in an unsafe condition, to bring an action to recover possession of its property to ten days, is not such an arbitrary discrimination against banking institutions as to deprive them of the equal protection of the laws.

(May 17, 1913.)

A PPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco in defendants' favor in an action brought to recover certain property of the plaintiff bank, alleged to

financial welfare of the state as to be subject to special regulation. *State ex rel. Sparks v. State Bank & T. Co.* 31 Nev. 456, 103 Pac. 407, 105 Pac. 567.

So, a statute empowering a state banking board to declare a bank in default or turn its affairs over to the superintendent of banks does not violate the constitutional requirement of due process of law when such statute makes it a prerequisite of such action by the board that such superintendent first submit to the board matters of default or misconduct in the affairs of the bank, of which the bank shall have notice, and upon which it may be heard in person or by counsel, with right to apply to the courts within ten days for an injunction and reinstatement. *Montgomery Bank & T. Co. v. Walker*, 181 Ala. 368, 61 So. 951. Approved in *McDavid v. Bank of Bay Minette*, — Ala. —, 69 So. 452.

Nor does a statute of this nature delegate judicial functions to an executive officer, where the taking over of the assets is for a mere temporary holding in the nature of an attachment for the preservation of the property until the court can adjust the rights of the parties. *State ex rel. Sparks v. State Bank & T. Co. supra*.

The right of the superintendent of the State Banking Department to take possession of a bank under the New York statute seems to be accepted as a matter of course. See *Re Murray Hill Bank*, 153 N. Y. 190, 47 N. E. 298. It may be noted that in *Re Union Bank*, 204 N. Y. 313, 97 N. E. 737, it was held that the superintendent's power to take possession was merely as a receiver and conservator, and that he had no power to take possession "for the purpose of conducting a *post mortem* investigation."

And in *Blaker v. Hood*, 53 Kan. 499, 24 L.R.A. 854, 36 Pac. 1115, the court upheld, as within the state's police power, the Kan-

have been illegally seized by defendants, and for an injunction *pendente lite*. Affirmed.

The facts are stated in the opinion.

Mr. Arthur Crane for appellant.

Messrs. F. A. Cutler, F. R. Sweasey, and A. A. De Ligne, for respondents:

The statutory authority under which the superintendent of banks acted in making the seizure of plaintiff's property is not without constitutional sanction, and is not violative of the 14th Amendment to the Constitution of the United States.

American Land Co. v. Zeiss, 219 U. S. 65, 66, 55 L. ed. 96, 97, 31 Sup. Ct. Rep. 200; Noble State Bank v. Haskell, 219 U. S. 104-110, 55 L. ed. 112-116, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599; Schaafe v. Dolley, 85 Kan. 598, 37 L.R.A.(N.S.) 877, 118 Pac. 80, Ann. Cas.

1913A, 254; Cunningham v. Northwestern Improv. Co. 44 Mont. 180, 119 Pac. 554; State ex rel. Sparks v. State Bank & T. Co. 31 Nev. 456, 103 Pac. 407, 105 Pac. 567; Ex parte Pittman, 31 Nev. 43, 22 L.R.A.(N.S.) 266, 99 Pac. 700, 20 Ann. Cas. 1319; People v. Bank of San Luis Obispo, 159 Cal. 65, 37 L.R.A.(N.S.) 934, 112 Pac. 866, Ann. Cas. 1912B, 1148, 154 Cal. 194, 97 Pac. 306; State v. Richcreek, 107 Ind. 217, 5 L.R.A.(N.S.) 874, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 Ann. Cas. 899; Lee v. O'Malley, 69 Misc. 215, 126 N. Y. Supp. 775; Engel v. O'Malley, 219 U. S. 128, 136, 137, 55 L. ed. 128, 136, 31 Sup. Ct. Rep. 190; Argues v. Union Sav. Bank, 133 Cal. 139, 65 Pac. 307; Union Sav. Bank v. Dunlap, 135 Cal. 628, 67 Pac. 1084; Union Sav. Bank v. Leiter, 145 Cal. 696, 79 Pac. 441; Re Murray Hill Bank, 153 N. Y. 199, 47 N. E. 298; Los Angeles County v. Spencer, 126 Cal. 672, 77 Am. St. Rep. 217, 59 Pac. 202, 385; People ex rel. Dean v. Contra Costa County, 122

sas banking law of 1891, including a provision for the summary seizing of the bank by the bank commissioner, to be followed by an action by the attorney general for the appointment of a receiver.

In *Montgomery Bank & T. Co. v. Walker*, supra, the court, having decided as above, stated that the provisions for notice and judicial hearing met the requirement, as to due process of law, and went on to say: "Moreover, we do not understand the act as making this proceeding operate as a change in the ownership or legal title to the property, but the superintendent is in reality a receiver who takes charge of the bank for the benefit of the stockholders, depositors, and other creditors."

The foregoing cases all arose under statutes providing for a judicial review of the officer's action if asked for, or, as in the Kansas case, requiring a procedure in court by the attorney general. In *Cartmell v. Commercial Bank & T. Co.* 153 Ky. 798, 156 S. W. 1048, it was held that an action would not lie by bank depositors, alleging the insolvency of the bank, for the appointment of a receiver, where the bank was already in the hands of the banking commissioner, having been voluntarily placed in his hands as insolvent by a majority of the board of directors under a statute providing that it should be the duty of the commissioner to take possession of a bank appearing to be insolvent, and also that the directors of a bank who find it to be insolvent may place it in the hands of the commissioner, but containing no provision for a judicial review of the officer's action unless on his own application. The court seemed to approve the general scheme of the statute, but states that the bank was concededly insolvent.

In *Jeffries v. Bacastow*, 90 Kan. 495, 135 Pac. 582, it was held that the appointment of a "receiver" by a bank commissioner L.R.A.1915E.

who had found the bank to be insolvent was an administrative, not a judicial, act, and that such receiver might, without an order of court, bring an action against the bank directors to enforce their liability for various acts causing loss. The court said that the commissioner's powers were "purely administrative and in no way infringe upon the ancient authority of courts to determine rights of person and property in specific controversies pending before them." The statute, which was held constitutional, provided that "if, upon examination by the state bank commissioner or his deputy, or from any report made to the bank commissioner, it shall appear that any bank is insolvent . . . it shall be the duty of the bank commissioner to immediately take charge of such bank. . . . Upon taking charge of any bank, the bank commissioner shall, as soon as possible, ascertain by a thorough examination into its affairs, its actual condition; and whenever he shall become satisfied that such bank cannot resume business or liquidate its indebtedness to the satisfaction of all its creditors, he shall forthwith appoint a receiver," who shall wind up the bank's affairs, etc.

Generally as to the power to prohibit, or impose condition upon, the right of individuals to engage in the banking business, see the notes to *State v. Richcreek*, 5 L.R.A.(N.S.) 874; *State v. Scougal*, 15 L.R.A. 477; and *Weed v. Bergh*, 25 L.R.A.(N.S.) 1217. See also *Marymont v. Nevada State Bkg. Bd.* 32 L.R.A.(N.S.) 477; *Engel v. O'Malley*, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190. Since the note in 25 L.R.A.(N.S.) 1217, the decision in *First State Bank v. Shallenberger*, 172 Fed. 999, there cited, has been reversed by the United States Supreme Court (219 U. S. 114, 55 L. ed. 117, 31 Sup. Ct. Rep. 139) upon the authority of *Noble State Bank v. Haskell*, supra.

B. B. B.

Cal. 424, 55 Pac. 131; *People v. Apfelbaum*, 251 Ill. 18, 95 N. E. 995; *Conover v. Gatton*, 251 Ill. 587, 96 N. E. 522.

It is only when plaintiff clearly and affirmatively shows that his rights will be affected by the alleged invalid legislative provision that he will be permitted to question its constitutionality.

Re *Johnson*, 139 Cal. 532, 96 Am. St. Rep. 161, 73 Pac. 424; *Gibbs v. Green*, 54 Miss. 592; *Southern R. Co. v. King*, 217 U. S. 524-534, 54 L. ed. 868-872, 30 Sup. Ct. Rep. 594; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; *Detroit, Ft. W. & B. I. R. Co. v. Osborn*, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. Rep. 540; *Castillo v. McConico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

The ten days limitation from the date of seizure in which to bring suit to enjoin defendant from further withholding possession of the property of such bank is reasonable.

Terry v. Anderson, 95 U. S. 632, 24 L. ed. 365; *Knarston v. Manhattan L. Ins. Co.* 140 Cal. 57, 73 Pac. 740.

Lorigan, J., delivered the opinion of the court:

This action was brought against the defendants, representing the state banking department, to recover the property of the plaintiff bank which had been seized and taken into their possession, and for an injunction against them *pendente lite*.

The complaint sufficiently discloses that the business and property of the plaintiff bank was seized by the defendant Anderson as superintendent of banks (defendant Young assisting as chief deputy) on July 17, 1909, and is now held by defendant Williams as successor to said Anderson as superintendent of banks, under a claim that said plaintiff bank when the seizure complained of was made had been found by said Anderson to be in an unsafe and unsound condition to transact or continue the banking business for which it was organized, and hence its business and property were subject to seizure by the superintendent of banks under the provisions of § 136 of the banking act of this state.

This action was commenced on July 15, 1911, two years subsequent to the alleged seizure made on July 17, 1909. It is provided by § 136 of the banking act (Stat. 1909, p. 115) that "whenever the superintendent of banks shall have reason to conclude that any bank is in an unsound or unsafe condition to transact the business for which it is organized, or that it is unsafe or inexpedient for it to continue business, the superintendent of banks may forthwith take possession of the property and business of such bank, and retain such possession until such bank shall resume business, or its af-

fairs be finally liquidated, as herein provided." It is further provided by the same section that "whenever any such bank, of whose property and business the superintendent of banks has taken possession as aforesaid, deems itself aggrieved thereby, it may at any time within ten days after such taking possession, and not thereafter, apply to the superior court in the county in which the principal office of such bank is located, to enjoin further proceedings; and said court, after citing the superintendent of banks to show cause why further proceedings should not be enjoined, and upon hearing the allegations and proofs of the parties, and determining the facts, may, upon the merits, dismiss such application, or enjoin the superintendent of banks from further proceedings, and direct him to surrender such business and property to such bank."

The defendants demurred to the complaint on the ground, among other things, that the right of the plaintiff to maintain its action was barred by the last provision of § 136, just quoted, which prescribes that such action must be brought within ten days after taking possession of the property by the superintendent, and not thereafter. The demurrer was sustained and judgment entered in favor of the defendants. This appeal is taken by plaintiff from that judgment.

It is not questioned on this appeal but that, under § 136 of the banking act, treating its provisions as valid, the ruling of the court sustaining the demurrer of the defendants was correct, but it is contended that the section in question is void as contravening the 14th Amendment of the Constitution of the United States, prohibiting any state from depriving a person of his property without due process of law, or denying him the equal protection of the law.

The specific points made in this attack by appellant are that the section in question is violative of such constitutional provision, in this: that it commands "an executive officer to seize property unwarrantably and without judicial authority," and "in unwarrantably limiting the time for banks to bring action for the recovery of their property." These points are made by counsel for appellant in his brief in the concise language above quoted, but are not followed by any discussion or elaboration of the propositions. We take it, however, that the particulars in which it is claimed that the section of the bank act in question is invalid are both in authorizing a summary seizure of the business and property of banking institutions without action brought against them and judicial warrant for the taking, and in prescribing a particular limitation upon the right of action by banks,—provi-

sions which do not apply to other corporations or individuals, and whereby an arbitrary and unwarranted discrimination,—class legislation,—directed solely against banks, is made, amounting to a deprivation of their property without due process of law, in violation of the constitutional guaranty.

There is nothing novel in the legislation of this state embraced in our banking act, either in the provision for the summary seizure of the business or property by the superintendent of banks when it is found by him that such bank is unsound or in an unsafe condition to further transact a banking business, nor any novelty in the provision for its liquidation, or the particular limitation of ten days upon the right of action on the part of such bank. Our statute is taken from that of the state of New York, and our provisions as to initial seizure, liquidation, and limitation of action on the part of the bank are as therein contained. Similar legislation exists in the states of Alabama, Massachusetts, Minnesota, Nevada, Oregon, South Dakota, Colorado, and Louisiana. All these provide for summary seizure and liquidation, and further provide a limitation on the right of action by the banks of from ten to thirty days after seizure. Idaho, Kansas, Oklahoma, and Texas, while also providing for summary seizure and liquidation, seem to provide no time limit within which suit shall be brought by the delinquent bank. By act of Congress, applying, of course, only to national banks, initial seizure, liquidation, and limitation of action to ten days are provided, and the District of Columbia adopts the same system as is provided for national banks. We are not pointed to any decision, and our own examination has disclosed none, where it has been held that this regulation, which seems to be so generally adopted by the states, has been held to be violative of the constitutional provision invoked by appellant. As early as 1893 the bank commissioners act of this state conferred upon the bank commissioners a similar power of seizure to that given to the superintendent of banks under the present bank act when they found that the bank was unsafe to continue the transaction of business. In the case of *People v. Bank of San Luis Obispo*, 154 Cal. 194, 97 Pac. 306, in an appeal by the bank whose assets were summarily seized by the bank commissioners, an attack was made upon the validity of the provision authorizing such seizure, and on the same grounds urged here. In disposing of that appeal it was deemed unnecessary to pass upon that point, though respecting it the court said: "The provision in question has been a part of our law ever since March 26, 1895; and, L.R.A.1915E.

so far as we are advised, no question has ever been made as to its validity except as the same has been made in this case. In view of the well-settled doctrine that the business of banking is a proper subject of legislative control by the state in the exercise of what is known as the police power, and in view of the decisions as to what constitutes the judicial power that is vested exclusively in the courts under our Constitution, and what constitutes due process of law under our Federal and state Constitutions, we are not strongly impressed by the argument of learned counsel for defendant against the validity of this provision; but, as already stated, we consider it preferable not to decide the question in a case where such a decision is clearly unnecessary."

Under the rapid changes which have occurred in recent years in the industrial and economic world, enterprises and industries which were theretofore considered mainly of a private character have become essentially of a public nature, and the changed conditions have called for regulations of a kind different from those that have theretofore sufficed. In that progress, banking, considered in early years as more or less of a private enterprise, has, in the commercial development of the world, become so incorporated into the business growth and prosperity of the country, and so affects the commercial welfare and business interests of the people as to have become a proper and legitimate subject of legislative regulation by the state in the exercise of its police power. With respect to the business of banking as being of a character which brings it within the regulation of the state, in the exercise of such power, it is said in *Schaake v. Doley*, 85 Kan. 598-604, 37 L.R.A.(N.S.) 877, 118 Pac. 80, Ann. Cas. 1913A, 254: "Banks are indispensable agencies through which the industry, trade, and commerce of all civilized countries and communities are now carried on. The banker is the universal broker over whose counter the exchanges of supply and demand are, in the final analysis, effected. The capital which he has invested and the returns which he receives upon it are insignificant in importance relative to the advantages which society at large derives from the conduct of the banking business, and the evil consequences of unsound banking are distributed between the banker and the general public in like proportion. Banking is not a business 'affected with a public interest' in the sense in which Lord Hale first used that expression in the treatise '*De Portibus Maris*.' But banking has ceased to be, if it ever was, a matter of private concern only, like the business of the merchant, and for all pur-

poses of legislative regulation and control it may be said to be 'affected with a public interest.' The public patronage which the banker invites and receives is of such a character that he becomes in a just sense a trustee of the fiscal affairs of the people and of the state."

On the same subject the Supreme Court of the United States in *Noble State Bank v. Haskell*, 219 U. S. 104-111, 55 L. ed. 112-117, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, 188, Ann. Cas. 1912A, 487, states: "It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderate opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderate opinion give their sanction to enforcing the primary conditions of successful commerce. . . . We cannot say that the public interests to which we have adverted and others are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary, we are of opinion that it may go on from regulation to prohibition except under such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection, and the above-described co-operation are necessary safeguards, this court certainly cannot say that it is wrong."

Declaring the same doctrine are *State ex rel. Sparks v. State Bank & T. Co.* 31 Nev. 456, 103 Pac. 407, 105 Pac. 567; *State v. Richcreek*, 167 Ind. 217, 5 L.R.A. (N.S.) 874, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 Ann. Cas. 899; *Lee v. O'Malley*, 69 Misc. 215, 126 N. Y. Supp. 775; *Engel v. O'Malley*, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190.

The business of banking being therefore subject to the regulation by the state in the exercise of its police power, such power of regulation is supreme and subject to no limitation so far as the 14th Amendment to the Federal Constitution is concerned, except that such regulation must be reasonable.

As said in *American Land Co. v. Zeiss*, 219 U. S. 65, 66, 55 L. ed. 96, 97, 31 Sup. Ct. Rep. 206: "It is to be borne in mind that it has been settled (*Griffith v. Connecticut*, 218 U. S. 563, 54 L. ed. 1151, 31 Sup. Ct. Rep. 132, and cases cited) that the 14th Amendment does not operate to deprive the states of their lawful power, and of the right in the exercise of such power to re-

sort to reasonable methods inherently belonging to the power exerted. On the contrary, the provisions of the due process clause only restrain those arbitrary and unreasonable exertions of power which are not really within lawful state power, since they are so unreasonable and unjust as to impair or destroy fundamental rights."

In *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L.R.A. (N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599, the court says: "The test of a police regulation, when measured by this clause of the Constitution, is reasonableness, as contradistinguished from arbitrary or capricious action. . . . Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discrimination is necessarily vested in the legislature to determine, not only what the interests of the public acquire, but what measures are necessary for the protection of such interests. . . . If, therefore, the act in controversy has a reasonable relation to the protection of the public health, morals, safety, or welfare, it is not to be set aside because it may incidentally deprive some person of his property without fault, or take the property of one person to pay the obligations of another. To be fatally defective in these respects, the regulation must be so utterly unreasonable and so extravagant in nature and purpose as to capriciously interfere with and destroy private rights."

And in *Schaake v. Dolley*, supra: "When once a subject is found to be within the scope of the state's police power, the only limitations upon the exercise of the power are that regulations must have reference in fact to the welfare of society, and must be fairly designed to protect the public against evils which might otherwise occur. Within these limits the legislature is the sole judge of the nature and extent of the measures necessary to accomplish its purpose." As further declaring this principle are *Engel v. O'Malley*, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; *Noble State Bank v. Haskell*, supra; *Mutual Loan Co. v. Martell*, 222 U. S. 225, 56 L. ed. 175, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; *Northwestern Trust Co. v. Bradbury*, 117 Minn. 83, 134 N. W. 513, Ann. Cas. 1913D, 69; *Cunningham v. Northwestern Improv. Co.* 44 Mont. 180, 119 Pac. 554.

As is settled by the authorities, the state has unquestionable power to adopt such measures respecting matters affecting the public welfare as it deems expedient, and, when it sees fit to regulate upon a matter which is within its police power, its authority over the subject is plenary, and can only be reviewed by the courts to the extent of

determining whether the regulation is reasonable. The principle embodied in the 14th Amendment was substantially incorporated into the Constitutions of the states at the time the Amendment was adopted, "and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. The Amendment was never designed to interfere with the police power of the state to regulate for the public good on some particular subject which, in the judgment of the legislature, called for regulation. When the state determines that some business which, in its conduct, affects the public welfare, should be regulated in the public interest and safety, any legislation to that end, in the nature of things, must be special; but it is not special in the sense that it is violative of the constitutional guaranty if it operates equally upon all persons and property under the same conditions and circumstances. What the Amendment prohibits as a denial of due process of law is invidious legislation,—capricious and arbitrary legislation which discriminates favorably as to some and unfavorable as to others. But it does not prohibit legislation which, while limited in its application, is designed to subserve the public welfare, and affects all persons alike within the sphere of its operation. Within the principles declared by these authorities, and which control the consideration of the validity of legislation by the state enacted in the exercise of its police power, we are satisfied that § 136 of the banking act is open to none of the particular objections urged by appellant in support of its claims that the constitutional guaranty that one shall not be deprived of his property without due process of law is thereby violated.

As far as the act provides for the initial seizure of a banking business which is found unsound or insecure, and its immediate liquidation without action previously brought against the bank, or judicial process issued directing the seizure, these are provisions which have obtained in the regulatory banking laws, not only of this state for years past, but in the large number of the states to which we have referred. Such legislation, adopted so generally, has come as the result of years of observation of the intimate relation of banking with the business world, the disastrous consequences of unsound banking, and the necessity for prompt measures for the protection of the public therefrom. It is generally recognized, as it is clearly obvious, L.R.A.1915E.

that it is the duty of the state to its people who are dealing with banking institutions of a quasi public nature to see that protection to the public is afforded by the immediate abatement of such institutions as have become unsafe or insolvent, and whose further continuance in business is a fraud upon and a menace to the public, and that danger can only be effectually averted by prompt action on the part of the state. The state owes to the public the duty not only of providing for supervision and examination of banks, but the added duty as a matter of public policy, if the conditions warrant, of summarily closing them up and terminating their existence. When the management thereof has brought them into a condition of unsafety or insolvency, the public interest demands that, on this condition being ascertained, they should not be permitted to further hold themselves out as responsible institutions, or be permitted to remain in a position to do so. Police regulations are only effective when provision is made for their prompt and summary execution, and summary seizure and liquidation of unsafe banks can fairly and reasonably be justified on the ground of immediate danger to the public welfare in further permitting their business continuance.

In this view it cannot be said that initial seizure is not a fair and reasonable measure to be adopted to effect the protection of the public welfare which is designed by it, and, as the only limitation on the power the state, imposed under the constitutional amendment, is that the regulations it makes shall be of that character, no constitutional right of the appellant has been impaired by such legislation.

Nor is the due process of law clause violated because such summary seizure is authorized to be made without action brought and judicial warrant for the taking. Due process of law does not necessarily imply a regular proceeding in a court of justice or after the manner of such courts. As said in *Davidson v. New Orleans*, 96 U. S. 107, 24 L. ed. 616: "In judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but, if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'" It signifies, as said in *Wulzen v. San Francisco*, 101 Cal. 15-20, 40 Am. St. Rep. 17, 35 Pac. 353, 354, "such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards

for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." The special case of banking institutions to which the legislation here in question is addressed is one falling within the class of cases subject to regulation by the state under its police powers, and where the only restraint on that power is that, in such regulation, reasonable methods shall be adopted to accomplish the designed end, in contradistinction to measures which are so unreasonable as to be in their nature arbitrary and destructive of fundamental rights. As we have pointed out, the provision authorizing initial seizure without action brought is, considering the end to be attained thereby, not an unreasonable exercise of the power, or manifestly unfitted to accomplish the purpose designed, namely, of prohibiting an insecure or insolvent bank from continuing its business to the public injury. The initial taking authorized by the bank act is not intended to work a permanent divestment of the title of the bank to its property. The provision merely authorizes the superintendent to take temporary statutory custody of it. The power conferred on him is for the purpose of preserving the property for administration under the banking act. He takes and holds it as a statutory custodian for that purpose until either the bank brings an action to test the validity of his finding of its insecurity or unsoundness, and under which he justifies the taking, or, through a failure to do within the time limited for that purpose, the bank admits that his action in making the seizure was warranted, and thereby consents to the liquidation of its affairs, or until, in a suit brought by the bank, the court enjoins further proceedings on the part of the superintendent, and directs a restitution of the business and property of the bank. While the initial seizure is authorized under the act without suit brought, and is justified as a matter of public policy for the reasons here given, it cannot be said that the bank is thereby deprived of its property without due process of law as heretofore defined. An opportunity is given the alleged delinquent bank to invoke the aid of a court of competent jurisdiction as to the validity of the seizure and right of the superintendent to hold the property; and, if that opportunity is a reasonable one, then the right which the Constitution guarantees has been in substance preserved to it.

In this regard, however, it is claimed that the limitation of the right of action by the bank to ten days after seizure is unreasonable. But, as is said in *Terry v. Anderson*, 95 U. S. 632, 24 L. ed. 365: "In all such cases the question is one of reasonable-

ness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of the government, unless a palpable error has been committed. In judging of that we must place ourselves in the position of the legislators, and must measure the time of limitation in the midst of the circumstances which surrounded them as nearly as possible; for what is reasonable in a particular case depends upon its particular facts. . . . As was said in *Jackson ex dem. Hart v. Lamphire*, 3 Pet. 280, 7 L. ed. 679: 'The time and manner of their operation [statutes of limitation], the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend upon the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment.'

Tested by the rule quoted, and considering that the purpose of the legislature as disclosed by the bank act is to wind up unsafe and unsound banks as inexpensively and speedily as possible, it does not appear to us that the limitation complained of which tends to promote that purpose, and which was primarily within the right of the legislature to enact, is open to the objection that it is unreasonable.

The consideration we have given to this matter embraces all the points as we understand them which appellant presents against the validity of this provision of the bank act, and we are satisfied that none of them is tenable. The act deals solely with a matter pertaining to the public welfare and within the police power of the state to regulate. These regulations have substantial relation to and are intended and reasonably designed to protect and safeguard the people of the state against insecure banking or the further continuance in business of such institutions of that character as have become unsafe. These regulations, while applying to the banking business alone, apply to all who are engaged in that business either as corporations or individuals; they are all within a class subject to control and regulation by the state; the regulations prescribed operate upon all without any discrimination, and within the legal rules declared for determining their validity are violative of no constitutional guaranty which the plaintiff has invoked.

The judgment appealed from is affirmed.

We concur: **Henshaw, J.; Melvin, J.**

Affirmed by the Supreme Court of the

United States, May 10, 1915, 238 U. S. 611, 59 L. ed. —, 35 Sup. Ct. Rep. 792.

Petition for rehearing denied June 16, 1913.

MISSISSIPPI SUPREME COURT.

A. K. McINNIS et al., Appts.,

v.

NEW ORLEANS & NORTH EASTERN
RAILROAD COMPANY.

(— Miss. —, P.U.R.1915D, 418, 68 So. 481.)

Railroad — compelling construction and maintenance of spurs — constitutionality.

A railroad company cannot, in view of the constitutional provision against taking property without due process of law, be compelled to construct and maintain spurs or sidings to connect industrial plants with its right of way, even upon the sole condi-

tions that they will not cause hazard to the property and trains of the company, and the cost of materials and right of way is imposed upon the applicant.

(May 31, 1915.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Forrest County in defendant's favor in an action brought to recover an amount of money expended by plaintiffs in constructing a spur track which the Railroad Commission had ordered the defendant railroad company to construct. Affirmed.

Chapter 88, Laws of 1908, which it was alleged plaintiffs fully complied with, was as follows:

That upon application to it for that purpose the Railroad Commission may order side tracks, spur tracks, loop or switch tracks to be constructed by railroad companies so as to connect their main lines with manufacturing or other industrial

Note. — Power to compel railroad to build, maintain, or connect with side track for accommodation of shippers.

For the earlier cases upon this question, see note to State ex rel. Mt. Hope Coal Co. v. White Oak R. Co. 28 L.R.A.(N.S.) 1013.

For requiring connection or joint use of property of public service corporations as a taking for which compensation must be made, see Pacific Teleph. & Teleg. Co. v. Eshleman, 50 L.R.A.(N.S.) 652, and note.

A statute providing for the compulsory construction and maintenance by a railway company at its own expense, and without a preliminary hearing, under penalty of a heavy fine for refusal, of side tracks or switches necessary to reach grain elevators, cannot be justified as an exercise of the police power, but such a statute takes the property of the railway company without due process of law, even if it operates only when the demand for such facilities is reasonable. Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989.

In St. Louis & S. F. R. Co. v. State, 27 Okla. 424, 112 Pac. 980, the court holds, following its former decisions cited in the earlier note, and Missouri P. R. Co. v. Nebraska, supra, that the Corporation Commission did not have authority to make an order requiring a railroad company to extend switching facilities to an elevator located upon its right of way, the company to pay for such facilities, except the crossings and grading, which were to be paid for by complainant.

But in St. Louis & S. F. R. Co. v. Zalondek, 28 Okla. 746, 115 Pac. 867, it is held that when the amount of business reasonably to be afforded to a railway line by a plant after a switch or spur track has been constructed from the railroad to the plant, at the expense of the owner, is sufficient

to justify it, the railway company may be required to furnish switch stands and frogs and other necessary material for making connections with the side track or spur, under reasonable terms, conditions, and regulations.

In State ex rel. Chicago, M. & P. S. R. Co. v. Public Service Commission, 77 Wash. 529, L.R.A.—, —, 137 Pac. 1057, it is held that a statute giving a Public Service Commission authority to require a railroad to build a spur track entirely upon its right of way, after a full investigation into the facts upon a written complaint filed for the purpose, the spur, though constructed by the company, to be paid for by the shipper who uses it, and though intended for the immediate use of a particular shipper or shippers, to be open to the use upon reasonable terms of all shippers who may desire to use it, is not unconstitutional as authorizing the taking of property for private use or without due process of law, distinguishing Northern P. R. Co. v. Railroad Commission, 58 Wash. 360, 28 L.R.A.(N.S.) 1021, 108 Pac. 938, on the ground that in that case the order of the Railroad Commission sought to compel the railroad company, at its own expense in whole or in part, to build a spur track off its own right of way and over private property for the exclusive use of a single shipper, which spur did not become the property of the railroad company, and could not be open to the public use because located on private property.

In State v. Chicago, M. & St. P. R. Co. 115 Minn. 51, 131 N. W. 859, under a statute which provides that railroad companies shall construct, maintain, and operate side tracks connecting their respective roads with any of the industries adjacent thereto, enumerated in the statute, of which a quarry is one, the court sustained an order of the Railroad Commission requiring a

plants, if they can be constructed without causing undue hazard to the property or trains of the railroad company; but all expenses for the right of way, grading, cross-ties, rails, spikes, fastenings, and switches required shall be defrayed, unless otherwise agreed on, by the person, company, or corporation applying for their construction.

If the applicant shall comply with such rules and regulations as are uniformly in force by the railroad company for the safe operation of similar tracks, spur tracks, loop or switch tracks situated on its lines, they shall not, after having been constructed, be removed, abandoned, or destroyed without the consent of the Commission, given after ten days' notice of the application to it for such consent, to the party or parties or their assigns upon whose application they were required to be constructed.

Further facts appear in the opinion.

railway company to run a spur track to petitioner's quarry, the work and cost of putting in the tracks to be apportioned between petitioner and the railroad company, it being held that such order did not deprive the railroad company of its property without due process of law, inasmuch as it appeared of record, by the admission of the railway company, that the petitioner was entitled to the side track, that such connection would be profitable to the railway, and that the railway company desired it for business considerations, which facts were held to distinguish the case from that of *Missouri P. R. Co. v. Nebraska*, supra; and its having been found that the switch could be put in without, in an unreasonable degree, affecting the operation or safety of trains on the main line. The court further found in answer to an objection that to construct the track would require the taking of land for a private purpose, that the taking of land upon which to lay and operate the side track from the main line to the quarry would be for a public use, for which the right of eminent domain could be exercised.

Although a siding is sought by an industrial plant for the purpose of facilitating its shipments, the function which the railroad company is required to exercise in laying and operating a siding is a public use and a part of its duty as a common carrier. *State ex rel. North Carolina Corp. Commission v. Southern R. Co.* 153 N. C. 559, 69 S. E. 621.

In *Union Lime Co. v. Railroad Commission*, 144 Wis. 523, 129 N. W. 605, the court, in answer to a contention by the railroad company that a statute authorizing the Public Service Commission to require it to establish a spur track connecting with private plants was unconstitutional, because the side tracks provided for were private and the land taken for a right of

Messrs. Currie & Currie for appellants.
Messrs. R. H. Thompson and J. H. Thompson, for appellee:

Laws of Mississippi 1908, p. 72, are violative of the due process of law clause of the 14th Amendment to the Constitution of the United States.

The statute does not authorize, nor has the Commission provided, compensation to the railroad.

Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 80 Sup. Ct. Rep. 461, 18 Ann. Cas. 989.

Cook, J., delivered the opinion of the court:

The averments of the declaration in this case, taken most favorably for plaintiffs, make this case: Plaintiffs were the owners of and operated a gravel pit somewhere near the main line of the New Orleans & North Eastern R. R. Company in Forrest county. Being unable to induce the com-

pany for such track was taken for a private, and not a public, use, said: "Such track when built becomes a portion of the trackage of the railroad. The fact that its initial cost is borne by the party primarily to be served, with provisions for subsequent equitable division of such cost, does not make it a private track, nor change the nature of its use. Over it the products of the industry find their way into the markets of the world, and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof. That these products are supplied by a single owner, or by a limited number of owners, affects the extent, and not the nature of its use,—the track is none the less a part of the avenue through which the commodities reach the public. Subject to the equitable division of initial cost, the track is at the service of the public as much as any other, and it constitutes an integral part of the railroad system. The duty to maintain and operate it rests upon the railroad. Except that it is relieved of the initial cost of right of way and construction, the track stands in the same relation to it that any other portion of its track does. The owner of the industry obtains no interest in or control over it beyond that of being served by it equally with anyone else who may desire to use it. And this is the crucial test as to whether or not the track is a private or public one. If it is open to the use of anyone who may desire, upon equal or equitable terms, and is subject to state control under general laws, it is a public track, irrespective of the degree of the probability of anyone else using it, or the extent of such use."

In *State ex rel. North Carolina Corp. Commission v. Southern R. Co.* supra, it was held that the absence from a statute which gave the Corporation Commission power to require the construction of side

pany to build a spur track to this pit, plaintiffs sought the aid of the Railroad Commission. After hearing plaintiffs' complaint the Railroad Commission made the following order, *viz.*:

The Southern Cement Building Material Company v. The New Orleans and North Eastern Railroad Company.

On this, a day of the regular July term of the Railroad Commission court, came on to be heard the application of the Southern Cement Building Material Company, a partnership composed of A. K. McInnis and P. Bechgard, against the New Orleans & North Eastern R. R. Company, a corporation engaged in the business of common carrier; the plaintiffs and defendants, being called, appeared in open court and announced ready for trial, whereupon the application was

read by the secretary of said Commission, and the testimony of both the plaintiffs and the defendant was introduced and the arguments of counsel made; and, it appearing to the Commission, after hearing all the testimony in the case and being advised in the premises, that as a matter of fact the applicants are entitled to the relief prayed for in their petition; that the applicants are a sand and gravel mining manufacturing plant; that a practical and feasible route can be found along which to extend a spur track, as prayed for by the applicants, connecting their plant with the main line of the defendant company; and, it further appearing that the construction of such a spur track is necessary to the successful operation of their said plant by the applicants, and that the construction and operation of the same would be beneficial

tracks by any railroad company to industries already established, of any provision for the exercise of the right of eminent domain, indicates clearly that industrial sidings can be ordered only when laid upon the railroad's own right of way, or when the petitioner has tendered the right of way.

Whether a proposed spur track will interfere with interstate commerce is a question of fact for the Commission and the courts to determine. *State ex rel. Chicago, M. & P. S. R. Co. v. Public Service Commission*, 77 Wash. 529, L.R.A.—, 137 Pac. 1057.

The establishment of an industrial siding under the authority of the Corporation Commission is not an interference with interstate commerce. *State ex rel. North Carolina Corp. Commission v. Southern R. Co.* 153 N. C. 559, 69 S. E. 621.

In *Southern R. Co. v. Byrum*, 135 Ga. 426, 69 S. E. 550, where it appears that a railroad company constructed a spur track to a brickmaking plant of one of the plaintiffs, under a contract by which the railroad company reserved the right to rescind it upon sixty days' notice after one year, it was held that, as to such plaintiff, the railroad company should not be enjoined from removing the spur track in accordance with the contract, as, having contracted that it might be removed, plaintiff could not complain that the railway company was proceeding to avail itself of its contractual right to remove the track; and that the injunction should likewise be refused as to other plaintiffs who had used the track and who had joined with the person with whom the contract was made in the suit, where the only claim of some of them was for a continuance of the track as a matter of convenience merely, and not for the purpose of preventing loss to them, and as to another who had established a sawmill upon the assumption that the track would be continued, where he failed to allege or establish that he did not know that the track had been put in under contract at the time that he established the mill.

In *Adikes v. Long Island R. Co.* 165 App. L.R.A.1915E.

Div. 221, 151 N. Y. Supp. 49, it appeared that defendant railroad company had constructed a switch track to plaintiff's establishment under an agreement by which plaintiff paid the cost of the switch, and the railroad company was to have the right to remove the same upon ten days' notice and the payment to the plaintiff of the cost of the part removed. Thereafter the Public Service Commissions law was enacted, which provided that in case a railroad corporation failed to install a switch connection upon due application, the Commission could order, upon petition of the shipper and hearing and investigation, the establishment and maintenance of a siding, and also, upon the application of the railroad company, could order the discontinuance of an existing switch connection. Upon a notice being served upon plaintiff of an intention to remove the siding, plaintiff brought the present suit for injunction to restrain the railroad company from removing the siding, and it was held that the statute did not overlay and nullify the agreement between the parties, but that plaintiff could apply to the Commission for a siding, and, inasmuch as in law plaintiff had no siding, because the present one existed only because the defendant was enjoined from removing it in the exercise of a legal right, a burden rested upon the plaintiff to initiate an application for a siding, and not upon the defendant to initiate an application for the removal of the siding.

In *Harnish v. Quarryville R. Co.* 246 Pa. 426, 92 Atl. 501, it is held that a bill for a mandatory injunction, brought by the owner of property abutting upon a street along which a railway track ran, to compel the railroad company to construct a side track to his property, was properly dismissed where the statute giving the railroad company the right to use the street did not include the right to construct sidings, and the city intervened and showed that the construction of such sidings would practically destroy the value of the street as a highway, although, as between the

to the defendant company as well as to the applicants; and it further appearing to the said Commission that the applicants are entitled to the extension of said spur track as a matter of law,—it is accordingly ordered and adjudged by said Commission that the defendant, the New Orleans & North Eastern R. R. Company, a corporation, be and it is hereby ordered to proceed forthwith and without unnecessary delay to construct the said spur track so as to connect the plant of the applicants with the main line of said company, under and pursuant to the terms, provisions, and conditions contained in chapter 88 of the Acts of the legislature of the state of Mississippi, enacted at the 1908 session thereof, upon compliance by the applicants for said track with all the terms and conditions of said act obligatory and binding upon them; and

it further appearing to the Commission that route No. 2, as indicated in the plat marked "Exhibit B" to the testimony of J. H. Putnam, civil engineer, and now on file among the papers in said cause, is a practical and feasible route, and that the operation of engines and trains over the same would not unduly hazard the trains and property of the defendant company, it is accordingly further ordered that said defendant company be and it is hereby ordered forthwith and without unnecessary delay to construct a spur track along said line as indicated in said Exhibit B and marked "proposed siding No. 2," upon compliance by the applicants with all the terms, provisions, and conditions of said chapter 88 of the Acts of the legislature of the state of Mississippi of 1908.

The grading, switches, rails, ties, etc., to

plaintiff and the railroad company, it may be that he had the right to insist upon a siding.

In *Canadian Northern R. Co. v. Robinson*, 43 Can. S. C. 387, which was an action for damages by a shipper whose side track had been taken up by the railway company, it appears that the Railway Board required the railway company to replace the side track.

In *State ex rel. Chicago, M. & P. S. R. Co. v. Public Service Commission*, 77 Wash. 529, L.R.A.—, 137 Pac. 1057, the court, in answer to a contention by the railroad company that a certain spur should not be established, because if it could be, then every industrial plant along the road might rightfully demand one, says: "The answer is of course so, if the demand, after a hearing on notice, be found reasonable in view of all the surrounding conditions, including safety and the number, proximity, and accessibility of other spurs; and of course not, if, on such hearing, the demand be found unreasonable from any cause."

Where a railroad chose to comply with an order of a Railroad Commission to construct a side track to a warehouse at the expense of the owner of the warehouse, instead of applying for a suspension of the order, it could not thereafter review the proceedings of the Commission and reverse the order on the ground that the order was in its nature a continuing one. *Great Northern R. Co. v. Public Service Commission*, 69 Wash. 579, 125 Pac. 948.

In *Cox v. Pennsylvania R. Co.* 240 Pa. 27, 87 Atl. 581, it is held that the refusal of the railroad to allow plaintiffs a siding connection was an undue and unreasonable discrimination against them; for which an action for damages could be sustained.

Mere ownership of land adjoining a railroad, without more, confers no right upon the adjoining landowner to have a siding furnished. *Moser v. Philadelphia, H. & P. R. Co.* 233 Pa. 259, 40 L.R.A.(N.S.) 519, 82 Atl. 362.

In *Michigan R. Commission v. Detroit & L.R.A.* 1915E.

M. R. Co. 178 Mich. 230, 144 N. W. 696, the court issued a writ of mandamus upon the petition of the Railroad Commission to enforce its order against a railway, requiring it to replace its track connecting with a track of one upon whose petition the order was granted, which track provided shipping facilities for a large amount of forest products, where it appeared that the railroad company had received such products over its line for some time and then, without notice, took up a part of the track connecting therewith, and the owner of the spur track and forest products offered to furnish a bond to indemnify the railway company for the cost of replacing the track, with interest, it being held that the intent of the statute was that the orders of the Commission should continue in force during all subsequent proceedings until modified or set aside by the Commission or by the courts, and that mandamus was the proper remedy to enforce its orders.

The right given by a statute to private enterprises to railroad side track facilities was not intended to operate, and did not operate, to cramp or curtail the police power of the state, or the right, in the exercise of such power, to order railroad tracks to be depressed, and where a city ordinance provided generally for the depression of a certain line of railroad tracks without specific mention of side tracks, the proprietors of business plants served by the side tracks were not entitled to an injunction restraining the railway company from depressing its main line, consisting of a single track, on the ground that such depression involved an abandonment of the side tracks without application to and order from the Railroad and Warehouse Commission, the remedy of such proprietors being by way of direct proceedings to enforce whatever right, if any, they may have to side track facilities after, or in view of, the depression of the main track. *Twin City Separator Co. v. Chicago, M. & St. P. R. Co.* 118 Minn. 491, 137 N. W. 193.

R. L. S.

be used in the construction of the spur track hereby ordered shall be of the same grade and character of material as is now used by the Louisiana Sand & Gravel Company and J. M. Chapman in the same locality and the present track of the Southern Cement Building & Material Company, and according to the uniform custom in building such tracks; the grade of the said spur track shall be in accordance with the profile plan of said spur track, as appears in Exhibit C, and marked "profile of proposed switch S. C. B. & M. Co."

The said railroad company shall connect the spur track hereby ordered to be constructed with their line known as the Gravel Pit Line, and upon its completion shall supply such cars and engines to the said Southern Cement Building & Material Company over said spur track as may be necessary for the handling of its said product.

Ordered July 6, 1910.

It is alleged that plaintiffs fully complied with chapter 88, Laws 1908, which required that applicants for spur tracks secure the right of way, do the grading, and furnish all the material for the building of the spur; that defendant refused to construct the spur track and to maintain same after its construction; that plaintiffs, in order to reduce their damages, then proceeded to construct and maintain the spur at their own expense. Judgment is demanded for the amount of money expended by them in doing the work which the law and the order of the Railroad Commission required the railroad company to do. The aggregate amount claimed is \$955.55.

To the declaration the defendant demurred, which demurrer was sustained. We will only consider the second and fourth grounds of demurrer, which read:

"(2) The defendant was and is under no legal duty or obligation to the plaintiff, under the act relied upon, to wit, chapter 88 of the Acts of the legislature of Mississippi of 1908, or said order of said Railroad Commission, to construct or maintain, at its own expense, the said spur track, or without due compensation being first made to it."

"(4) Because the said act of the legislature, if by its terms it requires the defendant railroad company, upon the order of said Railroad Commission, to construct the said spur track at its own expense, or without due compensation being first made to it, or to pay or reimburse to the plaintiff the cost and expenses of constructing the same, is in violation of the Constitution of the United States, and particularly the 14th Amendment thereof, in that it deprives the defendant of its property with-

out due process of law, and denies to the defendant the equal protection of the law."

It will be observed that § 1 of the act in question confers upon the Railroad Commission the power to require railroad companies to construct, without compensation, spur tracks "so as to connect their main line with manufacturing and other industrial plants," if they can be constructed without causing hazard to the property or trains of the railroad company. The only limitation upon the power of the Commission is to see that the property and trains of railroad companies are not put in peril by the proposed spur tracks, and, after finding that the spur track can be constructed without this hazard, the statute gives it the power to require the railroads to construct the same at their own expense. It may be that the cost of construction and maintenance may be out of all proportion to the extra revenue which may be obtained therefrom; it may be that there is no real necessity for the proposed spur; nevertheless the Commission is empowered to require its construction, and the railroad company must obey its order, unless it can be shown that its property or trains will be hazarded thereby.

We think that statutes of this character are condemned as unconstitutional by the Supreme Court of the United States in *Missouri P. R. Co. v. Nebraska*, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989.

In this case, as in the case decided by the Supreme Court of the United States, "this statute has no reference to special circumstances. It is universal in its terms." Any person or corporation engaged in the business of manufacturing, or in any other industrial pursuit, may secure, at the hands of the Railroad Commission, an order compelling any railroad company to construct a spur to serve his or its plant, whether it be reasonable to do so or not, if the Railroad Commission is of opinion that the spur track will not endanger the property or trains of the railroad company.

In *Missouri P. R. Co. v. Nebraska*, supra, the reason for the condemnation of the state law under consideration is expressed thus: "We are of opinion that this statute is unconstitutional in its application to the present cases, because it does not provide indemnity for what it requires."

We think that the law in question is also condemned in *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130.

The statutes of Nebraska, so far as the principles involved in this case are concerned, are, in all essentials, the same character of legislation as our statute under

review. Our statute puts it in the power of a Commission to require railroad companies to spend money for the purpose of giving special facilities to certain named industries without requiring any indemnity for the money expended, and without regard to the circumstances, if, in the opinion of the Commission, the property or trains of the railroad will not be endangered thereby. No matter what may be the special circumstances or necessities of the case, the Railroad Commission is given the power to order the construction of a side track to any or all industrial plants. What the Commission may or may not do in each case is immaterial, inasmuch as their statutory power is unlimited except as above noted. It may be that the Commission will, as suggested, consider each application for a spur track upon its merits, and with due regard for the public welfare, but such are not the requirements of the statute. The statute is the thing to be considered, and it is under the authority of the statute the Commission may take the property of railroads without requiring due compensation, and this statutory power is just what the Supreme Court of the United States has declared to be in contravention of the Constitution of the United States. An unconstitutional grant of power cannot be exercised in a constitutional manner.

We do not feel justified in adopting counsel's criticisms of the reasoning of the Supreme Court in the Nebraska cases. Our judgment as to the correctness of the Supreme Court's decisions is of little consequence. Upon all questions involving a construction of the national Constitution the decisions of the Supreme Court of the United States are as binding on state courts as are the mandates of their own state Constitutions. However, it seems to us that the reasoning in the cases cited is unanswerable. The action of the trial court is approved, and the cause is dismissed.

Affirmed.

Suggestion of error overruled.

NEBRASKA SUPREME COURT.

STATE OF NEBRASKA EX REL. PETER
O'SHEA, Appt.,
v.
FARMERS' IRRIGATION DISTRICT et al.

(— Neb. —, 152 N. W. 372.)

Statute — construction — rules.

1. A statute which is not uncertain or

Headnotes by FAWCETT, J.
L.R.A.1915E.

ambiguous will be construed according to its terms.

Bridge — duty to build.

2. Section 3438, Rev. Stat. 1913, which requires the owner, or those in control, of an irrigation ditch or canal, to construct and maintain a bridge across the same, for the free and convenient use of the owner of lands lying on both sides of such ditch or canal, applies in all cases, whether the owner owned it at the time the ditch or canal was built, or subsequently acquired by purchase tracts lying on different sides, which together constitute one farm.

Irrigation company — bridge — property rights.

3. And such statute is not void as authorizing the taking of the property of the ditch company without compensation. The burden so imposed upon ditch companies constitutes a part of the consideration for the valuable right of eminent domain given to such companies by other provisions of the statute.

(April 16, 1915.)

APPEAL by relator from a judgment of the District Court for Scotts Bluff County, denying a writ of mandamus to compel the respondent Irrigation District to construct a bridge across its irrigation canal. Reversed.

The facts are stated in the opinion.

Mr. William Morrow for appellant.

Messrs. F. A. Wright and J. G. Motherhead, for appellees:

The statute does not apply where the canal is constructed over the land with consent of the landowner.

Brearely v. Delaware & R. Canal Co. 20 N. J. L. 236; Perry v. Pennsylvania R. Co. 55 N. J. L. 178, 26 Atl. 829.

It does not apply to cases where the necessity for a road occurs at a time subsequent to the building of the canal.

Note. — Duty as to establishment and maintenance of bridges over canals or ditches for use of adjoining owners.

Cases where the bridge is to carry a railroad are not included.

For duty as to highway crossing ditch constructed by drainage district, see the note to Richardson County ex rel. Sheehan v. Drainage Dist. 43 L.R.A. (N.S.) 695.

See Harding v. Funk, 8 Kan. 315, for a case holding that an owner on a stream raised by the building of a dam under a milldam statute was entitled to show that he would be put to additional expense in making a crossing over the stream on his own land after the dam was erected and the stream raised in consequence thereof.

Canals.

For cases relating to canals, see the note to Mullen v. Lake Drummond Canal & Water Co. 61 L.R.A. 865. No later cases have been found as to canals.

Franklin County v. Wilt, 87 Neb. 132, 31 L.R.A.(N.S.) 243, 126 N. W. 1007; Boise City v. Boise City Canal Co. 19 Idaho, 717, 115 Pac. 505; Madera v. Madera Canal & Irrig. Co. 159 Cal. 749, 115 Pac. 936.

If the statute applies, it is unconstitutional as class legislation, in that it does not apply to all waterways, but only to irrigation ditches.

State ex rel. Dawson County v. Farmers' & M. Irrig. Co. 59 Neb. 1, 80 N. W. 52; Richardson County ex rel. Sheehan v. Drainage Dist. 92 Neb. 776, 43 L.R.A.(N.S.) 695, 139 N. W. 648, Ann. Cas. 1914A, 546; Althaus v. State, 94 Neb. 780, 144 N. W. 799.

Respondent is given no compensation for the taking of its property for the purpose of the road by relator.

Missouri P. R. Co. v. Cass County, 76 Neb. 396, 107 N. W. 773; Chicago, B. & Q. R. Co. v. Douglas County, 1 Neb. (Unof.) 247, 95 N. W. 339.

And it takes the property of respondent for private purposes.

Welton v. Dickson, 38 Neb. 767, 22 L.R.A. 496, 41 Am. St. Rep. 771, 57 N. W. 559.

Fawcett, J., delivered the opinion of the court:

Relator is the owner of land in the south half of section 18, township 22, range 53, in Scotts Bluff county, which land is traversed by the irrigation canal of respondent. About 120 acres lie north and about 26 acres south of the canal. Relator brought this action in the district court for

Scotts Bluff county, to compel respondent to construct a bridge across the canal so as to connect the two tracts of land. From a judgment denying a writ and dismissing his action, he appeals.

The action is based on the provisions of § 3438, Rev. Stat. 1913, viz.: "Any person, company, corporation, or association constructing a ditch or canal through the lands of any person, company, or corporation having no interest in said ditch or canal shall build such ditch or canal in a substantial manner so as to prevent damage to such land; in all cases where necessary for the free and convenient use of lands on both sides of the ditch or canal by the owner or owners of such lands, the owner or those in control of such ditch shall erect substantial and convenient bridges across such canal or ditch, and they shall erect and keep in order suitable gates at the point of entrance and exit of such ditch through any inclosed field."

The case turns upon the construction to be given to the words "in all cases," immediately following the semicolon. Does the requirement of the section, beginning with those words, relate to lands owned by one person and located on both sides of the ditch at the time the ditch was constructed, or does it relate as well to cases subsequently arising, where one person becomes the owner of lands on both sides? In 1906 the Tri-State Land Company, being the then owner of the entire tract of land,

The company constructing a canal "will be liable to erect and maintain a bridge for the benefit of a private individual whose land is severed by the construction of the canal." 1 Farnham, Waters, 486, 487.

Ditches.

A number of cases have arisen in Illinois some under a drainage statute requiring farm bridges, and others where there was no statutory requirement. The statute referred to provided that "there shall be constructed at least one bridge or proper passageway over each open drain, where the same crosses any inclosed field or parcel of land, and the cost of construction thereof shall be charged as part of the cost of construction of such drain, and such bridge or passageway shall be maintained by the commissioners from the district funds: Provided, the commissioners may contract with the owners of land crossed by such drain to maintain such bridge or crossing."

Under this statute it has been held that a drainage district is required to bridge a ditch when it acquires by condemnation the right to enter upon land lying outside of the district for the purpose of deepening and enlarging a natural channel through an enclosed field so as to obtain a sufficient outlet to its drains and ditches, and thereby renders such channel impassable. Union L.R.A.1915E.

Drainage Dist. v. O'Reilly, 132 Ill. 631, 24 N. E. 426.

The same was held where, by agreement between two districts, one allowed the other to clear and enlarge a natural channel which theretofore had not needed a bridge. People ex rel. Biggs v. Lake Fork Drainage Dist. 231 Ill. 435, 83 N. E. 172.

In the O'Reilly Case, supra, it was also held that the owner was not concluded by the condemnation proceedings, for they did not include the element of damage from lack of a bridge, as, under the statute, the cost and maintenance of bridges was charged on the district as "part of the cost of construction of said drain."

A claim for a bridge under the statute is barred by limitation in five years, beginning a reasonable time after the ditch is finished, where the statute covering the case provides that "all civil actions not otherwise provided for shall be commenced in the five years next after the cause of action accrued." Meents v. Reynolds, 62 Ill. App. 17.

But where a bridge erected by the commissioners had been destroyed, and after the statute had run against a claim for a new bridge the commissioners had much enlarged the ditch, it was held that a new right to have a bridge built arose in favor of the landowner. Stroud v. Union Drainage Dist. 157 Ill. App. 427.

constructed the irrigation canal through the same. In 1909 it sold the canal, together with the right of way, to the Farmers' Mutual Canal Company. After the construction of the canal, and after the sale of the same to the Farmers' Mutual Canal Company, the Tri-State Land Company sold the lands in controversy to relator; and at a still later date the Farmers' Mutual Canal Company conveyed the canal and right of way to the respondent Farmers' Irrigation District. It is contended by respondent, in support of the judgment of the district court, that, the canal having been built by the Tri-State Company while it owned the land, the canal was constructed through the lands of a corporation having an interest in the canal, and that, such being the fact, the land, by virtue of such interest in its owner at that time, was thereby excluded from the provisions of the statute, and hence the statute does not apply to the present case; that the statute does not apply where the canal is constructed over the land with the consent of the landowner, and does not apply to cases where the necessity for a bridge occurs at a time subsequent to the building of the canal. We are unable to concur in this construction. The statute is not ambiguous, and must therefore be construed according to its terms. It provides, first, the manner in which the ditch or canal shall be constructed, viz., "in a substantial manner so as to prevent damage to such land." This

provision relates solely to the manner of construction. The words "through the lands of any person, company, or corporation" do not limit the statute to cases where the ditch cuts through the land of some individual owner, leaving land on both sides thereof. They apply as well to lands abutting on a ditch. As to all such lands, as well as those actually penetrated or cut in two by a ditch, it must be constructed "in a substantial manner so as to prevent damage to such land." The statute then proceeds to say what shall be done so as to enable owners of lands on both sides of the ditch to have "the free and convenient use" of such lands, and provides that, where it is necessary for the free and convenient use of lands on both sides of the ditch, the owner of the ditch shall erect substantial and convenient bridges across its canal or ditch "in all cases." The words "in all cases" mean precisely the same, whether they be used, as in the statute, immediately preceding the requirement for the construction of bridges, or immediately following such requirement. If the legislature had intended this requirement to relate only to conditions as they existed at the time the ditch was constructed, it would have been an easy matter to have said so. We see no difference between the rule which should be applied in construing this statute and that applied to the statute requiring railway companies to construct farm cross-

Under a different statute which did not contain any provision requiring the commissioners to construct farm bridges at the expense of the district, it has been held that the commissioners were not required to construct them (the McCaleb Case, *infra*); that the expense of a necessary bridge was an element of the owner's damage (the Pinkstaff Case, *infra*); and that the drainage district might stipulate to build a bridge and thus reduce the damage (the Smith Case, *infra*).

Thus it was held erroneous to instruct the jury that the commissioners were required to construct bridges, and that the jury might take into consideration any benefits arising from the construction of such bridges in estimating damages or benefits. *McCaleb v. Coon Run Drainage & Levee Dist.* 190 Ill. 549, 60 N. E. 898.

In *Pinkstaff v. Allison Ditch Dist.* 213 Ill. 186, 72 N. E. 715, it was held that where a bridge is necessary to give the owner full access to his land on both sides of a proposed drainage ditch, the expense of such a bridge is an element of his damages, the court citing the *McCaleb Case*, *supra*.

Following the *Pinkstaff Case*, it was held in *Smith v. Claussen Park Drainage & Levee Dist.* 229 Ill. 155, 82 N. E. 278, that the condemning drainage district had a right, as lessening the damages, to stipulate to

build a bridge on the severed land of the owner.

The *Smith Case* was cited in *Anderson v. Clay County*, 154 Iowa, 497, 133 N. W. 653, an action for damages for the construction of an open ditch across the plaintiff's land, where the court, in approving the refusal to strike out the allegations of the board of supervisors that they had provided for the construction of approaches to the ditch by excavating the banks so that stock would have access thereto and passageway across the same, said: "Our attention has not been called to any statute requiring the construction of crossings or approaches by the drainage district, but the impaired convenience and use of the land on account of the ditch are proper elements to be considered in estimating the damages which will be suffered by the landowner; and we see no reason why it is not proper to show, in an action of this kind, that the drainage district is willing to stand the expense of constructing adequate approaches or crossings, and has made provision therefor in the contract for the construction of the ditch. If such crossings or approaches are necessary to the convenient use of the land, and the drainage district constructs them, or agrees with the landowners to construct them where needed, their cost should not thereafter become an element of the damages recovered by the landowner." *B. B. B.*

ings across their roads. The principle involved is the same in each.

This question is fully and very ably discussed in *Quantock v. Missouri, K. & T. R. Co.* 117 Mo. App. 469, 74 S. W. 1034, where, in construing the section of the Missouri statute providing for farm crossings by railroads, it is held that the statute was not intended to apply only to farms which the road divided by its original construction, but should apply where farming lands on both sides of the road are afterwards owned by a single proprietor. This decision was by the Kansas City court of appeals; and being in conflict with a construction of the same statute by the St. Louis court of appeals in *Stumpe v. Missouri P. R. Co.* 61 Mo. App. 357, the case was transferred to the supreme court for final determination. That court, in 197 Mo. 93, 94 S. W. 978, expressly disapproved the holding of the St. Louis court of appeals and affirmed the holding of the Kansas City court. The syllabus reads: "The statute requiring a railroad, which cuts a farm in two, to construct a crossing for the benefit of the owner, applies in all cases where the farm lies on both sides of the railroad, whether the owner owned it at the time the railroad was built, or subsequently acquired by purchase tracts lying on different sides, which together constitute one farm."

The supreme court cuts its own opinion short, thus (197 Mo. 96): "We do not deem it necessary to enter upon a further discussion of this subject, because in the opinion of our Kansas City court of appeals, by Ellison, J., in this case, reported in 117 Mo. App. 469, everything is said that is necessary to be said, and we adopt that as our opinion."

Emulating the example of the Missouri supreme court, we adopt the reasoning of Ellison, J., of the Kansas City court, as being applicable to the case at bar, and sound in principle.

Franklin County v. Wilt, 87 Neb. 132, 31 L.R.A.(N.S.) 243, 126 N. W. 1007, strongly relied upon by respondent, does not sustain its contention. In that case the county sought to compel the respondents, who were the owners of a private mill, to construct a bridge over their millrace at a point on their private grounds, where it was intersected by a public road laid out seven years after the construction of the millrace. That such a case is clearly distinguishable from the one at bar is shown by the language of Judge Root, as follows (87 Neb. 134): "There is nothing in the record to indicate that the mill to which the raceway is appurtenant is a toll mill, L.R.A.1915E.

that any right exercised in operating it was acquired by the exercise of the right of eminent domain, or that the respondents' business is affected in any manner with a public interest."

It is next urged that, if the statute under consideration applies to a case like the one at bar, it is unconstitutional, for the reason that it is class legislation in that it does not apply to all waterways, but only to irrigation ditches; and *State ex rel. Dawson County v. Farmers' & M. Irrig. Co.* 59 Neb. 1, 80 N. W. 52, is cited in support of the contention. We think counsel are in error. The cited case holds that § 58, art. 2, chap. 93a, Comp. Stat. 1897, is void, but also holds that the section is not so intimately connected with the remainder of the act as to be incapable of separation from it, and announces the oft-repeated rule that, when a separable part of a statute is adjudged to be null, the remainder continues in force, unless the unconstitutional part was an inducement to the adoption of the measure, which the opinion holds was not true in that case. Turning, then, to chapter 93a, supra, and eliminating from it § 58, thus held void, we find that § 51 is in the exact language of the section of the statute we are now considering, and under which the present action was instituted. We are unable to see how § 51, supra, is vulnerable to the holding made as to § 58.

It is next said that the section under consideration is void, for the reason that respondent is given no compensation for the taking of its property for the purpose of a bridge, and that it would take the property of respondent for private purposes. The answer to this contention is that the burden thus imposed upon a ditch company constitutes a part of the consideration for the valuable right of eminent domain given it by the statute. Without such right it could not build its ditch through a man's farm. Having accepted the right to build, regardless of the wish of the landowner, it must take that right burdened with the conditions imposed by the legislature. The question of the weight of the burden is one for the consideration of that body, and not for the court.

The judgment of the District Court is reversed, and the cause remanded, with directions to grant a peremptory writ of mandamus, as prayed in relator's petition.

Rose and Sedgwick, JJ., not sitting.

Petition for rehearing denied June 7, 1915.

NEVADA SUPREME COURT.

EX PARTE GEORGE OLIVER ROBERSON.

(— Nev. —, 149 Pac. 182.)

Extradition — abandonment of wife — act not within jurisdiction.

One is not a fugitive from justice subject to extradition, who, after leaving his wife with her consent and going to another state with no intention of abandoning her, forms within the latter state such intention, although he is subsequently indicted for such abandonment at his former domicile.

(June 5, 1915.)

APPPLICATION for a writ of habeas corpus to secure petitioner's release from custody to which he had been committed under an extradition warrant. Petitioner discharged.

The facts are stated in the opinion.

Mr. George Springmeyer, for petitioner.

Messrs. Sweeney & Moorehouse and George B. Thatcher, Attorney General, for respondents.

McCarran, J., delivered the opinion of the court:

This is an original proceeding in habeas corpus.

Petitioner relates, among other things, that he is unlawfully imprisoned, detained, confined, and restrained of his liberty by J. H. Stern, as sheriff of Ormsby county, Nevada, and J. D. Hillhouse, as chief of police of the city of Reno, Washoe county, Nevada, and by J. C. Crawford, as sheriff of Martin county, state of North Carolina, who has been deputized and appointed by the governor of the state of North Carolina as the agent of that state for the purpose of taking and carrying petitioner from the state of Nevada to the state of North Carolina.

Petitioner relates that he is a citizen and resident of the state of Nevada; and the admitted facts are that on the 25th day of February, 1915, the governor of the state of Nevada made and executed an executive warrant pursuant to a requisition issued by the governor of North Carolina; such re-

quisition declaring petitioner to be a fugitive from justice from that state, by reason of the fact that the grand jury of the superior court of Martin county, North Carolina, had filed an accusation in that court, wherein petitioner was charged with the crime of having deserted his wife and child in said county of Martin, state of North Carolina.

The accusation, as filed by the grand jury of Martin county, in part is as follows: "The jurors for the state upon their oath present: That Ollie Roberson, late of the county of Martin, on the — day of December, in the year of our Lord 1913, with force and arms, at and in the county aforesaid, unlawfully and wilfully did abandon his wife, one Lucy Roberson, without providing adequate support for her, the said Lucy Roberson, and the child which he, the said Ollie Roberson, left on the care of his said wife, had heretofore begotten, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state; and the jurors aforesaid, upon their oath aforesaid, do further present: That the said Ollie Roberson, late of the county of Martin, then on the — day of December, 1913, at and in the county aforesaid, while living with his wife, one Lucy Roberson, continually from said last-mentioned day, while so living with his wife, to the time of taking of this inquisition, unlawfully and wilfully did omit, neglect, and refuse to provide adequate support for his said wife, the said Lucy Roberson, and did fail to support her and the child which he, the said Ollie Roberson, upon the body of his said wife had begotten."

It appears from the record that petitioner was arrested by J. D. Hillhouse, chief of police of the city of Reno, upon the executive warrant of the governor of this state, and thereafter, by some proceeding the nature of which is unknown to us, was admitted to bail; and later, having come into Ormsby county, surrendered himself to the sheriff of this county and sued out this writ.

It is suggested by counsel for respondent in this case that petitioner is not entitled to invoke the writ of habeas corpus, for the

Note. — Aside from the case of *Ex parte Kuhns*, 50 L.R.A. (N.S.) 507, decided by the same court, there seems to be no exact precedent for the question considered in *Ex parte Roberson*, as to the extradition of a husband who, after leaving the state of the domicile, forms the intention of abandoning his wife. The decisions in those cases are but specific applications of the general rule—as shown in the notes to *State v. Hall*, 28 L.R.A. 289, and *Ex parte Williams*, 51 L.R.A. (N.S.) 668, on the general question, L.R.A. 1915E.

Who are fugitives subject to extradition? —that one cannot be a fugitive from justice subject to interstate extradition, unless he was present in the state at the time of the commission of the crime with which he is charged.

The right of the court of the asylum state to examine, in interstate extradition proceedings, the sufficiency of papers charging the offense for which the return of the fugitive is demanded, is discussed in the note to *Re Waterman*, 11 L.R.A. (N.S.) 424.

reason that he is in custody by his own voluntary act in having surrendered to the sheriff of this county. However that may be, even though we should hold this point well taken, petitioner would be entitled to institute original proceedings in the court against anyone in whose custody he might hereafter be held, until the merits of the matter involving the legality of the proceedings under which and by reason of which he was restrained of his liberty had been finally determined by this court. Hence, a holding by this court at this time to the effect that petitioner was not entitled to the writ by reason of the fact that he was in voluntary custody would only entail additional proceedings and thus delay. For this reason, we have concluded that a decision upon this suggested phase is not essential.

This court has in the past established a rule that a person held upon an executive warrant may, upon habeas corpus proceedings, show that he is not a fugitive from justice; and upon such showing being made, we have held that he is entitled to be discharged.

In the Eureka Bank Habeas Corpus Cases, 35 Nev. 80, 126 Pac. 655, 129 Pac. 308, this court said: "After all, should not the controlling question be whether there is any probable cause or evidence to indicate that the accused has committed any act within the jurisdiction of the court which the law makes criminal, or is there anything for it to try, or any evidence available to the state which would indicate the commission of an offense or sustain a conviction? Under our statute, with its liberal provisions for taking testimony and for the examination of the merits of the case, we see no reason why we should not investigate it to the bottom and discharge any of the petitioners if justice requires, or if it is clear that they have not committed any acts within the county or the jurisdiction of the court which the law makes criminal."

Again, in the case of *Re Kuhns*, 36 Nev. 487, 50 L.R.A. (N.S.) 507, 137 Pac. 83, we referred to the Eureka Bank Habeas Corpus Cases approvingly, and held that a person who was not within a demanding state at the time an alleged crime was committed could not be a fugitive from justice, unless he be an accessory.

In the case at bar, it is the contention of petitioner, and his contention in this respect is borne out by the testimony of his wife, that he never lived with his wife in Martin county, North Carolina. The facts disclosed by the testimony of the wife of petitioner are to the effect that they were married on the last day of June, 1913, by a L.R.A.1915E.

justice of the peace, near Williamston, in Martin county, North Carolina; that the marriage took place between 7 and 8 o'clock in the morning; that immediately after the marriage the couple went by automobile from the residence of the justice of the peace to the town of Williamston, boarded a train at that place, and continued on to Raleigh, Wayne county, North Carolina, and there continued to live together as man and wife until December 17, 1913, on which date petitioner, according to his wife's testimony, went to Hamlet, North Carolina; and on the following day, to wit, December 18th, his wife left their former place of abode in Raleigh and returned to the home of her mother and grandfather, with whom she had lived prior to the marriage in Martin county, North Carolina.

Testimony of the wife of petitioner also discloses that prior to his departure from Raleigh for Hamlet, petitioner employed a physician in the city of Raleigh for the benefit of his wife, she being shortly to be delivered of a child.

With reference to her leaving Raleigh on the 18th of December, the day following the departure of her husband, Mrs. Roberson testified as follows:

Q. You say it was your mother or grandfather who sent you the money with which to come home?

A. My mother.

Q. Will you please, mam, tell me when it was she sent it to you?

A. The week before. I came the next.

Q. Do you mean to say that a week before you came home that your mother had sent you money to come home on?

A. Yes, sir; that is what I mean to say.

Q. Then you knew a week before he left you in Raleigh that you were coming home?

A. Yes, sir; I knew that I intended to.

Taking this testimony, as given by the wife of petitioner, together with petitioner's own statement under oath in this court, it appears that the separation which occurred on December 17th in Raleigh, Wayne county, North Carolina, between petitioner and his wife, was a mutual separation, whether it was at that time intended to be permanent or otherwise. There is nothing in the testimony of the wife of petitioner, as it is before us, from which we could infer that her act in separating from petitioner was other than a voluntary one on her part. They had lived in Raleigh from the date of their marriage, to wit, the last day of June, 1913, until the 17th day of December of the same year. He had attended school to some extent during their stay in Raleigh.

The testimony of petitioner is to the effect that from Hamlet he went to Pough-

keepsie, New York, and there attended school, later coming to Nevada and entering the university of this state, in which institution it appears he is still enrolled as a student.

From all the facts and circumstances as they are presented by the record, we can come to no other conclusion than that the separation which took place between petitioner and his wife on the 17th day of December, 1913, in Raleigh, Wayne county, was an act of mutual assent, the wife leaving the former abiding place and returning to the home of her parent and guardian without any intimation, so far as the record discloses, of trouble or discord occurring between the parties.

There is a circumstance in the record, as disclosed from the testimony of the wife of petitioner, which might lead us to believe that petitioner had expected his wife to remain in Raleigh, at least until after her child was born. This might be inferred, as we have already said, from the fact that petitioner had engaged a Raleigh physician to attend his wife on the occasion of her confinement. Whether or not it be a proper inference to draw from this that petitioner expected his wife to remain in Raleigh is immaterial.

The money on which Mrs. Roberson returned to her former home was, according to her statement, sent to her by her mother; and it is not unfair to presume, from the record, and especially from the testimony of the wife of petitioner, that the money was sent to her by her mother for the very purpose toward which she applied it, namely, to pay her expenses back to her mother's home. We refer to these facts only to support the conclusion which to us appears manifest from the record; that the separation between petitioner and his wife was mutual; and the separation constituting the act of desertion, if desertion it be, occurred in the city of Raleigh, Wayne county, North Carolina, and not in Martin county.

It was suggested in the oral argument by attorney for respondent that the jurisdiction of the superior court of any county in North Carolina was not confined exclusively to matters occurring within that county, and hence the jurisdictional power of the superior court of Martin county was sufficient to give that court control over this case, even though the desertion took place in Wayne county.

It is our judgment that respondent's position in this respect is untenable, in view of the decision of the superior court of North Carolina in the case of the State v. Patterson, 5 N. C. (1 Murph.) 443, wherein the court said: "The superior court of one county has no jurisdiction of criminal of-

fenses committed in another county, although both of the counties belonged to the same judicial district before the act of 1806, chap. 2. . . . The legislature intended to give to the several county superior courts, jurisdiction over the same offenses and civil matters which the district superior courts had in 1806, limiting the territory within which that jurisdiction was to be exercised to the county in which the court was held. In all indictments, it must appear that the offense charged was committed within the territorial jurisdiction of the court."

It has been held almost uniformly by the courts in which this subject has been considered, that only the courts of the state in which the abandonment occurred have jurisdiction. *State v. Weber*, 48 Mo. App. 503; *State v. Miller*, 90 Mo. App. 131; *State v. Shuey*, 101 Mo. App. 438, 74 S. W. 369; *People v. Flury*, 173 Ill. App. 640; *People ex rel. Sagazei v. Sagazei*, 27 Misc. 727, 59 N. Y. Supp. 701; 21 Cyc.; *Re Kuhns*, supra.

While, as we have already stated, the courts have held almost universally that the courts of the state in which the act of abandonment took place have jurisdiction to try parties accused, the question as to whether or not a party can be successfully tried and convicted in one county, where the abandonment admittedly took place in another, has not been before the courts to such an extent as to crystallize any particular rule relative to jurisdiction. Notwithstanding this, however, courts in which this matter has been considered have held quite uniformly that prosecution for the crime of abandonment must take place in the county where the parties resided at the time of their separation.

Says the supreme court of Nebraska in the case of *Cuthbertson v. State*, 72 Neb. 727, 101 N. W. 1031: "It is quite immaterial where the first act of separation occurs, if such act is followed by a wilful refusal to support at the place previously provided by the husband and considered by them as their home. The county in which the home is fixed the venue of the offense."

To the same effect is the case of *People ex rel. Vitan v. Vitan* (Ct. Gen. Sess.) 8 N. Y. Crim. Rep. 25, 10 N. Y. Supp. 909.

Speaking upon this subject in a case where the state made a similar contention to that made by respondent here, the supreme court of Minnesota said: "If the contention of the state be correct, then the wife may, by taking up her residence in any county in the state she may elect, make the crime ambulatory, and render the husband guilty of felony therein, although he may never have been within such county."

That she cannot so do is too obvious to justify any discussion of the proposition, for this case does not fall within the limited class of cases in which a party may become liable to punishment in a particular jurisdiction while his personal presence is elsewhere,—for example, circulating a libel in a county in which he is not personally present.” *State ex rel. Delevan v. Justus*, 85 Minn. 114, 88 N. W. 415.

Said the court in *Com. v. Douglas*, 2 Lanc. L. Rev. 179, speaking upon a similar subject: “If she (the wife) voluntarily moves into another county, it does not change his (the husband’s) domicile, or make him a deserter for not following her.”

As we have already observed, in the case at bar, the only place where petitioner and his wife established a domicile or lived together as man and wife was in the city of Raleigh, Wayne county, North Carolina. The desertion, if any, took place in that city and county. The offense with which petitioner stands accused by the indictment found in Martin county, North Carolina, is not a continuing offense, nor one which might be termed transitory or ambulatory in its nature.

In the case of *Re Waterman*, 29 Nev. 288, 11 L.R.A.(N.S.) 424, 89 Pac. 291, 13 Ann. Cas. 926, this court went at length into the subject of its right to review on habeas corpus the sufficiency of the papers on which the executive warrant is issued; and in that case the court, speaking through Mr. Justice Sweeney, said: “While I believe in paying the highest respect to the requisition warrants of chief executives of other states, and believe that any executive would hesitate before issuing his requisition warrant knowingly without believing that sufficient and legal grounds existed on which to ask the extradition of a defendant, yet my regard for the sacred writ of habeas corpus is such that I would jeopardize the retention of the good will of anyone rather than nullify, modify, or limit in any way the prerogatives of this great writ,—the greatest bulwark of our liberty,—and which gives every person under our glorious government the right to appeal to a judicial tribunal when restrained of his liberty, and privileged to have the party in whose custody he is detained directed to produce his body, and show by what right or authority of law he is depriving him of his liberty.”

At another place in the opinion, the learned justice said: “If a defendant is unjustly accused, or illegally charged, or restrained of his liberty, certainly justice L.R.A.1915E.

demands that he should not be deprived of his liberty or removed hundreds or thousands of miles, as the case may be, there to wait or be put on trial on an illegal charge. The sooner his detention, if it be illegal, is so ascertained, the better.”

The right of this court to go behind the executive warrant and inquire into the validity of the papers upon which or by reason of which the executive warrant issued was emphasized in the case of *Re Waterman*, supra. There is no question going to the validity of papers or proceedings preliminary to the issuance of an executive warrant for one charged as being a fugitive from justice more vital or significant to the whole proceeding than the jurisdiction of the court or tribunal out of which the original accusation, information, or indictment issued. If it be an undisputed fact, such as we deem it in this case, that the court out of which the indictment issued was and is devoid of jurisdiction to try the petitioner on the accusation thus filed; if, as a matter of fact, that court, under the rule laid down by the supreme court of the state of North Carolina (*State v. Patterson*, supra), would be precluded, for want of jurisdiction, from passing judgment on this defendant on the indictment thus filed, in view of the fact that the offense, if any, was not committed within the county in which that court has jurisdiction,—we find ourselves constrained to reassert the rule so ably laid down by the learned jurist in the case of *Re Waterman*, supra, to the effect that justice demands that the petitioner should not be removed hundreds or thousands of miles, as the case may be, there to wait the action of a court which must eventually declare its own lack of jurisdiction.

It is well-settled law that a person sought to be extradited may show upon a proceeding in habeas corpus that he is not a fugitive from justice. In the recent case of *Re Kuhns*, 36 Nev. 487, 50 L.R.A.(N.S.) 507, 137 Pac. 83, we held that where the petitioner at the time of leaving the state of Pennsylvania was not in default under the statute of that state “making it a misdemeanor for a husband and father to desert and neglect to support his wife or child,” his subsequent neglect, while a citizen of another state, to support his family in the demanding state, would not render him a fugitive from justice therefrom.

Subject to some possible exceptions, within which this character of case does not fall, it is the general rule that a person must be within a state at the time of

the commission of acts constituting the offense in order to become a fugitive from justice.

Petitioner is indicted under a section of the Criminal Code of North Carolina (Revisal 1905, § 3355), which provides: "If any husband shall wilfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor."

It appears from the evidence introduced upon the hearing of this case without conflict, that the petitioner was under eighteen years of age at the time of his marriage, and is still a minor; that the petitioner was at such time, ever since has been, and is now, without means and dependent upon his father for support; that after the marriage, defendant and his wife, who was near his own age, went to live at Raleigh, where petitioner attended school; that it was the desire of petitioner's father that petitioner complete his education, and it would seem to have been the understanding of all parties that petitioner was to complete his education at his father's expense before assuming the burdens of providing for his family; that, after residing some months at Raleigh, it was mutually agreed between petitioner and his wife that petitioner should go to Poughkeepsie, New York, and continue his studies there at his father's expense; that at the time of petitioner's departure for Poughkeepsie, the relations of the parties were harmonious and so continued for some time thereafter; that at the time petitioner left the state of North Carolina he had no intention of permanently separating from his wife or abandoning her; that if petitioner formed an intent to abandon his wife and child, such intent was formed some considerable time after he had left the state of North Carolina.

This case in some respects is *sui generis*, but from the fact that the petitioner left the state of North Carolina under the circumstances disclosed without conflict in the evidence, I am of the opinion that he is not a fugitive from justice within the law of extradition, and is entitled to his discharge.

From the foregoing it follows that the writ of habeas corpus heretofore issued by this court should be perpetuated, and that petitioner should be discharged from custody.

It is so ordered.

Norcross, Ch. J., and Coleman, J.:

We concur in the order, and in so much of the foregoing opinion as holds that petitioner is not a fugitive from justice.
L.R.A.1915E.

OKLAHOMA SUPREME COURT.
(Division No. 1.)

OKLAHOMA NATIONAL LIFE INSURANCE COMPANY, Plff. in Err.,

v.

MARY C. NORTON.

(— Okla. —, 145 Pac. 1138.)

Insurance — accident — death from shooting.

1. Where a provision of an accident insurance policy provided that in the event of the death of the insured by bodily injury effected exclusively by external, violent, or accidental means, resulting in death within a given time, and the insured was killed by gunshot wounds inflicted by another, the insurer is liable to the beneficiary to the extent named in the particular provision of the policy, without regard to whether such fatal injury be deemed accidental or not; the character of the bodily injuries covered by the policy being in the disjunctive.

Same — disconnected provisions in policy — construction.

2. Where a different and disconnected provision of the policy creates a liability only where death was caused within a fixed time by bodily injury effected exclusively by external, violent, and accidental means, while riding in or on any vehicle, or public or private conveyance, and where a lesser sum was payable, the provision of the policy named in the former paragraph remains unaffected by the conjunctive feature of the latter, creating liability only when the in-

Headnotes by SHARP, C.

Note. — Interchangeableness of "or" and "and" in provision in insurance policy relating to cause or circumstances of death.

Obviously, one of these words cannot be substituted for the other in construing such a provision, unless it is apparent from the context that the substitution will effectuate the actual intention of the parties. There appears to be but one other case in point involving a provision like that referred to in the title.

In that case Gentry v. Standard Life & Acci. Ins. Co. 6 Ohio S. & C. P. Dec. 114, an accident policy provided for a stated indemnity "for loss by severance of one entire hand and one entire foot," and it was contended that the word "and," used in such provision, should read "or;" but it was held that the succeeding words, "or of two entire hands or two entire feet, or the entire loss of sight of both eyes," controlled the construction and showed a distinct purpose to stipulate for the severing of two limbs, and not one limb or part of two limbs before the indemnity should accrue, and the insured was denied a recovery under this provision where he had suffered a loss of only one hand.

jury was by external, violent, and accidental means.

Same — "or" and "and."

3. As used in the policy of insurance, the words "or" and "and" cannot be treated as interchangeable, so as to create a liability only where death was the result of external and violent means, but accidental as well. The character of the injuries named in the policy being in the disjunctive, it is sufficient that death resulted from external and violent means alone.

Same — substitution.

4. As used in the policy of insurance, there is nothing in the context rendering dubious the use of the conjunction "or." Hence the conjunctive particle "and" cannot be substituted in its stead.

Same — favoring insured.

5. If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured.

(January 12, 1915.)

ERROR to the District Court for Grady County to review a judgment in plaintiff's favor in an action brought to recover a balance alleged to be due on a life insurance policy. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Ledbetter, Stuart, & Bell, for plaintiff in error:

The death of the deceased, George D.

Somewhat analogous are the following cases:

The interchangeableness of "or" and "and" was in question in *Paskusz v. Philadelphia Casualty Co.* 146 App. Div. 763, 131 N. Y. Supp. 421, involving the construction of a credit insurance bond or policy, it being held that an "old customer" who had a rating as to credit, but not as to capital, was not embraced in the class described in a provision limiting the insurer's liability as to old customers to those who possess a "capital and credit rating" other than as specified in a certain schedule, notwithstanding the contention of the insured that "or" should be substituted for "and." The court said: "There are undoubtedly cases in which the courts, in order to carry into effect the evident intention of the parties, will substitute 'or' for 'and,' or *vice versa*; but there must be something in the context or elsewhere to clearly indicate what the intention of the parties was. Otherwise, to make such a change would be to make a new contract for the parties. We find nothing in the context, or in any other circumstances, to suggest that the parties intended to make any other contract than that which is indicated by the language which they used. That language clearly excludes the indebtedness of Annie Scheinberg from the protection of the policy, and, in so far as the L.R.A.1915E.

Norton, did not result from accidental means, and defendant was not liable for the amount for which judgment was rendered against it by the trial court.

Taliaferro v. Travelers' Protective Asso. 25 C. C. A. 494, 49 U. S. App. 275, 80 Fed. 368; *Fidelity & C. Co. v. Carroll*, 5 L.R.A. (N.S.) 657, 74 C. C. A. 409, 143 Fed. 271, 6 Ann. Cas. 955; *American Acci. Co. v. Carson*, — Ky. —, 30 S. W. 879.

The policy as a whole shows that the double indemnity should accrue in case of death arising from external, violent, and accidental means. This is the only reasonable reading of the policy.

Witherspoon v. Jernigan, 97 Tex. 98, 76 S. W. 445; *Richmond v. Woodward*, 32 Vt. 833; *Chemical Nat. Bank v. Colwell*, 14 Daly, 361; *Willoughby v. Willoughby*, 5 N. H. 244; *Quinby v. Merritt*, 11 Humph. 439; *Gibson v. Tyson*, 5 Watts, 34, 13 Mor. Min. Rep. 72.

Messrs. Welborne & Durbin, for defendant in error:

The policy provides that in the event of the death of the insured by bodily injury effected exclusively by external, violent, or accidental means, and occurring within ninety days after such injury, the amount payable thereunder shall be \$10,000.

The court cannot bodily lift the word "or" from the policy and insert in lieu thereof the word "and."

29 Cyc. 1506, 1507; *Givens v. Kendrick*, 15 Ala. 648; *Armstrong v. West Coast L.*

judgment appealed from rests upon a claim for indemnity against her indebtedness, it is erroneous."

This case was reversed in 213 N. Y. 23, 106 N. E. 749, Ann. Cas. 1915A, 652, on the ground that under the facts of the case the customer in question had a "capital and credit rating" within the meaning of the policy.

In *Douglass v. Eyre*, Gilp. 147, Fed. Cas. No. 4,032, the court, in refusing to construe the word "or" as used in articles describing a voyage to mean "and," said: "'Or' is a disjunctive particle; in its ordinary signification it corresponds to 'either' meaning one or the other of two, but not both. If this meaning be taken from it, I know of no other word in our language to supply it. It is true that this word has sometimes been construed to mean 'and,' when this was clearly necessary to give effect to some clause in a will, or some legislative provision. In such cases it has been forced out of its proper meaning to effect these purposes; but never to change a contract at pleasure. Indeed, it seems to be an inaccurate expression to say that 'or' can ever mean 'and.' It should rather be said that, for strong reasons, and in conformity with a clear intention, 'or' has been changed or removed, and 'and' substituted in its place."

J. T. W.

Ins. Co. 41 Utah, 112, 124 Pac. 518; Corona v. Merriam, 20 Cal. App. 231, 128 Pac. 769; San Diego County v. Bryan, 18 Cal. App. 460, 123 Pac. 347; Witherspoon v. Jernigan, 97 Tex. 98, 76 S. W. 445; People ex rel. Westchester F. Ins. Co. v. Davenport, 91 N. Y. 585; Standard Acci. Ins. Co. v. Hite, 37 Okla. 305, 46 L.R.A. (N.S.) 986, 132 Pac. 333; American Acci. Co. v. Carson, 99 Ky. 441, 34 L.R.A. 301, 59 Am. St. Rep. 473, 36 S. W. 169.

Mr. Norton's death was accidental within the meaning of the policy.

1 Cyc. 227-229; McCarty v. New York & E. R. Co. 30 Pa. 247; Schneider v. Provident L. Ins. Co. 24 Wis. 28, 1 Am. Rep. 157, 7 Am. Neg. Cas. 174; Lovelace v. Travelers' Protective Asso. 126 Mo. 104, 30 L.R.A. 209, 47 Am. St. Rep. 638, 28 S. W. 877; Supreme Council, O. C. F. v. Garrius, 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818; Fidelity & C. Co. v. Johnson, 72 Miss. 333, 30 L.R.A. 206, 17 So. 2; Accident Ins. Co. v. Bennett, 90 Tenn. 256, 25 Am. St. Rep. 685, 16 S. W. 724; American Acci. Co. v. Carson, 99 Ky. 441, 34 L.R.A. 301, 59 Am. St. Rep. 473, 36 S. W. 169; Railway Mail Asso. v. Moseley, 127 C. C. A. 427, 211 Fed. 1.

Sharp, C., filed the following opinion:

On February 10, 1910, the Oklahoma National Life Insurance Company issued to George Daniel Norton its policy of insurance, payable, at his death, to his wife, Mary C. Norton, according to the conditions named in the policy. The part of the policy pertinent to the issues presented is as follows:

"The Oklahoma National Life Insurance Company, a stock company, of Oklahoma City, U. S. A., will pay (\$5,000) five thousand dollars, to Mary C. Norton, wife of the insured (the beneficiary hereunder), at its home office in Oklahoma City, U. S. A., immediately upon receipt of due proof of the death of George Daniel Norton (the insured hereunder), if such death occur during the continuance of this contract.

"Or, in the event of the death of the insured by bodily injury effected exclusively by external, violent, or accidental means, and occurring within ninety days after such injury, the amount payable hereunder, as above, shall be (\$10,000) ten thousand dollars.

"Or, in the event of the death of the beneficiary, first above named, the same being caused by bodily injury effected exclusively by external, violent, and accidental means while riding in or on any vehicle, or public or private conveyance, and occurring within ninety days after such injury, the company will pay to the insured L.R.A.1915E.

hereunder (\$5,000) five thousand dollars immediately upon receipt of due proofs of the death of said beneficiary, in the manner designated."

On August 18, 1913, the insured sustained a bodily injury effected exclusively by external and violent means, said injury being a gunshot wound inflicted by another, and from which bodily injury the insured immediately died. On the day following the burial of the insured, the insurer paid the beneficiary under the policy the sum of \$5,087.55, in full settlement and satisfaction of the policy. Thereafter the present action was brought to recover on the double indemnity provision of the policy, and at the trial plaintiff obtained judgment in the sum of \$5,150.

But two errors are urged in the brief of counsel for plaintiff in error: (1) That, the death of the insured not resulting from accidental means, under the terms of the policy, the insurer was not liable for any sum other than that already paid and upon which the settlement was based; (2) that the court erred in not construing the double indemnity provision of the policy, fixing the increased liability of the company in the event of the death of the insured by bodily injury "effected exclusively by external, violent, or accidental means," to read "effected exclusively by external, violent, and accidental means." The former assignment of error is dependent upon the latter, and, in view of our conclusion, the latter alone need be considered.

It is conceded that the insured met his death in the manner already indicated; hence, that it was effected by violent means. If the disjunctive conjunction "or" is to be given its common meaning, there can be no question of plaintiff's right of recovery, for it is only by the substitution of the word "and" for "or" that the insurer can hope to avoid liability. Under the evidence, even were the substitution permitted, we are not prepared to say that a recovery could be defeated, though we are not to be understood as determining this question. It is true that the word "or" is sometimes made to signify "and," when it appears to be consistent with the meaning employed by the context, and in order to carry out the manifest intent of the contracting parties, but not where such interpretation would be inconsistent with any intent which can be reasonably gathered from the connection in which the word is used, from the whole undertaking, or from the light of surrounding circumstances. The words are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious. Witherspoon v. Jernigan, 97 Tex. 98, 76 S. W. 445.

Ordinarily, the words "and" and "or" are in no sense convertible terms, but, upon the contrary, are used in the structure of language for purposes entirely variant. *Robinson v. Southern P. Co.* 105 Cal. 526, 28 L.R.A. 773, 38 Pac. 94, 722; *Corona v. Merriam*, 20 Cal. App. 231, 128 Pac. 769; *State v. Beauchleigh*, 92 Mo. 490, 4 S. W. 666; *Starr v. Flynn*, 62 Kan. 845, 62 Pac. 659; *Kennedy v. Haskell*, 67 Kan. 612, 73 Pac. 913; *McGraw v. Davenport*, 6 Port. (Ala.) 319, 332; *Ayers v. Chicago Title & T. Co.* 187 Ill. 42, 56, 58 N. E. 318.

In *State ex rel. Caldwell v. Hooker*, 22 Okla. 712, 98 Pac. 964, recognizing this rule, it was said by this court, referring to the statute there under consideration: "It must be assumed that the legislature could not have intended to have produced an absurd or unreasonable result, or to express itself in terms which would defeat the very objects of the enactment; and, when such effect would follow a literal construction of the statute, the conjunctive particle may be read as disjunctive, or *vice versa*, on the theory that the word to be corrected was inserted by inadvertence or clerical error. While they are not treated as interchangeable, and should be followed when their accurate reading does not render their sense dubious, their strict meaning is more readily departed from than that of other words, and one may be read in place of the other to carry out the evident legislative intent. 2 Lewis's Sutherland, Stat. Constr. 2d ed. § 397; Black, Interpretation of Laws, p. 153; 6 Words & Phrases, 5003 et seq.; *Bryan v. Menefee*, 21 Okla. 1, 95 Pac. 472."

See also *Williams v. United States*, 17 Okla. 28, 87 Pac. 647.

There is nothing in the context of the policy authorizing or warranting this court in changing the plain and unambiguous language employed by the insurer. The fact that, under another provision of the policy the word "and" is employed, instead of the word "or," affords no reason for its use in the provision in question. The other provision is wholly separate and apart from that portion of the policy under which the liability in this case attached. There but a \$5,000 recovery could be had, and the bodily injury causing death must have been effected exclusively by external, violent, and accidental means, and sustained while the beneficiary, and not the insured, was riding in or on a vehicle, or public or private conveyance. As shown at the outset of this opinion, the two provisions of the policy pertain to different classes of injuries, sustained under dissimilar conditions, and are attended by different liabilities on the part of the insurer. If on account of the L.R.A.1915E.

use of the word "and" in the latter provision we are to change the language of the policy in the former provision to read "and," we can see no good reason why with equal force, in another case, it might not be urged that in the second provision the word "and" be substituted by the use of the word "or." It is difficult to conceive of language less uncertain, and clearer of but one construction than that employed. Having but one meaning, it is the plain duty of the court to give it force and effect. To hold otherwise would be not to construe the language of the policy, but to change it. *United States v. Fisk*, 3 Wall. 445, 18 L. ed. 243.

The argument of counsel for plaintiff in error, referring to the printed statements on the front and back pages of the policy, calling attention to the four special benefits, is entitled to little consideration, for the reason that in our opinion such statements form no part of the policy. Neither can they be used in construing the policy, for, as we have already seen, there is nothing to construe. If the terms of the policy are onerous, it was the fault only of the company which had prepared, adopted, and used the form. It must be, and is, charged with knowledge of the meaning of the language employed by it. However, even were we mistaken in our conclusion that the printed statements form no part of the policy, it would avail plaintiff in error nothing; for to give consideration to said printed statements would, at most, only tend to make doubtful when and in what event the insurer would be liable on the double indemnity provision of its policy. Where such is the case, and where the meaning of the policy of insurance is ambiguous, or where the language employed may be fairly susceptible of different constructions, it will be most strictly construed against the insurer, and that construction adopted which is most favorable to the insured. *Taylor v. Insurance Co. of N. A.* 25 Okla. 92, 138 Am. St. Rep. 906, 105 Pac. 354; *Capital Fire Ins. Co. v. Carroll*, 26 Okla. 286, 109 Pac. 535; *Southern Surety Co. v. Tyler & S. Co.* 30 Okla. 116, 120 Pac. 936; *Standard Acci. Ins. Co. v. Hite*, 37 Okla. 305, 46 L.R.A.(N.S.) 986, 132 Pac. 333; *Union Acci. Co. v. Willis*, — Okla. —, L.R.A. 1915D, 358, 145 Pac. 812.

The death of the insured having been effected exclusively by violent and external means, and occurring within ninety days from the time the fatal injury was received, and the provisions of the policy with regard to the character of the injuries covered by it being clearly in the disjunctive, it is unnecessary to determine whether his death

was also accidental within the meaning of the policy.

The foregoing settles the only issues presented here.

For the reasons indicated, the judgment of the trial court should be affirmed.

Petition for rehearing denied January 30, 1915.

OKLAHOMA SUPREME COURT.

OKLAHOMA PORTLAND CEMENT COMPANY, Plff. in Err.,
v.

C. W. SHEPHERD.

(— Okla. —, 147 Pac. 1031.)

Master and servant — care of machine — daily repair.

1. The general rule that the master owes to his servant the duty to keep an appliance used by the latter in order, and that he cannot delegate the duty so as to escape responsibility, does not apply to defects arising in its daily use, which are not of a permanent nature and do not require the help of skilled mechanics to repair, but which may easily be, and are usually, remedied by the workmen, and to repair which proper and suitable materials are furnished.

Same — repair of sacks — fellow servants.

2. In a suit in damages for personal injuries, where the evidence discloses that plaintiff was an employee in the packing department of defendant's cement plant, and that the employees in the sacking department are charged with the duty of repairing the sacks used in the packing department, and were furnished suitable material for that purpose, and where it was the duty of plaintiff to tie the sack in question after it had been filled at a chute and passed to him by another employee, and where in so doing, owing to the failure of the employees in the sacking department to repair two holes near the top of the sack, two jets of hot cement escaped therefrom, owing to the plaintiff's weight upon the

sack, and which struck him in the eyes and injured him, held, that plaintiff and the employees charged with the duty of repairing the sack were fellow servants, and that a demurrer to the evidence should have been sustained.

(December 22, 1914.)

ERROR to the District Court for Pontotoc County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Currie & Duncan and Blanton & Andrews, for plaintiff in error:

The duty which was assigned to the sack repairers was a delegable duty, and there was no liability on the part of the defendant.

Van Winkle Gin & Mach. Co. v. Brooks, 29 Okla. 351, 116 Pac. 908; Mollhoff v. Chicago, R. I. & P. R. Co. 15 Okla. 540, 82 Pac. 733; Ruemmeli-Braun Co. v. Cahill, 14 Okla. 422, 79 Pac. 260; Northern P. R. Co. v. Peterson, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; Central R. Co. v. Keegan, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; Kansas & A. Valley R. Co. v. Waters, 16 C. C. A. 609, 36 U. S. App. 31, 70 Fed. 28; Northern P. R. Co. v. Hambly, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; Alaska Treadwell Gold Min. Co. v. Whelan, 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40; New England R. Co. v. Conroy, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85, 7 Am. Neg. Rep. 182; Northern P. R. Co. v. Dixon, 194 U. S. 338, 48 L. ed. 1006, 24 Sup. Ct. Rep. 683, 16 Am. Neg. Rep. 645; Atchison & E. Bridge Co. v. Miller, 71 Kan. 13, 1 L.R.A.(N.S.) 682, 80 Pac. 18; American Bridge Co. v. Seeds, 11 L.R.A.(N.S.) 1041, 75 C. C. A. 407, 144 Fed. 605; 2 Labatt, Mast. & S. § 585; Beesley v. F. W. Wheeler & Co. 103 Mich. 196, 27 L.R.A. 266, 61 N. W. 658; Fraser v. Red River Lumber Co. 45 Minn. 235, 47 N. W. 785; Rogers Locomotive & Mach. Works v. Hand, 50 N. J. L. 464, 14 Atl. 766; Webber v. Piper, 109 N. Y. 496,

Headnotes by TURNER, J.

Note. — The principles underlying the questions involved in this case have been treated at great length in the note in 54 L.R.A. 33. See especially pages 106 et seq., as to nonliability for negligence of co-servants in respect to the details of the work; pages 116 et seq., as to negligence of co-servants involving merely the use of instrumentalities; pages 136 et seq., as to negligence of co-servant in respect to the preparation or structural modification of instrumentalities or their parts; and pages 153 et seq., as to negligence of co-servants whose duty it is to keep the instrumentalities in proper repair. L.R.A.1915E.

pair. And see also note in 4 L.R.A.(N.S.) 220, as to duty of master to furnish safe appliances as affected by the fact that the defective appliances are prepared by the fellow servants.

The analogous question as to the liability of the master for injury from defect in simple tools is discussed in the notes to Vanderpool v. Partridge, 13 L.R.A.(N.S.) 668; Sheridan v. Gorham Mfg. Co. 13 L.R.A.(N.S.) 687; Parker v. W. C. Wood Lumber Co. 40 L.R.A.(N.S.) 832, and Sivley v. Nixon Min. Drill Co. 51 L.R.A.(N.S.) 337.

17 N. E. 216; *Cregan v. Marston*, 126 N. Y. 568, 22 Am. St. Rep. 854, 27 N. E. 952; *Hussey v. Cogger*, 112 N. Y. 614, 3 L.R.A. 559, 8 Am. St. Rep. 787, 20 N. E. 556; *Johnson v. Boston Tow-Boat Co.* 135 Mass. 209, 46 Am. Rep. 458; *Wellman v. Oregon Short-Line & U. N. R. Co.* 21 Or. 530, 28 Pac. 625; *Porter v. Silver Creek & M. Coal Co.* 84 Wis. 418, 54 N. W. 1019; *Murphy v. Boston & A. R. Co.* 88 N. Y. 146, 42 Am. Rep. 240; *Hall v. United States Canning Co.* 76 App. Div. 475, 78 N. Y. Supp. 617; *Connolly v. Hall & G. Constr. Co.* 117 App. Div. 387, 102 N. Y. Supp. 599; *Tilley v. Rockingham County Light & P. Co.* 74 N. H. 316, 67 Atl. 946; *Vogel v. American Bridge Co.* 180 N. Y. 373, 70 L.R.A. 725, 73 N. E. 1, 17 Am. Neg. Rep. 689; *Agresta v. Stevenson*, 112 App. Div. 367, 98 N. Y. Supp. 594; *Forbes v. Dunnavant*, 198 Mo. 193, 95 S. W. 934; *Curran v. Manhattan R. Co.* 118 App. Div. 347, 103 N. Y. Supp. 351; *Miller v. American Bridge Co.* 216 Pa. 559, 65 Atl. 1109; *Phoenix Bridge Co. v. Castleberry*, 65 C. C. A. 481, 131 Fed. 175; *Bedford Belt R. Co. v. Brown*. 142 Ind. 659, 42 N. E. 359; *Hogan v. Smith*, 125 N. Y. 774, 26 N. E. 742; *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017; *Larsen v. De Daux*, 11 Idaho, 49, 81 Pac. 600, 18 Am. Neg. Rep. 363; *Byrnes v. New York, L. E. & W. R. Co.* 113 N. Y. 251, 4 L.R.A. 151, 21 N. E. 50.

The petition is fatally defective because it fails to show that the sack repairers were performing any non-delegable duties of the master, and all servants of a master are presumed to be fellow servants until the contrary is shown.

Labatt, Mast. & S. p. 1729; 26 Cyc. 1394; *Dwyer v. American Exp. Co.* 82 Wis. 307, 33 Am. St. Rep. 44, 52 N. W. 304; *Davis v. Muscogee Mfg. Co.* 106 Ga. 126, 32 S. E. 30; *Kerr v. Crown Cotton Mills*, 105 Ga. 510, 31 S. E. 166; *Woodward Iron Co. v. Cook*, 124 Ala. 349, 27 So. 455; *Alabama G. S. R. Co. v. Carroll*, 97 Ala. 126, 18 L.R.A. 433, 38 Am. St. Rep. 163, 11 So. 803; *Smoot v. Mobile & M. R. Co.* 67 Ala. 13; *Browne v. King*, 40 C. C. A. 545, 100 Fed. 561; *Carolan v. Southern P. Co.* 84 Fed. 84; 1 *Bailey, Personal Injuries*, § 259; *Helling v. Schindler*, 145 Cal. 303, 78 Pac. 710, 17 Am. Neg. Rep. 177; *Fortin v. Manville Co.* 128 Fed. 642; *Pittsburgh. C. C. & St. L. R. Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 218, 660; *Higgins v. Missouri P. R. Co.* 104 Mo. 413, 16 S. W. 409; *State use of Zier v. Chesapeake Beach R. Co.* 98 Md. 35, 56 Atl. 385; *Joliet Steel Co. v. Shields*, 134 Ill. 209, 25 N. E. 569; *Hovis v. Richmond & D. R. Co.* 91 Ga. 36, 16 S. E. 211; *Bell v. Globe Lumber Co.* 107 La. 725, 31 So. 994; *Boyer v. Eastern R. Co.* 87 Minn. L.R.A.1915E.

367, 92 N. W. 326, 12 Am. Neg. Rep. 496; *Kitchen Bros. Hotel Co. v. Dixon*, 71 Neb. 293, 98 N. W. 816, 15 Am. Neg. Rep. 600; *Di Marcho v. Builders Iron Foundry*, 18 R. I. 514, 27 Atl. 328, 28 Atl. 661; *Whitwam v. Wisconsin & M. R. Co.* 58 Wis. 408, 17 N. W. 124; *Dwyer v. American Exp. Co.* 55 Wis. 453, 13 N. W. 471.

All those engaged in the common service of the master, receiving compensation from the same source, though working in different branches of the department, but whose efforts tend to the accomplishment of the common purpose, are fellow servants.

Pfeiffer v. Dialogue, 64 N. J. L. 707, 46 Atl. 772, 8 Am. Neg. Rep. 90; *Dewey v. Parke, D. & Co.* 76 Mich. 631, 43 N. W. 644; *Lindvall v. Woods*, 41 Minn. 212, 4 L.R.A. 793, 42 N. W. 1020, 16 Am. Neg. Cas. 200; *Marsh v. Herman*, 47 Minn. 537, 50 N. W. 611; *Maher v. McGrath*, 58 N. J. L. 469, 33 Atl. 945, 16 Am. Neg. Cas. 717; *Benn v. Null*, 65 Iowa, 407, 21 N. W. 700; *Kelly v. Detroit Bridge Works*, 17 Kan. 558; *Kennedy v. Spring*, 160 Mass. 203, 35 N. E. 779; *O'Connor v. Neal*, 153 Mass. 281, 26 N. E. 857; *Dahlke v. Illinois Steel Co.* 100 Wis. 431, 76 N. W. 362; *Hefferen v. Northern P. R. Co.* 45 Minn. 471, 48 N. W. 1, 16 Am. Neg. Cas. 254; *Kehoe v. Allen*, 92 Mich. 464, 31 Am. St. Rep. 608, 52 N. W. 740; *Rawley v. Colliau*, 90 Mich. 31, 51 N. W. 350; *Dewey v. Detroit, G. H. & M. R. Co.* 97 Mich. 329, 22 L.R.A. 292, 37 Am. St. Rep. 348, 56 N. W. 756; *Ford v. Lake Shore & M. S. R. Co.* 117 N. Y. 638, 22 N. E. 946; *Lellis v. Michigan C. R. Co.* 124 Mich. 37, 70 L.R.A. 598, 82 N. W. 828; *Gorman v. Woodbury*, 173 Mass. 180, 53 N. E. 373; *Perry v. Rogers*, 157 N. Y. 251, 51 N. E. 1021, 5 Am. Neg. Rep. 68; *McC Campbell v. Cunard S. S. Co.* 144 N. Y. 552, 39 N. E. 637; *Kimmer v. Weber*, 151 N. Y. 417, 56 Am. St. Rep. 630, 45 N. E. 860, 1 Am. Neg. Rep. 156; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905; *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521, 16 Am. Neg. Cas. 820; *McCosker v. Long Island R. Co.* 84 N. Y. 77; *Brick v. Rochester, N. Y. & P. R. Co.* 98 N. Y. 211; *Loughlin v. State*, 105 N. Y. 159, 11 N. E. 372; *Klos v. Hudson River Ore & Iron Co.* 77 App. Div. 566, 79 N. Y. Supp. 156; *Hall v. United States Canning Co.* 76 App. Div. 475, 78 N. Y. Supp. 617; *Wagner v. New York C. & St. L. R. Co.* 76 App. Div. 552, 78 N. Y. Supp. 696; *Bagley v. Consolidated Gas Co.* 13 Misc. 6, 34 N. Y. Supp. 187; *O'Brien v. American Dredging Co.* 53 N. J. L. 291, 21 Atl. 324; *Maher v. Thropp*, 59 N. J. L. 186, 35 Atl. 1057; *Curley v. Hoff*, 62 N. J. L. 758, 42 Atl. 732, 5 Am. Neg. Rep. 668; *McLaughlin v. Camden Iron Works*, 60 N. J. L. 557, 38 Atl. 677, 4 Am.

Neg. Rep. 69; Knutter v. New York & N. J. 129 Mass. 268, 37 Am. Rep. 343; McGinty v. Athol Reservoir Co. 155 Mass. 183, 29 N. E. 510; Miller v. Southern P. Co. 20 Or. 285, 26 Pac. 70; Norfolk & W. R. Co. v. Houchins, 95 Va. 398, 64 Am. St. Rep. 791, 28 S. E. 578; Webb v. Richmond & D. R. Co. 97 N. C. 387, 2 S. E. 440; Callan v. Bull, 113 Cal. 593, 45 Pac. 1017.

The master is not required at all hazards to indemnify the servants against injuries arising in the course of their labor, but to exercise only ordinary care to prevent such injuries.

Kansas & A. Valley R. Co. v. Waters, 16 C. C. A. 609, 36 U. S. App. 31, 70 Fed. 28; Hussey v. Cogger, 112 N. Y. 614, 3 L.R.A. 559, 8 Am. St. Rep. 787, 20 N. E. 556; Johnson v. Boston Tow-Boat Co. 135 Mass. 209, 46 Am. Rep. 458; Hall v. United States Canning Co. 76 App. Div. 475, 78 N. Y. Supp. 617; Curran v. Manhattan R. Co. 118 App. Div. 347, 103 N. Y. Supp. 351; Miller v. American Bridge Co. 216 Pa. 559, 65 Atl. 1109; Phoenix Bridge Co. v. Castleberry, 65 C. C. A. 481, 131 Fed. 175; Larsen v. Le Doux, 11 Idaho, 49, 81 Pac. 600, 18 Am. Neg. Rep. 363; Northern P. R. Co. v. Dixon, 194 U. S. 338, 48 L. ed. 1006, 24 Sup. Ct. Rep. 683, 16 Am. Neg. Rep. 645; Atchison & E. Bridge Co. v. Miller, 71 Kan. 13, 1 L.R.A.(N.S.) 682, 80 Pac. 18.

Messrs. Conway O. Barton, R. C. Roiland, and Wolfe, Maxey, Wood, & Haven for defendant in error.

Turner, J., delivered the opinion of the court:

On December 7, 1909, C. W. Shepherd, defendant in error, in the district court of Pontotoc county, sued the Oklahoma Portland Cement Company in damages for personal injuries. After alleging the corporate existence of defendant, and that at the time of the injury complained of it was engaged in the manufacture of cement at Ada; that on August 5, 1909, plaintiff was in its employ as a packer in its packing department, which was a part of its cement plant at that place,—the petition substantially states that while so employed it was his duty to receive from a fellow servant sacks of cement which he had filled from a spout in that department, and to tie and truck them into a car; that the sacks so used were inspected and repaired in another part of the plant called the sacking department, and were delivered empty by the sacking crew to the packing crew with which he worked; that on said date while so engaged, and while he was in the act of pressing down, in the usual way, upon the cement in a sack so filled, preparatory to tying and removing the same, jets of hot cement shot from two holes in the sack he was using,

one of which struck him in the eyes and injured him. He charged that defendant, by the exercise of ordinary care, could have known of the existence of the holes; that his injury was the result of defendant's negligence in failing to inspect and in delivering to the packing crew for use said sack in that unsafe condition; that he was unaware of the holes, and could not have ascertained their existence by the use of ordinary care, wherefore he prayed damages, etc. After demurrer to the petition was filed and overruled, defendant answered in effect a general denial. He also pleaded assumption of risk, and that the negligence, if any, complained of, was that of a fellow servant. There was trial to a jury, and judgment for plaintiff for \$1,100, and defendant brings the case here.

Assuming the sufficiency of the petition, as the evidence discloses the injury to have resulted from the negligence of a fellow servant, the demurrer thereto should have been sustained. There is no dispute as to the facts. The evidence discloses that on the day of the injury, defendant was engaged in making Portland cement from rock, that its manufacturing department was situate on one side of two railroad tracks, and, when made, the cement was conveyed across the tracks to defendant's storeroom and from thence to its packing department, of which one Holeman was foreman, where it was placed in sacks furnished from its sacking department, of which Emry was foreman, and that these last two departments connected by an open door. The evidence further discloses that one Curtis was general foreman in charge of the entire plant, and received his orders from one Rodarmel, who received his orders from one Whitaker, defendant's superintendent. It was the custom of defendant to purchase a large number of these sacks and fill them, and, after selling the cement, the customer would return the sacks. They were then all placed in the sack department, where a crew of hands assorted them and placed those without holes in one pile, those with small holes in another, and those with large holes in a third. They were then turned and beat, and those with small holes were patched by using portions of the worthless sacks and a quantity of glue. The sacks were then placed at a point where they could be had by the packers. The defendant always had on hand plenty of sacks, and no complaint was ever made that defendant did not furnish a sufficient quantity of glue and material to make the necessary repairs. The evidence further discloses that when the cement is first made it is run into the storeroom and thence conveyed into the packing room, and, when not permitted to

lay in the storeroom for several days before sacking, contains considerable mechanical heat, and is fine and dusty. Such was its condition at the time of the injury complained of. After passing from the storeroom into the packing room the cement is there automatically weighed through a chute from which it is dumped into a sack held at the mouth of the chute. At each of these chutes worked a crew of three men. The duty of one was to fill the sacks from the chute and pass them to another of the crew to be tied. At the time of the injury plaintiff, as one of such crew, received a sack filled with hot cement, and, after shaking it down, prepared to tie it by folding the sack at the mouth and placing his weight upon it. In doing so jets of hot cement shot from two holes near the mouth of the sack, one of which struck him in the eyes and injured him. Neither the allegation or proof disclose that it required any particular skill to repair the sacks, or that defendant was negligent in selecting competent help so to do. The case was won on the theory that defendant was chargeable with the act of the sack repairers in furnishing for plaintiff's use this sack in its defective condition, because, they say, the same was an appliance, and, being such, it was the duty of the defendant to use reasonable care in maintaining it in proper repair; that such duty, being non-delegable, made of the sacking crew to whom such duty was intrusted by defendant vice principals, for whose negligence in failing so to do the defendant is liable. Such was the view of the court. The court erred. The sacking crew to whom the duty of inspecting and repairing the sack was intrusted were fellow servants of the plaintiff.

In 1 Bailey's Personal Injuries, 1st ed., after declaring the general rule to be that the master owes to his servants the personal duty to exercise reasonable care to keep and maintain appliances furnished for their use in proper repair, and that, if such duties are negligently performed and thereby the servant is injured, the master is liable even though he may have intrusted the performance of such duty to subordinates, the learned author in § 259 states: "The general rule does not apply to defects arising in the daily use of an appliance, which are not of a permanent character and do not require the help of skilful mechanics to repair, but which may easily be and usually are repaired by the workmen, and to repair which proper and suitable materials are supplied."

In support of this exception he cites, among others, the cases of Cregan v. Marston, 126 N. Y. 568, 22 Am. St. Rep. 854, 27 N. E. 952; Miller v. Chicago & G. T.

R. Co. 90 Mich 230, 51 N. W. 370; Texas & P. R. Co. v. Patton, 9 C. C. A. 487, 23 U. S. App. 319, 61 Fed. 259; Webber v. Piper, 109 N. Y. 496, 17 N. E. 216.

In *Cregan v. Marston*, supra, the facts were that plaintiff's intestate was an employee of defendant and was killed by being struck by a bucket which fell owing to the breaking of a rope, called a "fall," attached to a derrick and used in hoisting buckets of coal from the hold of a vessel. In a suit to recover damages for personal injuries causing his death, the evidence disclosed that defendant kept on hand an adequate supply of "falls" of the most approved kind; that the defective "fall" was in full view of the employees, and that its appearance would indicate from time to time whether prudence required it to be changed; that application for these "falls" were usually made by the engineer or his assistant, but any employee was at liberty to call for a new one; that a day or two before the accident the "fall" in question was examined by the engineer and deemed safe. On this state of facts the court charged the jury that it was the duty of the master to watch the rope used by its servants and note its changes of condition; that the engineer was his agent for such purpose, and that the negligence of the engineer, in case he failed so to do, was that of the master. On appeal the supreme court held such charge to be error, and in effect that the engineer was a fellow servant of the deceased, and reversed the case. In the syllabus it is said: "The general rule that a master owes to his servant the duty to keep a machine or appliance used by the latter in order, and that he cannot delegate the duty so as to escape responsibility, does not apply to defects arising in its daily use, which are not of a permanent character and do not require the help of skilled mechanics to repair, but which may easily be and are usually remedied by the workmen, and to repair which proper and suitable materials are supplied."

Miller v. Chicago & G. T. R. Co. 90 Mich. 230, 51 N. W. 370, was a suit in damages for personal injury. There a brakeman was injured by reason of the engine step being loose and out of repair, and upon which he stepped in attempting to mount the engine when moving. It was, in effect, the holding of the court that, although it may not have been the duty of the brakeman to inspect and repair the step which he was constantly using, but was the duty of the engineer, yet they were fellow servants, and plaintiff could not recover for the negligence of the engineer in failing to fix it.

In *Johnson v. Boston Tow-Boat Co.* 135 L.R.A.1915E.

Mass. 209, 46 Am. Rep. 458, the injuries of the deceased were sustained by the breaking of a "fall," substantially as in the *Cregan Case*, supra. In that case one Moore was the foreman, whose duty it was to superintend the labor of the men and the use and condition of the steam derrick in question. In stating the respective contentions the court said: "It is not disputed that, in superintending the labor of the men and the use of the apparatus, . . . , he was a fellow servant with the plaintiff; but it is contended that, in his supervision of the condition of the appliances, he was acting, not as a servant, but as a deputy master." But the court held not so, and in the syllabus said: "A corporation owning a lighter is bound to use reasonable care in maintaining in suitable condition the appliances used on board the lighter by its servants in hoisting and lowering merchandise; but if it furnishes such appliances, and employs a competent servant to see that they are kept in proper condition, it is not liable for an injury occasioned to one servant by the parting of a rope in consequence of its being used for too long a time, and after its defective condition was known to the servant whose duty it was to replace it."

In *Grams v. C. Reiss Coal Co.* 125 Wis. 1, 102 N. W. 586, deceased was in defendant's employ as a shoveler engaged in filling buckets with coal, which were conveyed for loading on cars by means of a derrick operated by other employees of the defendant. The buckets when filled were raised by a cable over a wheel at the end of a boom, and were swung to the place where dumped. After one of the buckets was raised, but before it was dumped, it fell, owing to a parting of the cable, and deceased was struck by it and killed. The contention was there, as here, that the machinery was out of repair, which the defendant should have known and repaired it; that the employees operating the derrick, and who were instructed and directed to make the repairs rendered necessary by its daily use, with material that defendant had furnished sufficient and proper to make the repairs, were vice principals for whose negligence in failing so to do defendant was liable. But the court held not so, and drew the distinction indicated as drawn in the syllabus of the case. There it is said: "A person making incidental repairs and readjustments of appliances is doing servant's duty for his master, and is a fellow servant to all employed in the common service, while those who make repairs and readjustments which are unusual in their nature and permanent in their character, or such as require a skilled mechanic, are acting in the master's place

or as vice principals to those employed with them in their master's business."

In *Webber v. Piper*, 109 N. Y. 496, 17 N. E. 216, plaintiff was injured while using a circular saw while an employee in defendant's factory. The injury was caused by the dullness of the saw. The evidence disclosed that in the prosecution of the work the defendant furnished saws so that when one was needed to be sharpened it could be replaced by another. It was the duty of another servant to make the change and sharpen and reset the saws when necessary. On the morning of the injury plaintiff notified the other servant that the saw plaintiff was using was dull, and that he needed another. The servant replied that he had not time to sharpen the saw and ordered plaintiff to go on with the work. He did so, and was injured. On this state of facts it was held on appeal that the plaintiff was properly nonsuited, as no negligence on defendant's part was shown; that defendant's duty was performed when suitable saws and proper appliances for sharpening them were furnished, and that the negligence complained of, if any, was that of a fellow servant.

In *Kimmer v. Weber*, 151 N. Y. 417, 56 Am. St. Rep. 630, 45 N. E. 860, 1 Am. Neg. Rep. 156, the court again applied this doctrine, and said: "The master is not responsible for the negligent performance of some detail of the work intrusted to the servant, whatever may have been the grade of the servant who execute such detail. If it is the work of the servant, and he volunteers to perform it, the master is not at fault in furnishing proper materials, there is no breach of duty on the part of the latter. *Cullen v. Norton*, 128 N. Y. 1, 26 N. E. 905; *Hankins v. New York, L. E. & W. R. Co.* 142 N. Y. 416, 25 L.R.A. 396, 40 Am. St. Rep. 616, 37 N. E. 466."

In *McGee v. Boston Cordage Co.* 139 Mass. 445, 1 N. E. 745, in the syllabus, it is said: "A person employed to make such ordinary repairs of a machine as its use requires to keep it in order from day to day is a fellow servant with those employed to run the machine; and, if the master employs competent servants to make such repairs, and supplies them with suitable means, he has performed his duty to those employed in running the machine."

See also *Garragan v. Fall River Iron Works Co.* 158 Mass. 596, 33 N. E. 652; *Helling v. Schindler*, 145 Cal. 303, 78 Pac. 710, 17 Am. Neg. Rep. 177; *Texas & P. R. Co. v. Patton*, 9 C. C. A. 487, 23 U. S. App. 319, 61 Fed. 259; *Whittaker v. Bent*, 167 Mass. 588, 46 N. E. 121, 1 Am. Neg. Rep. 455; *South Baltimore Car Works v. Schaefer*, 96 Md. 88, 94 Am. St. Rep. 560, 53 Atl. 665, 13 L.R.A.1915E.

Am. Neg. Rep. 78; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56; *Quigley v. Levering*, 167 N. Y. 58, 54 L.R.A. 62, 60 N. E. 276. We are therefore of opinion that defendant lived up to the full measure of its duty when it furnished plaintiff with proper fellow servants and placed in their hands suitable material with which to mend the sacks used in the business, and charged them with the duty so to do. We are also of opinion that those charged with that duty were not vice principals, but fellow servants, for whose negligence, if any, in overlooking the holes in the sack and in failing to repair them, defendant is not liable. The cause is accordingly reversed.

All the Justices concur, except Kane, Ch. J., absent and not participating.

Petition for rehearing denied April 27, 1915.

TENNESSEE SUPREME COURT.

MEMPHIS STREET RAILWAY COMPANY, Plff. in Certiorari,
v.

A. C. STRATTON.

(131 Tenn. 620, 176 S. W. 105.)

Master and servant — assault by servant — exemplary damages.

Contractual relations with the principal are not necessary to render him liable in exemplary damages for a wanton assault by his agent within the line of his duty, and therefore one whose automobile drops into an unguarded excavation made by a street railway company in a public street may recover such damages from the company for such an assault made upon him by one employed by the company to watch the excavation, because of the accident and the steps taken to extricate the machine.

(May 3, 1915.)

CERTIORARI to the Court of Civil Appeals to review a judgment affirming a judgment of the Circuit Court for Shelby County in plaintiff's favor, in an action brought to recover damages for an assault on plaintiff by defendant's servant. Affirmed.

The facts are stated in the opinion.

Mr. McKinney Barton, for plaintiff in certiorari:

The charge as to punitive damages was

Note. — The general subject of the master's liability to exemplary damages for the act of a servant is treated in the note to *Voves v. Great Northern R. Co.* 48 L.R.A. (N.S.) 35.

erroneous because, even if the servant was acting within the scope of his employment in the assault, and while the master would be liable for compensatory damages, punitive damages are not recoverable.

Nashville & C. R. Co. v. Starnes, 9 Heisk. 52, 24 Am. Rep. 296; *Illinois C. R. Co. v. Ellis, Addison* (1907) — Tenn. —; *Sedgw. Damages*, 8th ed. 537; *Sutherland, Damages*, 1141.

Messrs. *Anderson & Crabtree*, for defendant in certiorari, cited the following authorities:

Louisville & N. R. Co. v. Garrett, 8 Lea, 438, 41 Am. Rep. 640; *Haley v. Mobile & O. R. Co.* 7 Baxt. 239; *Southern R. Co. v. Terry*, 3 Tenn. C. C. A. 460; *Iron Mountain R. Co. v. Dies*, 98 Tenn. 663, 41 S. W. 860, 3 Am. Neg. Rep. 273; *Cumberland Teleph. & Teleg. Co. v. Shaw*, 102 Tenn. 313, 52 S. W. 163; *American Lead Pencil Co. v. Davis*, 108 Tenn. 252, 66 S. W. 1129; 2 *Mechem, Agency*, ¶ 2016; *Goddard v. Grand Trunk R. Co.* 57 Me. 202, 2 Am. Rep. 39, 8 Am. Neg. Cas. 316.

Williams, J., delivered the opinion of the court:

Stratton, as plaintiff, recovered in the circuit court a judgment against appellant company for \$3,000, \$1,000 of which was allowed for compensatory damages, and \$2,000 for exemplary damages.

One of the assignments of error accompanying a petition for certiorari filed for a review of the judgment of the court of civil appeals, which approved the allowance of exemplary damages, is that there is no proper basis for the support of such an allowance.

Stratton was driving his automobile at nightfall on Poplar avenue, in the city of Memphis, at the intersection of which avenue with Third street the track of the company was torn up for reconstruction purposes, and the automobile, in order to avoid street car rails piled on one side of the street, swerved to the left, and in so doing it dropped into the excavation, which was unguarded and which was lighted by no signal or warning lanterns.

While Stratton was engaged in trying to remove the machine from the excavation, the watchman of the company, one Nelson, whose place of duty was at the excavation in the street for the purpose of looking after the company's property, came up. Stratton had just procured a board from a temporary crossway over the excavation placed to allow vehicles to pass, for the purpose of aiding him in raising the automobile to the street level.

Nelson asked, with an epithet, of Stratton why he had run into the trench or hole. L.R.A.1915E.

Stratton started to get another board for the same purpose, and was in the act of lifting it when Nelson remarked with an exceedingly vile and opprobrious epithet, not fit to be mentioned here, "Don't tear up my walk," and struck Stratton, who was stooping over, in the face with his fist, and then over the head with the butt of his pistol. This was done in the presence of Stratton's friends who had been with him in the automobile and of a large number of bystanders who had been attracted by the disabled machine.

It is the contention of the company that exemplary damages are not allowable for wilful and wanton acts of one of its servants, done even in the scope of his employment, unless the person wronged stand in some contractual relation to the company, as, for example, passenger to carrier.

The appellant properly concedes that this court is committed to the doctrine, along with many others (7 *Labatt, Mast. & S.* §§ 2554-2556), that a principal is liable for such acts of his agent regardless of previous special authorization or of subsequent ratification, but urges that the true rule excludes liability for wrongs done to one who has no such contractual relation, citing *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 46 L.R.A. 549, 53 S. W. 557; *Louisville & N. R. Co. v. Garrett*, 8 Lea, 438, 41 Am. Rep. 640; *Louisville, N. & G. S. R. Co. v. Fleming*, 14 Lea, 128, 151. These cases afford examples of the general rule; they are not to be construed as imposing any such limitation on it.

In this connection appellant company criticizes the case of *Union R. Co. v. Carter*, 129 Tenn. 459, 166 S. W. 592, and along with it *Iron Mountain R. Co. v. Dies*, 98 Tenn. 655, 41 S. W. 860, 3 Am. Neg. Rep. 273, as having disregarded, as by oversight, the limitation so contended for; it being recognized that these cases on their faces support the contrary view.

We are cited no case in which this distinction for limitation is taken; and, on the other hand, many cases proceed, as do the last two cited above, upon the theory that the existence of no such relationship is requisite to the allowance of exemplary damages, among them being *Haehl v. Wabash R. Co.* 119 Mo. 325, 24 S. W. 737; *Smith v. Middleton*, 112 Ky. 588, 56 L.R.A. 484, 99 Am. St. Rep. 308, 66 S. W. 388; *Highland Ave. & Belt R. Co. v. Robinson*, 125 Ala. 483, 28 So. 28; *St. Louis, I. M. & S. R. Co. v. Hackett*, 58 Ark. 381, 41 Am. St. Rep. 105, 24 S. W. 881; *Baltimore & O. R. Co. v. Strube*, 111 Md. 119, 73 Atl. 697; and other cases cited in note to *Forrester v. Southern P. Co.* 48 L.R.A.(N.S.) 35, 44.

The chief reliance of the appellant is the

case of *Nashville & C. R. Co. v. Starnes*, 9 Heisk. 52, 24 Am. Rep. 296, the soundness of which on the point of exemplary damages has been doubted, when, as there, it is once granted that the servant was acting in the line of complainant. *Louisville & N. R. Co. v. Garrett*, 8 Lea, 438, 41 Am. Rep. 640. And it must be conceded that that case is not easily to be harmonized with our later cases, or made to consist logically in respect to the rulings therein made upon its facts.

The following observations of the supreme court of Mississippi are not without considerable force: "The judge-made law of punitive damages is not the result of logic, but of public necessity, as text writers and courts have repeatedly shown. If corporations—artificial beings who can act only through agents and servants in their varied and multitudinous and constantly recurring business dealings with the public—can never be held liable in punitive damages for the acts of their servants unless expressly authorized by them, unless expressly ratified by them, no matter how gross and outrageous the wrongful act of the servant, we feel perfectly safe in declaring that no recovery for more than mere compensatory damages will ever again be awarded against corporations. Corporations never expressly authorize their servants to beat or insult or outrage those having business relations with them, and they rarely ratify such conduct. Having, by the constitution of their being, to act solely by agents or servants, they must, as matter of sound public policy, be held liable for all the acts of their agents and servants who commit wrongs while performing the master's business and in the scope of their employment, and this to the extent of liability for punitive damages in proper cases."

There was no error in the judgment of the Court of Civil Appeals. Writ of certiorari denied.

UNITED STATES SUPREME COURT.

STANLEY FRANCIS, Plff. in Certiorari,
v.

J. HECTOR McNEAL, Trustee in Bankruptcy of the Provident Investment Bureau.

(228 U. S. 695, 57 L. ed. 1029, 33 Sup. Ct. Rep. 701.)

Bankruptcy — partnership — property of partner.

An individual partner who has not been adjudged a bankrupt may be required to turn over his separate estate for administration to the trustee in bankruptcy of the firm, where the partnership and individual L.R.A.1916E.

estates together are not enough to pay the partnership debts,—especially where such partner has not objected that he should have been put into bankruptcy, and where, assuming that the case is within the provisions of the bankrupt act of July 1, 1898, § 5A, that "in the event of one or more but not all of the members of a partnership being adjudged bankrupt," the partnership property may be administered by the partners not so adjudged, and does not come into bankruptcy at all except by consent, such partner has never objected to the administration of the firm property by the trustee.

(May 26, 1913.)

CERTIORARI to the United States Circuit Court of Appeals for the Third Circuit, to review a decree which affirmed an order of the District Court for the Eastern District of Pennsylvania, requiring petitioner to turn over his separate estate for administration to the trustee in bankruptcy of the firm of which petitioner was a member. Affirmed.

The facts are stated in the opinion.

Messrs. Charles L. Frailey and Henry J. Scott, for plaintiff in certiorari:

A partnership for the purpose of adjudication and administration in bankruptcy under the act of July 1, 1898, is an entity separate and distinct from the members which compose the partnership.

Fidelity Trust Co. v. Gaskell, 115 C. C. A. 527, 195 Fed. 865; *Mills v. Fisher*, 16 L.R.A.(N.S.) 656, 87 C. C. A. 77, 159 Fed. 897; *Re Bertenshaw*, 17 L.R.A.(N.S.) 886, 85 C. C. A. 61, 157 Fed. 363, 13 Ann. Cas. 986; *Tumlin v. Bryan*, 21 L.R.A.(N.S.) 960, 91 C. C. A. 200, 165 Fed. 166; *Re Stein*, 62 C. C. A. 272, 127 Fed. 547; *Re Mercur*, 58 C. C. A. 472, 122 Fed. 384; *Re Sanderlin*, 109 Fed. 857; *Re Solomon*, 163 Fed. 140; *Re Everybody's Grocery & Meat Market*, 173 Fed. 492; *Re Meyer*, 39 C. C. A. 368, 98 Fed. 976; *Strause v. Hooper*, 105 Fed. 590; *Re Farley*, 115 Fed. 359; *Re Barden*, 101 Fed. 553; *Re Hale*, 107 Fed. 432.

Before a partnership can be adjudged a bankrupt for an act of bankruptcy involv-

Note. — Prior to the decision in *FRANCIS v. McNEAL* there was some difference of opinion among the courts as to proceedings in bankruptcy against a partnership without calling in the individual partners. See note to *Re Bertenshaw*, 17 L.R.A.(N.S.) 886, and note to which reference is there made. *FRANCIS v. McNEAL*, cited and followed in *Re Samuels*, 132 C. C. A. 187, 215 Fed. 845, definitely settles the law on the question. See note to *Abbott v. Anderson*, L.R.A.1915F, —, on the effect of a discharge of the partnership in bankruptcy to discharge the individual partners from liability for partnership debts.

ing insolvency, it is not necessary that the individual partners be insolvent also.

Re Bertenshaw, 17 L.R.A.(N.S.) 886, 85 C. C. A. 61, 157 Fed. 363, 13 Ann. Cas. 986; Re Sanderlin, 109 Fed. 857; Re Everybody's Grocery & Meat Market, 173 Fed. 492.

Section 5A is applicable to a case where the partnership has been adjudicated a bankrupt as well as where it has not.

Re Bertenshaw, 17 L.R.A.(N.S.) 886, 85 C. C. A. 61, 157 Fed. 363, 13 Ann. Cas. 986; Re Solomon, 163 Fed. 140.

So distinct are the estates of the members of the firm from that of the firm, that when all the members of the firm are adjudged bankrupt individually, and the firm is not so adjudged, the trustee of the individual members is adjudged not to be entitled to administer the firm assets which are in the hands of the trustee under an assignment made by the firm.

Mills v. Fisher, 16 L.R.A.(N.S.) 656, 87 C. C. A. 77, 159 Fed. 897; Re Mercur, 58 C. C. A. 472, 122 Fed. 384.

The trustee of a partnership adjudicated a bankrupt because of the commission by it of any of the acts of bankruptcy defined in the act of 1898 cannot draw to himself for administration or administer in bankruptcy the estate of an unadjudicated partner.

Re Bertenshaw, *supra*; Re Stein, 62 C. C. A. 272, 127 Fed. 547; Strause v. Hooper, 105 Fed. 590.

Messrs. George Wharton Pepper and Edgar J. Pershing, for defendant in certiorari:

Subsection h of § 5 has no application whatever to a case in which the partnership has been adjudged bankrupt. It applies only to a case where less than all of the members of a partnership, but not the partnership, have been so adjudged.

Chemical Nat. Bank v. Meyer, 92 Fed. 896; Re Meyer, 39 C. C. A. 368, 98 Fed. 976.

The view of petitioner that whenever, for the purposes of adjudication, it becomes necessary to determine whether or not the partnership is insolvent, the court should merely weigh joint debts and joint assets against one another, and should disregard the individual liability of the partners to firm creditors, is inconsistent with *Re Meyer, supra*, and *Vaccaro v. Security Bank*, 43 C. C. A. 279, 103 Fed. 436.

Mr. Justice Holmes, delivered the opinion of the court:

This is a proceeding to review an order of the bankruptcy court to the effect that the separate estate of Stanley Francis should be turned over for administration to the respondent, McNeal, trustee in bank-

ruptcy of a firm of which Francis was a member. The order was made on the petition of the trustee, and was affirmed upon a petition for revision by the circuit court of appeals. 108 C. C. A. 459, 186 Fed. 481.

The facts are short. Creditors filed a petition against Latimer, Francis, and Martin, alleging that they were partners trading as the Provident Investment Bureau, and that they were bankrupt individually and as a firm. McNeal was appointed receiver of the partnership and individual estates, but Francis denied that he was a partner, and sought to have the receiver discharged. Thereupon, on March 13, 1906, it was agreed between the counsel for the receiver and for Francis that McNeal should be discharged as receiver of the individual estate of Francis; that the question whether Francis was a partner should be referred to one of the regular referees; that until the determination of that question, his counsel, Scott, should collect the rents and retain possession of his estate; and that thereafter Scott should account and turn over the funds to such person as the court might direct. On April 17 an order was made embodying the agreement and naming a referee. The referee found that Francis was a partner, and that now stands admitted for the purposes of the present decision. The firm was adjudicated bankrupt in June, 1909. McNeal was appointed trustee in July, and forthwith filed the petition upon which the order in question was made. The order declared that the separate estate of Francis was subject to administration in bankruptcy, and ordered the real estate turned over to McNeal, with leave to sell. The firm, even with the separate estates of the partners, will not be able to pay its debts in full.

Since Cory on Accounts was made more famous by Lindley on Partnership, the notion that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshaling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the bankruptcy act. Therefore ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available for that end. A judgment

could be got and the partnership debt satisfied on execution out of the individual estates.

The question is whether the bankruptcy act has established principles inconsistent with these fundamental rules, although the business of such an act is, so far as may be, to preserve, not to upset, existing relations. It is true that by § 1, the word "person," as used in the act, includes partnerships; that by the same section, a person shall be deemed insolvent when his property, exclusive, etc., shall not be sufficient to pay his debts; that by § 5a, a partnership may be adjudged a bankrupt, and that by § 14a, any persons may file an application for discharge. No doubt these clauses, taken together, recognize the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debts on partnership assets, and that of individual debts upon the individual estate. § 5g. But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula,—a guillotine for cutting off all the consequences admitted to attach to partnerships elsewhere than in the bankruptcy courts. On the contrary, we should infer from § 5, clauses c through g, that the assumption of the bankruptcy act was that the partnership and individual estates both were to be administered, and that the only exception was that in h, "in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt." [30 Stat. at L. 548, chap. 541, Comp. Stat. 1913, § 9589.]

In that case, naturally, the partnership property may be administered by the partners not adjudged bankrupt, and does not come into bankruptcy at all except by consent. But we do not perceive that the clause imports that the partnership could be in bankruptcy, and the partners not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for its continuing out. The necessary and natural meaning goes no further than that.

On the other hand, it would be an anomaly to allow proceedings in bankruptcy against joint debtors from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed, it would be a further anomaly not to distribute all the partnership assets. Yet the individual estate, after paying private debts, is part of those assets, so far as needed. § 5f. Finally, it would be a third incongruity to grant a discharge in such a case L.R.A 1915E.

from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for however much the difference between firm and member under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts for use in which the discharge is granted. If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the act, is to administer both in bankruptcy. If such a case is within § 5h, it is enough that Francis never has objected to the firm property being administered by the trustee.

If it be said that the logical result of our opinion is that the partners ought to be put into bankruptcy whenever the firm is, as held by the late Judge Lowell, in an able opinion (*Re Forbes*, 128 Fed. 137), it is a sufficient answer that no such objection has been taken, but, on the contrary, Francis has consented and agreed to hand over his property according to the order of the court. So far as *Vaccaro v. Security Bank*, 43 C. C. A. 279, 103 Fed. 436, 442, is inconsistent with the opinion of the majority in *Re Bertenshaw*, 17 L.R.A.(N.S.) 886, 85 C. C. A. 61, 157 Fed. 363, 13 Ann. Cas. 986, we regard it as sustained by the stronger reasons and as correct.

Decree affirmed.

OKLAHOMA SUPREME COURT.

A. L. WELCH, Insurance Commissioner,
Plff. in Err.,

v.

MARYLAND CASUALTY COMPANY et al.

(— Okla. —, 147 Pac. 1046.)

Insurance — foreign company — representative.

1. Part of § 3429, Rev. Laws 1910, reads: "Upon written notice by an authorized foreign insurance company of its appointment

Headnotes by RIDDLE, J.

Note. — Power of public to determine capacity or suitability of particular officer, agent, or employee of private corporation, or corporation whose business is affected with a public interest.

As to constitutionality of civil service laws, see note to *State ex rel. Buell v. Frear*, 34 L.R.A.(N.S.) 480.

This note does not cover the right of the public to prescribe general qualifications of officers, agents, or employees of corporations, such, for example, as those in *Smith*

of a suitable person," etc., the insurance commissioner shall, "if the facts warrant it," etc. Held, the words "suitable person" relate to the right and authority of the insurance company, in the first instance, to appoint some person suitable to it. Held, further, the words, "if the facts warrant it," relate to the question as to whether or not the insurance company is authorized to engage in business within the state by complying with the law, and to the question of the sufficiency of the notice to the insurance commissioner of the appointment of such agent.

Same — discretionary power — constitutionality.

2. Section 3433, Rev. Laws 1910, in part reads: "Every insurance company, domestic or foreign, permitted to do business in this state, shall file with the insurance commissioner the name and address of each person it appoints or employs to act as its agent in this state, but the insurance commissioner may, at any time thereafter, for cause shown, determine any person so appointed or employed to be unsuitable to act as such agent, and shall thereupon notify both the company and the agent so determined to be unsuitable: Provided, that . . . he may likewise, for cause shown, refuse to license such agent." Held, that that part of said section which reads: "The insurance commissioner may, at any time thereafter, for cause shown, determine any person so appointed or employed to be unsuitable to act as such agent, and shall thereupon notify both the company and the agent so determined to be unsuitable. . . . He may likewise, for cause shown,

refuse to license such agent,"— is in contravention of both the 14th Amendment to the Federal Constitution, and likewise of § 2, art. 2, of the Constitution of Oklahoma, in that it fails to prescribe any uniform and permanent rule or test but undertakes to vest in the insurance commissioner a discretionary and arbitrary power to license or to withhold a license from whomsoever he will; hence is void as an infringement upon the personal liberties and rights of a citizen.

(January 9, 1915.)

ERROR to the District Court for Oklahoma County to review a judgment in plaintiff's favor in a proceeding to compel defendant to issue a license to plaintiff Skipwith to act as the local agent of the plaintiff insurance company. Affirmed.

The facts are stated in the opinion.

Mr. C. W. Stringer, with Messrs. Charles West, Attorney General, and Charles L. Moore, Assistant Attorney General, for plaintiff in error:

It must be presumed that the action of the commissioner was regular and in fulfillment of his duty under the law.

Christ v. Fent, 16 Okla. 379, 84 Pac. 1074; 16 Cyc. 1076; Territory ex rel. Thacker v. Sellers, 15 Okla. 419, 82 Pac. 575; Watkins v. Havighorst, 13 Okla. 128, 74' Pac. 318.

The right to write insurance is a privilege or franchise, and plaintiff Skipwith has no vested interest in, or right to the

v. State, 233 U. S. 630, 58 L. ed. 1129, L.R.A. 1915D, 677, 34 Sup. Ct. Rep. 681, where the validity of a statute making it a misdemeanor for any person to act as a conductor on a railway train without having previously served two years as a freight conductor or brakeman was involved; but the note is concerned only with the question of the right of the public to say whether a given person is qualified to act as an officer, agent, or employee of a private corporation, or a corporation whose business is affected with a public interest.

It will be noticed that in *WELCH v. MARYLAND CASUALTY CO.* a statute requiring insurance companies to give the names and residences of those it appoints or employs as agents, and providing that the insurance commissioner might at any time for cause shown determine any person so appointed or employed to be unsuitable to act as such agent, and thereupon notify both the company and the agent so determined to be unsuitable, and also giving the commissioner the right to refuse to license such agent, was held to violate the provision of the state Constitution giving all persons the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry, and also in contravention of the 14th Amendment of the Federal Constitution. L.R.A.1915E.

This decision is in harmony with the result reached in such cases as *Noel v. People*, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *State v. Tenant*, 110 N. C. 609, 15 L.R.A. 423, 28 Am. St. Rep. 715, 14 S. E. 387; and *Sioux Falls v. Kirby*, 6 S. D. 62, 25 L.R.A. 621, 60 N. W. 156, where statutes attempting to vest arbitrary powers relative to the granting of licenses, etc., in certain bodies, were held invalid.

These cases, however, do not involve the right to determine the capacity or suitability of officers or employees of private corporations, or those affected with a public interest, and are not within the scope of the present note.

Concerning the power of municipal corporation to make right to transact certain business dependent upon consent of municipal authorities, see note to *Montgomery v. West*, 9 L.R.A.(N.S.) 659.

The authority upon the precise point under consideration in this note is extremely meager.

In holding that the legislature has no power to take the management and control of a city waterworks system out of the city's hands and invest it in trustees in no respect responsible to the appointing power, to be appointed by the district court, in *State ex rel. White v. Barker*, 116 Iowa, 96, 57 L.R.A. 244, 93 Am. St. Rep. 222, 80 N.

issuance of, a license, his former license having expired by operation of law.

State ex rel. Mackintosh v. Rossman, 53 Wash. 1, 21 L.R.A.(N.S.) 821, 101 Pac. 357; 17 Ann. Cas. 625; State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, L.R.A. 1915D, 1218, 131 Pac. 703; 4 Cyc. 989.

In order to entitle plaintiffs to the writ of mandamus, they must show that there is vested in them a clear legal right to the thing demanded, which it must be the imperative duty of the insurance commissioner to perform.

State ex rel. Shepard v. Crouch, 31 Okla. 206, 120 Pac. 915; Stearns v. Sims, 24 Okla. 623, 24 L.R.A.(N.S.) 475, 104 Pac. 44; 26 Cyc. 151.

Officers who have imposed upon them by law the performance of duties involving the exercise of judgment and discretion cannot be controlled in the discharge of such duties by mandamus.

Seminole County v. State, 31 Okla. 198, 120 Pac. 913; Monroe v. Beebe, 10 Okla. 581, 64 Pac. 10; 28 Cyc. 158; Darby v. Pence, 17 Idaho, 697, 27 L.R.A.(N.S.) 1194, 107 Pac. 484; Smyth v. Butters, 38 Utah, 151, 32 L.R.A.(N.S.) 393, 112 Pac. 809; Stanley v. Monnet, 34 Kan. 708, 9 Pac. 755; State ex rel. Julian v. Police Comrs. 170 Ind. 133, 83 N. E. 83; State ex rel. Hathaway v. State Bd. of Health, 103 Mo. 22, 15 S. W. 322; State ex rel. Klaue v. Barrett, 22 Ohio C. C. 104, 12 Ohio C. D. 231; United States ex rel. West v. Hitchcock, 205 U. S. 718, 51 L. ed. 718, 27 Sup. Ct. Rep. 423; State ex rel. Brown v. Dental Examiners, 38 Wash. 325, 80 Pac. 544.

The courts will not, by mandamus, undertake to review the actions of ministerial officers or boards clothed with discretionary powers; nor will they undertake to substi-

tute their judgments for the judgments or decisions of such boards or persons.

Seminole County v. State, 31 Okla. 198, 120 Pac. 913; Darby v. Pence, 17 Idaho, 697, 27 L.R.A.(N.S.) 1194, 107 Pac. 484; Smyth v. Butters, 38 Utah, 151, 32 L.R.A.(N.S.) 393, 112 Pac. 809; Stanley v. Monnet, 34 Kan. 708, 9 Pac. 755; State ex rel. Hathaway v. State Bd. of Health, 103 Mo. 22, 15 S. W. 322; State ex rel. Julian v. Police Comrs. 170 Ind. 133, 83 N. E. 83; United States ex rel. West v. Hitchcock, 205 U. S. 718, 51 L. ed. 720, 27 Sup. Ct. Rep. 423.

Messrs. Burwell, Crockett, & Johnson, for defendants in error:

Plaintiffs are presumed to be ordinarily intelligent and honest.

Goggens v. Monroe, 31 Ga. 331; 16 Cyc. 1082; Mullen v. United States, 46 C. C. A. 22, 106 Fed. 892; Society for Visitation v. Com. 52 Pa. 125, 91 Am. Dec. 139.

The right of Skipwith to represent the plaintiff company as its agent involves a property right in him which cannot be denied except by due process of law.

Kell v. Rudy, 15 Pa. Co. Ct. 309; McManus v. School Controllers, 7 Phila. 23.

Where a public officers abuses his discretion, mandamus will lie to review the action of such ministerial officer or board.

Seminole County v. State, 31 Okla. 196, 120 Pac. 913; Bacon v. Tacoma, 19 Wash. 674, 54 Pac. 610; State ex rel. Gillette v. Clausen, 44 Wash. 437, 87 Pac. 498; Darby v. Pence, 17 Idaho, 697, 27 L.R.A.(N.S.) 1194, 107 Pac. 484; Smyth v. Butters, 38 Utah, 151, 32 L.R.A.(N.S.) 393, 112 Pac. 809; State ex rel. Hathaway v. State Bd. of Health, 103 Mo. 22, 15 S. W. 322; Potter v. Homer, 59 Mich. 8, 26 N. W. 208; Amperse v. Kalamazoo, 59 Mich. 85, 26 N. W. 222, 409; Zanone v. Mound City, 103 Ill.

W. 204. The court said: "If the city were a mere private corporation, it would need no argument to show that the legislature could not take the management of its property out of the hands of its officers and directors, and place it in the custody and control of officials, even if they be stockholders, selected by persons who had no interest in the corporate entity, and who were in no manner responsible to those interested in the welfare of the organization. Such divestiture of property, or, what is the same thing, of its management and control, would be unconstitutional and void."

And it was further held that the attempt to vest such power in the district court, which was created by the Constitution, was also invalid since such power was not, in advance of litigation or of any dispute concerning the management and control of the waterworks system, judicial in its character. State ex rel. White v. Barker, supra.

In Mutual L. Ins. Co. v. Prewitt 127 Ky. L.R.A.1915E.

399, 105 S. W. 463, where by a statute it was provided that the insurance commissioner should furnish licenses to such agents as a foreign insurance company directed, upon being satisfied that the company had fully complied with the laws of the state, and also that he should revoke or suspend all authority granted to a company's agent if the company has failed to comply with the law, it was held that the commissioner was not authorized to revoke the licenses to the company's agents on the ground that the company had dismissed its state manager because he had refused to support the company's ticket of candidates for trustees, and was a candidate for trustee on an opposition ticket, the supporters of which claimed that the affairs of the company had been mismanaged, it being held that the commissioner had no authority except that conferred upon him by statute, and that under the facts there had been no failure of the company to comply with the law.

J. T. W.

552; *East St. Louis v. Wehrung*, 46 Ill. 392; *State ex rel. Fidelity & C. Co. v. Rotwitt*, 18 Mont. 92, 44 Pac. 407; *Bankers' L. Ins. Co. v. Howland*, 73 Vt. 1, 57 L.R.A. 374, 48 Atl. 435; *Ex parte Newman*, 14 Wall. 152-170, 20 L. ed. 877-880; *The Homesteaders v. McCombs*, 24 Okla. 201, 38 L.R.A.(N.S.) 1000, 103 Pac. 691, 20 Ann. Cas. 181.

When the applicant for a license brings himself within the provisions of the law, the courts, as a matter of law, will infer that the refusal is arbitrary, unless the licensing officer, in the event of mandamus proceeding, pleads and proves sufficient facts in justification of such refusal.

State ex rel. Kelleher v. St. Louis Public Schools, 134 Mo. 296, 56 Am. St. Rep. 503, 35 S. W. 617; *Beadles v. Fry*, 15 Okla. 428, 2 L.R.A.(N.S.) 855, 82 Pac. 1041; *Rothrock v. Carr*, 55 Ind. 334; *Taylor v. Robertson*, 16 Utah, 330, 52 Pac. 1; *Glencoe v. People*, 78 Ill. 382; *State ex rel. Hathaway v. State Bd. of Health*, 103 Mo. 22, 15 S. W. 322; *Atlanta v. Wright*, 119 Ga. 207, 45 S. E. 994; *Dillon v. Bare*, 60 W. Va. 483, 56 S. E. 390; *Merrill, Mandamus*, § 40; *Wood v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766; *State ex rel. Chicago, R. I. & P. R. Co. v. Smith*, 172 Mo. 446, 72 S. W. 692.

The cause shown for which the commissioner might refuse a license to an agent necessarily would have to be a legal cause, and as to whether or not the cause for which the license was refused was a legal cause is a question which would have to be determined by the courts of the state on proper application.

State ex rel. Hart v. Duluth, 53 Minn. 238, 39 Am. St. Rep. 595, 55 N. W. 120.

Whenever the legislature or a municipality fails to fix the terms and conditions or the causes, and what shall be sufficient causes, for granting or refusing a license, such law is void.

Noel v. People, 187 Ill. 587, 52 L.R.A. 287, 70 Am. St. Rep. 238, 58 N. E. 616; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *State v. Tenant*, 110 N. C. 609, 15 L.R.A. 423, 23 Am. St. Rep. 715, 14 S. E. 387; *Sioux Falls v. Kirby*, 6 S. D. 62, 25 L.R.A. 621, 60 N. W. 156; *Bessonies v. Indianapolis*, 71 Ind. 189; *Plymouth v. Schultheis*, 135 Ind. 339, 35 N. E. 12; *Chicago v. Trotter*, 136 Ill. 430, 26 N. E. 359; *State ex rel. Garrabad v. Dering*, 84 Wis. 585, 19 L.R.A. 858, 36 Am. St. Rep. 948, 54 N. W. 1104; *Anderson v. Wellington*, 40 Kan. 173, 2 L.R.A. 110, 10 Am. St. Rep. 175, 19 Pac. 719; *Barthet v. New Orleans*, 24 Fed. 563; *Montgomery v. West*, 149 Ala. 311, 9 L.R.A.(N.S.) 659, 123 Am. St. Rep. 33, 42 So. 1000, 13 Ann. L.R.A.1915E.

Cas. 651; *State v. Dubarry*, 44 La. Ann. 1117, 11 So. 718; *May v. People*, 1 Colo. App. 157, 27 Pac. 1010; *Los Angeles County v. Hollywood Cemetery Asso.* 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153.

Riddle, J., delivered the opinion of the court:

The plaintiff in error will be referred to as the insurance commissioner and the defendants in error as plaintiffs. The plaintiff Maryland Casualty Company is a foreign insurance corporation, and plaintiff F. A. Skipwith has been acting in the capacity of general agent for plaintiff Maryland Casualty Company for several years past in the state of Oklahoma. Plaintiffs, on August 4, 1913, filed their petition in the district court of Oklahoma county, alleging, substantially, a compliance with the law in every respect on the part of the insurance company, and the issuance of a permit authorizing it to engage in the insurance business in this state. They allege the appointment by plaintiff insurance company of plaintiff Skipwith as its local state agent, and of notice to the insurance commissioner of the designation of said Skipwith as its agent, a request to the insurance commissioner to issue a license to said Skipwith, and a refusal on the part of the insurance commissioner to issue such license, claiming that said refusal was arbitrary and without any just cause. They prayed for a writ of mandamus against said insurance commissioner directing the issuance of said license.

An alternative writ of mandamus was issued, reciting the foregoing facts. To this writ the insurance commissioner made his return, admitting substantially the foregoing facts, and affirmatively alleging that the application of the company and of said Skipwith and his appointment as agent were considered, and, he having considered the fitness and suitability of said Skipwith to act as insurance agent for the Maryland Casualty Company, and cause having been shown as to the lack of fitness and suitability of said Skipwith to act as such agent, it was adjudged that the said Skipwith was not a suitable person to act as such agent, and, as the facts did not warrant the issuance of such license, the same was therefore refused. The insurance commissioner denied he acted arbitrarily and without just cause, and claimed that he acted in good faith and with judgment and discretion.

Plaintiffs filed a motion for judgment on the pleadings, which motion the court sustained, and issued a peremptory writ of mandamus. Motion for new trial was filed and overruled. From this judgment and

order overruling motion for new trial, the insurance commissioner prosecutes this appeal. In his petition in error, the insurance commissioner sets out six assignments of error, of which Nos. 1, 3, and 4 will be the only ones necessary to be considered. They are: (1) The court erred in sustaining motion for judgment on the pleadings. (3) Error in denying defendant's motion for a new trial. (4) Error in granting a peremptory writ of mandamus.

The view we take of this case will involve the consideration of only two questions in connection with the foregoing assignments of error: (1) The construction of § 3429, Rev. Laws 1910; (2) the constitutionality of a portion of § 3433, Rev. Laws 1910. Said § 3429, *supra*, reads: "Upon written notice by an authorized foreign insurance company of its appointment of a suitable person to act as its agent within this state, and the payment of \$3, the insurance commissioner shall, if the facts warrant it, grant to such person a license, which shall state in substance that the company is authorized to do business in this state and that the person named therein is a constituted agent of the company for the transaction of such business as it is authorized to do in this state: Provided, that domestic insurance companies shall pay 50 cents, only, for each agent's license. Said license shall continue in force until the last day of February next after its issue, and, by the renewal thereof, on the annual payment for such renewal of \$3, if a foreign company, and if a domestic company, on the annual payment of 50 cents, until revoked by the insurance commissioner for noncompliance with the laws, or until the company, by written notice to the insurance commissioner, cancels the agent's authority to act for it. While such license remains in force, the company shall be bound by the acts of the person named therein within his authority as its acknowledged agent."

The words in this section requiring construction are "its appointment of a suitable person." In our judgment, these words relate to the appointment of an agent by the insurance company, and the connection in which they are used here has no application to or bearing upon the insurance commissioner; in other words, the insurance company which is authorized to transact business in this state may, in the first instance, by written notice, notify the insurance commissioner of its appointment of a suitable person to act as its agent within this state, etc. In our judgment, a fair construction of this language intends to leave it with the insurance company, in the first instance, to appoint some person suit-

able to said company to transact its business in the state. It is presumed that the company will know best the fitness and qualifications of the person who is to act as its agent, and who can best serve the interests of such company, with the right or authority in the state, however, to require such insurance company to comply with all state laws and reasonable regulations prescribed.

The next words in this section requiring construction are "the insurance commissioner shall, if the facts warrant it, grant to such person a license." The particular words here involved are "if the facts warrant it." We think these words have reference to the question as to whether or not the insurance company has met the requirements of the law, and also refers to the notice of such appointment, whether or not it meets the requirements. The subsequent words seem to justify this construction. It provides that the license shall state, in substance, that the company is authorized to do business in this state, and that the person named therein is the one selected as agent of the company for the transaction of such business as it is authorized to do in the state.

The second question involves the constitutionality of a portion of § 3433, *supra*, which section reads: "Every insurance company, domestic or foreign, permitted to do business in this state, shall file with the insurance commissioner the name and residence of each person it appoints or employs to act as its agent in this state, but the insurance commissioner may, at any time thereafter, for cause shown, determine any person so appointed or employed to be unsuitable to act as such agent, and shall thereupon notify both the company and the agent so determined to be unsuitable: Provided, that appeal may be to the supreme court of this state; he may likewise, for cause shown, refuse to license such agent. Whoever shall assume to act as such agent, or, unless a licensed broker; shall in any manner for compensation negotiate contracts of insurance on behalf of such corporation for a person other than himself, prior to the filing of such notices of appointment or after receiving notice of such finding of unsuitability, shall be subject to the penalties provided by this article for soliciting insurance without license."

This section, after providing that every insurance company, domestic or foreign, authorized to do business in this state, shall give the name and residence of each person it appoints or employs to act as agent in this state, then provides: "But the insurance commissioner may, at any time thereafter, for cause shown, determine any person

so appointed or employed to be unsuitable to act as such agent, and shall thereupon notify both the company and the agent so determined to be unsuitable. . . . He may likewise, for cause shown, refuse to license such agent."

Provision is then made for an appeal, and also providing that any person acting as agent, after receiving notice of his unsuitability, shall be subjected to certain penalties, etc. It is the last above quoted provision which governed the insurance commissioner in his acts in refusing to issue license to plaintiff Skipwith.

It is the contention of plaintiffs that the foregoing language undertakes to vest in the insurance commissioner the power to license whomsoever he may, and to refuse arbitrarily to issue license to any person, notwithstanding his fitness or qualifications; hence is unconstitutional and void. It is the contention of the insurance commissioner, on the other hand, that the state may prohibit entirely insurance companies from engaging in business in this state, and to fully regulate the same in the exercise of its police power; that, in the exercise of this power, the state may lawfully vest the insurance commissioner with discretionary power, as is granted by this provision of the law.

That the state, in the exercise of its police power, may fully and completely regulate the insurance business, is no longer a debatable question. This proposition is too well settled to require citation of authority to sustain it. Section 2, art. 2, Const., reads: "All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry."

The 14th Amendment to the Constitution of the United States provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

We are of the opinion that that portion of this section last quoted is in conflict with both the provisions of the Federal Constitution and the Constitution of this state, and therefore void, and to so hold does not in the least militate against the power of the state to fully regulate the insurance business. It is well-settled that the legislature is without power to delegate authority to any person or board to grant or refuse li-

cense at his or its discretion, arbitrarily or capriciously, according to the state of mind of such officer or persons composing said board. Many authorities and adjudicated cases might be quoted from sustaining this proposition, but, as it has been repeatedly announced, a quotation from a few will suffice.

It was said by the Federal Supreme Court, speaking through Mr. Justice Matthews, in the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064: "For the very idea that one man may be compelled to hold his life for the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

This same rule, in effect, has been announced by various courts in different language or in a different form, a few of which we cite: *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Noel v. People*, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *State v. Tenant*, 110 N. C. 609, 15 L.R.A. 423, 28 Am. St. Rep. 715, 14 S. E. 387; *Sioux Falls v. Kirby*, 6 S. D. 62, 25 L.R.A. 621, 60 N. W. 156; *Bessonies v. Indianapolis*, 71 Ind. 189; *Plymouth v. Schultheis*, 135 Ind. 339, 35 N. E. 12; *Chicago v. Trotter*, 136 Ill. 430, 26 N. E. 359; *State ex rel. Garrahad v. Dering*, 84 Wis. 585, 19 L.R.A. 858, 36 Am. St. Rep. 948, 54 N. W. 1104; *Anderson v. Wellington*, 40 Kan. 173, 2 L.R.A. 110, 10 Am. St. Rep. 175, 19 Pac. 719; *Barthet v. New Orleans (C. C.)* 24 Fed. 563; *Montgomery v. West*, 149 Ala. 311, 9 L.R.A. (N.S.) 659, 123 Am. St. Rep. 33, 42 So. 1000, 13 Ann. Cas. 651; *Los Angeles County v. Hollywood Cemetery Asso.* 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153; *State v. Dubarry*, 44 La. Ann. 1117, 11 So. 718; *May v. People*, 1 Colo. App. 157, 27 Pac. 1010.

It was said by Mr. Justice Field, speaking for the court in the case of *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 757, 28 L. ed. 585, 4 Sup. Ct. Rep. 660: "The common business and callings of life, the ordinary trades and pursuits which are innocuous in themselves, and have been followed in all communities from time immemorial, must therefore be free in this country to all alike upon the same conditions. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."

The legislature failed to prescribe any rule controlling the judgment or discretionary power of the insurance commissioner. For reasons satisfactory to himself upon an *ex parte* examination, or without any examination, he could say to one applicant who might be pre-eminently qualified, "I find you to be an unsuitable person, hence refuse you license," and to another applicant who might fail to have any suitable qualifications, that "I find you to be a suitable person, hence license will be granted."

Briefly stated, the power which is sought to be vested in the insurance commissioner is no less than permitting him to issue license to whomsoever he will, and to withhold license arbitrarily from whomsoever he will. If this law is valid, there is really no power to control his action in this regard. It is said, however, that the insurance commissioner is a sworn officer, and we are not to presume that he will act arbitrarily or otherwise than in the exercise of his sound judgment and in good faith; but this is not the question we are called upon to meet. The question is the defect in the law attempting to confer the power. It is so clear to our minds that this part of the statute under consideration is void that further discussion of the question is a useless waste of time. We therefore hold that the portion of the statute quoted is unconstitutional and void.

The portion of the statute which is held void being the basis of the action of the insurance commissioner, the judgment of the trial court is affirmed.

All the Justices concur.

Petition for rehearing denied April 27, 1915.

VIRGINIA SUPREME COURT OF APPEALS.

THOMAS B. LEONARD, Plff. in Err.,
v.

HENRY M. VAUGHAN et al.

(— Va. —, 85 S. E. 471.)

Broker — failure of sale — commission — misrepresentations to vendor.
Brokers cannot recover commissions on a

Note. — Broker's right to commission on failure of employer's title.

- I. Introductory, 714.
 - II. In general, 715.
 - III. Under special contract, 719.
 - IV. Effect of broker's knowledge of defect.
 - a. In general, 720.
 - b. Defect created by broker's act, 721.
- L.R.A.1915E.

sale of real estate which fails because of defect in title as to a portion of the property, where the vendor had recently purchased the property through them on their representations as to title and boundaries, and immediately listed the property with them for resale.

(June 10, 1915.)

ERROR to the Hustings Court of the City of Richmond to review a judgment in plaintiffs' favor in an action brought to recover commissions alleged to be due for securing a purchaser for real estate. Reversed.

The facts are stated in the opinion.

Messrs. McGuire, Riely, Bryan, & Eggleston, for plaintiff in error:

When one of two innocent persons must suffer a loss, it must be borne by that one of them who, by his conduct, acts, or omissions, has rendered the injury possible.

Norfolk & W. R. Co. v. Perdue, 40 W. Va. 442, 21 S. E. 755; Baldwin v. Richman, 9 N. J. Eq. 394; 16 Cyc. 773; Blaisdell v. Bohr, 77 Ga. 381; Middle Atlantic Immigration Co. v. Ardan, 115 Va. 148, 78 S. E. 588.

The rule of liability has no application where the facts are such that the ordinary presumption of knowledge by the owner and a guaranty in favor of the agent cannot reasonably be implied.

Corbin v. Mechanics' & T. Bank, 121 App. Div. 744, 106 N. Y. Supp. 573; Reiger v. Merrill, 125 Mo. App. 541, 102 S. W. 1072; Hoyt v. Shipherd, 70 Ill. 309; Crockett v. Grayson, 98 Va. 354, 36 S. E. 477; Murray v. Rickard, 103 Va. 132, 46 S. E. 871; Bankers' Loan Co. v. Spindle, 108 Va. 426, 62 S. E. 266; Green v. Marye, 112 Va. 352, 71 S. E. 555; Henschell v. J. L. Gates Land Co. 146 Wis. 140, 131 N. W. 423; Condict v. Cowdrey, 139 N. Y. 273, 34 N. E. 781; Diamond v. Hartley, 38 App. Div. 87, 55 N. Y. Supp. 994; Hausman v. Herdtfelder, 81 App. Div. 46, 80 N. Y. Supp. 1039; Keough v. Meyer, 127 App. Div. 273, 111 N. Y. Supp. 1; Curtiss v. Mott, 90 Hun, 439, 35 N. Y. Supp. 983.

Messrs. Gunn & Mathews and William M. Justice, for defendants in error:

When a broker has found a purchaser who is ready, able, and willing to complete the purchase upon the terms agreed upon,

IV.—continued.

c. Constructive knowledge of defect, 721.

I. Introductory.

The earlier cases on this question are discussed in the note to Brackenridge v. Claridge, 43 L.R.A. 593, subdiv. 3, beginning on page 609; Yoder v. Randol, 3 L.R.A.

and who has entered into a valid contract to that effect, he has earned his commissions.

Vaughan v. Pleasonton, 112 Va. 508, 71 S. E. 529; Caldwell v. Tannehill — Va. —, 84 S. E. 6.

Harrison, J., delivered the opinion of the court:

This controversy involves the right of the plaintiffs, Vaughan & Company, to recover of the defendant, Thomas B. Leonard, commissions alleged to be due them as real estate agents for making sale of certain property for Leonard.

(N.S.) 576; Little v. Fleishman, 24 L.R.A. (N.S.) 1182. See also the case of Arnold v. National Bank, 3 L.R.A. (N.S.) 580.

As to the personal liability of officer or referee to sell property, for broker's services, see note to Jones v. Ford, 38 L.R.A. (N.S.) 777.

As to the effect of contract expressly making broker's right to commission depend upon the sale of property or other condition beyond that ordinarily implied, see note to Pfanz v. Humburg, 29 L.R.A. (N.S.) 533.

It is to be observed that this note and the earlier notes which it supplements are confined to cases that proceed upon the assumption, at least for the purposes of the point, that the objection made by the customer to the title was a valid one, and justified him in refusing to enter into a contract of purchase or to carry out such contract if entered into; and so do not include cases like Reeder v. Epps, 112 Ark. 566, 166 S. W. 747, holding that the broker is not entitled to his commissions where the customer refuses to purchase the property or to enter into a binding contract therefor, because of an invalid objection to the title. So, of course, cases involving the right of the broker to his commissions where the customer entered into a binding contract to purchase, but refused to perform upon the ground of an invalid objection to the title, are beyond the scope of this note.

The note does not deal specifically with the question whether or not there has been a sale. The case of Henschell v. J. L. Gates Land Co. 146 Wis. 140, 131 N. W. 423, is illustrative of cases passing upon this question. Here the contract was signed by one of two proposed purchasers and forwarded to another place for execution by the other; the one who had signed, upon examination of the title, determined that it was not good and directed his associate not to sign the contract. It is stated that the parties at no time treated the agreement as a consummated purchase and sale of the land embraced therein; that the contract was not to be effective until signed by the remaining partner; therefore there was no completed sale, and the agent not entitled to his commission.

So, a broker was held not entitled to commissions for services in procuring a purchase.

It appears that Vaughan & Company had in their hands for sale certain real estate situated on the west side of Thirteenth or Governor street, in the city of Richmond, belonging to one Wallerstein, to whom it had been sold and conveyed by a former owner through the agency of Vaughan & Company. This same agency, acting for Wallerstein, sold the property to the defendant, Leonard, who immediately replaced the same in the hands of Vaughan & Company to be sold for his benefit, one of the inducements to his purchase being the statement of the agents that they could certainly resell it for him at a profit in a few days.

chaser, where a defect was discovered in the title and it was agreed that the land should be sold at public auction so as to perfect the title, and the purchaser found by the broker did not purchase at that sale. Tombs v. Alexander, 101 Mass. 255, 3 Am. Rep. 349. It is stated that the purchaser was sent to the owner by the broker, and they agreed orally upon the terms of purchase; that the oral contract was not binding; the parties were therefore not brought together so as to entitle the broker to his compensation.

Likewise, a broker was held not entitled to commissions for effecting an exchange of property, where the title of his employer was rejected because of encroachment, where, in the contract between the vendor and vendee, the exchange was made to depend upon the option of the vendee to take or not to take title in case encroachment existed, since the contract was thus not a binding enforceable contract to exchange property. Hough v. Baldwin, 50 Misc. 546, 99 N. Y. Supp. 545.

It is assumed that the broker has done all that is required of him, to entitle him to commission should the sale be completed. The question thus assumes the aspect whether, after he has performed the services which entitle him to his commission, this right to commission is defeated because the transaction is not completed on account of a defective title.

II. In general.

The rule, as stated in the earlier notes, that a broker who has obtained a purchaser ready, able, and willing to take the land is, in the absence of a stipulation to the contrary, entitled to his commission notwithstanding the sale is not completed because of a defect in his employer's title of which the broker had no notice, is supported by the following cases in addition to those cited in the earlier notes: W. T. Craft Realty Co. v. Livernash, — Colo. App. —, 146 Pac. 121; McKinnon v. Hope, 118 Ga. 462, 45 S. E. 413; Harger v. Watson, 176 Mich. 192, 142 N. W. 352; Bruce v. Wolfe, 102 Mo. App. 384, 76 S. W. 723; Perrin v. Kimberlin, 110 Mo. App. 661, 85 S. W. 630; Brown v. Smith, 113 Mo. App. 59, 87 S. W. 556;

In ten days thereafter a sale was made for the defendant to one Dunlop at an advance. The contract between Wallerstein and the defendant and that between the latter and Dunlop were both in writing, and each contained a provision making the sale conditional on the title being free from valid objection. Dunlop, the purchaser from the defendant, had the title examined, and found that no title could be made to a certain small vacant space in the rear of the lot, which was regarded as a material inducement to the purchase. Thereupon Dunlop declined to consummate the sale that had been made to him, and the defendant, Leonard, a few days thereafter, through another agency, sold the property to other parties

for a still larger price, and subject to the defect which had been developed in the title.

The theory of the plaintiffs is that this was only the ordinary case of real estate agents procuring a purchaser ready, able, and willing to buy property at a stipulated price; that, having done this, they cannot be defeated of their commissions because of a defect in the title; that the employer guarantees his title as to the agents, and must pay their commissions although the sale they have made fails because of defect in the title.

This general rule is not denied by the defendant, but it is insisted, on his behalf, that it is not applicable to the facts of this case, it being contended that the sale to Dunlop failed through a material misrepresenta-

O'Neil v. Printz, 115 Mo. App. 215, 91 S. W. 174; Maddux v. St. Louis Union Trust Co. 186 Mo. App. 138, 171 S. W. 669; Reasoner v. Yates, 90 Neb. 757, 134 N. W. 651 (action by subbroker against broker); Hess v. Investors' & Traders' Realty Co. 67 Misc. 390, 123 N. Y. Supp. 243; Cheek v. Nicholson, — Tex. Civ. App. —, 133 S. W. 707; O'Reilly v. Cryer, — Tex. Civ. App. —, 175 S. W. 773.

Reason for the rule.

The broker is regarded as having performed his duty, and thereby earned his commission, when he has brought the vendor and purchaser together and a binding contract is entered into. The subsequent failure to complete the transaction does not affect his right to commission.

There is sometimes stated to be an implication resulting from the employment, that the employer is able to convey the land by a marketable title. *W. T. Craft Realty Co. v. Livernash*, — Colo. App. —, 146 Pac. 121; *Maddux v. St. Louis Union Trust Co.* 186 Mo. App. 138, 171 S. W. 669 (owner agreed to furnish good title, but it is stated that this duty would rest upon her apart from such agreement).

So, where the brokers employed in turn employ subbrokers, this implication runs in favor of the subbrokers. *Reasoner v. Yates*, 90 Neb. 757, 134 N. W. 651.

No such implication arises in case of employment by independent executors; brokers employed by them to sell land belonging to the estate cannot recover for a sale which failed of completion because of a defect in the title, for the reason that the rule of *carcat emptor* applies to a purchaser from an executor. *Roberts v. Holland*, — Tex. Civ. App. —, 134 S. W. 810. There was nothing in this case to indicate that the executors undertook to do more than sell such title as the estate owned, and the broker's customer declined to buy this. Upon these facts the broker was held not to have secured a customer at all.

See *Wiggins v. Coddington*, 83 Misc. 439, 145 N. Y. Supp. 3.
L.R.A.1915E.

Application of rule.

So, a broker is entitled to his commission upon obtaining a purchaser for property on the terms specified by the owner, although the sale thereafter fails because the owner insists on putting a provision in the contract that the buyer take the property subject to any and all encroachment, and it appears upon a survey that the property encroaches upon the street and upon adjoining property. *Davidson v. Stocky*, 202 N. Y. 423, 95 N. E. 753.

In *Smith v. Mellen*, 116 Minn. 198, 133 N. W. 566, it is apparently held that a broker is entitled to his commission notwithstanding the sale fails because of an outstanding street easement, the contract with the broker embracing in effect a representation that there was no such street.

In *Freilich v. Tucker*, 68 Misc. 318, 123 N. Y. Supp. 786, the broker entered into an agreement with the owner to sell the property for a certain commission, and in the event of the purchaser refusing to take title and pay the consideration, the commission agreed upon was a less sum. Under this agreement the broker was held entitled to the full commission, where the purchaser declined to take title to the property because of the existence of a mortgage additional to the two mortgages mentioned in the contract of sale; the court stating that the purchaser did not refuse to take title and pay the consideration in accordance with the terms of the contract, but on the contrary declined to perform in accordance with terms contrary to the provisions of the contract; that the owner failed to perform her part of the contract, and by that failure the right of the broker to commission could not be defeated.

A broker who has secured a purchaser for property which is described to him as a single tract is entitled to his commission although no contract is entered into and no sale made, because the owner insists on making three separate contracts, one for each of the three houses involved, it appearing that there is a strip 1½ inches in width between two of the houses not owned by

sentation as to the lines of the property made by the plaintiffs, without fault on the defendant's part, and relied on by the latter both in his own purchase and in authorizing a sale to Dunlop, and that under such circumstances he cannot be held liable.

In support of this theory of the case the evidence tends to show that when approached by the plaintiffs on the subject of buying the property in question, the defendant knew nothing about the property or the state of the title thereto, except such information as he acquired from the plaintiffs, who had, as real estate agents, handled the property several times; that he was shown the property by one of the plaintiffs, who pointed out the lines and told him that

they included the vacant space to which the title proved defective; "that the property was cheap; that he could certainly turn it over in a few days; and that it was unnecessary to have the title examined, mentioning that as part of the sale."

These declarations of the real estate agents were intended to and had the effect of inspiring full confidence and assuring the defendant as to what land was embraced within the lines of his purchase. The deed conveying this property to Wallerstein included within its boundary the vacant space mentioned, and it was upon this deed and the plat filed therewith that the plaintiffs were relying in making their representations to the defendant, and subsequently to Dunlop, in making the sale to him. It fur-

him. *Gordon v. Rosenthal*, 130 N. Y. Supp. 226.

A real estate broker was allowed to recover commissions in *Irons v. Snyder*, 49 Pa. Super. Ct. 522, although the purchasers entered into a mere option with the vendor for the property, and afterward refused to take it because of his inability to procure a release of dower. Generally, as to right of broker to compensation upon procuring a customer to take an option, see note to *Warnekros v. Bowman*, 43 L.R.A. (N.S.) 91.

The opinion of the Texas Court of Civil Appeals in *Hamburger v. Thomas*, which is cited in the note in 24 L.R.A. (N.S.), at page 1182, was, subsequently to the date of that note, affirmed by the supreme court in 103 Tex. 280, 126 S. W. 561. In the supreme court the fact that the contract entered into between the vendor and purchaser provided that, even if the purchaser should approve the title, he might either take the land or forfeit the deposit, was urged as rendering this an unenforceable contract. Because of the contract not being enforceable, it was urged that the broker was not entitled to his commission. This contention, however, was overruled, and the broker allowed to recover. In answer to the argument that the sale was not defeated by any real defect in the title, it is stated that the vendor agreed to furnish a title which was good, and as there was no evidence to show that the title was good, the vendor had not complied with his contract.

That a broker is entitled to his commission although the sale afterward failed because of the defect in title is held in *Godley v. Haley*, 27 Ohio C. C. 606, where the owner at the time he accepted the offer agreed to pay the broker a commission "for services rendered" since, in the absence of fraud or mistake, neither of which was alleged in this case, it must be assumed that the owner was satisfied that the purchaser produced was ready and willing to complete the purchase, and that he released the broker from any responsibility for a failure thereafter on the part of the purchaser to carry out the contract.

See *Roberts v. Holland*, supra. L.R.A.1915E.

A broker was allowed to recover commissions in *Indiana Bermudez Asphalt Co. v. Robinson*, 29 Ind. App. 59, 63 N. E. 797, for finding a purchaser for property consisting of real estate, brickworks, contracts for doing street paving, tools and appliances for such work, and contracts for the purchase of material and for the use of certain processes for paving streets, in which business his employer was engaged, although the sale was not completed because the purchaser refused to carry it out unless he was indemnified against the result of certain injunction suits of which he had been notified, and which were not referred to in the contract, the suits having relation to certain paving contracts which were to be assigned to him.

A broker is entitled to his commission on the sale of a saloon and restaurant, although the sale fails because of the failure of the vendor to settle an unsatisfied chattel mortgage. *Braune v. Henrichs*, 151 N. Y. Supp. 575.

But an owner of real estate who agrees to pay brokers a certain commission for a sale thereof, but expressly refuses to make a contract for sale until her title, which is imperfect, is corrected, is not liable for commission to the brokers upon their finding a purchaser ready, able, and willing, to take the land, even with the defect in its title, since the owner has the right to insist on a perfection of her title before sale, and the prospective purchaser cannot waive this right. *Nash v. Childers*, 155 Ky. 772, 160 S. W. 485.

The fact that the contract is afterward rescinded by the mutual consent of the vendor and vendee, because of the defect, does not affect the right of the broker to his commission. *O'Neil v. Printz*, 115 Mo. App. 215, 91 S. W. 174; *Reasoner v. Yates*, 90 Neb. 767, 134 N. W. 651 (action by sub-broker against broker); *Cheek v. Nicholson*, — Tex. Civ. App. —, 133 S. W. 707.

In *Stocking v. Huth*, — Tex. Civ. App. —, 141 S. W. 570, the purchaser, not being satisfied with the title, insisted on the vendor giving him a bond, and this was agreed upon, but afterward, when the terms of the

ther appears that the defendant did not see any plat of the property, nor was there any reference to what the title papers showed. He relied solely on the statement of the agents, which was without qualification as to the land included in the sale. The evidence further tends to show that, in pursuance of a previous understanding with them, the defendant contemporaneously with his purchase, directed the plaintiffs to find a purchaser for him with a view to a quick sale at a profit; that no time was taken for an examination of the title, and that all concerned knew it had not been examined, and that the agents knew the defendant had no knowledge of the title, and that he was relying on their representation and assur-

ance as to the true lines and the property embraced therein.

Under these circumstances, Dunlop having declined to take the property because of defective title as to a part thereof, the defendant insisted that it was neither just nor equitable to hold him liable to the plaintiffs for commissions on a sale that had failed because of their misrepresentation. We do not mean to say that there is evidence tending to prove that the plaintiffs knowingly deceived the defendant, but merely that the evidence tends to show that they represented to the defendant and to Dunlop that the lines of the property included a larger area than the fact justified, and did this knowing that the defendant's sole knowledge of the property came

bond were discussed, no agreement was reached and the contract was rescinded. The broker was held entitled to his commissions upon these facts.

The failure of the sale because the wife of the vendor would not join in the deed does not defeat the right of the broker to his commission. *Tebo v. Mitchell*, 5 Penn. (Del.) 356, 63 Atl. 327; *Herrick v. Maness*, 142 Mo. App. 399, 127 S. W. 394; *Herrick v. Woodson*, 143 Mo. App. 258, 127 S. W. 391; *Clapp v. Hughes*, 1 Phila. 382.

This is true of a broker who has secured a purchaser of land which is occupied as a homestead, although the sale fails because of the refusal of the wife to join in the conveyance. *Staley v. Hufford*, 73 Kan. 686, 85 Pac. 763; *Marlin v. Sipprell*, 93 Minn. 271, 101 N. W. 169.

Although such a contract by a husband alone for the sale of a homestead is unenforceable, and no action will lie for its breach, the husband may be liable for commission to a broker who has secured a purchaser for the property. *Fleming v. Hattan*, 92 Kan. 948, 142 Pac. 971; *Remington v. Sellers*, 8 Kan. App. 806, 57 Pac. 551 (it not appearing whether sale failed).

The husband of an owner of land, who has listed the same with a real estate broker, cannot avoid payment of commission on the theory that he is not the owner of the land. *Valerious v. Luhning*, 87 Neb. 425, 127 N. W. 112. It seems that a statute required contracts with real estate brokers to be signed by the owner of the land. It is stated that if the husband had sufficient interest in the land to enter into such a contract, he is the owner of the land within the meaning of the statute.

The general question, however, of the liability for commission of one other than the owner of the land, is not discussed in this note.

Loans.

A broker to secure a loan is entitled to his commission where he has secured a person to make it, although it fails because of a defective title to property offered as security. *L.R.A.1915E.*

ity, of which defect the broker was ignorant. *Dorlon v. Forrest*, 101 App. Div. 32, 91 N. Y. Supp. 431; *Clark v. Henry G. Thompson & Son Co.* 75 Conn. 161, 52 Atl. 728; *Fitzpatrick v. Gilson*, 176 Mass. 477, 57 N. E. 1000; *Neftelberger v. Garner*, 125 App. Div. 420, 109 N. Y. Supp. 747 (judgment liens which owner refused to remove); *Egan v. Kieferdorf*, 16 Misc. 385, 38 N. Y. Supp. 81; *Finck v. Bauer*, 40 Misc. 218, 81 N. Y. Supp. 625; *Green v. Lucas*, 33 L. T. N. S. 584.

The right of a broker to secure a loan to commissions upon finding a party willing to make the loan upon the terms stated is not defeated by the subsequent refusal of the party to make the loan because of imperfect title. It is stated that if for any reason the loan fails, the right of the broker to his commission is not forfeited, as the broker is not a guarantor. *Crasto v. White*, 3 N. Y. Supp. 682.

A broker to secure a loan was held entitled to commissions in *Fullerton v. Carpenter*, 97 Mo. App. 197, 71 S. W. 98, although the loan failed because, in the opinion of the attorney for the proposed lender, the borrower and executor did not have power to mortgage the real estate of his decedent.

So, in *Smith v. Peyrot*, 201 N. Y. 210, 94 N. E. 662, in the case of a broker employed by an executor to secure a loan, the broker was held entitled to his commission, although the completion of the loan failed because the executor could not furnish the security therefor.

It has been held necessary, however, for the broker to show that the completion of the loan failed because the title of his employer was defective, and this must be shown by competent proof, that is, by showing the specific facts evidencing the defect. *Gatling v. Central Spar Verein*, 67 App. Div. 50, 73 N. Y. Supp. 496.

But in *Chambers v. Ackley*, 91 N. Y. Supp. 78, a broker was held not entitled to commissions on a loan which failed because of a defect in the title, where the application for the loan was approved by the person who was to make it, "subject to the

from them; that he was buying at their solicitation and on their assurance that they could make a quick resale of the property, as they had represented it to him, and accepted the employment to make such sale before "the ink was dry on the defendant's contract of purchase."

The lower court, being of the opinion that the plaintiffs' right to recover was not affected by the facts and circumstances shown of record tending to sustain the defendant's theory of the case, wholly disregarded all such evidence, refused the instructions asked for by the defendant, submitting his theory of the case to the jury, and gave a single instruction for the plaintiffs, which told the jury that if they believed from the evidence that the defendant, Leonard, placed

the property in the hands of the plaintiffs, and that they procured a valid contract to purchase signed by Dunlop and accepted by the defendant, then the plaintiffs had completed their contract, were entitled to their commissions, and the jury must find for them.

This instruction ignored the defendant's theory of the case, and practically directed a verdict for the plaintiffs. We have not been cited to one, and there does not appear to have been a case, involving similar facts, or an express decision on the particular question here presented. The general rule unquestionably is that in making their contract and in producing a customer, real estate agents may act upon the assumption that the owner can tender a title free from

condition, title, etc., being found ultimately satisfactory."

III. Under special contract.

See also cases cited in notes in 3 L.R.A. (N.S.) 577, and 24 L.R.A. (N.S.) 1183.

By special contract the owner may protect himself against liability for commission where the sale is not completed because of defective title.

An owner of real estate who has agreed with a broker to pay him a certain sum per acre for all land which a certain prospective purchaser shall "actually take over and pay for" is not liable to the broker for commission, where a part of the tract has been conveyed and a certain sum paid, but not the full purchase price for the tract conveyed, and this conveyance was afterward rescinded because of a defective title. *Wilson v. Rafter*, 188 Mo. App. 356, 174 S. W. 137. The property which had been conveyed had not been reconveyed by the purchaser at the time of the trial, but an agreement had been entered into between the purchaser and the original owner that it should be reconveyed upon certain condition.

A broker is not entitled to his commission on a sale which has failed because the owner could not give a good title by reason of certain restrictions, under a contract providing that the commission shall not be paid from the first \$5,000 paid the owner, but that the broker "will not make any claim for commission unless Hovey (the owner) receives more than \$5,000 in cash from the sale." This contract is stated by the court to stipulate in unequivocal words that compensation shall not be paid by the owner until after he has received \$5,000 on account of the sale. Its effect is not, as in some of the cases, to fix a time beyond which the broker shall not be called upon to wait for his pay, but it establishes a moment before the arrival of which he cannot ask for his compensation; it is further stated that there was nothing in the record to indicate that the employer of the broker had failed through any volition of his L.R.A.1915E.

own to carry out the contract'. *Clark v. Hovey*, 217 Mass. 485, 105 N. E. 222.

An agreement of one who is a prospective purchaser of real estate, to pay a broker a commission in case he purchases the property, does not bind him to pay the commission where he merely takes an option on the property, but does not complete the purchase. *Kinney v. Eckenberger*, — Or. —, 145 Pac. 665. The land involved in this case was owned by a corporation, and the option was really taken upon the stock of the corporation. For this reason it was held that the case was not brought within the operation of the rule that where a broker's principal, who desires to purchase property, makes a valid agreement with the person produced by the broker, the broker has earned his commission. Therefore being no valid agreement to purchase the property referred to in the broker's contract, the broker's right to commission was denied. The title of the corporation to the property in question was defective, and for this reason the contemplated sale fell through.

A broker to procure a loan is not entitled to commission where the loan failed because of the opinion of attorneys that the title of the property was defective, under a contract providing that his employer would accept a loan and pay the broker 2 per cent as a commission from the proceeds of the loan. *Hess v. Eggers*, 37 Misc. 845, 76 N. Y. Supp. 980, affirmed in 38 Misc. 726, 78 N. Y. Supp. 1119. In the opinion in the lower court, it is stated that the person desiring the loan did not employ the broker to secure the loan, but agreed only that he would accept a loan. Generally, as to loans, see *supra*, II.

It is held generally in *Pfanz v. Humburg*, 82 Ohio St. 1, 29 L.R.A. (N.S.) 533, 91 N. E. 863, that under a contract providing for the payment of commission "when the property is sold," the broker is not entitled to his commission unless the property is actually sold, or there is an enforceable contract for its sale. There being neither in this case, the right of the broker to commission was denied. Nothing is said as to the reason for the proposed purchaser's refusal being that the title was defective, fur-

infirmities, there being an implied contract that he has the ability to confer upon a purchaser a perfect title to that which he offers for sale. We are, however, of opinion that this general rule can have no application where the facts are such that the ordinary presumption of knowledge by the owner and his guaranty in favor of the agents cannot be implied. The presumption afforded by the general rule is not conclusive. It may be waived by the act of the parties, and when the facts are inconsistent with the usual presumption, it will not be implied. Under the facts which the evidence in the present case tends to establish, if believed by the jury, the plaintiffs would not be entitled to the benefit of the usual presumption that the owner knows his own title and guarantees it as to the agents, because the established facts would be wholly in conflict with such a presumption. The evidence tends to show that the sale in question failed without fault on the part of the defendant, and solely as the result of a representation that the plaintiffs assumed the responsibility of making, as to the true lines of the property, which proved to be unfounded, and caused the pur-

chaser, Dunlop, to exercise his undoubted right to abandon the purchase.

As said by this court in *Middle Atlantic Immigration Co. v. Ardan*, 115 Va. 148, 78 S. E. 588: "If the plaintiff is entitled to recover, it must be for a breach of contract upon the part of the defendant by reason of his having omitted to do that which by his contract he ought to have done, or having done that which by the terms of his contract he should have refrained from doing. The recovery must be based upon some default or misconduct on the part of the defendant."

In conclusion, we are of opinion that the lower court erred in giving the instruction asked for by the plaintiffs, and further erred in refusing to give the instructions offered by the defendant in the form in which they were requested, which instructions submitted the defendant's theory of the case to the jury without prejudice to the rights of the plaintiffs.

For these reasons, the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial not in conflict with this opinion.

ther than that the nature of the defect, if any, does not appear in the record.

But a contract employing a broker which provides for the payment of commission "when the title is passed" does not prevent the broker from obtaining his commission before the sale is actually completed, but when he has obtained a purchaser who has entered into a binding contract with the owner, although the sale thereafter is not completed because of a defect in the owner's title, the broker is entitled to his commission. *Meckes v. Mullen*, 75 Misc. 303, 132 N. Y. Supp. 942. The phrase, "when the title is passed," is stated to merely fix the time when the contract was to be performed, and the actual closing of the title was not a condition precedent to suspend the payment of the commission.

A real estate owner who has agreed to pay his broker "upon the consummation of the said sale" is liable to the broker for his commission, where the broker has procured a purchaser who has entered into a contract with the vendor, although the contract is afterward rescinded in an action brought for that purpose, because the vendor is unable to convey a marketable title. *Clark v. Battaglia*, 47 Pa. Super. Ct. 290. The expression, "upon the consummation of the said sale," is held to have been intended to fix the time before which payment to the plaintiff could not be legally demanded, but when it further appeared that such date would never arrive, because of the inability of the owner to perform his contract with his purchaser, there was nothing to prevent the broker from suing and recovering the compensation he had earned.

Under a contract providing for the pay-

ment of a commission "if the trade went through," a broker is entitled to his commission upon a binding contract being entered into between the purchaser and the vendor; and the fact that the sale is not thereafter consummated, because of an encumbrance existing on the property of the employer, does not change the rule. *Fawver v. Fullingim*, — Tex. Civ. App. —, 149 S. W. 746.

A broker is entitled to his commission where the sale failed because of the defective title of the vendor, even under a contract providing that he was not to have any commission unless the deal went through. *Dean v. Williams*, 56 Wash. 614, 106 Pac. 130.

IV. Effect of broker's knowledge of defect.

a. In general.

If the broker has knowledge of the defect at time of entering into the employment, he is not entitled to his commissions where the sale is not completed because of the defect.

It is stated *obiter* in *Willson v. Crawford*, — Tex. Civ. App. —, 130 S. W. 227, that if the brokers undertook to sell land with the knowledge that there was an unexpired lease for a term of one year thereon, they would not be entitled to their commission where the sale failed because of the refusal of the purchaser to take the land burdened with the lease.

In order to defeat the broker's right to commission, however, the owner must show that he had knowledge of the defect; in the absence of such showing, he will be entitled to his commission. *Ibid*.

L.R.A.1915E.

It is made a condition of liability in *McKinnon v. Hope*, 118 Ga. 462, 45 S. E. 413, and *Cheek v. Nicholson*, — Tex. Civ. App. —, 133 S. W. 707, that the broker have no knowledge of the defect at the time of undertaking sale.

The question of the broker's knowledge of the defect in title is raised in *O'Neil v. Printz*, 115 Mo. App. 215, 91 S. W. 174. It is there decided, however, that the broker had no knowledge of the defect, and the case does not discuss the effect of knowledge.

If the owner has promised to cure the defects he will be liable to the broker for commission upon a failure to do so, and the failure to complete the sale on account thereof. *McGowan v. Eubank*, — Tex. Civ. App. —, 177 S. W. 512. The defect in this case was a debt upon the land which apparently might have been discharged by the owner.

A broker who knew of restrictions upon the property, who obtained a contract with the purchaser with the express provision that there were no easements or restrictions against the land, cannot recover where the sale fails because of such restrictions. *Hollway v. Covert*, 11 Ont. Week. Rep. 433.

Where the owner has employed brokers to sell property which the owner had left after deeding away three parcels of land originally owned by him, the brokers are not entitled to commissions where a purchaser procured by them refused to take the land because of an easement created by one of the deeds above referred to, unless the owner represented to them that no encumbrance or easement existed. *Lord v. Crane*, 78 Misc. 389, 138 N. Y. Supp. 383.

In *Wiggin v. Holbrook*, 190 Mass. 157, 76 N. E. 463, a broker employed to sell a note and mortgage given by a cemetery association was held not entitled to his commission where a prospective purchaser secured by him refused to complete the purchase because his attorney was of the opinion that the mortgage did not give a right that could be enforced by foreclosure.

A broker who has erroneously advised the purchaser that certain assessments are liens on the property in question, by reason of which the sale is defeated, is not entitled to his commission. *Mercantile Trust Co. v. Niggeman*, 119 Mo. App. 56, 96 S. W. 293.

In *Wiggins v. Coddington*, 83 Misc. 439, 145 N. Y. Supp. 3, an owner who had given a memorandum of sale to a broker showing an encroachment by a neighboring building to the extent of 5½ inches at one point upon his property, on account of which the broker's proposed purchaser refused to purchase, was held not liable to the broker for his commission. When the property in this case was first listed a higher price was fixed and nothing was said about the encroachment; several offers of purchasers at a less price were obtained, and the price was then reduced, and a memorandum showing the encroachment given to the broker as above stated. There is stated to be no duty on the part of a real estate owner to inform a broker of

encroachments unless he is asked about them. It is not misrepresentation, either wilful or inadvertent, for him to remain silent when he is not asked, and when he is under no duty to volunteer or speak. The broker is an expert in such matters, and it is his duty to inquire as to the terms of sale and as to matters affecting the general character of the property. It appears that the broker had knowledge of the defects and therefore, under the rule of the above cases, would not be entitled to his commission, but this is not the reason given for this decision. In fact, the reason for the decision is left somewhat obscure. It is stated that, so far as appears, the owner had a good marketable title to the realty. The decision closes by stating that the broker failed to produce a purchaser, and therefore did not make out a cause of action.

b. Defect created by broker's act.

A broker who has defeated the consummation of a sale made through another agency to a purchaser whom he had first secured, by levying a writ of attachment on the property for his commission, cannot recover his commission, since the sale was prevented solely by his act in levying the writ of attachment. *Rogers v. McMillen*, — Tex. Civ. App. —, 132 S. W. 853.

A broker who has had his contract with the owner recorded, so that it constitutes a cloud upon the owner's title and prevents a sale which the owner personally made to purchasers secured by the broker, cannot recover any commission. *Woolf v. Sullivan*, 224 Ill. 509, 79 N. E. 646.

See *Mercantile Trust Co. v. Niggeman*, supra, IV. a.

c. Constructive knowledge of defect.

In some instances the broker is held chargeable with notice of the defect. *LEONARD v. VAUGHAN*.

It has been denied, however, that a broker is charged with constructive notice of the term of the lease of a tenant in possession of land which the broker has undertaken to sell. *Willson v. Crawford*, — Tex. Civ. App. —, 130 S. W. 227.

See *Lord v. Crane*, supra, IV. a.

W. A. E.

INDIANA SUPREME COURT.

TIPPECANOE LOAN & TRUST
COMPANY, Appt.,
v.
ELLA M. JESTER.

(180 Ind. 357, 101 N. E. 915.)

Master and servant — liability of agent for nonfeasance — failure of building agent to keep elevator in repair.

1. Agents of an apartment building with full authority to keep it in repair and hire the employees are personally liable for injury to a tenant through their negligence

to keep the door of the elevator shaft in repair, so that it stands open when the elevator is not at the floor where the door is located, and the tenant, misled by the open door, steps into the shaft and falls to the bottom, since they are guilty of misfeasance in permitting the elevator to be operated in an unsafe condition.

Trial — contributory negligence — question for jury.

2. The jury must determine whether or not a tenant of an apartment in a building, who knows of a custom to have a door to the elevator shaft open only when the car is there, is negligent in stepping through an open door without ascertaining that the car is in fact there.

Principal and agent — subagent — relation to principal.

3. A subagent in actual control of a business is the agent of the principal, if he knew from the character and location of the business that it could not be carried on by the principal agent, and that the subagent had been employed.

Elevator — liability of operator — insurer.

4. One operating a passenger elevator in an apartment house is not an insurer of the safety of passengers.

Trial — instruction — duty of tenant of apartment.

5. It is error to instruct the jury in an action by a tenant of an apartment house for injuries caused by falling down the elevator shaft, that it was not his duty to look at every place he stepped in going from the street to his apartment, since the question of his duty in this respect is for the jury.

Appeal — instruction — interest of witness.

6. It is not reversible error to instruct the jury that they "must" consider the interest and the appearance upon the witness stand of, and the bias or prejudice shown by, the witnesses.

(May 9, 1913.)

Note. — Liability for injury to elevator passenger.

- I. Introduction, 722.
- II. Is one maintaining elevator subject to rules governing liability of common carrier, 723.
- III. Presumption of negligence from happening of accident, 724.
- IV. Construction and inspection of passenger elevator, 726.
- V. Care in operation and selection of operatives, 726.
- VI. Injuries by negligence in operation of passenger elevator.
 - a. In general, 728.
 - b. When entering car, 730.
 - c. When leaving car, 730.
 - d. Stepping into shaft.
 1. In general, 731.
 2. Contributory negligence, 731.
 - e. Struck by descending car, 732.
- VII. Freight elevators.
 - a. Rightful use of, 732.
 - b. Putting to use not intended, 732.

I. Introduction.

The earlier cases on this question are discussed in the note to *Edwards v. Manufacturers' Bldg. Co.* 2 L.R.A.(N.S.) 744.

The following notes will be found helpful on specific phases of liability with reference to elevators:

Leaving elevator in position to be operated by stranger as proximate cause of injury to passenger occasioned by act of third party in connection therewith is discussed in the note to *Board of Trade Bldg. Corp. v. Cralle*, 22 L.R.A.(N.S.) 297.

As to liability of an owner of an elevator for injuries to trespassers or licensees, see L.R.A.1915E.

note to *Davis v. Ohio Valley Banking & T. Co.* 15 L.R.A.(N.S.) 402, the subsequent case of *Faurot v. Oklahoma Wholesale Grocery Co.* 17 L.R.A.(N.S.) 136; and note to *Sweeden v. Atkinson Improv. Co.* 27 L.R.A.(N.S.) 124.

As to the right of one who has been prohibited from entering a passenger elevator, but who does so for the purpose of doing business with a tenant, see note to *Ferguson v. Truax*, 14 L.R.A.(N.S.) 350.

The duty of an innkeeper with respect to the operation of an elevator is discussed in *McCracken v. Meyers*, 16 L.R.A.(N.S.) 290; and see also note in 43 L.R.A.(N.S.) 659.

The duty of store or shopkeeper toward customer as to condition of premises, including elevator shafts, is discussed in the note to *McDermott v. Sallaway*, 21 L.R.A.(N.S.) 458, and *Smith v. Johnson*, L.R.A. 1915F, —.

The measure of duty owing to servants with respect to elevators which they are required or permitted to use for personal transportation is discussed in the note to *Walsh v. Cullen*, 18 L.R.A.(N.S.) 911; and as to duty to employees as to inspection of elevators, see note to *Young v. Mason Stable Co.* 21 L.R.A.(N.S.) 592. The responsibility of owner or occupier of building where operation of elevator is let to independent contractor is discussed in the note to the case in 32 L.R.A.(N.S.) 945.

For an exhaustive note on the violation of police ordinances, including those in relation to elevators, as ground for private action, see note to *Sluder v. St. Louis Transit Co.* 5 L.R.A.(N.S.) 260.

Generally, as to liability of owner for injury to tenant's guests or employees, see note in 17 L.R.A.(N.S.) 1161, VI. a; and specifically as to whether such an employee assumes the risk from a defective elevator, see *B. Shoninger Co. v. Mann*, 3 L.R.A.(N.S.) 1097.

APPEAL by defendant from a judgment of the Superior Court for Tippecanoe County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. William R. Wood, for appellant:

No action can be maintained by a third person against the agent to recover damages for any injury which he may have sustained by reason of the nonperformance or neglect of a duty which the agent owes his principal.

Mechem, Agency, §§ 539, 569.

There is no privity of consideration between the servant and the person who employs his master; and nonfeasance alone will not support an action without consideration.

3 Sutherland, Damages, 59.

An agent having the care of real estate is not liable for an injury sustained by a

third person by reason of the agent's neglect to keep the same in repair.

Dean v. Brock, 11 Ind. App. 507, 38 N. E. 829; Delaney v. Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456; Labadie v. Hawley, 61 Tex. 177, 48 Am. Rep. 278; Hill v. Caverly, 7 N. H. 215, 26 Am. Dec. 735; Bissell v. Roden, 34 Mo. 63, 84 Am. Dec. 71; Henshaw v. Noble, 7 Ohio St. 226; Levi L. Brown Paper Co. v. Dean, 123 Mass. 267; Colvin v. Holbrook, 2 N. Y. 126; Montgomery County Bank v. Albany City Bank, 7 N. Y. 459; Hall v. Lauderdale, 46 N. Y. 70; Greenberg v. Whitcomb Lumber Co. 90 Wis. 225, 28 L.R.A. 439, 48 Am. St. Rep. 911, 63 N. W. 93; Carey v. Rochereau, 16 Fed. 87; Drake v. Hagan, 108 Tenn. 265, 67 S. W. 470; Deaderick v. Bank of Commerce, 100 Tenn. 457, 45 S. W. 786; Ellis v. Southern R. Co. 72 S. C. 465, 2 L.R.A. (N.S.) 378, 52 S. E. 228, 19 Am. Neg. Rep. 541; Murray v. Usher, 117 N. Y. 542, 23 N. E. 564.

Where an agent has authority to employ

II. Is one maintaining elevator subject to rules governing liability of common carrier.

Supplementing note in 2 L.R.A. (N.S.) 745.

The rule sustained by the great weight of authority, as shown by the earlier note, that the owner or operator of an elevator is a common carrier of passengers and as such is bound to exercise the highest degree of care for their safety, is supported by the later cases. Champagne v. A. Ham-burger & Sons, — Cal. —, 147 Pac. 954; Munsey v. Webb, 37 App. D. C. 187; Grant v. Allen, 141 Ga. 106, 80 S. E. 279; Helmly v. Savannah Office Bldg. Co. 13 Ga. App. 498, 79 S. E. 364; Steiskal v. Marshall Field & Co. 238 Ill. 92, 87 N. E. 117; Anderson Art Co. v. Greenburg, 118 Ill. App. 220 (elevator containing two compartments, upper for passengers, lower for freight. Injury occurred in lower compartment); Fraser v. Harper House Co. 141 Ill. App. 390 (innkeeper) Cabbage v. Youngerman, 155 Iowa, 39, 134 N. W. 1074; Ohio Valley Trust Co. v. Werneke, 42 Ind. App. 326, 84 N. E. 999, subsequent appeal in 179 Ind. 49; 99 N. E. 734; Belvedere Bldg. Co. v. Bryan, 103 Md. 514, 64 Atl. 44; Orcutt v. Century Bldg. Co. 201 Mo. 424, 8 L.R.A. (N.S.) 929, 99 S. W. 1062 (freight elevator); Becker v. Lincoln Real Estate & Bldg. Co. 118 Mo. App. 74, 93 S. W. 291; Howard v. Scarritt Estate Co. 161 Mo. App. 552, 144 S. W. 185; Cooper v. Century Realty Co. 224 Mo. 709, 123 S. W. 848; Quimby v. Bee Bldg. Co. 87 Neb. 193, 138 Am. St. Rep. 477, 127 N. W. 118; Kelly v. Lewis Invest. Co. 66 Or. 1, 133 Pac. 826, Ann. Cas. 1915B, 568; Atkeson v. Jackson Estate, 72 Wash. 233, 130 Pac. 102; Ferguson v. Truax, 136 Wis. 637, 118 N. W. 251; Dibbert v. Metropolitan Invest. Co. 158 Wis. 69, L.R.A. 1915D, 305, 147 N. W. 3, 148 N. W. 1095; L.R.A.1915E.

Perrault v. Emporium Dept. Store Co. 71 Wash. 523, 128 Pac. 1049; Shellabarger v. Fisher, 5 L.R.A. (N.S.) 250, 75 C. C. A. 9, 143 Fed. 937.

Both the owner of an elevator and his agents are sometimes stated to be required to exercise extraordinary diligence to protect the lives of passengers therein. Grant v. Allen, 141 Ga. 106, 80 S. E. 279; Helmly v. Savannah Office Bldg. Co. 13 Ga. App. 498, 79 S. E. 364.

In determining whether an elevator used in transporting both freight and passengers was a passenger elevator, within the meaning of a double indemnity clause of an accident insurance policy, the court in Wilmarth v. Pacific Mut. L. Ins. Co. 168 Cal. 536, 143 Pac. 780, Ann. Cas. 1915B, 1120, affirmed the doctrine of this state that the liability of an elevator owner is analogous to that of a common carrier.

The rule applicable to common carrier was applied in Dibbert v. Metropolitan Invest. Co. 158 Wis. 69, L.R.A.1915D, 305, 147 N. W. 3, 148 N. W. 1095, as to the liability of the owner of the building in which the elevator was operated, as to latent defects therein. See L.R.A. note to this case on the liability of the carrier for latent defects.

Generally, as to the applicability to latent defects of rule imputing to the master notice of defect in original construction, see note to Sack v. Ralston, a case involving a latent defect in an elevator, in 17 L.R.A. (N.S.) 104.

The fact that no fare is paid does not prevent the application of the rule requiring the highest degree of diligence. Helmly v. Savannah Office Bldg. Co. 13 Ga. App. 498, 79 S. E. 364.

And notwithstanding a statute providing that "a carrier of persons without reward must use ordinary care and diligence for their safe carriage." Champagne v. A.

subagents, he will not be liable for their acts or omissions, unless in their appointment he is guilty of fraud or gross negligence, or improperly co-operates in the acts of omission.

1 Am. & Eng. Enc. Law, 981; Ellis v. Southern R. Co. 72 S. C. 465, 2 L.R.A. (N.S.) 378, 52 S. E. 228, 19 Am. Neg. Rep. 541; Stone v. Cartwright, 6 T. R. 411, 3 Revised Rep. 220, 9 Mor. Min. Rep. 672; Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304.

The injured party must himself be without fault contributing to the production of the accident, if the defendant is to be held liable.

Quinn v. Chicago & E. R. Co. 162 Ind. 442, 70 N. E. 526; Newhouse v. Miller, 35

Ind. 463; Cincinnati, W. & M. R. Co. v. Peters, 80 Ind. 168, 13 Am. Neg. Cas. 133; Mt. Vernon v. Dusouchett, 2 Ind. 586, 54 Am. Dec. 467; Evansville & C. R. Co. v. Hiatt, 17 Ind. 102; Indianapolis, P. & C. R. Co. v. Keely, 23 Ind. 133; Jeffersonville R. Co. v. Hendricks, 26 Ind. 232, 3 Am. Neg. Cas. 70; Riest v. Goshen, 42 Ind. 339; Wabash & E. Canal v. Mayer, 10 Ind. 400; Baltimore & O. S. W. R. Co. v. Hunsucker, 33 Ind. App. 33, 70 N. E. 556.

Where want of due care appears on the face of the complaint, plaintiff cannot recover.

Indianapolis Street R. Co. v. Tenner, 32 Ind. App. 311, 67 N. E. 1044; Indianapolis Traction & Terminal Co. v. Pressell, 39 Ind. App. 472, 77 N. E. 357; Morford v.

Hamburger & Sons, supra. Reward is stated not necessarily to import that there must be a fare paid for carriage in an elevator in order to constitute the owner thereof a carrier of persons for hire. The elevator accident involved in this case occurred in a department store, and it is held that the proprietor of a department store, operating an elevator to carry customers or prospective customers from one floor of a store to another for the purpose of trade, is a carrier of persons for hire.

The New York doctrine that the owner is bound to use only reasonable care is followed in *Frahm v. Siegel-Cooper Co.* 131 App. Div. 747, 116 N. Y. Supp. 90; *Rumetsch v. Wanamaker*, 154 App. Div. 800, 139 N. Y. Supp. 385, and by *Lehman, J.*, in *Cohen v. Farmers' Loan & T. Co.* 70 Misc. 548, 127 N. Y. Supp. 561.

III. Presumption of negligence from happening of accident.

Supplementing note in 2 L.R.A. (N.S.) 748. See also notes in 3 L.R.A. (N.S.) 619, and 29 L.R.A. (N.S.) 816.

As to whether pleading particular cause of injury is a waiver of the right to rely on *res ipsa loquitur*, see note to *Walters v. Seattle, R. & S. R. Co.* 24 L.R.A. (N.S.) 788, and to *Biddle v. Riley*, L.R.A. —, —, supplementing the former note.

As to the relation of doctrine of *res ipsa loquitur* to burden of proof, see note to *Cleveland, C. C. & St. L. R. Co. v. Hadley*, 16 L.R.A. (N.S.) 527.

The doctrine of *res ipsa loquitur* applies to injuries in elevators. Just what must be shown to raise the presumption of negligence has been variously stated.

When it is shown that a passenger was injured while being carried, a presumption of negligence arises. *Cooper v. Century Realty Co.* 224 Mo. 709, 123 S. W. 848.

A presumption of negligence arises when a person is injured while in transportation under ordinary conditions. *Burdette v. Chicago Auditorium Assn.* 166 Ill. App. 186.

L.R.A.1915E.

The fact that an elevator falls when persons are being carried thereon is evidence that the elevator was mismanaged or was out of repair or of faulty construction. *Steiskal v. Marshall Field & Co.* 238 Ill. 92, 87 N. E. 117.

The fact that an elevator fell when subjected to ordinary use raised the presumption of negligence. *Cleary v. Cavanaugh*, 219 Mass. 281, 106 N. E. 998 (freight elevator).

It is sufficient to show the accident and the attendant circumstances and conditions, when negligence will be presumed. *Orcutt v. Century Bldg. Co.* 201 Mo. 424, 8 L.R.A. (N.S.) 929, 99 S. W. 1062.

Where a passenger is injured by the giving way of some portion of the machinery or appliances in a way unexplained, the presumption of negligence arises. *Anderson Art Co. v. Greenburg*, 118 Ill. App. 220.

An instruction to the effect that there is no presumption of negligence from the mere fact that a passenger on an elevator received an injury while being carried therein was approved in *Quimby v. Bee Bldg. Co.* 87 Neb. 193, 138 Am. St. Rep. 477, 127 N. W. 118.

The court in *Wagner v. Farmers' & M. Ins. Co.* 90 Neb. 463, 133 N. W. 650, approves of an instruction to the effect that if the elevator was stopped on the floor at the place where the plaintiff was waiting, and in response to his signal, and the door thereof was opened by defendant's servant in charge of such elevator, "and that, while plaintiff was in the act of entering, the elevator was started by defendant's servant, and by reason thereof plaintiff was injured, as alleged in his petition, this would be presumptive evidence of negligence upon the part of defendant."

It has been held that where the owner has shown that the structure and its appliances were suitable for the purpose, and not defective, this presumption is overcome, and it then becomes necessary for the plaintiff to adduce evidence sufficient to sustain the charge, and in case he fails to do so his complaint should be dismissed. *Cohen v.*

Chicago, I. & L. R. Co. 158 Ind. 494, 63 N. E. 857; Southern R. Co. v. Sittasen, 166 Ind. 257, 76 N. E. 973; Indianapolis v. Cook, 99 Ind. 10; Gosport v. Evans, 112 Ind. 133, 2 Am. St. Rep. 164, 13 N. E. 256.

What the appellee should have done, or not have done, in this case, to have avoided the injury, was a question for the jury.

Prothero v. Citizens' Street R. Co. 134 Ind. 431, 33 N. E. 765, 3 Am. Neg. Cas. 279; Rhodius v. Johnson, 24 Ind. App. 407, 56 N. E. 942; Pennsylvania Co. v. Horton, 132 Ind. 189, 31 N. E. 45; Cleveland, C. C. & St. L. R. Co. v. Schneider, 40 Ind. App. 38, 80 N. E. 985; Van Winkle v. New York, C. & St. L. R. Co. 34 Ind. App. 480, 73 N. E. 157; Pennsylvania Co. v. Stegemeier, 118

Ind. 305, 10 Am. St. Rep. 136, 20 N. E. 843; 3 Elliott, Railroads, § 1157.

In directing the jury as to the manner of determining the credibility of the witnesses, it is error to instruct them what facts they must or should consider.

Wabash R. Co. v. Biddle, 27 Ind. App. 161, 59 N. E. 284, 60 N. E. 12; Woollen v. Whitacre, 91 Ind. 502; Fulwider v. Ingels, 87 Ind. 414; Shorb v. Kinzie, 100 Ind. 429; Jones v. Casler, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812; Durham v. Smith, 120 Ind. 463, 22 N. E. 333; Dodd v. Moore, 91 Ind. 522; Duvall v. Kenton, 127 Ind. 178, 26 N. E. 688; Newman v. Hazelrigg, 96 Ind. 73; Hartford v. State, 96 Ind. 461, 49 Am. Rep. 185; Finch v. Bergins, 89 Ind. 360; Bird v. State, 107 Ind. 154, 8 N. E.

Farmers' Loan & T. Co. 70 Misc. 548, 127 N. Y. Supp. 561.

Lehman, Judge, in Cohen v. Farmers' Loan & T. Co. supra, expressed the opinion that the defendant in this case, who had shown only that competent men had inspected the elevator and found it safe, had not gone far enough to overcome the presumption raised by the doctrine of *res ipsa loquitur*, and that it was still necessary for him to show that the competent men were not negligent in their inspection.

In Frahm v. Siegel-Cooper Co. 131 App. Div. 747, 116 N. Y. Supp. 90, the presumption of negligence is held not to arise merely upon a showing of the accident, but the accident and the surrounding circumstances should be shown. In this case the injury resulted from a passenger being struck by a piece of mortar which fell from the elevator well. In addition to showing the accident, it was held that it must be shown that for part of the way up the elevator shaft, mortar had been allowed to protrude into the shaft in such a manner as to be broken off or shaken off by constant vibration, and that where the owner and operator of the elevator undertook to show that the condition of the mortar on the inside of the shaft was not necessarily dangerous, and that it had exercised all reasonable care to inspect and guard against such an accident, it was entitled to an instruction to the effect that, "in the absence of evidence that establishes that the defendant knew, or in the exercise of reasonable care should have known, that mortar on the sides of its elevator shaft was in such condition that a reasonably prudent person would believe that it might fall, the verdict must be for the defendant."

That the "accident and surrounding circumstances" constitute the *res* is held in Harvey v. Proctor, 158 App. Div. 139, 142 N. Y. Supp. 769.

Evidence that the elevator was in proper working order immediately after the accident, and that the operator used due care in the operation at the time of the accident, does not so conclusively rebut the presumption of negligence arising from the L.R.A.1915E.

happening of the accident and attendant circumstances as to warrant a dismissal of the complaint. Gage v. Waldorf Astoria Hotel Co. 90 Misc. 331, 152 N. Y. Supp. 1019.

As applied by the court in Frahm v. Siegel-Cooper Co. supra, the doctrine amounts to but little more than proof of negligence by circumstantial evidence. This seems to have been the theory of the court in Kelly v. Lewis Invest. Co. 66 Or. 1, 133 Pac. 826, Ann. Cas. 1915B, 568, where it is stated: "It is a rule of law, except in cases of mischief done in accordance with the generic propensities of the animal committing it, that negligence will not be presumed. 1 Thomp. Neg. § 853. An averment of negligence, however, need not necessarily be substantiated by direct testimony, but may be made out of circumstantial evidence, from the production of which proof carelessness may be inferred. Thus, where, from the relation of the parties and the manner of the accident, it appears that an instrumentality causing an injury was at the time controlled by the defendant, and that the casualty was such as, in the usual course of events, would not have occurred if those who managed the thing had used proper care, evidence of the injury and of the incidents accompanying and tending to produce the hurt inferentially shows that the accident arose from the want of requisite care. That is, by establishing a condition of surrounding and limiting circumstances, whose existence forms an antecedent from which the principal fact of negligence may be deduced, sufficient to create a *prima facie* case requiring the defendant, who evidently had a better opportunity to know the cause of the harm, if he would avoid an adverse judgment based on such state of the case, to offer evidence tending to overcome the deduction which the reason of the jury makes from the facts and circumstances so established."

A discussion of the distinction between *res ipsa loquitur* as a distinctive rule of evidence, and the rule that negligence may be established by circumstantial evidence,

14; *Pennsylvania Co. v. Hunsley*, 23 Ind. App. 37, 54 N. E. 1071.

Messrs. **George P. Haywood** and **Charles A. Burnett**, for appellee:

For an injury resulting from the carelessness or negligence of a servant while in the performance of his master's business, to a third person, the master is liable, and also the servant, and they may be joined as defendants in an action to recover damages for the injury.

Wright v. Compton, 53 Ind. 337, 2 Mor. Min. Rep. 189; *Indiana Nitroglycerine & Torpedo Co. v. Lippincott Glass Co.* 185 Ind. 361, 75 N. E. 649; *Evansville & I. R. Co. v. Baum*, 26 Ind. 70, 8 Am. Neg. Cas. 201; *McGinnis v. Chicago, R. I. & P. R. Co.* 200 Mo. 347, 9 L.R.A.(N.S.) 880, 118 Am.

St. Rep. 661, 98 S. W. 590, 9 Ann. Cas. 656; *McHugh v. Northern P. R. Co.* 32 Wash. 30, 72 Pac. 450; *Morrison v. Northern P. R. Co.* 34 Wash. 70, 74 Pac. 1064; *Howe v. Northern P. R. Co.* 30 Wash. 569, 60 L.R.A. 949, 70 Pac. 1100; *Stevick v. Northern P. R. Co.* 39 Wash. 501, 81 Pac. 999, 18 Am. Neg. Cas. 667; *Southern R. Co. v. Reynolds*, 125 Ga. 657, 55 S. E. 1039; *Mayberry v. Northern P. R. Co.* 100 Minn. 79, 12 L.R.A.(N.S.) 675, 110 N. W. 356, 10 Ann. Cas. 754; *Whalen v. Pennsylvania R. Co.* 73 N. J. L. 192, 63 Atl. 993; 6 Thomp. Neg. § 7437.

An action based on the negligence of persons doing certain work lies against those who are guilty, as well as against those in whose employ they are.

Hardrop v. Gallagher, 2 E. D. Smith, 523.

may be found in the notes to *Fitzgerald v. Southern R. Co.* 6 L.R.A.(N.S.) 337, and *Byers v. Carnegie Steel Co.* 16 L.R.A.(N.S.) 214, dealing with applicability of the rule as between master and servant.

It has been held that one injured in an elevator has a right to rely on the doctrine of *res ipsa loquitur*; although he has attempted to show specific acts of negligence, should the jury determine that he has failed in showing the specific acts. *Cleary v. Cavanaugh*, 219 Mass. 281, 106 N. E. 998. It does not appear whether the specific acts of negligence were alleged in the petition.

IV. Construction and inspection of passenger elevator.

Supplementing note in 2 L.R.A.(N.S.) 749.

It has been held that an automatic electric elevator in an apartment house, intended for the use principally of women and children, which has no regular elevator operator, and which operates in a well into which the floors at the landing places protrude, is negligently constructed, where it has no gate or door by which to close the entrance to the elevator proper. *Atkeson v. Jackson Estate*, 72 Wash. 233, 130 Pac. 102.

The use of such an elevator without an operator was held negligence as to a young child, where an ordinance required an operator, in *Shellabarger v. Fisher*, 5 L.R.A.(N.S.) 250, 75 C. C. A. 9, 143 Fed. 937; but nothing is said as to the lack of a door. See *Atkeson v. Jackson Estate*, *infra*, V.

It cannot be said as a matter of law that it is not negligence for the grating surrounding an elevator shaft to be so constructed as to permit the hand of one who is endeavoring to press the elevator button to pass between the bars. *Byrd v. Atlanta Nat. Bank*, — Ga. App. —, 84 S. E. 219.

The owner of an elevator is not negligent and therefore not liable for injury resulting from an accident due to the fall of an elevator owing to a defect in the original construction, where he employed a concern of high reputation in the manufacture, *con-* L.R.A.1915E.

struction, and installation of elevators, ordered an elevator capable of carrying a working load much greater than that imposed upon it at the date of the accident, or so far as the evidence discloses at any previous time, and had the elevator frequently inspected by competent men. *Rumetsch v. Wanamaker*, 154 App. Div. 800, 139 N. Y. Supp. 385.

In *Cubbage v. Youngerman*, 155 Iowa, 39, 134 N. W. 1074, it was held for the jury to say whether the elevator machinery had been kept in a reasonable and proper condition of repair, where there was evidence tending to show that, although the electric power was shut off and the brake automatically applied when the floor of the car was only about 2 feet higher than the bottom of the door of the exit, the car did not stop until the plaintiff's legs were jammed against the top of the opening, which was 7 feet high, and that the attention of the superintendent had, three days before, been called to the fact that the car would slide at times more than was usual.

See *Cohen v. Farmers' Loan & T. Co.* *supra*, III.

Evidence that there was some defect in an elevator which prevented it being stopped at the will of the operator is sufficient to require the jury to pass upon the liability of the owner. *Anderson Art Co. v. Greenburg*, 118 Ill. App. 220. The injury in this case occurred in an elevator with two compartments, the upper one for passengers, the lower one for freight. The passenger injured was in the lower compartment for the purpose of going into the basement, while the elevator operator was in the upper compartment.

V. Care in operation and selection of operatives.

Supplementing note in 2 L.R.A.(N.S.) 751.

The duty to keep an elevator closed while the car is in motion, or to guard the open space with the extended arm of the operator in charge, cannot as a matter of law be said not to exist in favor of all pas-

Where an agent has entered upon the management of his principal's business for which he has been employed, and thereafter, during the continuance of such contractual relation, fails or omits to do certain acts which he should have done, whereby a third person is injured, it is not a nonfeasance, but a misfeasance.

Orcutt v. Century Bldg. Co. 201 Mo. 424, 8 L.R.A.(N.S.) 929, 99 S. W. 1062; *Ellis v. McNaughton*, 76 Mich. 237, 15 Am. St. Rep. 308, 42 N. W. 1113; *Baird v. Shipman*, 132 Ill. 16, 7 L.R.A. 128, 22 Am. St. Rep. 504, 23 N. E. 384; *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437; *Lough v. John Davis & Co.* 30 Wash. 204, 59 L.R.A. 802, 94 Am. St. Rep. 848, 70 Pac. 491, 17 Am. Neg. Rep. 146; *Southern R. Co. v.*

Grizzle, 124 Ga. 737, 110 Am. St. Rep. 191, 53 S. E. 244; *Southern R. Co. v. Reynolds*, 126 Ga. 657, 55 S. E. 1039.

An agent having charge of a building, with authority to make repairs and employ servants, is personally liable for injuries to a passenger due to the negligent operation or repair of the elevator in such building.

Orcutt v. Century Bldg. Co. 201 Mo. 424, 8 L.R.A.(N.S.) 929, 99 S. W. 1062.

It is actionable negligence to leave the door to a passenger elevator shaft open and unguarded, so that persons taking the usual course to enter the elevator car are liable to fall down the shaft.

1 Thomp. Neg. § 1077; *Springer v. Ford*,

passengers, whether the car is crowded or not, where the floors of the building project at right angles into the elevator well for several inches, and there are no flanges or pieces of metal inclining from the projecting floor to the shaft wall. *Munsey v. Webb*, 231 U. S. 150, 58 L. ed. 162, 34 Sup. Ct. Rep. 44. In this case the injured passenger was the only passenger, and was standing about the center of the car, when he suddenly reeled and fell with his head protruding through the open car door, a sufficient distance to be caught between the floor of the car and the underside of the projecting floor of the building.

Evidence from which a jury may have drawn the inference that the elevator boy was in the habit of starting the car before closing the door of access is sufficient to carry the case to the jury on the question of negligence. *Cubbage v. Youngerman*, 155 Iowa, 39, 134 N. W. 1074.

The negligence of the elevator boy was held a question for the jury in *Cubbage v. Youngerman*, supra. A tenant of the building entered the car at the main floor with another tenant, and the elevator boy knew the usual destination of each, but neither announced his destination on that trip. When the elevator reached the floor of the plaintiff's companion, the elevator was stopped and the door opened and the companion immediately stepped out; plaintiff attempted to follow him, but the elevator boy, not noticing that he was stepping from the car, turned on the power and attempted to close the door, which struck the leg of the plaintiff as he was attempting to step out. Thereupon, the elevator boy attempted to shut off the power, but the car did not stop, the plaintiff's head struck against the top of the shaft opening; by this concussion he was thrown backward to the floor of the car, his feet protruding through the opening, and being brought in contact with the top of the door frame. The court states that, even if the plaintiff had announced his destination, it was the duty of the elevator boy to guard against inadvertence or a change of mind on his part, by seeing to it

that he was not in a position of danger when the elevator started; that the elevator boy would have no right to assume that each passenger would attempt to get off only at a floor which he had previously specifically designated.

Evidence that an elevator which had started to ascend was stopped when some persons were seen coming toward it, and brought back to the floor, and that one of the persons in attempting to enter was thrown by the sudden descent of the elevator, which was in perfect condition, is sufficient evidence of negligence on the part of the operator to withstand a demurrer to the evidence. *Chambers v. Kupper-Benson Hotel Co.* 154 Mo. App. 249, 134 S. W. 45.

The operator in charge of an elevator is presumed to be an employee of the owner in the absence of any showing otherwise, so as to render the owner liable for his negligence, and even if he is not an employee, but is operating the elevator on the occasion of the accident to accommodate the regular elevator boy or for some other reason, the owner is nevertheless responsible, since it is his duty to furnish elevator service, and he can neither delegate, nor permit someone else to delegate, this duty to others so as to relieve him from responsibility. *Harvey v. Proctor*, 158 App. Div. 139, 142 N. Y. Supp. 769.

An owner out of possession is not liable for injuries occurring in an elevator because of the absence of a device to prevent the car from being started until the door or doors are closed, as required by a statute, until after the notice provided by the statute has been given; but a lessee in possession of the building and elevator is liable notwithstanding no notice has been given. *Hart v. Fletcher Land Co.* 175 Fed. 985.

A woman who is a tenant in apartment house is not guilty of contributory negligence in using an automatic electric elevator which is constructed without a gate or door by which to close the entrance to the elevator cage, so as to bar her recovery for the death of her child, resulting from injuries sustained when it fell, upon the sudden starting of the elevator, through the

189 Ill. 430, 52 L.R.A. 930, 82 Am. St. Rep. 464, 59 N. E. 953.

Persons operating passenger elevators are classed as common carriers, and are subject to the same responsibility and have imposed on them the same extraordinary obligation of care and skill. The law puts upon persons operating such elevators the highest degree of care consistent with the possibility of injury.

1 Thomp. Neg. § 1078; Mitchell v. Mar-ker, 25 L.R.A. 33, 10 C. C. A. 306, 22 U. S. App. 325, 62 Fed. 139, 7 Am. Neg. Cas. 389; Hartford Deposit Co. v. Sollitt, 172 Ill. 222, 64 Am. St. Rep. 35, 50 N. E. 178, 4 Am. Neg. Rep. 263; Treadwell v. Whittier, 80 Cal. 574, 5 L.R.A. 498, 13 Am. St. Rep. 175, 22 Pac. 266; Springer v. Ford, 189 Ill.

430, 52 L.R.A. 930, 82 Am. St. Rep. 464, 59 N. E. 953; Belvedere Bldg. Co. v. Bryan, 103 Md. 536, 64 Atl. 44; 10 Am. & Eng. Enc. Law, 2d ed. 946; 6 Cyc. 596; Burns's Rev. Stat. 1908, § 8024.

The duty to third persons to repair is imposed by law on an agent who is in control and management of a building, with full power, authority, and direction to repair, though he had not expressly agreed to repair.

Lough v. John Davis & Co. 30 Wash. 204, 59 L.R.A. 802, 94 Am. St. Rep. 848, 70 Pac. 491, 17 Am. Neg. Rep. 146; Baird v. Shipman, 132 Ill. 16, 7 L.R.A. 128, 22 Am. St. Rep. 504, 23 N. E. 384.

An agent who is authorized to keep a building in repair, and has undertaken that

open the door of the cage and was crushed by being caught between the floor of the cage and the floor beam of the floor above, where she did not realize any danger of such an accident and her experience with elevators was limited. Atkeson v. Jackson Estate, 72 Wash. 233, 130 Pac. 102.

Evidence of the condition of the elevator as far back as two years prior to the accident was held proper in Orcutt v. Century Bldg. Co. 214 Mo. 35, 112 S. W. 532.

See Jones v. Co-op. Asso. post, 745, on the question of care in the selection of operatives.

VI. Injuries by negligence in operation of passenger elevator.

a. In general.

Supplementing note in 2 L.R.A.(N.S.) 752.

The question of the negligence of the owner of a students' dormitory in which an elevator is operated, in causing the injury of a tailor's boy who was delivering clothes to the occupants of the dormitory, is for the jury, where the elevator boy took the person who was afterwards injured to the desired floor and then went away from the elevator, leaving the door open and the lever moved forward of the center to offset a leakage in the elevator machinery and keep it stationary, and the plaintiff was injured by the sudden starting of the elevator when he attempted to enter. Toohy v. McLean, 199 Mass. 466, 85 N. E. 578.

A railroad company which operates an elevator in one of its stations for the convenience of passengers is not liable for injuries suffered by a passenger who, in a crowded elevator, while attempting to prevent himself being thrown down, put out her hand, whereby it was struck by the door which was being closed by the elevator man, especially where, by the direction of the injured person, the elevator man was trying to move the elevator quickly in order to enable her to catch a train. Cashman v. New York, N. H. & H. R. Co. 201 Mass. 355, 87 N. E. 570. L.R.A.1915E.

Objection was made to an obstruction in Clark v. Scandinavian-American Bank, 113 Minn. 93, 128 N. W. 1114, to the effect that if the elevator doors were opened by someone other than the operator, but with his knowledge or permission, it would be his act so far as liability for injury to passengers was concerned; the reason urged why this was error was that there was no evidence tending to support any such hypothesis, and it does not appear that there was any objection to the principle of law contained in the instruction.

Negligence on the part of the owner of an elevator is shown by evidence that the car, evenly balanced by counterweights and with the lever control partly removed, so that the lever was free to move in either direction, was left at the top floor of a building with the door open, so as to render him liable for injuries to a tenant who stepped into the elevator and thereby caused it to descend, whereupon the tenant became frightened and was injured in attempting to escape. Cooper v. Century Realty Co. 224 Mo. 709, 123 S. W. 848.

The operation of an automatic electrical passenger elevator in an apartment building where several children under ten years of age lived and used the elevator, in a city in which the duty to employ an operator is imposed by ordinance, without complying with the ordinance and having an operator, constitutes sufficient evidence of negligence, actionable by a child between five and six years of age who was injured while running the elevator by getting her leg caught between the floor of the car and the second floor of the building as the car ascended. Shellabarger v. Fisher, 5 L.R.A. (N.S.) 250, 75 C. C. A. 9, 143 Fed. 937.

The owner of an elevator is liable for injuries to a passenger resulting from the act of the occupants of the elevator in rushing over her after she had fallen, in attempting to get out of the elevator after it had fallen to the bottom of cage. Champagne v. A. Hamburger & Sons. — Cal. —, 147 Pac. 954.

The owner of an office building in which a tenant is engaged in the practice of his

duty, and is in complete control of the work, having negligently failed to repair, is liable to a third person injured thereby.

Lough v. John Davis & Co. supra.

Where an agent has entered into contract with his principal to do certain work, or to conduct and manage certain business, and during the continuance of such contract, and while generally engaged in the performance of his duties under such contract, he negligently omits to do some thing whereby an innocent third person is injured, the agent is liable to such third person because of the duty imposed on him by law.

Orcutt v. Century Bldg. Co. 201 Mo. 424, 8 L.R.A.(N.S.) 929, 99 S. W. 1062; Ellis v. McNaughton, 76 Mich. 237, 15 Am. St.

Rep. 308, 42 N. W. 1113; Baird v. Shipman, 132 Ill. 16, 2 L.R.A. 128, 22 Am. St. Rep. 504, 23 N. E. 384; Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 437; Lough v. John Davis & Co. supra; Southern R. Co. v. Grizzle, 124 Ga. 737, 110 Am. St. Rep. 191, 53 S. E. 244; Southern R. Co. v. Reynolds, 126 Ga. 657, 55 S. E. 1039.

Where the injury results from such an omission of duty or act of negligence on the part of the agent as partakes of the character of a misfeasance, the agent is personally liable to third persons.

1 Am. & Eng. Enc. Law, 2d ed. 1133, 1134.

Plaintiff had no knowledge of the existence of danger, and no reason to suspect danger. She had a right to assume the place to be free from danger, and was there-

profession as an oculist is held bound to anticipate the presence of persons whose eyesight is affected or defective, and who therefore are unable to perceive dangers which might be obvious to persons in possession of unimpaired vision. Byrd v. Atlanta Nat. Bank, — Ga. App. —, 84 S. E. 219. It is further stated that the owner of a building which is occupied in part by physicians as tenants must anticipate that numerous persons, either temporarily or permanently disabled in some respects, in accepting the implied invitation extended by him through his tenants, will be passengers upon elevators provided by him as a means of ingress and egress.

In Oregon Co. v. Roe, 100 C. C. A. 269, 176 Fed. 715, the negligence of the elevator owner was held for the jury, where there was evidence on the part of the defendant that, in attempting to enter the elevator, the passenger stepped too far with her left foot, so that it passed over the edge of the well, and was struck by the elevator when it descended, and evidence upon behalf of the passenger to the effect that she stepped into the elevator with the floor thereof on a level with the floor of the building, and that, as she was attempting to make the final step with her left foot, the elevator sprang up, and then descended on her foot, which struck beneath the elevator floor.

The question of the contributory negligence of a commercial traveler who was injured in the elevator of a hotel was held to be a question for the jury where the injury occurred by reason of the passenger permitting his elbow to project some 5 or 6 inches beyond the cage into the shaft through an entrance to the elevator which was closed only by a wooden bar 5 or 6 inches wide across the opening, about 3 feet from the floor. Fraser v. Harper House Co. 141 Ill. App. 390.

The attempt of the passenger to escape from the elevator under the circumstances detailed in Cooper v. Century Realty Co. 224 Mo. 709, 123 S. W. 848, was held not to be contributory negligence on her part, if, by reason of the descent of the elevator, she was seized with terror and was alarmed L.R.A.1915E.

for her own safety and had reasonable cause to apprehend peril and danger to herself, and the appearance of danger was imminent, leaving no time for her to deliberate.

One who walks into an elevator while it stands empty and without anyone in control is not free from contributory negligence so as to entitle him to recover for injuries sustained thereby. Kaplan v. J. C. Lyons Bldg. & Operating Co. 61 Misc. 315, 113 N. Y. Supp. 516. The mere fact that the door of the elevator is open is stated not to be an invitation to get into the elevator when no one is in charge of it.

Contributory negligence was held not imputable to a child between five and six years of age who operated an automatic electric elevator and was injured thereby. Shellabarger v. Fisher, 5 L.R.A.(N.S.) 250, 75 C. C. A. 9, 143 Fed. 937. Nor is the doctrine of assumption of risk applicable, because the relation of master and servant does not exist.

Whether a passenger was guilty of contributory negligence in stepping into an elevator, the floor of which was lower than the floor of the building at which it stopped, is a question of fact for the jury, where the elevator door was open and the elevator boy at his post. Perrault v. Emporium Department Store Co. 71 Wash. 523, 128 Pac. 1049. The failure of the passenger to look at the floor of the elevator before stepping in is not negligence as a matter of law.

It cannot be said as a matter of law that the parents of a child not yet four years of age, who took him into an elevator, were guilty of contributory negligence in failing to prevent the child from getting out when the car stopped and the gates were opened, where the movement of the child in falling or going out of the elevator was sudden and unexpected. Howard v. Scarritt Estate Co. 161 Mo. App. 552, 144 S. W. 185. It was stated by the court that it was the duty of the parents, considering the circumstances and the age of the child and the mental confusion under which the child would labor while being carried in a rapid elevator in a large office building, to keep a close lookout for his safety, and it

fore not called upon to be anticipating danger or looking for it.

Brosnan v. Sweetser, 127 Ind. 1, 26 N. E. 555.

The elevator door was an invitation to plaintiff to enter.

Rhodius v. Johnson, 24 Ind. App. 401, 56 N. E. 942.

Plaintiff had no reason to apprehend danger, or that there was an exposed elevator pit instead of the floor of the elevator where she stepped. She had a right to assume that the elevator car was in position without stopping and looking.

Rhodius v. Johnson, 24 Ind. App. 401, 56 N. E. 942; *Tousey v. Roberts*, 114 N. Y. 312, 11 Am. St. Rep. 655, 21 N. E. 399.

Plaintiff was not required, in exercising

due care, to stop and look and feel her way before attempting to enter the elevator.

Rhodius v. Johnson, *supra*; *Fletcher v. Kelly*, 37 Ind. App. 254, 76 N. E. 813; *Brosnan v. Sweetser*, 127 Ind. 1, 26 N. E. 555; *Stevens v. Logansport*, 76 Ind. 498; *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153; *Tousey v. Roberts*, 114 N. Y. 312, 11 Am. St. Rep. 655, 21 N. E. 399; *Cincinnati, H. & I. R. Co. v. Claire*, 6 Ind. App. 390, 33 N. E. 918.

There is no reversible error in the court's giving or refusing to give instructions, for the instructions given, taken as a whole, correctly state the law of the case.

Hutchins v. State, 151 Ind. 667, 52 N. E. 403; *La Plante v. State*, 152 Ind. 80, 52 N.

was their duty, if they saw that the door of the elevator was open, to have prevented him from falling or going out if they could have done so by the exercise of proper effort. Contributory negligence was not chargeable to the boy, considering his age.

The court in *Oregon Co. v. Roe*, 100 C. C. A. 269, 176 Fed. 715, approved of the action of the trial court in striking out the words, "however slight," in an instruction requested by the defendant to the effect that the plaintiff could not recover if there was any negligence on her part, however slight, directly contributing to the injury, the court stating that the different degrees of negligence could usefully be applied in the trial of cases.

b. When entering car.

Supplementing note in 2 L.R.A.(N.S.) 753; *Kaplan v. J. C. Lyons Bldg. & Operating Co. and Perrault v. Emporium Department Store Co.* *supra*, VI. a, and *Chambers v. Kupper-Benson Hotel Co.* 154 Mo. App. 249, 134 S. W. 45, *supra*, V., in the present note.

A guest at a hotel becomes a passenger in the elevator where the elevator is stopped at a floor and the door is opened for the reception of passengers, the moment the guest starts to enter the car. *Chambers v. Kupper-Benson Hotel Co.* 154 Mo. App. 249, 134 S. W. 45.

c. When leaving car.

Supplementing note in 2 L.R.A.(N.S.) 754.

The operator of the elevator is bound to hold the car a reasonable time for passengers to alight or indicate their intention to alight at any given floor. If a passenger is in the act of leaving and the operator knows or ought in reason to know the fact, he has no right to start the elevator, even although it has already waited a reasonable time. *Becker v. Lincoln Real Estate & Bldg. Co.* 118 Mo. App. 74, 93 S. W. 291.

In *Grant v. Allen*, 141 Ga. 106, 80 S. E. 279, the injury to the plaintiff occurred while leaving the elevator immediately after

she had entered it, and while it was still stationary, with the floor of the elevator practically on a level with that of the floor of the building, and the door of the elevator shaft open. In discussing the duty of the operator of the elevator, the court states: "If this carriage is put in motion by the operator while a passenger is in the act of leaving, and his body is partly within and partly without the carriage, and in such position that the carriage cannot be moved without probable injury to his person, we cannot say, as a matter of law, that the operator may close his eyes to this situation, or is under no duty to see that his carriage has a proper clearance before starting it. Whether extraordinary diligence would require the operator to see that his passenger is out of harm's way before starting the carriage is for the jury to determine. That being the case, it would be negligence for him to start his carriage without ascertaining the passenger's peril, if the exercise of the proper care would have disclosed the danger."

In *Swan v. Boston Store*, 177 Ill. App. 349, an action was brought for the death of a boy who, in company with his mother, entered a passenger elevator in a store, intending to go to an upper floor, and when on a floor lower than that at which he intended to leave the car, he let go of his mother's hand, and as he stepped out of the elevator with one foot, it started up and he fell down the shaft, sustaining injuries from which he died. An instruction was given to the jury to the effect that it was immaterial that the boy or those having him in charge intended, when they entered the elevator, to get off at a floor other than the one where the accident occurred, and that the mere fact of mistaking the floor by the said boy, or those having him in charge when attempting to get off said elevator, would not defeat a recovery for damages. This was held error, the court stating that while the mere fact that the mother mistook the seventh floor for the eighth would not of itself defeat a recovery, yet it was a circumstance proper to be considered by the jury in connection with all

E. 452; *Shields v. State*, 149 Ind. 395, 49 N. E. 351; *Wampler v. House*, 30 Ind. App. 513, 66 N. E. 500; *Chicago, I. & E. R. Co. v. Patterson*, 26 Ind. App. 295, 59 N. E. 688; *Indiana Natural & Illuminating Gas Co. v. Anthony*, 26 Ind. App. 307, 58 N. E. 868; *Gemmill v. Brown*, 25 Ind. App. 6, 56 N. E. 691; *Archibald v. Harvey*, 23 Ind. App. 30, 54 N. E. 813; *Indianapolis Gas Co. v. Shumack*, 23 Ind. App. 87, 54 N. E. 414; *Baltimore & O. S. W. R. Co. v. Spaulding*, 21 Ind. App. 323, 52 N. E. 410; *Terre Haute Electric R. Co. v. Lauer*, 21 Ind. App. 466, 52 N. E. 703, 5 Am. Neg. Rep. 581; *Cromer v. State*, 21 Ind. App. 502, 52 N. E. 239; *Lofland v. Goben*, 16 Ind. App. 67, 44 N. E. 553, 651.

A cause will not be reversed because of

other facts and circumstances in evidence, in determining whether the mother was guilty of negligence contributing to the injury.

See *Cabbage v. Youngerman*, 155 Iowa, 39, 134 N. W. 1074, *supra*, V.

d. Stepping into shaft.

1. In general.

Supplementing note in 2 L.R.A.(N.S.) 756.

In *Grimmel v. Boyd*, 94 Neb. 246, 142 N. W. 893, the door to the elevator shaft had been left open and the elevator had moved from the floor. The person for whose death the action was sought stepped into the shaft through the open door and was killed. The trial court, in an instruction which was approved by the supreme court, states that if the door of the shaft was left open and the elevator unattended, the owners were guilty of negligence. The elevator attendant was at the floor where the accident occurred and, so far as the report shows, made no attempt to prevent the passenger from walking through the open door into the shaft.

In *Jolliffe v. Miller*, 126 App. Div. 763, 111 N. Y. Supp. 406, affirmed in 196 N. Y. 504, 89 N. E. 1102, where the plaintiff was injured by stepping into the shaft through an open door while the elevator boy was standing by, it was held that the open door and the elevator boy standing by constituted an invitation to the plaintiff to enter, with the right upon his part to assume that the car was there. The car had been moved by another person to an upper floor without the knowledge of the elevator boy.

It cannot be said, as a matter of law, that the owner of a building rented to various tenants who retained control of the stairways, passageways, hall ways, and other methods of approach to the several portions of the building, for the common use of the tenants, was not negligent where the entry way in which a servant of one of the tenants was working was not well lighted, and I. R. A. 1915E.

an erroneous instruction where it clearly appears that the substantial rights of the appellant were not affected thereby.

Wampler v. House, 30 Ind. App. 513, 66 N. E. 500.

A judgment will not be reversed because one or more instructions given, when standing alone, were erroneous, where, construing all the instructions together, it is apparent that the jury were not misled, and it affirmatively appears that the verdict was right upon the evidence.

Green v. Eden, 24 Ind. App. 583, 56 N. E. 240; *Miller v. Stevens*, 23 Ind. App. 365, 55 N. E. 262; *Posey County Fire Asso. v. Hogan*, 37 Ind. App. 573, 77 N. E. 670; *Chicago, I. & E. R. Co. v. Patterson*, 26 Ind. App. 295, 59 N. E. 688.

the elevator shaft was left open while the elevator ascended to an upper floor, without notice to the injured servant that it was about to ascend. *B. Shoninger Co. v. Mann*, 219 Ill. 242, 3 L.R.A.(N.S.) 1097, 76 N. E. 354, 19 Am. Neg. Rep. 198.

A lessee of an entire building, who agreed with his tenants to furnish an elevator, is liable to one lawfully upon the premises who is injured by falling into the shaft, which had negligently been left unguarded in a dark passageway. *Baker v. Ellis*, 248 Pa. 64, 93 Atl. 821.

The case was held one for the jury in *Sachheim v. Piguaron*, — N. Y. —, 109 N. E. 109, where the employee of a tenant in an office building was killed by falling down an elevator shaft through an open door which the evidence disclosed would not lock when closed, but would rebound.

2. Contributory negligence.

Supplementing note in 2 L.R.A.(N.S.) 757.

One intending to take an elevator, upon approaching the elevator entrance, is bound to exercise that degree of care which a person of ordinary prudence would exercise for his own safety under the circumstances. *Grimmel v. Boyd*, 94 Neb. 246, 142 N. W. 893.

In *Jolliffe v. Miller*, 126 App. Div. 763, 111 N. Y. Supp. 406, affirmed in 196 N. Y. 504, 89 N. E. 1102 (facts set forth in VI. d, 1, *supra*), the contributory negligence of the plaintiff was left to the jury, although the plaintiff testified that he walked into the shaft without looking; that if he had looked, he could have seen that the car was not there.

In *Wilcox v. Rochester*, 190 N. Y. 137, 17 L.R.A.(N.S.) 741, 82 N. E. 1119, 13 Ann. Cas. 759, the question of the contributory negligence of one injured by falling into an elevator well when attempting to enter the car for transportation was held for the jury on conflicting evidence as to whether or not the conductor, who had just come from the car, left the door open or closed.

It is proper for the court to tell the jury what they must take into consideration in determining the credibility of witnesses and the weight of their evidence. To do so is not telling them how much weight should be given any fact or circumstance, and is not invading the province of the jury.

Fifer v. Ritter, 159 Ind. 8, 64 N. E. 463; *Deal v. State*, 140 Ind. 354, 39 N. E. 930; *Newport v. State*, 140 Ind. 299, 39 N. E. 926; *Smith v. State*, 142 Ind. 288, 41 N. E. 595; *Keesier v. State*, 154 Ind. 242, 56 N. E. 232; *Strebin v. Lavengood*, 163 Ind. 478, 71 N. E. 494; *Indianapolis Street R. Co. v. Johnson*, 163 Ind. 518, 72 N. E. 571; *Toledo, St. L. & W. R. Co. v. Fenstermaker*, 163 Ind. 534, 72 N. E. 561; *Southern R. Co. v. State*, 165 Ind. 613, 75 N. E. 272; *Re Darrow*, 175 Ind. 44, 92 N. E. 369.

Myers, Ch. J., delivered the opinion of the court:

This was an action for damages for personal injuries sustained by appellee by fall-

So, in *B. Shoninger Co. v. Mann*, 219 Ill. 242, 3 L.R.A.(N.S.) 1097, 76 N. E. 354, 19 Am. Neg. Rep. 198, the contributory negligence of an employee of a tenant, who was sent to an unlighted entry way to deliver packages, in falling into an unlighted and unguarded elevator well, after the elevator, without notice to him, had been moved to another floor, was held for the jury.

One who, in a place well lighted, opened a substantially closed door to the elevator well, and stepped into the elevator shaft, is guilty of contributory negligence preventing a recovery for injuries sustained. *Wheeler v. Hotel Stevens Co.* 71 Wash. 142, 127 Pac. 840, Ann. Cas. 1914C, 576.

See *Follins v. Dill*, *infra*, VII. b.

The court in *Sachheim v. Pigueron*, — N. Y. —, 109 N. E. 109, *supra*, refused to hold the plaintiff's intestate negligent as a matter of law.

e. Struck by descending car.

See *Wright v. Selden-Breck Constr. Co.* post, 740, and earlier cases in note in 2 L.R.A.(N.S.) 744.

VII. Freight elevators.

a. Rightful use of.

Supplementing note in 2 L.R.A.(N.S.) 760.

It has been held that a passenger upon a freight elevator assumes the usual hazards due to that mode of conveyance, but not those arising from the negligence of the owner. *Orcutt v. Century Bldg. Co.* 201 Mo. 424, 8 L.R.A.(N.S.) 929, 99 S. W. 1062.

In *Gray v. Siegel-Cooper Co.* 187 N. Y. 376, 80 N. E. 201, one who had been sent to deliver meat to the defendant, with the assistance of the defendant's employees, placed the meat on an elevator, and then

ing down an elevator shaft in an apartment house known as "Columbia Flats" in the city of Lafayette. The action was originally brought against appellant as agent, George Mohr, day elevator boy at the building, and John W. Barr, Jr., and Henry W. Barret, owners of the building, as trustees. The action was dismissed as to Mohr, and the court sustained a plea in abatement by Barr and Barret for want of jurisdiction over their persons. The amended complaint, upon which the cause went to trial, alleges that Barr and Barret on December 28, 1904, and for two years prior thereto, were and had ever since been the owners of the grounds and building known as Columbia Flats in the city of Lafayette, a four-story building used as an apartment house for rooms and residences, and for part of the time as a restaurant; that it was used by many persons and families as tenants of Barret and Barr, who, on December 28, 1904, and for more than two years prior, and ever since have been and are nonresi-

got aboard and was taken to the fourth floor, where the meat was to be delivered; here he fell through an unguarded space between the elevator and the wall forming the shaft. There was some evidence that the place was poorly lighted and that the floor of the elevator was greasy; there was also evidence that it had been customary for those delivering freight upon the fourth floor of the building to use this elevator in taking the freight up and delivering it, without objection on the part of the defendant or those in charge of the elevator. It was claimed, however, that the elevator was a freight elevator, and not one for passengers. Upon these facts the question of the defendant's negligence was held one for the jury.

b. Putting to use not intended.

Supplementing note in 2 L.R.A.(N.S.) 762.

One who went to the premises of a tenant in a building to secure freight cannot, where he obtained no freight, recover for injuries sustained while riding back on the freight elevator, where the lease of the tenant contained a provision that the lessee agreed to use the freight elevator for freight purposes only and to allow no person to ride on the same. *Follins v. Dill*, — Mass. —, 108 N. E. 929. Nor will a custom of riding on the freight elevator when delivering freight control the terms of the lease, where, as in this case, there was no freight for the person who was injured.

The injury was sustained in this case by the person who went after the freight, walking, upon his return, into the elevator well through an open gate.

W. A. E.

dents of the state of Indiana, and were running and operating such building through the appellant trust company as their agent; that at that time, and ever since, the trust company was their agent in the management, control, and operation of the business, and as such agent had full charge and complete control of the management and operation of the business; that it employed all the employees and servants engaged in and about the building who were engaged in the care and control thereof, rented the rooms and apartments, looked after and had charge of the making of, and it was its duty to make, all repairs to the building and the different parts thereof, and had charge of the heating and the janitor work in the building, procuring coal and supplies necessary for the conduct of the business, and the management of the building generally; that as such agent it had not only the right, authority, and power to engage and employ all employees and servants used in and about the building and premises, but had the absolute right and authority to discharge said servants, and had complete control over the conduct of their work. Then follows a description of the construction and manner of operating an elevator in the building for the transportation of the tenants and all persons having business therein, to and from the several floors of the building.

It is alleged that the trust company was charged with the duty of making all necessary repairs, not only to the building, but particularly to the elevator and the doors thereof, and all things connected therewith, so as to render occupancy comfortable, convenient, and its use safe for the tenants thereof, and all persons using the same, and that the trust company held itself out to the plaintiff, and to the other occupants of the building, as having charge of the keeping in safe repair and condition the building and elevator and entrances to the latter, and all things connected therewith; that plaintiff knew that the trust company was agent for the owners, and had the control and management of and charge of the business, and had charge of the repairs to the building and the elevator, and that it was its duty to keep it in repair, and everything connected therewith, and to keep it in safe condition for the use of the plaintiff and others, and that she relied upon it to do so, and that it knew she so relied. That the use and operation of the elevator and the frequent closing and opening of the door thereto in the hall way leading thereto caused the catch on the door to become loose, and also caused a small bolt that helped to hold in position the catch on the jamb of the door, to become loose and fall

out, and thereby the catch became loose, and the latch would not and did not go into the slot of the catch, and hold the door when it should be kept closed. That this catch was loose and out of repair for several days prior to December 28, 1904, which fact the company knew, or by reasonable diligence could have known, in time to have repaired it, prior to that day. It is also alleged that the lock, latch, and catch had been out of repair as aforesaid for several weeks prior to the injury, and that the defendants knew, or by the use of ordinary diligence and care could have known, that it was so out of repair and in a dangerous condition, and that appellee did not know it. That the defendants carelessly and negligently permitted the lock, latch, and catch of the elevator door to be and remain out of repair as aforesaid, and to be in a dangerous and unsafe condition, so that when the door was closed the latch would not and did not fasten in the catch or slot, and hold the door closed, but on account of the defective condition of said lock, latch, and catch, as aforesaid, the door would rebound and roll back and open, and remain open after the elevator had ascended, thus leaving the elevator door open, through which any person was likely to step and fall into the elevator shaft, but of which dangerous condition plaintiff had no knowledge; and that the defendants carelessly and negligently continued to run, operate, and use the elevator from the time the door became out of repair as aforesaid until the time of the accident. That in the operation and running of the elevator it was the custom and duty of the defendants to keep the door to the elevator closed when the elevator was not at the floor where the door of the elevator was situated, and that it was the custom of defendants to have the door to the elevator open when the elevator was in position at such door, to receive passengers, of which custom plaintiff was aware. That appellee with her husband resided as tenants on the second floor of the building, and had done so for some time, and rented the apartments occupied by them through the trust company as agent. That during all said time, and on December 28, 1904, a main entrance to the building ran from the street 15 or 20 feet to the door of the elevator. That there was provided a gas light fixture or lamp in the ceiling of the hall way, a few feet from the door to the elevator, and another smaller fixture or lamp on the opposite side of and near the elevator door. That December 28, 1904, was a cloudy dark day at 4:30 P. M., and that the aforesaid lamps were not lighted, and the hallway and elevator shaft were dark and unlighted. That on said day

at about 4:30 P. M., the defendants, by and through the elevator boy, who had been employed by the trust company to operate the elevator, caused the elevator to ascend from its position on the main floor of the building to one of the upper floors, and, as the elevator started, said boy attempted to close the door, and after the elevator had left the main floor, on account of the aforesaid defective condition of the lock, latch, and catch, it failed to fasten when closed, but rebounded and rolled back and opened, and stood open, thus leaving the door into the elevator shaft open, through which door anyone was likely to step and fall into the shaft. That at about 4:30 P. M. of said day, plaintiff, who was familiar with the hall way and elevator, and the entrance to the latter through the said door, and the custom of the defendants to have the door open when the elevator was in position at the hall way to receive passengers, and the custom to have it closed when the elevator was ascending from, or descending to, the floor at the hall way, entered the hall way from the street and carefully approached the elevator door, and saw the elevator door open, but, because of the darkness, was unable to see beyond the elevator door. That the door was not in position, and she did not know that the elevator was not in position opposite the door, or that the elevator shaft was open and exposed, and because the door was open and exposed, and believing the elevator to be in position, with due care, she stepped through the door for the purpose of stepping into the elevator to be carried to the floor of her apartment, and because the elevator was not there, and the shaft open and exposed, she fell to the bottom of the shaft, a distance of about 10 feet, and was greatly injured, the injuries being minutely described, by reason of which aforesaid negligence of the defendants she was injured without fault on her part.

A demurrer for want of facts sufficient to constitute a cause of action was unsuccessfully interposed by appellant to this complaint, and the ruling is challenged here. The objections made to the complaint are: First, that as it appears from the complaint that appellant was an agent only, and that the charge of negligence is one of nonfeasance, and not of misfeasance, that for an act of nonfeasance an agent is not liable to third persons; second, that the complaint affirmatively shows contributory negligence on the part of appellee.

It is to be regretted that there is such a divergence of opinion on the first proposition, in the American courts. The cases are largely collected on both sides of the question in 2 Enc. L. & P. pp. 1160 et seq., and L.R.A.1915E.

in note to *Ellis v. Southern R. Co.* 2 L.R.A. (N.S.) 378.

. Where the entire premises are not let to a single tenant, or where a part of the premises is in control of the landlord, both as to maintenance or operation and repair in respect of the agency or conditions which give rise to the injury,—as, for instance, a general entrance to a quasi public building, or entries and stairways, or water-closets for general use, or a passenger elevator for common or general use,—the owners of buildings in which passenger elevators are operated are regarded as common carriers, as to those in the rightful use of the building, or for whom they are provided. *McGrell v. Buffalo Office Bldg. Co.* 153 N. Y. 265, 47 N. E. 305, 2 Am. Neg. Rep. 598; *Bourgo v. White*, 159 Mass. 216, 34 N. E. 191; *Griffen v. Manice*, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925, 9 Am. Neg. Rep. 336; *Bogendoerfer v. Jacobs*, 97 App. Div. 355, 89 N. Y. Supp. 1051; *Stewart v. Harvard College*, 12 Allen, 58; *Ellis v. Waldron*, 19 R. I. 369, 33 Atl. 869; *Kentucky Hotel Co. v. Camp*, 97 Ky. 424, 30 S. W. 1010; *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222, 64 Am. St. Rep. 35, 50 N. E. 178, 4 Am. Neg. Rep. 263; *Ohio Valley Trust Co. v. Wernke*, 42 Ind. App. 326, 84 N. E. 999; *Marker v. Mitchell (C. C.)* 54 Fed. 637, Id., 25 L.R.A. 33, 10 C. C. A. 306, 22 U. S. App. 325, 7 Am. Neg. Cas. 389; *Goodsell v. Taylor*, 41 Minn. 207, 4 L.R.A. 673, 16 Am. St. Rep. 700, 42 N. W. 873; *Treadwell v. Whittier*, 80 Cal. 574, 5 L.R.A. 498, 13 Am. St. Rep. 175, 22 Pac. 266; *Springer v. Ford*, 189 Ill. 430, 52 L.R.A. 930, 82 Am. St. Rep. 464, 59 N. E. 953, and cases cited; *Luckel v. Century Bldg. Co.* 177 Mo. 608, 76 S. W. 1035.

In such cases it is the landlord's duty to keep the premises and appliances over which he exerts control, in a reasonably safe condition for use, and as to elevators to exercise the highest care, as a duty owing by law, to third persons who have a right to their use, or for whom they are provided. *Domenicis v. Fleisher*, 195 Mass. 281, 81 N. E. 191; *Andrews v. Williamson*, 193 Mass. 92, 118 Am. St. Rep. 452, 78 N. E. 737; *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295; *Readman v. Conway*, 126 Mass. 374; *Miller v. Hancock* [1893] 2 Q. B. 177, 4 Reports, 478, 69 L. T. N. S. 214, 41 Week. Rep. 578, 57 J. P. 758; *Hargroves v. Hartopp* [1905] 1 K. B. 472, 74 L. J. K. B. N. S. 233, 53 Week. Rep. 262, 92 L. T. N. S. 414, 21 Times L. R. 226; *M'Martin v. Hannay*, 10 Sc. Sess. Cas. 3d series, 442; *Griffen v. Manice*, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925, 9 Am. Neg. Rep. 336; *Bogendoerfer v. Jacobs*,

97 App. Div. 355, 89 N. Y. Supp. 1051; *Stewart v. Harvard College*, 12 Allen, 58; *Ellis v. Waldron*, 19 R. I. 369, 33 Atl. 869; *Springer v. Ford*, 189 Ill. 430, 52 L.R.A. 830, 82 Am. St. Rep. 464, 59 N. E. 953, and cases there cited.

This landlord's duty he cannot delegate, and escape liability himself for injury arising from neglect of that care required of common carriers of passengers. *Connolly v. Des Moines Invest. Co.* 130 Iowa, 633, 105 N. W. 400, 19 Am. Neg. Rep. 223.

It appears from the complaint that appellant was employed by the owners, with full authority of management and control, with authority to make repairs and to hire and discharge employees; but there is no allegation showing whether appellant was to receive a sum from which it hired and paid the employees in running the business, or whether they were paid from the funds of the owners. From the character of the undertaking and the allegations of the complaint, it is clear that it was known, or implied, by the owners, that appellant would operate through others, and that it was authorized to do so, either on its own account or on the owner's account. Ordinarily the test of agency, or master and servant, is that of authority to control the liability for wages. *Bentley v. Edwards* (1905) 100 Md. 652, 60 Atl. 283. See note to *Hardy v. Shedden Co.* 37 L.R.A. 33; *Sacker v. Waddell*, 98 Md. 43, 103 Am. St. Rep. 374, 56 Atl. 399, 15 Am. Neg. Rep. 324; *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922.

So far as the complaint discloses, that authority was vested in appellant.

But the question still remains: Is the agent liable? Much of the disagreement among the decided cases seems to arise from attempts, and perhaps success, in distinguishing between acts of nonfeasance and misfeasance, and in the application of the rule that for an act of nonfeasance an agent is only liable to his principal upon the ground of the lack of privity between him and third persons, and holding the agent only for misfeasance. We shall not attempt to cite the cases, for they are very numerous.

The real ground, as we see it, for the application or nonapplication of the rule as to liability, is not one of agency, but a question of the duty imposed by general principles of law upon the owner, or those in control of property for him, to so use or manage the property as not to injure the property of another by its negligent use, or to injure the person of another who is where he has a right to be, or is in the use of property for which use he pays. There is a privity in law, by virtue of which everyone in charge of property is under obligation to so use it as not to injure another. It L.R.A.1915E.

is a duty imposed by law, it is true, but privity arises from the obligation to those in a situation to insist upon its respect, and the neglect of performance must, in order to render the agent liable, be neglect of performance of a duty which he owes third persons independent of and apart from the agency which arises from contract. The distinction is pointed out in *Dean v. Brock*, 11 Ind. App. 507, 510, 38 N. E. 829, upon which appellant relies, supported by *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437. In the latter case it is said: "And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution," or failing to give attention to the necessary consequences in its execution, and "leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing; but it is misfeasance, doing improperly." The court later says: "The plaintiff's action is not founded on any contract, but is an action of tort for injuries which, according to the common experience of mankind, were a natural consequence of the defendants' negligence. The fact that a wrongful act is a breach of a contract between the wrongdoer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby,"—citing cases.

Under the first branch of that case as cited in *Dean v. Brock*, supra, the question would resolve itself into the inquiry as to what is the particular work undertaken. Was it the general management and control of the building, in which was included the care of the elevator, or was it only the specific matter of the care of the elevator which was undertaken and neglected?

In *Shearman & Redfield on Negligence*, 5th ed. vol. 1, § 243, after stating the general rule as to nonliability of agents as such, for acts of nonfeasance, and citing *Dean v. Brock*, supra, it is said in the note: "But where premises owned by a nonresident are placed in the hands of a resident real estate agent, with authority to make repairs, lease, etc., and the agent permits such premises to become dangerous for want

of repairs, he will be liable to any person who is injured by such dangerous condition of the premises,"—citing *Baird v. Shipman*, 132 Ill. 16, 7 L.R.A. 128, 22 Am. St. Rep. 504, 23 N. E. 384, affirming 33 Ill. App. 503.

In *Clark & Skyles on Agency*, § 594, after stating the general rule of nonliability of agents to third persons so far as contractual obligations are concerned, it is stated in § 595: "But where an agent is guilty of misfeasance, that is, where he has actually entered upon the performance of his duties to his principal, and in doing so fails to respect the rights of others by some wrong, whether it is a wrong of omission or a wrong of commission, as where he fails or neglects to use reasonable care and diligence in the performance of his duties, he will be personally responsible to a third person who is injured by reason of such misfeasance,"—citing many cases, and continuing: "The agent's liability in such cases is not based upon the ground of his agency, but on the ground that he is a wrongdoer, and, as such, is responsible for the injury he may cause. . . . 'It is not his contract with his principal which exposes him to, or protects him from, liability to third persons, but his common-law obligation to so use that which he controls as not to injure another.'" In § 596 are drawn to our minds very satisfactory definitions of, and distinctions between, nonfeasance, misfeasance, and malfeasance. "A servant is personally liable to third persons when his wrongful act is the direct and proximate cause of the injury, whether such wrongful act be one of nonfeasance or misfeasance." 6 *Current Law*, p. 605. See note to *Baird v. Shipman*, 22 Am. St. Rep. 504; note to *Mayer v. Thompson*, 28 L.R.A. 433, 1 Va. L. Reg. 780, note; *Ward v. Pullman Car Corp.* 131 Ky. 142, 25 L.R.A. (N.S.) 343, 114 S. W. 754; *Banningan v. Woodbury*, 133 Am. St. Rep. 371, and note (158 Mich. 206, 122 N. W. 531); *Carter v. Atlantic Coast Line R. Co.* 84 S. C. 546, 66 S. E. 997; *Kenney v. Lane*, 9 Tex. Civ. App. 150, 36 S. W. 1063; *Nowell v. Wright*, 3 Allen, 166, 80 Am. Dec. 62; *Campbell v. Portland Sugar Co.* 62 Me. 552, 16 Am. Rep. 503; *Ferrier v. Trepannier*, 24 Can. S. C. 86; *Bannigan v. Woodbury*, 166 Mich. 491, 132 N. W. 77; *Greenberg v. Whitcomb Lumber Co.* 90 Wis. 225, 28 L.R.A. 439, 48 Am. St. Rep. 911, 63 N. W. 93; *Huffcut, Agency*, §§ 212, 291.

In *Jaggard on Torts*, § 98, the question is discussed, and liability is held to exist irrespective of agency, by virtue of a common-law duty to third persons. The note refers to the like doctrine and distinction as laid down by *Mechem on Agency*, § 572, L.R.A.1915E.

and *Wharton on Negligence*, 2d ed. § 535, where the latter declares that the distinction "between nonfeasance and misfeasance can no longer be sustained." 2 Enc. L. & P. pp. 1161-1164, and notes; *Horner v. Lawrence*, 37 N. J. L. 46; *Consolidated Gas Co. v. Connor*, 114 Md. 140, 32 L.R.A. (N.S.) 809, 78 Atl. 725; *Hagerty v. Montana Ore Purchasing Co.* (*Hagerty v. Wilson*) 38 Mont. 69, 25 L.R.A. (N.S.) 356, 98 Pac. 643; *Carson v. Quinn*, 127 Mo. App. 525, 105 S. W. 1088; *Harriman v. Stowe*, 57 Mo. 93; *Southern R. Co. v. Rowe*, 2 Ga. App. 557, 59 S. E. 462; *Stiewel v. Borman*, 63 Ark. 30, 37 S. W. 404; *Ellis v. McNaughton*, 76 Mich. 237, 15 Am. St. Rep. 308, 42 N. W. 1113.

In *Lough v. John Davis & Co.* 30 Wash. 204, 70 Pac. 491, 59 L.R.A. 802, 94 Am. St. Rep. 848, and note, is a careful review of some of the leading cases upon the question of liability of agents to third persons for nonfeasance.

In *Orcutt v. Century Bldg. Co.* 201 Mo. 424, 8 L.R.A. (N.S.) 929, 99 S. W. 1062, the plaintiff was injured as the result of the failure of an agent in charge of the building, having its leasing and control, to keep the elevator in repair, and it was there said: "When it undertook the management of this building from its principal, it undertook to do for the principal a particular work, and, after it entered upon the performance of that work, any act which it did, whether by omission or commission, was misfeasance."

"An agent, like every other person, is bound, in the course of the discharge of his duty to the principal, to exercise a due regard for the rights and privileges of others. If he fails in this duty, and by his wilful act, or by his negligent conduct, inflicts an injury upon a third person, he is liable to that person in the same manner as though he were not an agent." *Mechem, Agency*, § 540.

"Misfeasance may involve also to some extent the idea of not doing, as where the agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances,—does not take that precaution, does not exercise that care, which a due regard for the rights of others requires. All this is not doing, but it is not the not doing of that which is imposed . . . upon him by law, as a responsible individual in common with all other members of society. It is not the not doing which constitutes negligence in any relation." *Mechem, Agency*, § 572.

In *Bell v. Josselyn*, 3 Gray, 309, 63 Am. Dec. 741, an agent was held liable; the court saying: "As the facts are, the non-

feasance caused the act done to be a misfeasance. But from which did the plaintiff suffer? Clearly from the act done, which was no less a misfeasance by reason of its being preceded by a nonfeasance."

In the case at bar, even upon the theory of an agent not being liable for nonfeasance, but for misfeasance or malfeasance only, the nonfeasance was not inspecting or not keeping the elevator apparatus in repair, and the misfeasance in causing it to be operated in that condition. "If the distinction above noted is kept clearly in mind by the court, and nonfeasance held to apply only to cases where the agent fails to enter upon the performance of his contractual obligations, and not to cases where he has entered upon such performance, but neglected his duties in some respects, the confusion would not arise." Jaggard, *Torts*, § 596b.

That is to say that for failure to perform his contractual obligations to his principal, a third person cannot hold him liable, but for negligence of omission or commission, after he has undertaken performance, he is liable under common-law rules. The violation of a duty giving rise to injury and a cause of action arises as much, and as frequently, from omission to do a thing which ought to be done in the discharge of his duty to his principal, nonfeasance, as in doing it in the discharge of that duty in such a manner as to injure another, misfeasance. A direct order from the principal would not protect the agent in omitting to discharge a positive duty owing to third persons. "For the warrant of no man, not even the King, can excuse the doing of an illegal act; for although the commanders are trespassers, so also are the persons who did the act." *Sands v. Child*, 3 Lev. 352.

From these considerations, taking the allegations of the complaint as made, we conclude that the complaint is not open to objection as insufficient because of appellant being an agent.

The second reason assigned by appellant why its demurrer to the complaint should have been sustained is that the facts stated in said paragraph show contributory negligence on the part of appellee. It is contended that appellee was negligent in not ascertaining that the elevator was in place before she stepped through the door. The main case relied upon in support of this view is *Cincinnati, W. & M. R. Co. v. Peters*, 80 Ind. 168, 3 Am. Neg. Rep. 133. In that case the plaintiff was injured by stepping from a train. The train had slowed up, the conductor informed the plaintiff that this was his destination, and told him to get off. It was dark, and he was unacquainted with the place and could

not see where he would alight when he stepped off, but supposed that there was a platform. There was no platform, and he was thrown under the cars and injured. The judge who wrote the opinion held that the complaint showed contributory negligence on the part of the plaintiff in stepping off the train in the darkness, with no knowledge of whether it was a suitable place to alight. However, there was one dissenting opinion, and two of the other judges concurred in the result on the ground that the complaint did not aver that there was no fault on the part of the plaintiff.

In *Cleveland, O. C. & St. L. R. Co. v. Lynn*, 171 Ind. 589, 85 N. E. 999, it is said: "So long as the facts stated do not force the legal conclusion that there was contributory fault, the averment that there was no such fault entitles the plaintiff to have it submitted to the jury as a question of fact whether there was such negligence." In this complaint it is alleged, though unnecessary by virtue of the statute, that plaintiff was without fault, and the facts stated do not necessarily force the conclusion of contributory negligence. Appellee knew that it was the custom to leave the elevator door open only when the car was in place; though it was not lighted, she was acquainted with the surroundings, in which this case is distinguishable from the *Peters Case*. It is possible, and probable, that if she had looked more closely she could have seen that the car was not there.

The case of *Rhodus v. Johnson*, 24 Ind. App. 401, 56 N. E. 942, establishes the law that a person is not required to exercise the same degree of caution before proceeding into a place where no danger is to be anticipated that is required upon going into a place of known danger. It is said in that case: "The open doorway, if not an invitation to enter, was certainly not a warning. . . . What is due care must depend upon circumstances."

Carriers of passengers by elevator, being common carriers, must exercise the highest degree of care, both in providing and in managing them. *Ohio Valley Trust Co. v. Wernke* (1908) 42 Ind. App. 326, 84 N. E. 999; *Id.*, 179 Ind. 49, 99 N. E. 734; *Goodsell v. Taylor*, 41 Minn. 207, 4 L.R.A. 673, 16 Am. St. Rep. 700, 42 N. W. 873; *Marker v. Mitchell* (C. C.) 54 Fed. 637, 25 L.R.A. 33, 10 C. C. A. 306, 22 U. S. App. 325, 62 Fed. 139, 7 Am. Neg. Cas. 389; *Treadwell v. Whittier*, 80 Cal. 574, 5 L.R.A. 498, 13 Am. St. Rep. 175, 22 Pac. 266; *Orcutt v. Century Bldg. Co.* 201 Mo. 424, 8 L.R.A. (N.S.) 929, 90 S. W. 1062; *Luckel v. Century Bldg. Co.* 177 Mo. 608, 76 S. W. 1035; 7 *Thomp. Neg.* § 1078; *Ray*, Neg. 308; 1 *Thomp. Forms*, p. 1001, and note.

And it has been held that the public are authorized to enter an open door of an elevator apparently at rest. *Blackwell v. O'Gorman Co.* 22 R. I. 638, 49 Atl. 28; *Edwards v. Manufacturers' Bldg. Co.* 2 L.R.A.(N.S.) 744, and note (27 R. I. 248, 114 Am. St. Rep. 37, 61 Atl. 646, 8 Ann. Cas. 974, 18 Am. Neg. Rep. 621).

Also, that an invitation to enter arises from an attendant opening a door to an elevator. *Fisher v. Cook*, 23 Ill. App. 621; *H. B. Phillips Co. v. Pruitt*, 26 Ky. L. Rep. 1105, 83 S. W. 114; *Sheyer v. Lowell*, 134 Cal. 357, 66 Pac. 307; *Colorado Mortg. & Invest. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42; *Tousey v. Roberts*, 114 N. Y. 312, 11 Am. St. Rep. 655, 21 N. E. 399.

In this last case, where the same insistence was made as here, as to the duty of appellee to see that the car was at the door, it is said: "An elevator for the carriage of persons is not like a railroad crossing at a highway, supposed to be a place of danger to be approached with great caution; but, on the contrary, it may be assumed, when the door is thrown open by an attendant, to be a place which may be safely entered without stopping to look, listen, or make a special examination." In view of the allegation that it was a custom known to appellee that the door was only open when the car was at the door, the question of appellee's contributory negligence was one clearly for the jury. The court did not err in its ruling on the demurrer to the complaint.

Appellant next contends that the court erred in overruling its motion for judgment on the interrogatories. Several interrogatories are complained of, because they present more than one question, and because they call for conclusions instead of facts. It is insisted that, if these interrogatories are not considered, the special finding is contradictory of the general verdict. Appellant bases this contention on two grounds: First, that one of the material allegations of the complaint is that appellant was operating the elevator; that, eliminating the objectionable interrogatories, the remaining ones show that Mohr, the elevator boy, was the agent of Barret and Barr, and not of appellant; that therefore Barret and Barr were operating the elevator through their agent Mohr; and that appellee has failed to establish one of the material allegations of the complaint. Second, that the remaining interrogatories show that appellant had never actually undertaken to repair the elevator, and that appellant is not liable to third parties injured by reason of its failure to perform this duty.

L.R.A.1915E.

The second contention is answered by our holding in the previous part of the opinion.

As to the first contention, the complaint alleges that appellee was injured through the negligence of appellant in permitting the latch to get out of repair and in using and operating the elevator after it became out of repair. It is alleged that appellant assumed the management and operation of the elevator. The gist of the charge against appellant is that it undertook the management of the building, and negligently allowed the latch to become and remain out of repair. It was found that appellant had sole and complete control and management of the building and keeping it in repair, and it followed that it could have stopped the operation of the elevator at any time, or could have repaired it, or discharged the boy. It was found that the owners were residents of Kentucky, and that appellant was the agent of the Fidelity Trust Company of Louisville, Kentucky, which latter was the direct agent of the owners, with whom appellant had no contract, but that the owners knew of and assented to the appointment of appellant by the Kentucky company; that appellant was authorized to make repairs without consulting the Kentucky company or the owners; that the expense of these repairs, as well as the expense of running the building, including the wages of employees, was deducted from the monthly receipts from the building, and the balance transmitted to the Kentucky company, and no part taken for the compensation of appellant as managing agent, or paid by it from its funds. These findings inject into the controversy the additional element of subagency, a feature which has received no consideration by counsel in their briefs. Where, however, as here, the owner knows from its character and location that the business cannot be transacted by the primary agent, and also knows of the fact of the employment of a subagent, the latter is none the less the agent of the principal, and this would also apply to the employees of the subagent within the scope of his powers. *Olifers v. Belmont*, 12 Misc. 160, 33 N. Y. Supp. 275; *Murphy v. Emigration Comrs.* 28 N. Y. 134; *Bingaman v. Hickman*, 115 Pa. 420, 8 Atl. 644; *Buckland v. Conway*, 16 Mass. 396; *Peries v. Aycinena*, 3 Watts & S. 64; *Bellinger v. Collins*, 117 Iowa, 173, 90 N. W. 609; *Groscup v. Downey*, 105 Md. 273, 65 Atl. 930.

There are, however, other interrogatories and answers which disclose the theory upon which the verdict of the jury rests, which, while not sufficient to entitle appellant to judgment in its favor, cannot be ignored. One is as follows, "Was the Tippecanoe

Loan & Trust Company, as agent, in charge and control of said building as an apartment house for the use and benefit of the owners, and was said defendant, as such agent, charged with the duty of keeping said building in *safe repair and free from danger?*" (our italics) and the jury answered, "Yes." The interrogatory is objectionable because it calls for more than one distinct fact; but, assuming that the first fact is found in other interrogatories, the second finding presents a pure finding of law. Neither appellant nor the owners were insurers, and while they, as common carriers by the elevator, were required to exercise the highest care consistent with the operation of the elevator, the question and answer travel upon the theory that they are insurers.

Another interrogatory and answer finds that it was appellant's duty to "keep the elevator, the door, and the fixtures thereto in proper repair, in *safe condition and free from danger.*" Here again they are held as insurers, and the law is not so. *Louisville & S. I. Traction Co. v. Korbe*, 175 Ind. 450, 453, 456, 93 N. E. 5, 94 N. E. 768, and cases there cited.

One of the instructions given the jury was that if they found that appellant was charged with the duty of keeping the elevator and the premises about the elevator in a safe condition to those who used and had a right to use such elevator, and it negligently failed to keep such elevator and the latch and catch to the door in proper repair, so that the place became unsafe and dangerous, "in consequence of which the plaintiff was injured, . . . and you find all the other material facts in the case in favor of the plaintiff, . . . then you may find for the plaintiff, etc." It will thus be seen that this instruction also travels upon the theory that appellant being required to keep the elevator and premises safe,—that is, become an insurer,—and in no instruction pointed out is it shown that the jury were instructed as to what the legal duty of appellant was, as being required to exercise the highest degree of care consistent with the practical operation of the elevator, though such an instruction would be inconsistent with the former, and it is clear from the interrogatories and answers that the jury was instructed upon an erroneous theory as to that point, and that its finding was not only a conclusion, but one of law erroneously found.

Another instruction informs the jury that a tenant in an apartment house, in going to her room from the street, is not required to look at every place she steps. She has a right to rely upon the owners and those in exclusive charge of an apartment house L.R.A.1915E.

to keep the premises in a reasonably safe condition for those invited upon them and who have a right to be there. Which instruction were the jury to be guided by? Judging from the interrogatories and answers, they were guided by the erroneous ones.

Other interrogatories present double, or two or more, questions of fact; others present mixed questions of fact and law, as, for example, whether defendant knew, or had reason to know, of the unsafe condition of the latch or catch. *Newcastle v. Grubbs*, 171 Ind. 482, 494, 86 N. E. 757. However, taking the interrogatories and answers as a whole, they do not warrant a judgment for appellant as against the general verdict.

The instruction last quoted is attacked as being an invasion of the province of the jury in informing them that "a tenant, in going to her room from the street, is not required to look at every place where she steps," on the ground that it was a question for the jury whether she was required to look, and whether she was guilty of contributory negligence. The instruction is too broad, even as applied to the facts in the case. The fact that it was somewhat dark in the hall way and at the elevator door, even though appellee knew the surroundings, and the custom as to the door being open only when the elevator was at the door, and closed when it was not, would not of themselves excuse ordinary care on her part; but these were proper elements in determining whether she did under the circumstances and surroundings use ordinary care, and whether she did was a question of fact; and whether she should have looked before she stepped, or what degree of care she should have employed under the circumstances, was a question for the jury. It cannot be said as a matter of law that a person is not required to look under any circumstances, which is the effect of the instruction. In some places, and under some circumstances, it might be true as a matter of law that one is not required to look at every place where he steps; in others, such care might be required; but what care is required under the particular circumstances and surroundings is a question for the jury. The rule is well stated in *Pennsylvania Co. v. Hensil*, 70 Ind. 569, 575, 36 Am. Rep. 188: "It is only when the circumstances of a case are such that the standard of duty is fixed and certain, or when the measure of duty is defined by law and is the same under all circumstances, or when the negligence is so clearly defined and palpable that no verdict could make it otherwise, that the court is authorized to make the question of negligence one of law, and not of fact." The same thing must necessarily be true

as to the question of contributory negligence.

In support of the instruction it is urged that there is no conflict in the evidence as to how appellee was injured, so far as her actions were involved; but the court cannot say as a matter of law that all fair-minded men must honestly draw the same conclusion as to whether she was negligent in not discovering the absence of the elevator. The jury did draw that conclusion here, but under the instruction which informed them that to some extent she was under no requirement to look where she stepped, and it cannot be justified. Indianapolis Street R. Co. v. Marachke, 166 Ind. 490, 77 N. E. 945; Malott v. Hawkins, 159 Ind. 127, 63 N. E. 308; Greenawaldt v. Lake Shore & M. S. R. Co. 165 Ind. 219, 74 N. E. 1081; Young v. Citizens' Street R. Co. 148 Ind. 54, 44 N. E. 927, 47 N. E. 142, 2 Am. Neg. Rep. 703; Huntington County v. Bonebrake, 146 Ind. 311, 45 N. E. 470; Cleveland, C. C. & St. L. R. Co. v. Moneyhun, 146 Ind. 147, 34 L.R.A. 141, 44 N. E. 106, 9 Am. Neg. Cas. 308; Prothero v. Citizens Street R. Co. 134 Ind. 431, 33 N. E. 765, 3 Am. Neg. Cas. 279; Pennsylvania Co. v. Horton, 132 Ind. 189, 31 N. E. 45; Cincinnati, I. St. L. & C. R. Co. v. Howard, 124 Ind. 280, 8 L.R.A. 593, 19 Am. St. Rep. 96, 24 N. E. 892; Louisville, N. A. & C. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Union Mut. L. Ins. Co. v. Buchanan, 100 Ind. 63; Cleveland, C. C. & St. L. R. Co. v. Schneider, 40 Ind. App. 38, 80 N. E. 985; Van Winkle v. New York, C. & St. L. R. Co. 34 Ind. App. 476, 73 N. E. 157; Rhodius v. Johnson, 24 Ind. App. 401, 56 N. E. 942.

In another instruction the court instructed that, in determining the credibility of witnesses and the weight of their testimony, "they must take into consideration the interest, the appearance upon the witness stand, the bias or prejudice of the witness, if any be shown." This instruction is attacked also as invading the province of the jury. Such an instruction is not to be commended for the reason that it is calculated to unduly impress upon the minds of jurors that the judge has in mind some suspicion regarding the evidence of some witnesses, even though the jury should, and must necessarily in their deliberations, take those matters into consideration; and in earlier cases in this court judgments were reversed for less directory statements in instructions; but the rule seems to have been greatly relaxed in many later cases; the reason for the relaxed rule being given, that there is a wide distinction between consideration of the evidence, and the weight to be given it, and that in its deliberations it is L.R.A.1915E.

the duty of the jury to consider all the evidence admitted, and that "must," in such case, only implies duty to consider it, the weight being another matter. Indianapolis Street R. Co. v. Johnson, 163 Ind. 518, 526, 72 N. E. 571; Toledo, St. L. & W. R. Co. v. Fenstermaker, 163 Ind. 534, 540, 72 N. E. 561; Fifer v. Ritter, 159 Ind. 8, 11, 64 N. E. 463; Smith v. State, 142 Ind. 288, 293, 41 N. E. 595; Deal v. State, 140 Ind. 354, 368, 39 N. E. 930. See also Re Darrow, 175 Ind. 44, 92 N. E. 369; Southern R. Co. v. State, 165 Ind. 613, 621, 75 N. E. 272; Strebin v. Lavengood, 163 Ind. 478, 71 N. E. 494; Keesier v. State, 154 Ind. 242, 56 N. E. 232; Newport v. State, 140 Ind. 299, 303, 39 N. E. 926.

Other questions are sought to be reviewed as to the admission and rejection of evidence; but the questions are not presented for the reason that appellant expressly states in its brief that it sets out only those urged here, and these questions argued are not among those set out.

Neither were the questions or objections or answers set out. Complaint is made of other instructions given which we need not recur to, for the reason that they are not likely to be again given. Instructions requested by appellant and refused proceed upon the theory of appellant as to the insufficiency of the complaint, and were properly refused, for the reasons pointed out as to the sufficiency of the complaint.

For the errors in instructions, the judgment must be reversed, and it is so ordered, with instructions to the court below to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

Petition for rehearing denied October 31, 1913.

NEBRASKA SUPREME COURT.

JOHN WRIGHT

v.

SELDEN-BRECK CONSTRUCTION
COMPANY

and

FIRST NATIONAL BANK.

(97 Neb. 840, 151 N. W. 926.)

Elevators — operation without call bell — negligence.

1. It is not negligence *per se* to operate

Headnotes by LETTON, J.

Note. — As to liability for injury to elevator passenger, see notes to Tippecanoe Loan & T. Co. v. Jester, ante, 721, and other notes therein referred to.

an elevator without a call bell in an unfinished building not open to the public, but only to employees and licensees of the contractor.

Same — negligence of user.

2. One who desires to call an elevator in an unfinished building should act with care and caution. An elevator shaft is a place of danger, and if one carelessly thrusts his head through an opening in the door into the shaft, and on account of such negligence he suffers injury, he is not entitled to recover damages.

(March 13, 1915.)

CROSS APPEALS from a judgment of the District Court for Lancaster County in favor of the defendant bank, in an action brought to recover damages for personal injuries alleged to have been caused by the negligent operation of an elevator; defendant construction company appealing from the judgment in favor of plaintiff against it, and plaintiff appealing from the judgment releasing the defendant bank from liability. Reversed on defendant's appeal. Judgment dismissing the bank affirmed.

The facts are stated in the opinion.

Messrs. Greene, Breckenridge, Gurley, & Woodrough, for defendant Construction Company et al.:

The plaintiff's own gross negligence caused the injury.

Knapp v. Jones, 50 Neb. 490, 70 N. W. 19, 1 Am. Neg. Rep. 306; Guthrie v. Missouri P. R. Co. 51 Neb. 746, 71 N. W. 722; Modern Woodmen v. Kozak, 63 Neb. 153, 88 N. W. 248; Hardinger v. Modern Brotherhood, 72 Neb. 869, 101 N. W. 993, 103 N. W. 74; Mau v. Morse, 3 Colo. App. 359, 33 Pac. 283; Fairmount Cemetery Assn. v. Davis, 4 Colo. App. 570, 36 Pac. 912; Stiles v. Richie, 8 Colo. App. 393, 46 Pac. 694; Griffith v. Denver Consol. Tramway Co. 14 Colo. App. 504, 61 Pac. 48; Florence v. Snook, 20 Colo. App. 356, 78 Pac. 995; Bemiss v. New Orleans City & Lake R. Co. 47 La. Ann. 1671, 18 So. 713; Kappes v. Brown Shoe Co. 116 Mo. App. 154, 90 S. W. 1163; Donaldson v. Wilson, 60 Mich. 86, 1 Am. St. Rep. 487, 26 N. W. 842; Bedell v. Berkey, 76 Mich. 435, 15 Am. St. Rep. 370, 43 N. W. 308; Pelton v. Schmidt, 97 Mich. 231, 56 N. W. 689; Vanderbeck v. Hendry, 34 N. J. L. 467; Splittorf v. State, 108 N. Y. 205, 15 N. E. 322; Cusick v. Adams, 115 N. Y. 55, 12 Am. St. Rep. 772, 21 N. E. 673; Thiele v. McManus, 3 Ind. App. 132, 28 N. E. 327; Parker v. Portland Pub. Co. 69 Me. 173, 31 Am. Rep. 262; Pierce v. Whitcomb, 48 Vt. 127, 21 Am. Rep. 120; Gibson v. Szepienski, 37 Ill. App. 601; Zoebisch v. Tarbell, 10 Allen, 385, 87 Am. Dec. 660; Metcalfe v. Cunard L.R.A.1915E.

S. S. Co. 147 Mass. 66, 16 N. E. 701; Poin-dexter v. Benedict Paper Co. 84 Mo. App. 352; Taylor v. Carew Mfg. Co. 143 Mass. 470, 10 N. E. 308; Patterson v. Hemenway, 148 Mass. 94, 12 Am. St. Rep. 523, 19 N. E. 15; Knox v. Hall Steam Power Co. 60 Hun, 231, 23 N. Y. Supp. 490; Dieboldt v. United States Baking Co. 72 Hun, 403, 25 N. Y. Supp. 205; Guichard v. New, 9 App. Div. 485, 41 N. Y. Supp. 456; Headford v. McClary Mfg. Co. 23 Ont. Rep. 335.

Plaintiff's excuses for his act of thrusting his head into the elevator shaft neither justify his negligence nor impose liability upon the Selden-Breck Construction Company.

Ramsdell v. Jordan, 168 Mass. 505, 47 N. E. 244, 3 Am. Neg. Rep. 47; Murphy v. Webster, 151 Mass. 121, 23 N. E. 842; Rood v. Lawrence Mfg. Co. 155 Mass. 590, 30 N. E. 174; Degnan v. Jordan, 164 Mass. 84, 41 N. E. 117; Taylor v. Carew Mfg. Co. 143 Mass. 470, 10 N. E. 308; Ballou v. Collamore, 160 Mass. 246, 35 N. E. 463.

Selden-Breck Construction Company committed no breach of duty towards the plaintiff, and was not negligent.

Bennett v. Louisville & M. R. Co. 102 U. S. 577, 26 L. ed. 235, 7 Am. Neg. Cas. 349; Faris v. Hoberg, 134 Ind. 269, 39 Am. St. Rep. 261, 33 N. E. 1028; New Omaha Thomson-Houston Electric Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89, 17 Am. Neg. Rep. 601; Chesley v. Rocheford, 4 Neb. (Unof.) 768, 96 N. W. 241, 14 Am. Neg. Rep. 596; Shults v. Chicago, B. & Q. R. Co. 91 Neb. 587, 136 N. W. 834; Omaha & R. Valley R. Co. v. Martin, 14 Neb. 295, 15 N. W. 696; Blackstone v. Chelmsford Foundry Co. 170 Mass. 321, 49 N. E. 634; Indian Ref. Co. v. Mobley, 134 Ky. 822, 24 L.R.A. (N.S.) 497, 121 S. W. 657; Brown v. Thomas Blackwell Coal & Min. Co. 124 Ky. 324, 99 S. W. 299; Sterger v. Van Sicklen, 132 N. Y. 499, 16 L.R.A. 640, 28 Am. St. Rep. 594, 30 N. E. 987; Poling v. Ohio River R. Co. 38 W. Va. 645, 24 L.R.A. 215, 18 S. E. 782, 10 Am. Neg. Cas. 409; Dowd v. Chicago, M. & St. P. R. Co. 84 Wis. 105, 20 L.R.A. 527, 36 Am. St. Rep. 917, 54 N. W. 24, 10 Am. Neg. Cas. 485; Fitzpatrick v. Cumberland Glass Mfg. Co. 61 N. J. L. 378, 39 Atl. 675, 4 Am. Neg. Rep. 193; Berlin Mills Co. v. Croteau, 32 C. C. A. 126, 50 U. S. App. 419, 88 Fed. 860; Dixon v. Swift, 98 Me. 207, 56 Atl. 761, 15 Am. Neg. Rep. 314; Meunch v. Heinemann, 119 Wis. 441, 96 N. W. 800, 15 Am. Neg. Rep. 221; Woolwine v. Chesapeake & O. R. Co. (Manning v. Chesapeake & O. R. Co.) 36 W. Va. 329, 16 L.R.A. 271, 32 Am. St. Rep. 859, 15 S. E. 81; Gibson v. Leonard, 143 Ill. 182, 17 L.R.A. 588, 36 Am. St. Rep. 376, 32 N. E. 182; Plummer v. Dill, 156 Mass. 426,

32 Am. St. Rep. 463, 31 N. E. 128; Larmore v. Brown Point Iron Co. 101 N. Y. 391, 54 Am. Rep. 718, 4 N. E. 752; Benson v. Baltimore Traction Co. 77 Md. 535, 20 L.R.A. 714, 39 Am. St. Rep. 436, 26 Atl. 973; Johnson v. Paducah Laundry Co. 122 Ky. 369, 5 L.R.A. (N.S.) 733, 92 S. W. 331; Sweeny v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; Lackat v. Lutz, 94 Ky. 287, 22 S. W. 218; Galveston Oil Co. v. Morton, 70 Tex. 400, 8 Am. St. Rep. 611, 7 S. W. 758.

The elevator was not being operated by the Selden-Breck Construction Company, and that company is not responsible for its operation at the time of the accident.

Neff v. Brandeis, 91 Neb. 11, 39 L.R.A. (N.S.) 933, 135 N. W. 232.

Messrs. Burr, Greene, & Greene, for plaintiff:

The bank and the construction company were severally and jointly liable.

Weinman v. DePalma, 232 U. S. 571, 58 L. ed. 733, 34 Sup. Ct. Rep. 370; Munsey v. Webb, 231 U. S. 150, 58 L. ed. 162, 34 Sup. Ct. Rep. 44; George A. Fuller Co. v. McCloskey, 228 U. S. 195, 57 L. ed. 795, 33 Sup. Ct. Rep. 471.

Messrs. C. S. Allen and Hall & Bishop for defendant bank.

Letton, J., delivered the opinion of the court:

In 1911 the Selden-Breck Construction Company was engaged in constructing an eight-story office and bank building for the First National Bank of Lincoln, under a contract with that bank. This action is to recover damages against the owner and contractor for negligence in operating an elevator in the building. Verdict and judgment against the contractor, and in favor of the bank. Defendant Selden-Breck Construction Company appealed, and plaintiff has filed a cross appeal against the bank.

On Sunday, April 30, 1911, the plaintiff, with one McKee, was helping to move the office furniture of the Western Fire Insurance Company, by which they were employed, into rooms on the fifth floor to be occupied by it in the new building. The building was not entirely completed, but, under the terms of the contract, it was to be finished and delivered to the owner on the next day, May 1, 1911. There were two elevators in the elevator shaft. The elevator on the north side was being used by the workmen, and on this day by those moving into the building. The building was not open to the public. There were double sliding doors of metal in place in front of each elevator with spaces for four panes of glass in each, but the glass had not been inserted. No call bells had been installed,

and it was necessary to call for the elevator when wanted. On the north elevator the steel frame and the permanent floor of the car were in position, but a temporary plank floor had been laid over it, and a temporary cage of boards had been constructed to be used until the building was finished. The other elevator was not in use. At noon Curtis, the elevator operator who had been operating it for the contractors, went to lunch, and one Brackett took his place at the direction of Mr. Holmes (who was the president of the Western Fire Insurance Company, and was also the manager of the building for the bank) and Mr. Cunningham, the engineer of the building for the bank. A few moments afterwards the plaintiff and McKee, who were still upon the fifth floor, wanted to descend. They went to the elevator shaft, the doors of which were closed. There was a full-sized outside window in the shaft opposite the doors. Each put his head through one of the empty panes in each door, for the purpose of calling the elevator. Almost immediately the elevator descended from the sixth floor, striking each upon the back of the head. Plaintiff's jaw was caught between the bottom of the elevator and the bar across the door, breaking the bone and causing other severe injuries. The instant Brackett, who was operating the elevator, saw the men's shoulders, he reversed the lever, and this undoubtedly saved their lives.

The allegations of negligence are that the car was being operated by a conductor without a license; that, on account of the absence of a call bell, the defendants instructed the plaintiff to call the conductor orally; that the elevator car was unfinished, and was being run contrary to the laws of the state of Nebraska and ordinances of the city of Lincoln; that the defendants were negligent in "operating, managing, and controlling said elevator car, and in running and in stopping the same," and "in not giving notice to plaintiff of the time when said car would be lowered to and approach said fifth floor of said building, and in not placing a guard or a railing or protection in front of said iron doors and windows of said car." It is also alleged that "plaintiff, obeying the instructions and invitations of said defendants and their servants, stepped to said elevator on the fifth floor of said building on the 30th day of April, 1911, to call said conductor orally to stop said car at the fifth floor, and, while in the act of so doing, the defendants" carelessly and negligently, ran the car so that it struck plaintiff on the head and caused severe injuries, which are specifically described. The answers are general denials and pleas of contributory negligence.

It is necessary to examine the evidence in order to determine the principal questions involved. Brackett, who is an elevator operator, testified for the plaintiff: That the elevator was in all respects, except as to the steel cage, in the same condition as it now is. That electric wires and the balancing chain were hanging below the floor of the car. This chain is shown by other testimony to be 200 feet long, and to be connected at one end to the bottom of the car floor, and at the other to the counter balance weights, so that, when the elevator is at the top of the shaft, the entire length of the chain hangs below in plain sight. He had been instructed to take charge of the elevator until 1 o'clock, while Curtis, the conductor employed by the contracting company, went to lunch. That just after he had taken charge of the car someone called for the car to come to the sixth floor. When he reached there the man had gone. He started the car down, and the accident occurred. Most of the workmen had gone to lunch at the time, and there was very little noise in the building. There was no top or covering over the car, and if one stood back from the door at the fifth floor and called for the car he could hear him when he was at the bottom of the shaft. The car was in perfect running order. He was employed by Mr. Holmes, and had been helping the insurance company to move that morning, but he was to run the elevator in the completed building.

Mr. McKee testified that he worked for the Western Fire Insurance Company; that he went up and down a number of times that morning before the accident; that the only way to call the car was "to holler for it through the window." He says he also called by putting his head through the door where the window would be. At the instance before the accident "I put my head in there, I could not see anything or hear any elevator coming. Everything was quiet; not a sound. The elevator never made a noise; there was no noise when we went to the elevator shaft; there wasn't a sound." On cross-examination he testified that there was noise of moving desks at the time and a noise on the first floor; that when he was not using the elevator he was not in a position where he could see whether it was going to the sixth, seventh, or eighth floor; and that he heard men at work above the fifth floor. Mr. Taylor, another employee of the insurance company, testified that about a score of workmen were in the building, several in the stories above the fifth floor; he does not remember seeing any chains or wires attached to the bottom of the car.

The plaintiff testified that we went up L.R.A.1915E.

and down about ten or twenty times that morning; that he went no further than the fifth floor that day, and did not see the elevator go higher; that a great many men were working in the building, and the noise disturbed him in calling for the elevator.

He said:

We always would look to see where the elevator was, if there was anything moving, or if it was coming, or if it was going; and there was nothing in sight, so I put my head in and called for it.

Q. How light was it in there?

A. As light as day; in fact, it was mid-day.

Q. Did you hear anything?

A. No, sir.

Q. What did you do when you put your head in there?

A. Called for the elevator to come up.

Q. Which way was your mouth or head then?

A. Down; face down.

Q. How long did you have your head in there before you were injured?

A. About a second.

On cross-examination he testified that he knew the car was drawn by cables, and that he did not see the cables, and that the shaft was empty when he looked in. On redirect examination he was questioned as to a conversation with Curtis, the elevator man, and Mr. Holmes, the first time he went up in the elevator, and was asked to state fully what Curtis said as to the height the elevator would run. A number of questions directed along this line had previously been excluded, but the objection to this one was overruled. A motion was made to strike out the answer as incompetent, irrelevant, and immaterial, and not relevant to any issue in the case, which was overruled. He then testified that in the morning of that day Curtis, Taylor, and himself were going up with the first load of books, papers, desks, etc.; that Mr. Holmes said to the operator, "We go to the fifth floor;" and that Curtis said, "Then during the time that you are moving in I don't go above the fifth floor." There is a great mass of evidence more or less relevant, but the gist of that in behalf of the plaintiff material to the determination of the case has been outlined.

Were the defendants or either of them guilty of negligence? The building was incomplete, but the elevator, except for the absence of the call bell, was in perfect running order. When plaintiff elected to use the elevator in its unfinished condition he was bound to govern his conduct accordingly. He was as fully aware of all the circumstances as the defendants were, and

knew the manner in which it was necessary to call for the elevator. There is no proof that the construction company invited the Western Fire Insurance Company or its employees upon the premises. The fact seems to be that that company began to move on that day for its own accommodation. We must consider the plaintiff's case regardless of the testimony for the defense, which denies much of plaintiff's evidence, and is to the effect that anyone looking in the shaft could tell at once by the absence of the suspension cables that the car was above that floor, and that the bottom of the car at the sixth floor could be plainly seen from the lobby outside of the doors on the fifth floor.

Unless it was negligence, as a matter of law, to use the elevator without a call bell, no negligence in its operation has been shown. We are satisfied that, under all the circumstances, it was not negligence *per se* to so operate it, and that it could be used without danger by one calling into the shaft while standing outside of the bars. There is absolutely no evidence that anyone ever failed in getting a response while calling in this manner. That plaintiff and his witnesses did not call in this manner is not material. They should have done so. We are convinced that plaintiff was guilty of gross contributory negligence in thrusting his head through the opening. He had no right to place any part of his person beyond the barrier of the door and into a place so full of dangerous possibilities as an elevator shaft, more especially in a new eight-story office building with modern high-speed elevators. His action amounted to the opening of the closed door, which he had no right to do, or, rather, it had the same effect. Ordinary care and prudence should have warned him that it was exceedingly dangerous to place his head into the elevator shaft. The supreme court of Massachusetts say, in *Ramsdell v. Jordan*, 168 Mass. 505, 47 N. E. 244, 3 Am. Neg. Rep. 47: "It is so plainly dangerous for a person to put his head into an elevator well for the purpose of shouting up the shaft for the car to come down that the verdict for the defendants was rightly ordered." *Knapp v. Jones*, 50 Neb. 490, 70 N. W. 19, 1 Am. Neg. Rep. 306; *Bedell v. Berkey*, 76 Mich. 435, 15 Am. St. Rep. 370, 43 N. W. 308; *Guichard v. New*, 9 App. Div. 485, 41 N. Y. Supp. 456; *Kappes v. Brown Shoe Co.* 116 Mo. App. 154, 90 S. W. 1158; *Knox v. Hall Steam Power Co.* 69 Hun, 231, 23 N. Y. Supp. 490; *Diebold v. United States Baking Co.* 72 Hun, 403, 25 N. Y. Supp. 205; *Mau v. Morse*, 3 Colo. App. 359, 33 Pac. 283.

The latter case is very similar in its facts L.R.A.1915E.

to this. The court say: "If a man in his sound senses, with his eyes open, voluntarily and deliberately, even if carelessly, thrust himself into the jaws of death, we know of no theory upon which anyone can be held responsible for the consequences of his act but himself."

As we view the case, it is unnecessary to consider the merits of the cross appeal, since we find no negligence in the operation of this car by Brackett. It is not contended that Curtis was in the service of the bank. The elevator was under the control and management of the construction company at the time of the accident, though Curtis was relieved by Brackett for the lunch hour. It was using it for its workmen, and incidentally to accommodate tenants who were moving in. *George A. Fuller Co. v. McCloskey*, 228 U. S. 194, 57 L. ed. 795, 33 Sup. Ct. Rep. 471. The opinion in the case of *Munsey v. Webb*, 231 U. S. 150, 58 L. ed. 162, 34 Sup. Ct. Rep. 44, on which much stress is laid by the plaintiff, seems to have little relevancy to the question involved here.

It is argued that on account of the statement and promise made by Curtis plaintiff was misled, and believed there was no danger in putting his head into the shaft. This promise and its breach are not alleged as a ground for recovery. "Where a pleader relies upon one or more specific acts or omissions as negligence, then evidence of any act or omission not within some of such specifications is irrelevant." *Omaha & R. Valley R. Co. v. Wright*, 49 Neb. 456, 68 N. W. 618; *Elliott v. Carter White-Lead Co.* 53 Neb. 458, 73 N. W. 948. We are convinced that this evidence was erroneously admitted, and that instruction No. 8, which places this issue before the jury and instructed them that, "if you believe from the evidence that the plaintiff was informed that the elevator would not go higher than the fifth floor, and that he believed and had reason to believe that such was the case, then the question whether or not he would be guilty of negligence or contributory negligence in thrusting his head into the shaft becomes one for you to determine from all the facts and circumstances of the case," should not have been given. But, taking the testimony as to this statement as true, and considering it as within the issues, we are unable to see how it afforded any justification for the plaintiff's act. In the first place, the most natural meaning to be ascribed to the statement, under the circumstances in which it was made, with men at work all over the building, and with the elevator filled with furniture, books, etc., is that, when Mr. Holmes said, "We go to the fifth floor," and Curtis said "Then dur-

ing the time you are moving in I don't go above the fifth floor," he meant that he would not go above the fifth floor while carrying their effects; not that he would cease to operate the elevator above that floor. Another consideration is that the statement only had reference to what Curtis himself would do. It did not constitute a promise or agreement that the elevator would not be taken by others above that floor. His statement had reference to his own action alone, and not to that of any other operator. He could not control the action of his employer or of any other of the employees, and plaintiff had no right to assume, if he did assume, that he could do so. In whatever light we view this conversation, we can see nothing in it which would justify the plaintiff in projecting his head or body beyond the barriers and through the door into such an exceedingly dangerous situation.

The judgment of dismissal as to the bank is affirmed. The judgment against the construction company is reversed.

Morrissey, Ch. J., not sitting.

MAINE SUPREME JUDICIAL COURT.

LUCINDA N. JONES

v.

CO-OPERATIVE ASSOCIATION OF
AMERICA.

(109 Me. 448, 84 Atl. 985.)

Elevator — boy operator — injury — liability.

A storekeeper may be found negligent and held liable for the consequent injuries where he employs a boy below the statutory age to run his elevator, who, while a passenger is alighting, leaves the operating lever unguarded and in the presence of another boy, who has made attempts to get control of the lever, and who, while it is so unguarded, seizes it and starts the car with a jerk to the injury of the passenger.

(November 9, 1912.)

EXCEPTIONS by plaintiff to the granting of a nonsuit by the Supreme Ju-

dicial Court for Androscoggin County in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Sustained.

The facts are stated in the opinion.

Messrs. McGillicuddy & Morey for plaintiff.

Messrs. Oakes, Pulsifer, & Ludden, for defendant:

Employment in violation of statute, although evidence of negligence, is not conclusive.

Neal v. Rendall, 98 Me. 69, 63 L.R.A. 668, 56 Atl. 209, 15 Am. Neg. Rep. 68.

Illegal employment must be the proximate cause.

Gibson v. International Trust Co. 186 Mass. 454, 72 N. E. 70, 17 Am. Neg. Rep. 248, 177 Mass. 100, 52 L.R.A. 928, 58 N. E. 278; Conley v. American Exp. Co. 87 Me. 352, 32 Atl. 965, 15 Am. Neg. Cas. 288; Currier v. McKee, 99 Me. 364, 59 Atl. 442, 3 Ann. Cas. 57; Gilmore v. Ross, 72 Me. 194; Burbank v. Bethel Steam Mill Co. 75 Me. 373, 46 Am. Rep. 400; Christner v. Cumberland & E. L. Coal Co. 148 Pa. 67, 23 Atl. 221; Berry v. Sugar Notch, 191 Pa. 345, 43 Atl. 240, 6 Am. Neg. Rep. 376; Kutchera v. Goodwillie, 93 Wis. 448, 67 N. W. 729; Evans v. American Iron & Tube Co. 42 Fed. 519; Coal Run Coal Co. v. Jones, 127 Ill. 379, 8 N. E. 865, 20 N. E. 89; Snodgrass v. Carnegie Steel Co. 173 Pa. 228, 33 Atl. 1104; Kersey v. Kansas City, St. J. & C. B. R. Co. 79 Mo. 362; Borek v. Michigan Bolt & Nut Works, 111 Mich. 129, 69 N. W. 254; Sewell v. Moore, 166 Pa. 570, 31 Atl. 370; Lewis v. Flint & P. M. R. Co. 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744; Briggs v. New York C. & H. R. R. Co. 72 N. Y. 26; Newcomb v. Boston Protective Dept. 146 Mass. 596, 4 Am. St. Rep. 354, 16 N. E. 555.

If it is apparent that the plaintiff's action cannot be maintained, it is not only competent, but proper, for the presiding justice so to declare by directing a nonsuit.

Bryant v. Great Northern Paper Co. 103 Me. 32, 68 Atl. 379; Elwell v. Hacker, 86 Me. 416, 30 Atl. 64; Romeo v. Boston & M. R. Co. 87 Me. 540, 33 Atl. 24; White v. Bradley, 66 Me. 254; Young v. Chandler, 102 Me. 251, 66 Atl. 539; Mishou v. Maine C. R. Co. 106 Me. 150, 76 Atl. 261.

Note. — As to liability for injury to elevator passenger, see note to *Tippecanoe Loan & T. Co. v. Jester*, ante, 721, and other notes there referred to.

Generally, as to duty of store or shop keeper toward customer, see notes to *McDermott v. Sallaway*, 21 L.R.A.(N.S.) 456, and *Smith v. Johnson*, L.R.A.1915F. —

Generally, for violation of statute as negligence or evidence of negligence, see note to *Wolf v. Smith*, 9 L.R.A.(N.S.) 338. For L.R.A.1915E.

various concrete aspects of the question, see Index to L.R.A. Notes, "Negligence."

The question of violation of statutes in relation to the employment of minors, as affecting liability for injury to a minor, is discussed in notes to *Rolin v. R. J. Reynolds Tobacco Co.* 7 L.R.A.(N.S.) 335, and *Elk Cotton Mills v. Grant*, 48 L.R.A.(N.S.) 656; and see references therein to other notes.

Whitehouse, Ch. J., delivered the opinion of the court:

This is an action to recover damages for personal injuries to the plaintiff resulting from the alleged negligence of the defendant in the operation and control of the elevator in its store in Lewiston, known as the "Peck Department Store." The negligence complained of is described in the plaintiff's declaration in substance as follows: The defendant carelessly and negligently placed in charge of the elevator, to run and operate the same, an inexperienced, incompetent, and unsuitable boy of immature years, contrary to law, and negligently permitted another of its employees, a boy of immature years, to ride on the elevator without any business or employment thereon. The boy in charge of the elevator started the same by means of the lever, and ran it, with the plaintiff and the other boy thereon, down to the first floor of the store, and there stopped it for the plaintiff to alight; and while the plaintiff, in the exercise of due care, was attempting to alight by stepping out onto the first floor, the boy in charge of the elevator negligently failed to guard and protect the lever, and left the same unattended and unguarded, and while so left the other boy meddled with the lever and set the same in motion, whereby the elevator was suddenly and without warning started in motion with great force, so that the plaintiff was thereby thrown with great force and violence to the first floor of the store, fracturing the bone of her arm near the shoulder, and causing the other injuries of which she complains.

It is provided by § 1 of chapter 4 of the Laws of 1907, that "no person, firm or corporation shall employ or permit any person under fifteen years of age to have the care, custody, management or operation of any elevator," under the penalty prescribed in § 2.

Peter Hayes, the boy employed to operate and control the defendant's elevator at the time of the plaintiff's injury, was fourteen years and five months old.

The fact that Hayes was employed by the defendant, in violation of law, to operate and control this elevator, was competent, but not conclusive, evidence of the defendant's negligence with respect to all consequences resulting from a failure of duty on the part of such boy of immature age; and if it is unexplained, and taken in connection with other facts and circumstances, it may be conclusive evidence of such negligence on the part of the defendant. As stated by this court in *Larrabee v. Sewall*, 66 Me. 381: "It may be 'strong evidence' that a party is in the wrong, when he is doing that which the law forbids him to L.R.A.1915E.

do." *Neal v. Rendall*, 98 Me. 69, 63 L.R.A. 668, 56 Atl. 209, 15 Am. Neg. Rep. 68; *Moore v. Maine C. R. Co.* 106 Me. 297, 76 Atl. 871. In *Bourne v. Whitman*, 209 Mass. 166, 35 L.R.A.(N.S.) 701, 95 N. E. 404, 2 N. C. C. A. 318, the defendant was operating an automobile without a license, and it is said in the opinion: "It is universally recognized that the violation of a criminal statute is evidence of negligence on the part of the violator as to all consequences that the statute was intended to prevent." See also *Berdos v. Tremont & S. Mills*, 209 Mass. 489, 95 N. E. 876, Ann. Cas. 1912B, 797; *Doolan v. Pocasset Mfg. Co.* 200 Mass. 200, 85 N. E. 1055; *Finnegan v. Winslow Skate Mfg. Co.* 189 Mass. 580, 76 N. E. 192, 19 Am. Neg. Rep. 279, and *Stehle v. Jaeger Automatic Mach. Co.* 220 Pa. 617, 69 Atl. 1116, 14 Ann. Cas. 122.

On the day of the injury in the case at bar, the plaintiff, a lady sixty-seven years of age, accompanied by her daughter, made some purchases at the defendant's store, and, after lunching at the restaurant on the fourth floor, took the elevator in charge of the boy Peter Hayes for the purpose of returning to the first or street floor. At the third floor the elevator was stopped by Hayes, and another boy by the name of Lloyd Kritz, who was also in the employment of the defendant, and apparently of about the same age as Hayes, was taken into the elevator. The two boys were "playing and fooling" coming down to the first floor; Kritz making several attempts to seize and control the lever by which the elevator was operated. But Hayes retained control of it until the street floor was reached, when the elevator was stopped, and according to the testimony of the plaintiff's daughter, Hayes "opened the door and stepped across away from the lever, or away from his post of duty," leaving the lever unguarded, and Kritz within reach of it. The plaintiff's daughter stepped out, and just as the plaintiff was in the act of alighting, and before her foot reached the floor, Kritz seized the unguarded lever and started the elevator up with a jerk, throwing the plaintiff heavily to the floor, and causing the injuries of which she complains.

At the conclusion of the plaintiff's evidence, the presiding justice ordered a nonsuit upon the defendant's motion, with a stipulation on the part of the defendant that, "if for any reason the order for a nonsuit is overruled and the case sent back for trial, the question of damages only shall be submitted to the jury."

It was incumbent upon the defendant to exercise such thoughtfulness, prudence, and discrimination in the selection of elevator boys as the proper discharge of that duty

and the situation and circumstances demanded, having regard to the serious consequences likely to flow from a negligent or unskilful operation and management of the elevator. He was prohibited by statute from employing any boy under fifteen years of age. A boy of more mature years and judgment might have anticipated that it would be necessary to guard the lever of the elevator with vigilance, in order to prevent the mischief which might be caused by an intermeddling playmate who had shown an eager desire to obtain control of the lever and operate the elevator himself.

There is no suggestion of any want of due care on the part of the plaintiff herself, and, under all the circumstances, it is the opinion of the court that the question of the defendant's negligence should have been submitted to the jury, and that there was sufficient evidence to support a verdict in favor of the plaintiff upon that issue.

According to the stipulation of the parties, the certificate must therefore be:

Exceptions sustained; case to stand for trial upon question of damages only.

CONNECTICUT SUPREME COURT OF ERRORS.

L. M. SAGAL, Doing Business under the Name of New England Advertising Company, Appt.,

v.

O. C. FYLAR et al., Doing Business under the Name of Waterbury Telegraph School.

(89 Conn. 293, 93 Atl. 1027.)

Contract — by one doing business under assumed name — enforceability.

Failure of one doing business under an assumed name to file a certificate showing his real name, as required by statute providing punishment for failure to do so, does not render contracts made by him in the prosecution of the business unenforceable.

(May 11, 1915.)

A PPEAL by plaintiff from a judgment of the City Court of Waterbury in defendants' favor in an action brought to recover the amount alleged to be due under a contract of advertising. Reversed.

The facts are stated in the opinion.

Mr. Philip N. Bernstein, for appellant:
A contract entered into by a person who

Note. — As to validity of contract made by individual or partnership under an assumed name in violation of statute, see note to *Hunter v. Patterson*, L.R.A.1915D, 987.
L.R.A.1915E.

is doing business under an assumed or fictitious name will be enforced by the courts.

Union Nat. Bank v. Matthews, 98 U. S. 627, 25 L. ed. 189; *Re Dunlap*, 19 Am. Bankr. Rep. 374; *Fritts v. Palmer*, 132 U. S. 282-287, 33 L. ed. 317-319, 10 Sup. Ct. Rep. 93; *City Bank v. Bruce*, 17 N. Y. 515; *Hill v. Smith, Morris* (Iowa) 70; 25 Cyc. 633; *Mandlebaum v. Gregovich*, 17 Nev. 87, 45 Am. Rep. 433, 28 Pac. 121; *Rahter v. First Nat. Bank*, 92 Pa. 393; 2 *Lewis's Sutherland*, Stat. Constr. p. 938, § 503; *Smith v. Finch*, 12 B. C. 186; *Gay v. Seibold*, 97 N. Y. 476, 49 Am. Rep. 533; *Donlon v. English*, 89 Hun, 67, 35 N. Y. Supp. 82; *Model Heating Co. v. Magarity*, 2 *Boyce* (Del.) 469, L.R.A.1915B, 665, 81 Atl. 394.

Mr. Edward L. Seery, for appellees:

Louis Sagal, who now claims to be the New England Advertising Company, but whose name does not appear in the contract, is prohibited by the statute from doing business under an assumed tradename, by reason of his failure to comply with the terms of the statute.

Parsons, Contr. *8, *9; *Clark*, Contr. 2d ed. 45; 30 Cyc. 27; *Western & A. R. Co. v. Dalton Marble Works*, 122 Ga. 774, 50 S. E. 978; *Mexican Mill v. Yellow Jacket Silver Min. Co.* 4 Nev. 40, 97 Am. Dec. 510, 11 Mor. Min. Rep. 175; *The Peminaw v. Wilson*, 11 Iowa, 479.

The cause of action must be unconnected with an illegal act.

Phalen v. Clark, 19 Conn. 431, 50 Am. Dec. 253.

The making of the contract by the plaintiff was prohibited. It was therefore an illegal act.

Fawcett v. Supreme Sitting, O. I. H. 64 Conn. 209, 24 L.R.A. 815, 29 Atl. 614.

Courts have no jurisdiction of violations of the law, except for the purpose of punishment.

Funk v. Gallivan, 49 Conn. 124, 44 Am. Rep. 210; *Miller v. Post*, 1 Allen, 434; *Eaton v. Kegan*, 114 Mass. 433; *Bisbee v. McAllen*, 39 Minn. 143, 39 N. W. 299; *Lewis v. Welch*, 14 N. H. 297.

Prentice, Ch. J., delivered the opinion of the court:

The plaintiff, doing business under the name of the New England Advertising Company, contracted in writing under that name with the defendants to furnish the latter with certain advertising for an agreed price per week. The plaintiff in his complaint alleges performance of this agreement on his part, and failure on the part of the defendants to make the stipulated payment in full, and seeks to recover the unpaid balance. The defendants plead,

among other defenses, that the plaintiff had at no time prior to the commencement of the action filed in the office of the town clerk of the town where his business was conducted a certificate such as was required by chapter 27 of the Public Acts of 1911, p. 1586. A demurrer to this defense was overruled, and judgment rendered for the defendants.

The court below relied, and defendants' counsel rely, upon the principle enunciated in *Funk v. Gallivan*, 49 Conn. 124, 44 Am. Rep. 210, and afterwards affirmed or recognized in *William Wilcox Mfg. Co. v. Brazos*, 74 Conn. 208, 212, 50 Atl. 722, and *Connecticut Breweries Co. v. Murphy*, 81 Conn. 145, 151, 70 Atl. 450, to wit, that "every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender."

Whether the rule thus broadly stated does not have its exceptions or limitations, as has been held in cases of high authority, we have no occasion to inquire, since the situation here differs essentially from those presented in the Connecticut cases referred to, and does not come under the operation of the rule laid down in them. See *Harris v. Runnels*, 12 How. 79, 85, 13 L. ed. 901, 903; *Dunlop v. Mercer*, 86 C. C. A. 435, 156 Fed. 545, 555; *Re T. H. Bunch Co. (D. C.)* 180 Fed. 519, 527; *Model Heating Co. v. Magarity*, 2 Boyce (Del.) 459, 467, L.R.A. 1915B, 665, 81 Atl. 394; *Pangborn v. Westlake*, 36 Iowa, 546, 548; *Washburn Mill Co. v. Bartlett*, 3 N. D. 138, 144, 54 N. W. 544. In all three of the cases the undertaking was itself a forbidden one. The intention of the general assembly to prohibit that which the parties had sought to accomplish, and all means to that end, was too clear for question. In the first case the action was brought to enforce the result of a lottery drawing; in the second, to recover for the breach of a contract for the erection of a dam in violation of the statute; and, in the third, upon a note given in consideration of the illegal sale of intoxicating liquors.

Finn v. Donahue, 35 Conn. 216, was an earlier case whose decision rested upon the same principle. There the plaintiff sought recovery of a loan made on the Lord's Day contrary to the statutory prohibition of secular business on that day. The act which furnished the foundation of the right of action was thus a forbidden one.

The contract which furnishes the foundation for this action was one which parties competent to contract might properly enter into. Its purpose was lawful, and the L.R.A.1915E.

means to be employed lawful. Had Sagal used his own name, all possibility of criticism would have been avoided. The prohibition of the statute extended to the use of a name not his own. It did not extend to the business done or contract made. The contract sued upon was thus in no sense one "for or about any matter or thing" which was prohibited or made unlawful.

A closer analogy to the present situation is to be found in cases such as *Chieppo v. Chieppo*, 88 Conn. 233, 90 Atl. 940, where a note of a corporation was held to be enforceable although it was given in a business transaction, and the corporation was forbidden by statute to do business by reason of its failure to file a certificate of organization; or such as *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93, where a deed of Colorado land to a foreign corporation forbidden by statute to do business in that state without complying with certain conditions which had not been complied with was held not to be void. In these cases there was an express statutory prohibition, but it did not extend to the business, transaction, contract, or undertaking in question. It extended only to the qualification of the party to engage in the business or transaction, or to enter into the contract or undertaking.

In cases of this character at least, whatever decisions to the contrary may be found in other jurisdictions, there is no inflexible rule of arbitrary application for the determination of the effect by implication of the prohibitory statute. The question is one of legislative intent, to be gathered from the language of the statute read in the light of the circumstances with which it deals, the remedial object apparently in view, and such considerations of public policy as may be involved in the conflicting claims of construction. *Harris v. Runnels*, 12 How. 79, 84, 13 L. ed. 901, 903; *Dunlop v. Mercer*, 86 C. C. A. 435, 156 Fed. 543, 556; *Re T. H. Bunch Co. (D. C.)* 180 Fed. 519, 528; *Chieppo v. Chieppo*, 88 Conn. 233, 235, 90 Atl. 940; *Model Heating Co. v. Magarity*, 2 Boyce (Del.) 459, 467, 81 Atl. 394; *Pangborn v. Westlake*, 36 Iowa, 546, 548.

Upon examination of the statute before us two pertinent facts appear, to wit: (1) That it expressly imposes a penalty for non-observance in the form of a fine or imprisonment, which latter may be for the term of one year; and (2) that no further penalty or consequence is attached. This has frequently been regarded as a significant indication of a purpose that the penalty expressed should be exclusive. *Fritts v. Palmer*, 132 U. S. 282, 289, 33 L. ed. 317, 319, 10 Sup. Ct. Rep. 93; *Re T. H. Bunch Co. (D. C.)* 180 Fed. 519, 527; *Garratt Ford*

Co. v. Vermont Mfg. Co. 20 R. I. 187, 189, 38 L.R.A. 545, 78 Am. St. Rep. 852, 37 Atl. 948; Toledo Tie & Lumber Co. v. Thomas, 33 W. Va. 566, 570, 25 Am. St. Rep. 925, 11 S. E. 37. The significance of the expression of one form of penalty and silence as to any other is emphasized by the care which has been taken in other of our statutes to state that the contract based upon the prohibited act should be unenforceable. See, for example, § 2727, Gen. Stat. dealing with contracts connected with the illegal sale of intoxicating liquors, and chapter 244 of the Public Acts of 1911, p. 1539, touching usurious loans, in both of which there is a clear provision that the contract should be unenforceable.

The remedial purpose of the statute manifestly was that the public should have ready means of information as to the personal or financial responsibility behind the assumed name. Its aim was the protection of those who might deal with, or give credit to, the fictitious entity. It obviously was not to provide a means by which persons having received a benefit from another should be enabled to retain it without compensation, and to repudiate any agreement for compensation. Doubtless a penalty which held out a reasonable promise of securing compliance with the statute was intended; but one which had in it the possibility of a year's imprisonment would seem to be adequate to accomplish that end, and it would seem that a further penalty such as the defendants contend for would create a cumulative penal result with which the evil sought to be remedied was scarcely commensurate.

We are of the opinion that the intent of the general assembly was that the penalty expressed in the statute should be exclusive, and that contracts otherwise lawful entered into in the course of a business carried on in disregard of the statute should be neither void nor unenforceable. The demurrer should have been sustained.

There is error, the judgment is set aside, and the cause remanded for further proceedings according to law.

All concur.

MINNESOTA SUPREME COURT.

GERTRUDE FRASCH, Appt.,

v.

CITY OF NEW ULM, Resp't.

(130 Minn. 41, 153 N. W. 121.)

Municipal corporation — polluted water supply — injury — notice.

1. Service of the written notice prescribed

Headnotes by HOLZ, J.
L.R.A.1915E.

by § 1786, Gen. Stat. 1913, is a condition precedent to the maintenance of a suit to recover damages from a city on account of an illness contracted from the use of contaminated water supplied from the waterworks owned and operated by the city.

Constitutional law — discrimination — notice of claim against city.

2. The statute is not an arbitrary discrimination in favor of municipalities owning and maintaining public utilities as against private parties carrying on similar enterprises, and is not violative of any constitutional provision.

(June 11, 1915.)

APPEAL by plaintiff from an order of the District Court for Brown County, sustaining a demurrer to a complaint filed to recover damages for personal injuries alleged to have been caused by defendant's negligently furnishing plaintiff contaminated water. Affirmed.

The facts are stated in the opinion.

Messrs. Davis & Michel, for appellant:

Section 1786, Revised Laws of 1913, does not apply to an action brought against a municipality, to recover damages for its negligence while it is engaged in a private business enterprise.

Brantman v. Canby, 119 Minn. 396, 43 L.R.A.(N.S.) 862, 138 N. W. 671; Quackenbush v. Slayton, 120 Minn. 373, 139 N. W. 716; Mitchell v. Chisholm, 116 Minn. 323, 133 N. W. 804, 1 N. C. C. A. 199.

Defendant has no greater or higher privileges or immunities than are possessed by any private corporation in the same line of endeavor. It is subject to the same liabilities and entitled to the same defenses.

Henry v. Lincoln, 93 Neb. 331, 50 L.R.A.(N.S.) 174, 140 N. W. 664; East Grand Forks v. Luck, 97 Minn. 373, 6 L.R.A.(N.S.) 198, 107 N. W. 393, 7 Ann. Cas. 1015; Keever v. Mankato, 113 Minn. 55, 33 L.R.A.(N.S.) 339, 129 N. W. 158, 775, Ann. Cas. 1912A, 216, 1 N. C. C. A. 187; 2 Dill. Mun. Corp. No. 954; Kelly v. Faribault, 95 Minn. 203, 104 N. W. 231; D'Amico v. Boston, 176 Mass. 599, 58 N. E. 158; Haley v. Bos-

Note.—The character of claims within a statute or ordinance requiring notice or presentation of claim as a condition of municipal liability is treated at length in the note to Henry v. Lincoln, 50 L.R.A.(N.S.) 174.

As to constitutionality and validity of requirement of notice of injury as a condition of municipal liability, see note to Tonn v. Helena, 36 L.R.A.(N.S.) 1136.

As to validity of requirement of written notice of defect to render municipal corporation liable for injuries caused by defective highways, see note to MacMullen v. Middletown, 11 L.R.A.(N.S.) 391.

ton, 191 Mass. 291, 5 L.R.A.(N.S.) 1005, 77 N. E. 888; Dickinson v. Boston, 188 Mass. 595, 1 L.R.A.(N.S.) 664, 75 N. E. 68.

Messrs. Pfaender & Flor and S. B. Wilson, for respondent:

Service by the plaintiff of the notice required by the statute is a condition precedent to the maintenance of his suit.

Mitchell v. Chisholm, 116 Minn. 323, 133 N. W. 804, 1 N. C. C. A. 199; Gaughan v. St. Paul, 119 Minn. 63, 137 N. W. 199; Quackenbush v. Slayton, 120 Minn. 373, 139 N. W. 716; Condon v. Chicago, 249 Ill. 596, 94 N. E. 976; Koch v. Ashland, 83 Wis. 361, 53 N. W. 674; Barrett v. Mobile, 129 Ala. 179, 87 Am. St. Rep. 54, 30 So. 36; Hiner v. Fond du Lac, 71 Wis. 78, 36 N. W. 632; Adams v. Modesto, 6 Cal. Unrep. 486, 61 Pac. 957; Steltz v. Wausau, 88 Wis. 618, 60 N. W. 1054; Reining v. Buffalo, 102 N. Y. 308, 6 N. E. 792; Schigley v. Waseca, 106 Minn. 94, 19 L.R.A.(N.S.) 689, 118 N. W. 259, 16 Ann. Cas. 169.

Holt, J., delivered the opinion of the court:

The city of New Ulm owns and maintains a system of waterworks from which its inhabitants are supplied with water for a fixed price. The city is sued for negligently furnishing plaintiff contaminated water, causing her severe illness and large expense. This appeal is from an order sustaining a demurrer to the complaint.

No question is made of the sufficiency of the complaint except for the absence of an allegation that written notice of claim was served upon the city within thirty days of the loss or injury, in accordance with the provision of § 1786, Gen. Stat. 1913. Plaintiff contends that the section does not apply to a case of the kind here involved, and, further, if the law be construed applicable here, it runs counter to the Constitution.

Previous to the enactment of chapter 391, Laws 1913 (§§ 1786-1789, Gen. Stat. 1913), this court had held a notice not required in case of suit by a personal representative for death by wrongful act of a city, nor in case of damages claimed on account of negligence in the discharge of the duties of a city as master. Orth v. Belgrade, 87 Minn. 237, 91 N. W. 843, 12 Am. Neg. Rep. 294; Kelly v. Faribault, 95 Minn. 293, 104 N. W. 231; Pesek v. New Prague, 97 Minn. 171, 106 N. W. 305; Gaughan v. St. Paul, 119 Minn. 63, 137 N. W. 199; Quackenbush v. Slayton, 120 Minn. 373, 139 N. W. 716. The act of 1913, by specifically covering cases previously excluded by our decisions, indicates an intent to extend the protection afforded municipalities in the requirement of written notice of claim before suit. This, L.R.A.1915E.

together with the language employed in the title and body of the act, leaves no room to doubt the legislative purpose was that no person should be permitted to sue a municipality for damages suffered through the negligence of any of its officers, agents, servants, or employees, unless he has served a written notice of claim within the time specified in the act. Diamond Iron Works v. Minneapolis, — Minn. —, 152 N. W. 647.

But it is said the provision with respect to written notice of claim should be confined to actions involving or pertaining to the public or governmental functions of a city, and not to causes arising out of the conduct of some private endeavor which it may choose to enter upon, such as the maintenance of waterworks or lighting systems. We have held municipal corporations to the same accountability for negligence in the conduct of enterprises other than strictly governmental that we exact from private corporations engaged in similar business. Wiltse v. Red Wing, 99 Minn. 255, 109 N. W. 114; Keever v. Mankato, 113 Minn. 55, 33 L.R.A.(N.S.) 339, 343, 129 N. W. 158, 775, Ann. Cas. 1912A, 216, 1 N. C. C. A. 187; Brantman v. Canby, 119 Minn. 396, 43 L.R.A.(N.S.) 862, 138 N. W. 671. And it may be conceded that, in respect to every injury resulting from a negligent operation of its system of waterworks, defendant is answerable in damages to the same extent as would be a private owner thereof. But, even so, the legislature is not, because of similarity of liability, precluded from making distinctions between municipalities and private corporations in respect to conditions precedent to suit. When those conditions are complied with, the liability and redress are the same. This is a period when municipalities are not confined strictly to the functions of governmental agencies, but are permitted to embark in a variety of enterprises deemed beneficial and convenient to its inhabitants, upon the ground that cheaper and more efficient service can be rendered by the municipality than by persons or private corporations. Under this head come the so-called public utilities. This very need of intrusting a multitude of private or quasi private matters to municipalities, in addition to their purely public duties, is sufficient reason for the requirement of timely notice of a claim, before the one who has suffered from the negligence of the municipality may resort to the court for its enforcement. Every reason which calls for the service of a written notice of claim upon a municipality before suit in any case applies in this. It is as important that the head or administrative body of a city have notice of claim for

negligent injury or damage caused by something connected with its water system as if the injury arose out of some negligent defect in its streets. The funds of a city must be used to pay the one claim, as well as the other. The purpose of notice is to enable a city to ascertain the facts and keep in touch with the evidence pertaining to the claim, so as to facilitate a just settlement, or, if that cannot be done, defend with effect. The legislature, having deemed it expedient and conducive to public welfare to permit municipalities to own and manage public utilities, may to a reasonable extent protect them against stale and long-hidden demands, and perhaps unnecessary lawsuits, by requiring timely notice as a condition precedent to suit. We do not think this arbitrary class legislation. There can be no claim that thirty days' time is unreasonably short in cases like the present. *Tonn v. Helena*, 42 Mont. 127, 36 L.R.A.(N.S.) 1136, 111 Pac. 715, 3 N. C. C. A. 437; *Steltz v. Wausau*, 88 Wis. 618, 60 N. W. 1054; *McCue v. Waupun*, 96 Wis. 625, 71 N. W. 1054, and *O'Donnell v. New London*, 113 Wis. 292, 89 N. W. 511, go to sustain the proposition that, in respect to demands arising outside of the purely governmental functions of cities, or outside of statutory obligations imposed upon them, the legislature, in requiring service of notice of demand as a condition precedent to suit against them, is not improperly discriminating against individuals or private corporations owning and conducting like utilities.

No case to which our attention has been called holds directly that, upon constitutional grounds, the legislature may not place municipal owners and operators of public utilities, as respects conditions precedent to being sued, or as to limitation of time for suing them, in a different class from private concerns conducting like enterprises. As we read *Henry v. Lincoln*, 93 Neb. 331, 50 L.R.A.(N.S.) 174, 140 N. W. 664, the decision turns upon an interpretation of their statute, and not upon any constitutional objection. In construing the statute the court kept in mind the three different situations in which a municipality may find itself, and therefrom draws the conclusion that it was not intended to require notice in causes or demands arising out of the permissive enterprises which a municipality may engage in, or stay out of, as it deems best, but only when the demands grow out of its negligent failure to discharge a duty imposed by statute, or where claims or contracts arise in the exercise of its governmental functions. The decision is in line with the construction placed by this court upon the provisions for notice L.R.A.1915E.

existing in this state prior to the enactment of chapter 391, Laws 1913 (Gen. Stat. 1913, §§ 1786-1789). Nor does *D'Amico v. Boston*, 176 Mass. 599, 58 N. E. 158, find constitutional objections. There a notice was required before suit only when the defect causing the injury was in a legal highway or street, and it was held that, since the *locus in quo*, though formerly a street, had been taken for a water basin, it was not a public highway, even though it was still used as such. An authority in point is *Condon v. Chicago*, 249 Ill. 596, 94 N. E. 976. It directly passed upon and sustained the constitutionality of a law which required notice of claim as a condition precedent to bringing suit against a municipal corporation, although other persons or corporations carrying on the same kind of business as the one out of which the claim arose were subjected to suit without such precedent notice.

In our opinion, the demurrer was well taken.

Order affirmed.

KANSAS SUPREME COURT.

STATE OF KANSAS EX REL. CHARLES D. ISE, County Attorney,

v.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Appt.,

(95 Kan. 22, 147 Pac. 801.)

Highway — absence of records — effect.

1. A finding that a road which was declared established by the board of county commissioners, and which has been used by the public for years, is a regularly laid out highway, will not necessarily be overthrown by the fact that the affidavits showing the service of notice of the viewers' meeting, which the law requires to be filed with the county clerk, cannot be found in his office.

Railroad — construction of street crossings.

2. Whether or not the railway company is ordinarily required at its own expense to place a highway, at a point where it is laid out across an existing railroad, in such con-

Headnotes by MASON, J.

Note. — Power to compel railroad to establish or maintain at its own expense an overhead or underground highway crossing.

This note does not cover the cases so far as they turn upon the fact that the street or highway was opened subsequently to the construction of the railroad, as that point is covered in the note to *State ex rel. Min-*

dition that there shall be no unnecessary interference with travel, this obligation results where a highway which antedates the railroad is vacated, and a new road taking its place is established, crossing the track near the same point, and several years thereafter the embankment on which the railroad track is laid is raised some 8 feet.

Same — requirement of subway.

3. Where the situation is such that a railway company is under a legal obligation to restore a highway across its track to a reasonably safe condition for travel, and this result cannot be otherwise accomplished, a court may require the construction of a subway, but only where the necessity is clearly shown and supported by competent expert evidence.

(April 10, 1915.)

neapolis v. St. Paul, M. & M. R. Co. 28 L.R.A.(N.S.) 298.

As to compensation for the construction and maintenance of a crossing and safeguards, as an element of damages for laying out a street across railway property, see subdivision beginning at page 1232 of note to New York, C. & St. L. R. Co. v. Rhodes, 24 L.R.A.(N.S.) 1226, upon the necessity of making compensation, and the measure thereof, upon laying out a street across railway property.

Generally, as to liability for the cost of changing the grade of a street to prevent the crossing of a railroad at grade, see note to Kelly v. Minneapolis, 26 L.R.A. 92.

As to the liability of a railroad company to an abutting owner for damages from a change of grade of a highway necessary to carry it across the tracks, see note to Shrader v. Cleveland, C. C. & St. L. R. Co. 26 L.R.A.(N.S.) 226.

As to the duty of a railroad company to construct or alter bridges at its own expense over public drainage ditches, see note to People ex rel. Peeler v. Chicago & E. I. R. Co. L.R.A.1915B, 486.

As to the duty of a railroad to conform a crossing to a change of grade of a street, see note to Southern R. Co. v. State, L.R.A. 1915B, 766.

As to the duty of a railroad to light the space below elevated tracks, see note to Chicago v. Pennsylvania Co. 36 L.R.A.(N.S.) 1081.

This note does not include cases involving only the liability of a railroad company to an individual for personal injuries or injuries to property on a highway, at an overhead or underground railroad crossing, as depending upon the company's duty to maintain and keep in repair some portion of the crossing or the approach thereto.

Power to compel construction of overhead or underground crossing rendered physically necessary by construction or alteration of railroad.

It seems clear that a railroad company which is constructing or altering its rail-

A PPEAL by defendant from a judgment of the District Court for Montgomery County in plaintiff's favor in an action to enjoin the maintenance of a grade highway crossing over defendant's track. Modified.

The facts are stated in the opinion.

Messrs. William R. Smith, Owen J. Wood, and Alfred A. Scott, for appellant:

The highway in question was not a regularly laid out highway, and therefore the railway company was not compelled to maintain any crossing whatever over its right of way at said intersection.

State v. Farry, 23 Kan. 731; Chase County v. Cartter, 30 Kan. 581, 1 Pac. 814; State v. Bogardus, 63 Kan. 259, 65 Pac. 251; Bourbon County v. Ralston, 79 Kan. 432, 100 Pac. 288; Missouri, K. & T. R. Co.

road across a public highway is bound, under its common-law duty not unnecessarily to impair the usefulness of a highway crossed by it, to construct and maintain a crossing for the highway over or under its railroad, if such a crossing is rendered necessary by the construction of the railroad. Thus, the state, in the exercise of the police power, may impose upon a railroad company the uncompensated duty of constructing a highway bridge over its tracks, where they cross a public highway through an artificial cut, below the natural surface of the land and highway. Minneapolis v. Minneapolis Street R. Co. 115 Minn. 514, 133 N. W. 80.

And where a railroad company, in constructing its road, has excavated through and under a highway crossed by it, the railroad commissioners, under statutory authority, may compel the company to erect, or cause to be erected, at its own expense, a suitable highway bridge and approaches over and across the excavation made by it across the highway. Erskine v. Wiscasset & Q. R. Co. 105 Me. 113, 72 Atl. 1019.

Likewise, a city has power, at common law, to compel a railroad company to construct and maintain a necessary bridge over its tracks at a street crossing. Chattanooga v. Southern R. Co. 128 Tenn. 399, 161 S. W. 1000.

And where a railroad company has constructed its road across a public city street, on a high embankment, so as completely to obstruct the street, the city, having statutory power to open and improve streets, to prevent encroachments thereupon, and to regulate crossings of railway tracks, and make provisions to prevent accidents at such crossings, has power to compel the railroad company, in the fulfillment of its statutory duty to restore the street across which it has constructed its road to such a state that its usefulness shall not be materially impaired, to open the blockaded street for travel by removing the embankment across it, leaving the railroad upon a viaduct over the street. Emporia v. Atchison, T. & S. F. R. Co. 88 Kan. 611, 129 Pac. 161.

v. Long, 27 Kan. 684; Atchison, T. & S. F. R. Co. v. Conlon, 62 Kan. 416, 53 L.R.A. 781, 63 Pac. 432; State v. Horn, 35 Kan. 717, 12 Pac. 148; Dewey v. McLain, 7 Kan. 126, 12 Am. Rep. 418.

When the railroad was constructed there was no highway at the place in question to restore to its former condition, and therefore there was no duty upon the railway company to construct said crossing and approaches thereto and keep them in safe condition.

Rock Creek Twp. v. St. Joseph & G. I. R. Co. 43 Kan. 543, 23 Pac. 585; Kansas C. R. Co. v. Jackson County, 45 Kan. 716, 26 Pac. 394; Greenwood County v. Kansas City, E. & S. K. R. Co. 46 Kan. 104, 26 Pac. 397; Atchison, T. & S. F. R. Co. v.

Osage County, 48 Kan. 576, 29 Pac. 1084; Chicago, K. & W. R. Co. v. Chautauqua County, 49 Kan. 764, 31 Pac. 736; Southern Kansas R. Co. v. Johnson County, 52 Kan. 138, 34 Pac. 396.

The railroad embankment over the alleged highway is not a public nuisance.

Atchison, T. & S. F. R. Co. v. Armstrong, 71 Kan. 366, 1 L.R.A.(N.S.) 113, 114 Am. St. Rep. 474, 80 Pac. 978; Prunty v. Atchison, T. & S. F. R. Co. 88 Kan. 42, 127 Pac. 529; 3 Elliott, Railroads, 2d ed. § 1108; Kansas City Southern R. Co. v. Kaw Valley Drainage Dist. 233 U. S. 75, 78, 58 L. ed. 857, 858, 34 Sup. Ct. Rep. 564.

The order of the court to remove the embankment was an interference with interstate commerce.

And in *Chicago v. Pittsburg, C. C. & St. L. R. Co.* 146 Ill. App. 403, affirmed in 242 Ill. 30, 89 N. E. 648, which was an action by a city against a railroad company to recover money expended by the former in repairing certain sidewalks upon approaches to a viaduct over the railroad company's tracks, although a recovery was denied upon the ground that the city had no authority to make the repairs in question, because the street was under the control of a board of park commissioners, the court said: "Since the appearance of railroads the common-law rules relating to interference with highways have been applied to the crossings of streets and highways by them, apparently universally. There is no abatement of the common-law rules in favor of railroads. The compulsory construction of viaducts may be enforced against them where, in the opinion of the proper public authorities, the convenience of the public or the safety of lives and property may so require. The common law makes no arbitrary rules, but always follows along lines of sound reasoning, and the reason for applying to a railroad the general rule and compelling it to construct a viaduct where, owing to its crossing a highway, a viaduct is required, is stated to be that the situation and the necessity in regard to the viaduct has arisen solely from the construction of the railroad. The highway was there, and the general public travel and traffic had need of no viaduct but for the action of the railroad company in constructing and maintaining for its gain and advantage railway tracks over the highway. Thus, also, is occasioned the necessity for the continuance of the viaduct in repair, so that it be safe for use. The duty of maintenance, under the common law, follows upon the duty of construction. . . . From the foregoing it is clear that under the common law as in force in this state, there is a duty and obligation imposed upon railroads to construct and maintain crossings over highways, including viaducts and approaches, when the highway existed before the railroad at the place of crossing." And to the L.R.A.1915E.

same effect is *Chicago v. Pittsburg, C. C. & St. L. R. Co.* 146 Ill. App. 432.

And similarly a railroad company which has carried its tracks over a turnpike road by a bridge so low as to interfere, in some cases, with the use of the road, may be compelled to pay the expense of remedying the difficulty by lowering the surface of the road, where the turnpike company has been tardy in objecting to the height of the bridge, and the trouble can be more reasonably remedied by lowering the road than by raising the bridge and tracks. *Wooster Turnp. Co. v. Cincinnati, P. & V. R. Co.* 15 Ohio C. C. 268, 8 Ohio C. D. 269.

Power to compel maintenance or repair of overhead or underground crossing voluntarily established.

Where a railroad company, in constructing its railroad across a highway, has established an overhead or underground crossing, it seems clearly to be its duty, at common law as well as under various statutory and charter provisions, to maintain the crossing and keep it in proper repair for safe use,—its duty not unnecessarily to impair the safety or usefulness of the highway being a continuing one, the performance of which requires the continued maintenance of the crossing.

As held in *State ex rel. St. Paul v. Minnesota Transfer R. Co.* 80 Minn. 108, 50 L. R. A. 656, 83 N. W. 32, a railroad company which has laid its tracks across a street is under a continuing duty, at common law, by some reasonably safe and convenient means, to restore the street to, and maintain it in, its former condition of usefulness; and where, in the performance of this duty, it has built a necessary highway bridge over its tracks, it may be compelled to keep the bridge in repair, notwithstanding a contract with the municipality purporting to bind the latter forever to keep the bridge in repair,—such a contract being beyond the power of the officers of the city, contrary to public policy, and void.

Kansas City Southern R. Co. v. Kaw Valley Drainage Dist. *supra*.

Messrs. S. M. Brewster, Attorney General, Charles D. Ise, and A. L. Billings for appellee.

Mason, J., delivered the opinion of the court:

On January 27, 1913, the state brought an action against the Atchison, Topeka, & Santa Fe Railway Company, alleging that a grade highway crossing of its track is so constructed as to be unnecessarily dangerous to the traveling public, and asking relief by injunction. A judgment was rendered for the plaintiff, and the defendant appeals.

The defendant maintains that the road

referred to is not a regularly laid out highway. This contention is based on the fact that the affidavits showing the giving of notice to landowners, advising them of the meeting of the viewers, were not produced at the trial, nor was there any direct evidence of their ever having been filed with the county clerk, as required by statute. Gen. Stat. 1909, § 7277; Laws 1911, chap. 248, § 5. The filing of such affidavits is a prerequisite to the establishment of the road, and, if they were never filed, the attempt to create a highway failed. *State v. Farry*, 23 Kan. 731. The trial court found that the highway had been regularly established, and this implied a finding that the affidavits had been filed. They were not among the papers relating to the open-

And at common law a railroad company may be compelled, at its own expense, perpetually to maintain in good repair, and to rebuild when necessary, a bridge which it has built over a cut made for its roadbed across a public highway already in use. *Dyer County v. Chesapeake, O. & S. W. R. Co.* 87 Tenn. 712, 11 S. W. 943, expressly overruling *Chesapeake, O. & S. W. R. Co. v. State*, 16 Lea, 300, 2 S. W. 208.

So, where a railroad company, to allow the public travel to pass over its tracks at a certain point, voluntarily erected and for forty years maintained at its own expense a bridge across a cut made in grading for its roadbed, which bridge has been constantly used by the public, until becoming insufficient and unsafe and dangerous, the company may be compelled to build a new and sufficient bridge at that point. *Toledo v. Lake Shore & M. S. R. Co.* 17 Ohio C. C. 205, 9 Ohio C. D. 135.

And the state, in the exercise of its police power, may compel a railroad company to repair, at its own expense, a viaduct over its tracks where they cross a city street, notwithstanding the viaduct was built pursuant to a contract between the railroad company and the city, whereby the expense thereof was apportioned between them. *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513.

Likewise, a city, under statutory authority, may, in the exercise of the police power, compel a railroad company to replace at its own expense an old and inadequate bridge over its tracks at a street crossing, notwithstanding a contract pursuant to which the old bridge was built, whereby the city, in consideration of a contribution by the railroad company toward the construction of the bridge, was to build and forever maintain at the crossing in question a sufficient and suitable bridge. *Chattanooga v. Southern R. Co.* 128 Tenn. 399, 161 S. W. 1000.

And where a company has constructed, in connection with a viaduct for its railroad tracks along a street, a passageway for teams and pedestrians over the tracks of L.R.A.1915E.

another railroad company, it is its duty to maintain and keep in repair the viaduct and passageway. *Atty Gen. v. Fort Street Union Depot Co.* 117 Mich. 609, 76 N. W. 86.

Under the following charter provisions, also, a railroad company which constructed its railroad in a cut across a highway, and built a highway bridge over the cut, may be compelled, at its own expense, perpetually to maintain the bridge in good repair, and, when necessary, to rebuild it, or replace it with a new one:

—provision that the railroad company might construct its road across any highway so as not to interfere with the free use of the same, and in such manner as to afford and leave the same in good repair and well constructed for public use, and that the company should restore the highway thus intersected to its former good condition, or in a sufficient manner not unnecessarily to have impaired its usefulness, *Dyer County v. Chesapeake, O. & S. W. R. Co.* *supra*:

—provision that if the railroad should cross any highway, it should be so constructed as not to impede or obstruct the safe and convenient use of the highway. *Clarendon v. Rutland R. Co.* 75 Vt. 6, 52 Atl. 1057.

And under a statute authorizing a railroad company organized thereunder to carry under or over its track, as may be found most expedient, any highway which the track shall cross, and to construct its road across any highway which the route thereof shall intersect, but requiring that the company shall restore the highway thus intersected to its former state, or to such state as not unnecessarily to have impaired its usefulness,—a railroad company which has built a highway bridge over its track at a crossing may be compelled to maintain and keep the bridge in repair, and to rebuild it when necessary, so long as the company has the right to use and enjoy the franchise and until it is lawfully relieved from the duty, notwithstanding it has demolished and abandoned the use of its track for railroad purposes. *People ex rel. Schaghticoke v.*

ing of the road. The county clerk testified that he had made a search, and had found no other papers relating to the matter than those he produced. This showing was not conclusive that the affidavits had not been filed. Of a somewhat similar situation, growing out of the failure to find an affidavit the original existence of which was necessary to the validity of a tax deed, it was said in *Morrill v. Douglass*, 14 Kan. 293, 304: "It is probably true that, when notices, affidavits, etc., are directed to be preserved in a given office, a failure to find them there raises a presumption that no such documents ever existed. . . . But this presumption is by no means conclusive. It amounts simply to *prima facie* evidence. The deed, on the other hand, is *prima facie*

evidence that they did exist, and were duly and legally given and made. More than that, the testimony of the clerk as to the destruction of papers weakens the force of the presumption from his failure to find them."

Every other indication pointed to the regularity of the road proceedings. The record is not criticized in any other respect. The road was opened in October, 1898, to replace an earlier road crossing the track near the same point, which was vacated. It has been maintained and used by the public ever since, being a part of the main road between Independence and Cherryvale. The railroad was constructed before the highway was laid out. The railway company was entitled to receive notice of the meet-

Troy & B. R. Co. 37 How. Pr. 427, affirmed by the Court of Appeals in 2 Alb. L. J. 354.

And in *Chicago, D. & C. Grand Trunk Junction R. Co. v. St. Clair Circuit Judge*, 156 Mich. 567, 121 N. W. 297, an order requiring the maintenance or repair by the railroad company of a highway bridge over its railroad was upheld as against other objections than the lack of power to make the order, that not having been questioned.

And a statute is not unconstitutional or invalid, which provides that when a railroad company has constructed a railroad across a public highway by passing upon, over, or under the traveled path thereof, the company shall keep in good and sufficient repair, and rebuild when necessary, bridges, culverts, crossings, and other constructions made for the accommodation, safety, and convenience of the public travel on the highway over, under, or upon the railroad. *Clarendon v. Rutland R. Co.* supra.

But, although a railroad company is under a continuing duty to keep its railroad so constructed at a street crossing as not to obstruct the public in its travel over the street with the kind of conveyances and vehicles from time to time in use, and may be compelled to strengthen a bridge built by it to carry the street over its railroad, whenever, by reason of increase in the amount of travel over the street, or by reason of the greater weight of vehicles in use by travelers, the bridge becomes insufficient for the highway traffic,—yet a railroad company which has built over its right of way and tracks a highway bridge sufficiently strong to sustain the weight of the usual, ordinary, and regular highway traffic is under no legal obligation to alter or strengthen such bridge for the use of an electric railway which is laying its tracks along the highway. *Conshohocken R. Co. v. Pennsylvania R. Co.* 15 Pa. Co. Ct. 445; *Briden v. New York, N. H. & H. R. Co.* 27 R. I. 569, 65 Atl. 315.

But see also *Missouri P. R. Co. v. Omaha*, infra, under "Power to compel separation of grade crossing," as to the effect upon the power of the state, or of a city under its L.R.A.1915E.

authority, to compel a railroad company to separate a grade crossing by constructing at its own expense a prescribed viaduct along the street over its tracks, of the fact that the structure ordered is designed to carry the tracks of a street railway company operating in the street.

And a railroad company which has built its tracks across platted streets in a valley or gorge 50 feet deep and having precipitous sides is under no obligation to build a bridge over its tracks at the street crossings, where neither of the streets can be properly graded for public use without acquiring land for slopes outside of the street lines, or building high retaining walls along these lines, either of which would be more expensive than bridging; and the necessity or expediency of bridging the valley and tracks, that the streets may be opened to the public, is in no manner affected by the occupancy of the valley by the tracks, but has always existed, and will continue to exist, solely because of the natural surface features of the ground. *State ex rel. St. Paul v. St. Paul, M. & M. R. Co.* 62 Minn. 450, 64 N. W. 1140.

So, where a railroad company constructed a track through a ravine and under a highway bridge already in existence across the ravine, which bridge had been constructed and maintained by the township; and the railroad company, without any agreement with the township, elevated the bridge, which was too low to admit the safe passage of trains, and constructed approaches to it at its own expense, and voluntarily maintained the bridge during the time it operated this track, which it has since ceased to use, and the rails of which it has removed,—the company is under no legal duty, by reason merely of these facts, to continue to maintain the bridge and keep it in proper repair for travel, in the absence of evidence that the public are inconvenienced by the change in the bridge, or that it will cost the township more to rebuild or repair the bridge at its present height, than as it formerly existed. *Burdell Twp. v. Grand Rapids & I. R. Co.* 157 Mich. 255, 121 N. W. 743.

ing of the viewers. *State v. Bogardus*, 63 Kan. 259, 65 Pac. 251. It could, of course, waive the notice and the filing of the affidavit of its service. *Stephens v. Leavenworth County*, 36 Kan. 664, 14 Pac. 175. There is no indication of the company having raised any question as to the legality of the proceedings, or having treated the crossing in any different manner from those of other highways. We think it cannot be said that there was no evidence to support the finding that the road was regularly established.

The defendant maintains that, the highway being of later origin than the railroad, it owes the public no duty with regard to the crossing except that imposed by the statute requiring plank to be laid beside the

rails and the intervening space to be filled. Gen. Stat. 1909, § 7011; Laws 1911, chap. 246, § 1. An earlier statute which the defendant regards as referring only to highways in existence when a railroad is constructed reads: "Every railway corporation shall . . . have power . . . to construct its road across, along or upon any . . . highway . . . which the route of its road shall intersect or touch; but the company shall restore the . . . highway . . . intersected or touched, to its former state, or to such state as to have not [un] necessarily impaired its usefulness." Gen. Stat. 1909, § 1763, subdiv. 4.

The statutory requirement that the railroad company shall place the highways which it crosses in fit condition for travel

And where a railroad company, under an agreement with a city, has paid for the construction of a viaduct over its tracks at a street crossing, agreeing forever to maintain and keep the viaduct in repair, but undertaking nothing as to maintenance and repair of the roadway over the approaches thereto, and the city has, from time to time, for twenty years, made the usual and necessary repairs on this roadway without demanding from the railroad company either advance or reimbursement therefor, the city is estopped to compel the railroad company to assume the expense of necessary repairs on the roadway. *Chicago v. Chicago & W. I. R. Co.* 174 Ill. App. 452.

—maintenance or repair of roadway and approaches to crossing.

Under a statute requiring a railroad company whose railroad crosses a highway to maintain at its own expense a bridge, with the immediate approaches, by which the highway is carried over the railroad (*Lancashire & Y. R. Co. v. Bury*, L. R. 14 App. Cas. 417, 54 J. P. 197, 59 L. J. Q. B. N. S. 85, 61 L. T. N. S. 417, affirming L. R. 20 Q. B. Div. 485, 36 Week. Rep. 491; *North Staffordshire R. Co. v. Dale*, 8 El. & Bl. 836, 27 L. J. Mag. Cas. N. S. 147, 4 Jur. N. S. 631; *Leech v. North Staffordshire R. Co.* 29 L. J. Mag. Cas. N. S. 150, 1 L. T. N. S. 332, 8 Week. Rep. 216; *North of England R. Co. v. Langbaugh*, 24 L. T. N. S. 544), or a statute requiring the railroad company to maintain and keep in repair at its own expense all bridges constructed by it either under or over the railroad (*Reg. v. South Eastern R. Co.* 32 L. T. N. S. 858), the railroad company is bound to keep in repair not only the structures of the bridges, but the roadways over the same and the approaches thereto, including the paving of such roadways,—as the roadways are a part of the structures.

And under a statute authorizing railroad companies, whenever their tracks shall cross a highway, to carry the highway over or under the tracks, and providing that the company shall restore the highway thus in-

tersected to its former state, or to such a state as not unnecessarily to have impaired its usefulness,—it is the duty of a railroad company which has taken a highway over its intersecting railroad by a bridge properly to construct, and to keep in suitable repair, the approaches to the bridge. *People v. New York C. & H. R. R. Co.* 74 N. Y. 302.

So, under statutes providing that any corporation may raise any highway for the purpose of having its railroad cross under the same, and in such cases shall put the highway in as good repair and condition as before the alteration; and that if the authorities having jurisdiction over the highway require further repairs made thereon, or if the same, in their opinion, is unsafe, they shall give notice to the corporation, and if the parties are unable to agree such legal proceedings may be had that, if the railroad company fails to comply with the orders of the court with reference thereto, the court may enjoin the railroad company from using so much of its road as interferes with the highway,—the railroad company may be compelled to make necessary repairs to the approaches to the crossing. *Newton v. Chicago, R. I. & P. R. Co.* 66 Iowa, 422, 23 N. W. 905.

And under a charter provision requiring a railroad company to construct and keep in repair good and sufficient bridges or passages over or under its railroad where any highway shall cross the same, the company may be compelled to keep in repair a passage, including the pavement thereof, which it has constructed under its railroad at a highway crossing. *Metuchen v. Pennsylvania R. Co.* 73 N. J. Eq. 359, 69 Atl. 465, reversing on this point, 71 N. J. Eq. 404, 64 Atl. 484.

But under a statute providing that if the line of a railroad crosses a highway, then either the highway shall be carried over the railroad or the railroad shall be carried over the highway, by means of a bridge, "and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the

is purely declaratory. 33 Cyc. 236, 270. It is usually said that the common-law rule applies only to those highways which antedate the railroad. 33 Cyc. 285. And this might seem to be the effect of the statute quoted. But in a recent carefully considered case the supreme court of Minnesota decided that an act of the legislature substantially like our own was to be interpreted as applying also to highways laid out after the construction of the railroad, and, moreover, that the common law imposed the same duty regardless of the statute. *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 98 Minn. 380, 23 L.R.A. (N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047, affirmed in 214 U. S. 497, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698. The

line of reasoning followed on each proposition is indicated by the following excerpts from the opinion:

"It is not, therefore, . . . unreasonable to believe that they [the legislature] contemplated, when providing for the care of highway and street crossings, not only those then existing, but such as might thereafter, in the course of the growth and development of the state, become necessary to be laid across the railroad's right of way. The evils intended to be guarded against are the same, and apply equally to both new and old streets. There was no reason why the legislature should deem it prudent to provide for existing highways only; and we do no violence to the rules of statutory construction in holding that the provi-

expense of the company,"—a railroad company which, in carrying its railroad over a highway by a bridge, has lowered the level of the highway, is not bound to keep the slope of the road in repair as being either an immediate approach to the bridge, or part of the other necessary work connected therewith. *London & N. W. R. Co. v. Skerton*, 5 Best & S. 559, 33 L. J. Mag. Cas. N. S. 158, 10 L. T. N. S. 648, 12 Week. Rep. 1102; *Waterford & L. R. Co. v. Kearney*, 12 Ir. C. L. Rep. 224; *Fosherry v. Waterford & L. R. Co.* 13 Ir. C. L. Rep. 404.

—widening of crossing.

The state may also compel, or may authorize a municipality to compel, a railroad company whose charter is open to amendment, to widen bridges built by it over its road where it crosses streets, if public convenience and necessity require the widening. *English v. New Haven & N. Co.* 32 Conn. 241.

And under a statutory provision that if any railroad company deems it necessary, in the construction of its work, to cross any highway, etc., it may do so, "provided its work be so constructed as not to impair the safety or impede or endanger the operations of the work to be crossed; and that such crossing be otherwise effected by such permanent and proper structures and fixtures as will best make safe life and property passing upon the same, and shall be satisfactory to the company whose work is to be crossed,"—the duty of a railroad company which has made a cut across a highway, and spanned the cut with an overhead highway bridge, with reference to the safety and sufficiency of the crossing, is a continuing one; and the company may be compelled, if necessary for the convenience of the public, to widen the bridge and approaches thereto, to conform to the original width of the street as established by law before the construction of the crossing. *Charlottesville v. Southern R. Co.* 97 Va. 428, 34 S. E. 98.

Likewise, under a general statute authorizing railroad companies to construct their

railroads across any highway which the routes thereof shall intersect, but requiring them to restore the highway to its former state, or to such state as not unnecessarily to have impaired its usefulness, a railroad company which constructed its railroad across a highway by an over crossing or bridge with stone abutments parallel with the traveled track of the highway, and only 15 feet apart, may subsequently be compelled to widen the passageway between the abutment, if it be so narrow that, by reason of an increase of business on the highway, it becomes inadequate, and unnecessarily and materially impairs the usefulness of the highway, which was not therefore restored to its former state, or to such a state as not unnecessarily to have impaired its usefulness. *Hatch v. Syracuse, B. & N. Y. R. Co.* 50 Hun, 64, 4 N. Y. Supp. 509.

And under a charter provision requiring a railroad company to construct and keep in repair good and sufficient bridges or passages over or under its railroad where any highway shall cross the same, so that the passage of carriages, horses, and cattle on said road shall not be impeded thereby, the company may be compelled, from time to time, as public accommodation demands, to enlarge a passageway of less capacity than the highway, which it provided for the highway under its railroad at a crossing, until the passageway shall reach the full capacity of the highway (*Metuchen v. Pennsylvania R. Co.* 73 N. J. Eq. 359, 69 Atl. 465, modifying 71 N. J. Eq. 404, 64 Atl. 484); and to enlarge and keep in repair a passage which it has constructed for a highway under its railroad at a crossing, and which has become insufficient for the travel on the highway, and out of repair (*South Amboy v. Pennsylvania R. Co.* 76 N. J. Eq. 57, 73 Atl. 852, reversed in 77 N. J. Eq. 242, 76 Atl. 1038, on the ground that the statute under which the municipality was proceeding in equity to compel the railroad company specifically to perform its statutory duties as to the crossing, was not applicable, as the width of the highway, and the fact of the alleged encroachment by the

sions of defendant's charter were intended to include all streets and highways intersected by railroads, whether laid out before or after the building of the railroad. The expression of the statute is special, perhaps; but the reason therefor is general. The expression must therefore be deemed general." 98 Minn. 398.

"In view of the fact that the railroad company takes its franchise subject to the reserved right of the state to lay new streets over and across its track, and in contemplation that it may do so, . . . and the further fact that the company is solely responsible for the necessity of safety devices at street crossings, the same being occasioned by the operation of its trains over and across the street, and the further ele-

mentary principle that he who creates and maintains upon his premises a condition dangerous and inimical to others is under legal obligation to so guard and protect it that injury to third persons may not result therefrom, the rule of the common law as to existing, must be held to apply equally to new, streets." 98 Minn. 401.

See also *Lake Erie & W. R. Co. v. Shelley*, 163 Ind. 36, 71 N. E. 151; *Cincinnati, I. & W. R. Co. v. Connersville*, 170 Ind. 316, 83 N. E. 503.

Whether we should adopt in full the view of the Minnesota court need not now be determined, for this case is affected by two special circumstances: The present highway was established to take the place of an older one, which was in existence when

railroad company upon it, were in doubt and dispute, and had not been settled at law, and the statute conferred no jurisdiction or authority upon a court of equity to try and determine such controversies).

Power to compel separation of grade crossing.

If the legislature has reserved to itself the power to alter or amend the charter of a railroad company, it may, in the exercise of the police power of the state, without violating any of the provisions of the United States Constitution, compel the company to separate a grade crossing at its own expense. *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437, affirming 62 Conn. 527, 26 Atl. 122.

And where power has been reserved to amend the charter of a railroad company, the company may be compelled by the state (*People ex rel. Kimball v. Boston & A. R. Co.* 70 N. Y. 569), or by the local authorities under statutory authority (*Roxbury v. Boston & P. R. Corp.* 6 Cush. 424), to raise a highway where it is crossed by the railroad, or to construct a bridge at the point of intersection of the railroad and highway, so as to carry the highway over the railroad.

And it has been held that the state, in the exercise of its police power, or a municipality by the authority of the state, has power to compel a railroad company to construct and keep in repair at its own expense a viaduct over its tracks, along a street crossed thereby (*Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624, affirmed in 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. 513; *Missouri P. R. Co. v. Omaha*, 235 U. S. 121, 59 L. ed. 157, 35 Sup. Ct. Rep. 82), or, generally, in a proper case and manner, to separate a grade crossing at its own expense (*American Tobacco Co. v. Missouri P. R. Co.* 247 Mo. 374, 157 S. W. 502), notwithstanding a contract between the railroad company and the municipality regarding the construction of the viaduct L.R.A.1915E.

(*Chicago, B. & Q. R. Co. v. State*, supra), and although the structure ordered to be built is designed to carry the tracks of a street railway company operating in the street, and it will cost considerably more than a viaduct sufficient to carry the ordinary street traffic (*Missouri P. R. Co. v. Omaha*, supra).

As held in *Superior v. Roemer*, 154 Wis. 345, 141 N. W. 250, a railroad company is bound by the rules of common law to build at its own expense a viaduct necessitated by the construction of its railroad across an existing highway.

And "whenever it is reasonably necessary for the convenience and safety of the traveling public, it is the duty of a railroad company to viaduct or bridge its tracks at their intersection with streets. This duty exists at common law." *State ex rel. St. Paul v. Chicago, M. & St. P. R. Co.* 122 Minn. 280, 142 N. W. 312.

So, in *Wabash R. Co. v. Railroad Commission*, 176 Ind. 428, 95 N. E. 673, which was a suit to compel the railroad company to separate a grade crossing by constructing the highway under the grade of the railroad, the court said: "It is well settled in this state that the right of a railroad company to cross a highway with its tracks carries with it the duty on the part of the company to restore the highway to, and keep it in, its former condition of usefulness and safety, and if this cannot be done by a grade crossing, the company must do it either by constructing its tracks over or under the highway, or the highway over or under its tracks."

And under a provision in the charter of a railroad company that the company shall have the right and authority to construct its railroad across any public or private highway, if necessary, "but the said company shall put such highway . . . in such condition and state of repair as not to impair or interfere with its free and proper use" (*State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3); or a provision that the company shall "restore such . . . highway . . . to its former state, or

the railroad was built, in 1872. Whether or not this consideration should affect the strictly legal rights of the parties, it has an obvious bearing upon the question of any actual hardship suffered by the defendant from the application of the rule in this case. And in 1904, six years after the establishment of the present highway, the embankment forming the roadbed was raised 8 feet, presenting a situation entirely different from that existing when the earlier road was vacated and the new one laid out. Whatever might have otherwise been the rule, we conclude that, in view of these facts, it is the duty of the railway company to place the highway at the point of intersection in such condition that there shall be no unnecessary interference with travel.

in a sufficient manner not to impair its usefulness to the owner or to the public" (State ex rel. Minneapolis v. Minneapolis & St. L. R. Co. 39 Minn. 219, 39 N. W. 153);—the company is under a continuing duty to put the highway from time to time in such condition as changed circumstances may render necessary, and it may be required to establish at its own expense an overhead or underground crossing and the approaches thereto, if, by reason of the increase in the number of tracks and railway traffic, and in the amount of travel on the highway, the grade crossing becomes unsafe and dangerous, and seriously impairs and interferes with the free and proper use of the highway, rendering the separation of the grade necessary.

Where a grade crossing as constructed by a railroad company is dangerous to life and property, and interferes with the free use of the highway, the railroad company may be compelled to construct a crossing under the railroad, if that is necessary to afford security to life and property, and to place the highway in such condition as not unnecessarily to impair its usefulness, or interfere with the free use thereof, as required by law. Chicago, I. & L. R. Co. v. State, 158 Ind. 189, 63 N. E. 224.

And see also STATE EX REL. ISE v. ATCHISON, T. & S. F. R. CO.

And "under statutory authority, a railroad company may be required at its own expense to carry its track over a highway by means of a bridge. The rule applies to all cases where public safety, convenience, or the public welfare requires such a bridge." Louisville & N. R. Co. v. Hopkins County, 153 Ky. 718, 156 S. W. 379.

So, in People ex rel. Denver v. Union P. R. Co. 20 Colo. 186, 37 Pac. 610, it was conceded that the state, or a duly authorized municipality, has power to compel a railroad company to construct a viaduct along a street over its tracks, provided there is a reasonable public necessity therefor.

And in People ex rel. New York C. & H. R. R. Co. v. Purdy, 149 N. Y. Supp. 315, which was a proceeding involving the title, for purposes of taxation, to certain bridges L.R.A.1915E.

The defendant also maintains that, inasmuch as the railroad was built before the highway was laid out, it would be entitled to recover from the county, as damages, the expenses of constructing such crossing as might be adjudged necessary to meet the requirements of the situation. It has been decided in this state, by a divided court, that where a highway is established across a railroad right of way, the compensation to which the company is entitled includes all expenditures it is required to make by reason of the existence of the crossing. Kansas C. R. Co. v. Jackson County, 45 Kan. 716, 26 Pac. 394; Chicago, K. & W. R. Co. v. Chautauqua County, 49 Kan. 763, 31 Pac. 736. This is contrary to the great weight of authority elsewhere (33 Cyc. 286;

carrying public highways over railroad tracks, the court said: "That the state has the right to compel a railroad company at its own expense to eliminate crossings at grade by a depression of its tracks and the erection of bridges to carry streets over its right of way is too well recognized to admit of discussion."

And in Woodruff v. Catlin, 54 Conn. 277, 6 Atl. 849, the court said that it was then necessary only to state, not to argue, that the legislature of this state, having determined that the intersection of a railroad with a highway in a city, at grade, was a nuisance dangerous to life, had the power to determine that the expense of separating the grade crossing should be paid by either the railroad or the city alone or in part by both.

But "the power to require a railway to bridge or viaduct streets is referable to the police power. It is a legislative power. The city has no such power in the absence of legislative delegation." State ex rel. St. Paul v. Chicago, M. & St. P. R. Co. supra.

The state, however, in the exercise of the police power, may authorize a city to require a railroad company to construct at its own expense such viaducts over its tracks at street crossings as may be necessary for the safety and protection of the public. State ex rel. Omaha v. Union P. R. Co. 94 Neb. 556, 143 N. W. 918.

And a city, in the authorized exercise of the police power, may require a railroad company so to construct a necessary viaduct to carry the previously existing street over its tracks at a crossing (Ibid.; Superior v. Roemer, 154 Wis. 345, 141 N. W. 250), without providing for closing the street where the tracks cross it at grade (State ex rel. Omaha v. Union P. R. Co. supra).

Under provisions of a city charter that the common council shall have the care, supervision, and control of the public highways, bridges, streets, and alleys within the city, and shall cause all the streets which are open and graded under authority of the city to be kept open and in repair and free from nuisances, and that the common council may, by ordinance, provide for regulat-

note in 24 L.R.A.(N.S.) 1232-1234), and to the later decision of the Supreme Court of the United States which disposes of all Federal constitutional questions in that connection (*Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 255, 41 L. ed. 979, 991, 17 Sup. Ct. Rep. 581). See also *St. Paul, M. & M. R. Co. v. Minnesota*, 214 U. S. 497, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698; note in 28 L.R.A.(N.S.) 298. Here, however, the matter is affected by the exceptional circumstances already stated. The duty of the company to put the crossing in fit condition for travel being in this case of the same character as that arising when a railroad is built across an existing highway, the expense must be borne by the company.

The case then is substantially one brought to enforce the legal duty of the railway company to provide a reasonably safe crossing for travelers on the highway. This duty is enforced either by mandamus or injunction. 8 Am. & Eng. Enc. Law. 374; 33 Cyc. 281. The condition resulting from its breach is sometimes spoken of as a nuisance. 33 Cyc. 237, 268, 280. One of the principal controversies developed at the trial was whether or not the situation required the construction of an undergrade crossing. The railway company produced evidence to

the effect that such a crossing would cost \$9,813.88, while a wide grade crossing, reasonably adequate to the situation, and sufficient to overcome the specific dangers complained of, could be constructed for \$2,477.90. The judgment was that the defendant "be perpetually enjoined from maintaining said embankment and over or grade crossing constituting said public nuisance," and it was ordered "to abate said public nuisance by commencing actual abatement thereof within sixty days, . . . and to continue said abatement without unnecessary delay until wholly abated." The defendant interprets this judgment as making a specific requirement that it shall construct a subway under its track. The plaintiff regards it as a decision that the present condition is unlawful, and a command to remedy the condition, without specifying the method. The plaintiff adds: "Appellee does not say to this court or appellant in what manner appellant should abate the nuisance; that is a matter for appellant with its splendid engineering department and abundant means. It might comply with an overcrossing properly protected; by an underground crossing properly constructed; by an elevator; by a flagman; or by signals."

The language of the judgment is some-

ing and controlling the exercise by any person or corporation of any public right, franchise, or privilege in any of the streets and public places of the city, the city has delegated power to compel a railroad company to depress and bridge its tracks at their intersection with a street, if such change is reasonably necessary for the public convenience and safety. *State ex rel. St. Paul v. Chicago, M. & M. R. Co. supra*.

And where all cities are invested with the entire management and control of all public streets within their boundaries, and cities of the first class are also given power to adopt all such measures as they may deem necessary for the protection of strangers and the traveling public, in person or property, and to regulate the crossings of railroad tracks, and provide precautions and prescribe rules regulating the same, and to regulate the running of railroad engines, cars, and trucks within the limits of the city, and to prescribe rules relating thereto, and to make any other and further provisions, rules, and regulations to prevent accidents at crossings, and to require railroad companies to erect viaducts over their railroad tracks at the crossings of streets,—a city of the first class has the power, in proper cases and in a proper manner, to order a railroad company operating its trains across the streets of the city to erect at its own expense viaducts over its tracks at such crossings. *State v. Missouri P. R. Co.* 33 Kan. 176, 5 Pac. 772.

And in *State ex rel. St. Louis v. Missouri P. R. Co.* 262 Mo. 720, 174 S. W. 73, all L.R.A.1915E.

though the power of the city to compel the separation of a grade crossing at the railroad company's expense was not considered, an ordinance requiring the railroad company, at its own expense, to construct a viaduct and approaches thereto over its tracks at a public street crossing in the city, was upheld as against objections to its validity not involving the question of the city's power.

In New Jersey, the court of chancery may, in proper cases of peculiar necessity or danger, compel railroad companies whose roads cross streets at grade, and whose charters contain suitable provisions, to separate the crossings by elevating or depressing their tracks or the highways crossing them. *Newark v. Central R. Co.* 73 N. J. Eq. 469, 67 Atl. 1009; *Newark v. Erie R. Co.* 72 N. J. Eq. 447, 68 Atl. 413 (overruling *demurrer*), 75 N. J. Eq. 20, 71 Atl. 620 (hearing on the merits).

And under a statute providing that the railroad commissioners may discontinue any grade crossing of a highway by railroad, and determine at whose expense the change shall be made, the commissioners may impose the whole burden upon the railroad company, "if there be present such unusual facts as to justify a proceeding so extraordinary." *Fairfield's Appeal*, 57 Conn. 167, 17 Atl. 764.

Under a statute authorizing the Board of Railroad Commissioners to order that a railway already constructed across any highway be carried over the highway, or that the highway be carried over the rail-

what ambiguous. It does not unequivocally order an underground crossing, and yet it leaves a doubt whether any other method of compliance is open. The defendant is entitled to a more definite command before being required to undertake its execution. Of the character of order to be made in similar proceedings it is said: "The mode of restoration should ordinarily be left, in the first instance, to the discretion of the railroad company, and in a proceeding to compel a restoration the writ should ordinarily be general, and not specific, as to what the railroad company shall do; but the railroad company has no discretion as to whether it will restore the highway, and in any case where the nature of the thing to be done is uncertain, and can only be determined by the judgment of the court, the writ may properly be made specific; and where the railroad company, in the exercise of its discretion, has adopted a method of restoration which it claims to be sufficient, and which the court adjudges to be insufficient, it may properly direct specifically what the railroad company shall do so as not to fail again." 33 Cyc. 272.

In a case where the attempted compliance with an order couched in general terms was found to be unsatisfactory, a subsequent specific order was issued, the court saying:

way, etc., to remove the danger or obstruction arising or likely to arise in respect of the crossing, or any other crossing directly or indirectly affected, the Board of Railroad Commissioners has jurisdiction to make an order requiring a railroad company to construct a bridge to carry certain highways over its tracks, and to elevate a section of its tracks in a city, so as to carry intersecting streets under the tracks. *Grand Trunk R. Co. v. Toronto*, 42 Can. S. C. 613.

But where a railroad company has built viaducts over its tracks in pursuance of an ordinance to secure the public safety, the municipality cannot, in the exercise of its police power, compel it to remove the viaducts and elevate its tracks, where there is no proper or natural connection between such a change of the tracks and the public safety, welfare, or convenience,—the objects of viaducts and elevated tracks being the same, that is, to eliminate grade crossings, and the danger, delay, and inconvenience connected with them, and there being nothing tending to show that elevated tracks would be any safer for the public than viaducts. *Chicago v. Pittsburg, C. C. & St. L. R. Co.* 244 Ill. 220, 135 Am. St. Rep. 316, 91 N. E. 422.

And a city charter empowering the city to define nuisances and require their abatement; to secure the safety of citizens in the running of trains, and to provide protection against injury from their operation; to require railroad companies to change the location, grade, and crossings of their roads; to compel them to raise or lower

"The second point made by the appellant is that the peremptory writ may do no more than, in general terms, to direct it to restore the highway. It is claimed that there is a discretion reposed in it by the statute as to the manner in which the restoration shall be effected; that it is an engineering question, which the court cannot determine in a particular manner, when there may be other ways equally as good in result. . . . Though in the first instance there may be a discretion with the appellant, it is not that which is known as judicial. That may not be commanded by mandamus to act in a certain way. The discretion here is a ministerial one. The act of restoration must be done. If the discretion as to mode of doing it is so well exercised as that the restoration is complete, that is well. The object of this action is to test that. The appellant insists that it had well exercised it. The court has determined that it had not. The court will and should point out to it in what it has failed, and direct it particularly what it must do so as not to fail again." *People ex rel. Green v. Dutches & C. R. Co.* 58 N. Y. 152, 162, 163.

In *Wabash R. Co. v. Railroad Commission*, 176 Ind. 428, 436, 95 N. E. 673, 676, it was said: "The right of a railroad company to cross a highway with its tracks

their tracks, to conform to any grade that may be established, and to construct bridges, viaducts, or tunnels across their right of way at street crossing,—does not give the city power to require a railroad company to elevate its tracks through the city for the purpose of abolishing grade crossings, where the conditions at some of the crossings do not require such remedy. *State ex rel. Indianapolis v. Indianapolis Union R. Co.* 160 Ind. 45, 60 L.R.A. 831, 66 N. E. 163.

And where a railway company, acting under an ordinance, laid its tracks on a city street at a grade either established by or satisfactory to the city, and the city subsequently required it to construct a subway under its tracks at a street crossed by them, leaving the tracks on a viaduct over the street, the city has no further power, under a general statute giving it authority to regulate the crossing of railway tracks and to compel railway companies to erect such viaducts over or tunnels under streets or tracks as may be deemed and declared by the authorities to be necessary for the safety or convenience of the public,—unreasonably and unjustly to compel the company to construct, at great expense, another subway only 280 feet from the first, where a grade crossing at the second location will so nearly answer all the demands of traffic that an order to build the subway would be confiscatory. *Emporia v. Atchison, T. & S. F. R. Co.* 94 Kan. 718, 147 Pac. 1095.

A. C. W.

carries with it the duty on the part of the company to restore the highway to, and keep it in, its former condition of usefulness and safety, and if this cannot be done by a grade crossing, the company must do it either by constructing its tracks over or under the highway or the highway over or under its tracks." p. 436.

See also State ex rel. Minneapolis v. Minneapolis & St. L. R. Co. 39 Minn. 219, 39 N. W. 153; State ex rel. Duluth v. St. Paul & D. R. Co. 75 Minn. 473, 78 N. W. 87; People ex rel. Colesville v. Delaware & H. Co. 177 N. Y. 337, 69 N. E. 651; Burlington & C. R. Co. v. People, 20 Colo. App. 181, 77 Pac. 1026.

It is the duty of a railway company to restore a highway which is crossed by its track to as good a condition for travel as is practicable, and ought fairly to be required in the circumstances presented. If a court finds the situation in a particular instance to be such that a reasonably safe and serviceable crossing cannot be made at grade, no reason is apparent why an undergrade crossing may not be ordered. But to justify it the necessity should be clearly shown, and supported by the evidence of competent experts. We do not regard the evidence as warranting a finding of such necessity in the present case, nor was any made, unless it is to be implied from the language already quoted. The findings of fact made by the trial court are approved and will stand. The decree rendered will be set aside because of its ambiguity, and the cause will be remanded with directions that the court either render such judgment on the present findings as not necessarily to require the construction of a subway, or to take further evidence and make additional findings bearing upon that matter and be governed by the result.

Pending the decision of this case argument was invited on this question: Has the State Public Utilities Commission jurisdiction to inquire into and determine whether or not the means taken or about to be taken by a railroad company to restore a highway which is crossed by its track to a suitable condition for travel are such as to meet the requirements of the situation, and, if they are found unsuitable, to direct the company to construct a crossing upon plans determined by the Board to be essential to the safety of the traveling public? Each party has expressed the belief that no such power is possessed by the Board. Only one side of the question having been argued, no decision of it is made. Having in mind that a railroad company violates the law if it fails to restore a highway which it crosses to such a state as not to have unnecessarily impaired its usefulness, and that L.R.A.1915E.

just what constitutes that condition, and how it may be secured, is sometimes doubtful, it was thought that possibly jurisdiction to determine such questions was conferred on the Board by these provisions of the statute:

"Said Commissioners shall have the general supervision of all railroads operated by steam . . . within the state . . . and shall inquire into any neglect or violations of the laws of this state by any person, company or corporation engaged in the business of transportation of persons or property therein, or by the officers, agents or employees thereof; and shall also from time to time carefully examine and inspect the condition of each railroad in the state, and of its equipment, and the manner of its conduct and management with reference to the public safety and convenience." Gen. Stat. 1909, § 7186.

"Whenever in the judgment of the Board of Railroad Commissioners it shall appear that any railroad corporation or other transportation company fails in any respect or particular to comply with the terms of its charter or the laws of the state, or whenever in their judgment any repairs are necessary upon its road, . . . or any change in the mode of operating its road and conducting its business, is reasonable and expedient in order to promote the security, and convenience and accommodation of the public, said Commissioners shall inform such corporation of the improvement and changes which they deem to be proper . . . and if such orders are not complied with within the time stated in said notice, the attorney for the Board shall forthwith file with the Commissioners a complaint in writing, praying for an investigation of said matter, which complaint shall be heard according to the provisions of this act as in other cases." Gen. Stat. 1909, § 7188.

Dawson, J., did not sit.

IOWA SUPREME COURT.

RE ESTATE OF PETER CORNILS, Deceased, and
LIZZIE JACOBS
v.

WILLIAM CORNILS et al., Appts.

(— Iowa, —, 149 N. W. 65.)

Will — devise in trust during life of husband — effect of divorce.

Under a devise in trust of a share in

Note. — Divorce as equivalent of death for purpose of terminating a trust.

For the effect of a divorce or separation

testator's estate for his daughter whose husband is dissipated, with directions to pay her the income until the death of her husband, and then put her in possession of the property, and in case she dies before her husband her interest to be divided among her children, she is entitled to possession of the property upon being divorced from her husband.

(October 23, 1914.)

APPEAL by defendants from a judgment of the District Court for Woodbury County in favor of petitioner in a proceeding for the construction of the will of Peter Cornils, deceased. Affirmed.

Statement by Deemer, J.:

Lizzie Jacobs, an heir and devisee of Peter Cornils, deceased, filed a petition for the construction of the will of the deceased, and to this the trustees appointed by the will demurred. This demurrer was overruled, and they thereafter filed an answer.

upon a gift to a "husband," "wife," "widow," see *Meeker v. Draffen*, 33 L.R.A. (N.S.) 816, and note.

The present note is not confined to cases where the word "death" is used in the provision of the instrument involved, but includes other expressions ordinarily implying the death of the person referred to.

The general rule appears to be in accordance with the holding in *RE CORNILS*, that where the object of the provision in question is to protect one spouse in the use of property from the other, the object of the trust created by the provision is satisfied by a divorce of the parties, and the trust terminates.

Thus, in *Cary v. Slead*, 220 Ill. 508, 77 N. E. 234, it appeared that a testator devised property to his grandson in trust for his granddaughter, the income of which was to be paid to her so long as she remained a married woman, and the will further provided that if she should survive her present husband, the property should be conveyed to her absolutely and in fee; and it was held that while the word "survive" ordinarily means to live longer than some other individual, it may mean to continue to live beyond a specified period, event, or condition; and the apparent purpose of the trust being to protect the property from the husband of the granddaughter, the object of the trust was fulfilled and the property became hers in fee upon a termination of the coverture by a divorce procured by her.

In *McNeer v. Patrick*, 93 Neb. 746, 142 N. W. 283, where it appeared that a father conveyed property in trust for his daughter, a married woman, for the sole and exclusive use and benefit of her and her heirs forever, it was held that the word "heirs," as used in the deed, was merely a technical word of inheritance, and not a word of purchase.

On the issues thus joined the case was tried to the court, resulting in an order finding that the prayer of the petition should be sustained, and petitioner was awarded all the property given her in trust by the will. The trustees and other parties in interest appeal.

Messrs. H. B. Walling and Griffin & Page, for appellants:

Neither a court of equity nor a court of probate has power to reform a will.

Chambers v. Watson, 56 Iowa, 676, 10 N. W. 230.

Parol testimony is not admissible to prove that the intention of testator was different from what is clearly expressed in the language of the will.

Re Lyon, 70 Iowa, 375, 30 N. W. 642.

The testator's intent must govern in the construction of a will, and where there is no ambiguity, the intent must be gathered from the will itself.

Gilmore v. Jenkins, 129 Iowa, 686, 106

chase, and that she became the *cestui que trust* to the fee-simple title; and it being apparent that the purpose of creating the trust was solely to protect her against her husband and his creditors, it was held that when she became discoverd by divorce, the reason for the trust no longer existed, and the estate immediately terminated; and, no other trustee having been appointed for her, thenceforward she was vested with a fee-simple title to the land, with full power to convey the same.

In *Rittenhouse v. Hicks*, 10 Ohio Dec. Reprint, 759, where a mother conveyed property to a trustee, who was to pay the income therefrom to her daughter, who, at the time the will was executed, had a husband who was dissipated, the will providing that after the daughter's death the trust was to end and the property belong to her children, and further, that if plaintiff should become a widow, the trust should likewise end and the property be turned over her as her own absolutely, it is held that a consideration of the will showed that the only object of the trust was to keep the property from the control of that particular husband, and that the testatrix used the word "widow" simply as a term designating a husbandless condition, and a judgment declaring the trust terminated was sustained upon its appearing that the daughter had become divorced from the husband.

In *Koenig's Appeal*, 57 Pa. 352, where a father made provision in his will for one of his daughters, who was married, that she should have the use of certain property as a part of her legacy, and that the balance of her legacy should be put at interest for her, to be paid to her every year during her life, and after her decease the property and the principal sum or balance of her legacy should go to her children, but that,

N. W. 193, 6 Ann. Cas. 1008; *Evans v. Hunter*, 86 Iowa, 413, 17 L.R.A. 308, 41 Am. St. Rep. 503, 53 N. W. 277.

The intention of the testator must be sought from an examination of the instrument itself in its entirety when taken up by its four corners.

Law v. Douglass, 107 Iowa, 606, 78 N. W. 212; *Alden v. Johnson*, 63 Iowa, 124, 18 N. W. 696.

Messrs. C. N. Jepson and E. C. Logan for appellee.

Deemer, J., delivered the opinion of the court:

Peter Cornils died testate in Woodbury county, Iowa, some time in the year 1903, and on October 20th of the same year, his will was duly admitted to probate. Among other things his will made the following provision for the appellee, Lizzie Jacobs:

"First: It is my will that all of my just debts and all of the expenses of my last illness to be paid in full, subject thereto I give, devise and bequeath all of my property both real and personal monies and credits to my beloved wife, Erkel Cornils, to have and to hold with all rents and profits therefrom, during the term of her natural life.

"Second: Upon the death of my beloved wife, the said Erkel Cornils, it is my will that all of the remainder of my property, at the time of her death shall be divided equally between all of my beloved children share and share alike, subject only to the restrictions as to the share of my daughter Lizzie Jacobs, as hereinafter mentioned, it

if she should survive her husband, the trustee was to turn over and assign all and everything coming to her as legacy and bequest to her and her heirs and assigns forever, it was held that, the sole purpose of the trust being to protect the wife's estate against her husband, its purpose was accomplished when the coverture ceased by divorce of the parties.

A trust created by a will in favor of a married daughter of the testator, providing for the payment of income of property to her during her natural life, and, in the event of the death of her present husband, the trust to cease and determine and the estate devised to the trustees to vest in the daughter absolutely, and in event of her death before the death of her husband, to go to her children, was terminated by a divorce of the daughter, and she became entitled to the estate. *Lee's Estate*, 207 Pa. 218, 56 Atl. 425. To the same effect is *Gilbert v. Welsh*, 51 Ind. 491.

And a trust created by will in favor of testator's daughter of the income of a portion of his property, with a provision that in case she should lose her husband, then the trust property should be handed over to her absolutely, terminated, and the L.R.A.1915E.

being my intention that my son William Cornils, one seventh, to my son Edward Cornils, one seventh; to my daughter Mary Zeglin, one seventh, to my daughter Katie Schaalhouse, one seventh, to my daughter Agnes Cornils, one seventh, to my son Charles Cornils one seventh, and to my daughter Lizzie Jacobs, one seventh. The said one seventh as willed and bequeathed to my daughter, Lizzie Jacobs, shall be held in trust for her use only during the life of her husband, Andrew Jacobs, the interest on her one-seventh interest to be paid annually to her by trustee of her interest, said interest thereon to be at the rate of 5 per cent per annum. Upon the death of her husband, Andrew Jacobs, her full share one seventh shall be paid to her, but in the event of her death prior to the death of her husband, the said Andrew Jacobs, then and in that event, it is my will that her full share, being one seventh of the remainder of my estate on the death of my wife, Erkel Cornils, shall be divided among the children of the body of my daughter, the said Lizzie Jacobs.

"Third: It is my will and I hereby appoint as trustee of the share of the said Lizzie Jacobs my son, William Cornils.

"I hereby appoint and nominate my son, Edward Cornils, to be the executor of this my last will and testament and exonerate him from giving bonds in any amount."

At the time of testator's death, Andrew Jacobs, the husband of Lizzie, was still alive, but during the year 1911 the wife obtained a divorce from him on the grounds of habitual drunkenness and cruel and in-

property became hers, upon her divorce. *Snorgrass v. Thomas*, 166 Mo. App. 603, 150 S. W. 106.

But in *Pelton v. Macy*, 124 App. Div. 367, 108 N. Y. Supp. 713, where a father by his will created a trust fund for his married daughter and directed that the income therefrom should be paid to her during the husband's lifetime, and that "upon his death" the limitation should cease and the principal be payable to her, it was held that the trust was not terminated by an absolute divorce and remarriage of the husband.

And in the above case of *Pelton v. Macy*, the court cites as its authority its former decision in *Halsted v. Union Trust Co.* of which there seems to be no report except the court's affirmance without opinion of the judgment of a lower court in 120 App. Div. 876, 105 N. Y. Supp. 1119, which was in turn affirmed without opinion in 190 N. Y. 558, 83 N. E. 1126, but which the court states in the *Pelton* Case was an affirmance of the dismissal of a complaint to dissolve a trust created for the benefit of a married man during the life of his wife, from whom he was subsequently divorced, and who had lawfully remarried.

R. L. S.

human treatment. She was also awarded the custody of their four minor children, who are defendants or respondents herein. Testator's widow died some time in the year 1911, and at the time of his death Lizzie and Andrew Jacobs had three children. After his death, and before the death of his widow, another child was born. Lizzie Jacobs, the petitioner, claims that, in virtue of her divorce from her husband, the trust created by the will, having been accomplished, terminated, and that she became entitled to the entire fund for the reason that, the object of the trust having been accomplished, the entire property vested in her, and the trial court sustained this contention. The appeal is from this ruling.

That the estate devised to Lizzie Jacobs was in trust is, of course, conceded; but it is a well-established rule in equity that a trust will be canceled if the object for which it was created has ceased to exist. See *Underhill, Trusts & Trustees*, 4th ed. pp. 97, 98. As illustrating the rule, the following cases are cited by the author: *Culbertson's Appeal*, 76 Pa. 145; *Schlessinger v. Mallard*, 70 Cal. 326, 11 Pac. 728; *Ex parte Stone*, 138 Mass. 476; *Mitchell v. Mitchell*, 35 Miss. 108; *Witt v. Carroll*, 37 S. C. 388, 16 S. E. 130; *Roberts v. Moseley*, 51 Mo. 285; *Morgan v. Moore*, 3 Gray, 323; *Koenig's Appeal*, 57 Pa. 352; *Pillow v. Wade*, 31 Ark. 678; *Nightingale v. Nightingale*, 13 R. I. 113. See also, as sustaining the same doctrine, *Lee's Estate*, 207 Pa. 218, 56 Atl. 425; *Cary v. Slead*, 220 Ill. 508, 77 N. E. 234; *Hill, Trustees*, §§ 239 et seq.; *2 Perry, Trusts & Trustees*, p. 920.

In *Koenig's Case*, it is said: "It cannot be doubted that the trust was created for a single purpose. That was to protect the property given at first absolutely to Mrs. Smith, against her husband. . . . But if the sole purpose of the trust was to protect the wife's estate against her husband, it is manifest that purpose was fully accomplished when the coverture ceased. The divorce of the parties terminated all possibility of the husband's interference with the property bequeathed and devised to the wife as completely as his death would have done. Then why should the trust be continued after its exigencies have been met? It matters not what may be the nominal duration of an estate given by will to a trustee. It continues in equity no longer than the thing sought to be secured by the trust demands. . . . There can be no doubt that a trust for the separate use of a married woman ceases on the death of her husband, or on her divorce from him, and this though vested in terms in the trustee in fee, and though he be required to collect and pay over the rents and interest, L.R.A.1915E.

not because such a trust is not an active one, but because it is special, and either the death or divorce renders its continuance unnecessary. If, then, the trust in *Christian Koenig* was instituted, as we think the will clearly shows, solely to protect the appellee's property against her husband, it terminated when by the divorce it became useless as a means of such protection."

Lee's Estate follows *Koenig's Case*, and is very much like the one now before us, in that, in the event of the death of the wife before the demise of the husband, the property was to go to her children. In *Cary v. Slead*, 220 Ill. 508, 77 N. E. 234, the supreme court of Illinois said: "The testator devised a section of land to his four grandchildren, giving to each a quarter section, and created the trust only as to this one. No mention . . . is made of *Lester Cary* as an individual or dissevered from his relation to the complainant as husband, and it is clear that the only purpose of these provisions was to protect the property devised from any marital rights of *Lester Cary* as husband of the complainant, or any benefit to him or inheritance by him. They were not designed for the protection of the complainant against herself, or her improvidence, or want of judgment, because the trustee was directed to convey to her absolutely and in fee if she survived her 'present husband.' They were not made merely because the complainant was a married woman, but only for her protection while she was the wife of the individual who was then her husband. The testator meant either that the complainant should survive the marriage or the individual, and if he had referred to the individual, he would naturally have provided for a conveyance if she survived *Lester Cary*, or would have used some language indicating that intention. It is perfectly clear that it was not the physical existence of *Lester Cary*, but his relation to the complainant as husband, that induced the testator to create the trust. If the complainant was living after *Lester Cary* ceased to be her husband, every purpose of the will would be fulfilled by a conveyance to her; and if the testator had intended to use the word 'survive' in the sense of outliving the person, *Lester Cary*, we think he would have used different language. It will be seen from the will, considered as a whole, that its provisions were inspired by a distrust or dislike of *Lester Cary*, and were framed with the single purpose of preventing his receiving any benefits from the devise."

An examination of the cases cited leads us to the conclusion that the whole matter depends upon the intent of the testator. If the trust was created to protect the wife's

estate against her husband, and to preserve the property to herself and children, it is manifest that the death of the husband renders the continuance of the trust entirely unnecessary, and according to the overwhelming weight of authority, a divorce to the wife is quite as effectual as the husband's death.

The testimony shows that Andrew Jacobs was a hard-drinking man, and that he and his wife did not get along together—all of which was known to the testator at the time he made his will. He had no property, and accumulated nothing during his married life. He contributed little to the support of his family, and since the divorce he has done nothing for his children. Testator contributed to the support of his daughter and her children during his lifetime, and the testimony shows that the property was devised in trust to protect the daughter and her children. The will itself shows that the trust should cease on the death of the beneficiary's husband, and the full share provided therein for the wife should be paid to and vest in the wife, Lizzie Jacobs. It was also provided that in the event she died before her husband, the share so devised should pass to the children of her body. As the devise was in trust to preserve the same as against the husband of the beneficiary, and was to cease upon his death, it is manifest that a divorce from him would quite as effectively deprive him of any control of the property as would his death; and we are of opinion that upon the granting of the divorce the purpose of the trust failed, and that the beneficiary was entitled to have the property free of the trust.

It is suggested for appellant that the effect of this ruling might be to deprive the Jacobs children of a right to the property. It will be observed that their rights were contingent upon the death of their mother before their father's death. As we have construed this will to mean that divorce is the equivalent of death in terminating the trust, the same construction must obtain throughout, and in determining the children's rights it should be held that the divorce was the equivalent of the husband's death, and as the wife is still living, she is entitled to the property.

The supreme court of Pennsylvania, in the cases cited, found no difficulty in awarding the property to the beneficiary, although her children had a contingent interest under the will. We have no doubt that testator intended the trust to cease, not only upon the death of his son-in-law, but also whenever, by divorce or otherwise, his relations with his (testator's) daughter ceased.

L.R.A.1915E.

The trial court was right in ordering the trust property turned over to Lizzie Jacobs, and its order and judgment are affirmed.

Ladd, Ch. J., and Gaynor and Withrow, JJ., concur.

NEW MEXICO SUPREME COURT.

J. B. WOOD et al., Doing Business as Wood-Davis Hardware Company, Plffs. in Err.,
v.

J. H. SLOAN.

(— N. M. —, 148 Pac. 507.)

Negligence — defect in structure — liability of contractor.

1. The general rule is that where an independent contractor is employed to construct or install any given work or instrumentality, has constructed or installed same, the same has been received and accepted by the employer, and the contractor has been discharged, he is no longer liable to third persons for injuries received as a result of defective construction or installation.

Same — exceptions.

2. To the general rule certain well-defined exceptions exist, and they may be divided into two general classes, viz.: (1) Those where the thing dealt with is imminently dangerous in kind; and (2) those where the thing dealt with is not imminently dangerous in kind, but is rendered dangerous by defect.

Same — dangerous substances.

3. In the first class of cases, of which the manufacture or sale of poisons, explosives, guns, etc., forms an example, the law will not tolerate negligence. The duty to

Headnotes by PARKER, J.

Note. — Liability of contractor to third person for defects in his work, after its completion and acceptance.

The earlier cases on this question may be found in notes to First Presby. Congregation v. Smith, 26 L.R.A. 504, and Thornton v. Dow, 32 L.R.A. (N.S.) 968, wherein analogous notes are referred to.

As to liability of employer after he has assumed control of the subject-matter of the work executed by the contractor, see note to Choctaw, O. & W. R. Co. v. Wilker, 3 L.R.A. (N.S.) 595.

General rule.

The general rule as stated in the earlier note and in WOOD v. SLOAN is that, after the contractor has turned the work over and it has been accepted by the proprietor, the contractor incurs no further liability to third parties by reason of the condition

take care is a duty to the public, so that the lives and health of the people may not be jeopardized.

Same — dangerous defects.

4. In the second class of cases, the independent contractor, in order to be liable to third persons, not parties to the contract, must be shown to have had knowledge of the defect and its dangerous character when he put the same out.

Same — necessity of malice.

5. Knowledge of a defect and its dangerous character often evidences malice, deceit, or fraud, but neither malice, deceit, nor fraud on the part of the independent contractor are necessary to create liability to third persons, if, as a matter of fact, the independent contractor has knowledge of the defect and its dangerous character. If he has knowledge, he will be held to intend all the natural, usual, and probable consequences of his act.

Same — necessity of knowledge.

6. Actual knowledge of the defect and danger is not always required, but such

knowledge may, under some circumstances, be inferred or imputed.

Master and servant — contractor — liability — invitation.

7. Independent contractors are sometimes held liable to strangers to their contract upon the doctrine of implied invitation. That is to say, that where one undertakes with another to construct a place for the doing of certain work, such as a scaffold or stage, he may be liable to anyone who is injured while using the place in the performance of such work.

Negligence — contractor — dangerous instrument — tort.

8. If an independent contractor manufactures an instrumentality defectively, and the defect renders the same dangerous, and he does not know of the defect and its dangerous character by reason of his failure to exercise due care, he is guilty simply of negligence; but if he knows of the defect and its dangerous character, and puts out the thing in deceit, fraud, malice, or perhaps other bad motives, he is not guilty

of the work, but the responsibility, if any, for maintaining or using it in its defective condition, is shifted to the proprietor.

Thus, in *Vicksburg v. Holmes*, — Miss. —, 51 L.R.A. (N.S.) 469, 63 So. 454, where the city had contracted to raise a church building to a new grade, and after the work was completed, accepted, and the building turned over to the owners, the floor gave way during the holding of a funeral, precipitating the complainant with a number of others to the ground, the city, under the general rule above stated, was held not liable for the injuries sustained. "Before the city can be held liable to complainant," said the court, "it must be shown that there was some element of deceit, or concealment of the dangerous instrumentality. It is not sufficient to allege negligent construction. It must also be alleged that there was a concealment of this dangerous condition when the building was turned over to its owners and accepted by them. We think the bill of complaint may reasonably be construed to mean that the negligent construction and poor material used in the building was obvious, and that the owner accepted the work without demur; and if this be true, it follows that the owner knew of the defect when it accepted the building. It must be shown that the owner was unaware of the danger, and it must be shown that the city, or its agent, concealed the defective material and workmanship." The court cited *Thornton v. Dow*, 32 L.R.A. (N.S.) 968, and note, and *O'Brien v. American Bridge Co.* 32 L.R.A. (N.S.) 980.

Where a little girl was killed by a discharge of mud and steam through a blow pipe, it was held in *Orient Consol. Pure Ice Co. v. Edmundson*, — Tex. Civ. App. —, 140 S. W. 124, no defense that the pipe was constructed by an independent contractor, where, at the time of the accident, the defendant ice company was actually

operating and using the machinery which caused the discharge of mud and steam.

In *Bell v. Kidd*, 5 Ga. App. 518, 63 S. E. 607, it was alleged that a landlord employed certain contractors to repair and re-cover a roof, and through the negligent manner in which they did this repairing and re-covering, rain water came through and damaged certain furniture belonging to tenants below. It was held that where a landlord under duty to make repairs employs an independent contractor to do specific work needed to be done, the independent contractor may be held liable by the tenant for injuries resulting, prior to the acceptance of the work by the landlord, from the negligent manner in which the contractor has performed the work. However, if the contractor fulfilled his particular contract with ordinary care and diligence, he is not liable for injuries resulting by reason of defects in the original plan of the work, or because the repairs as made prove inadequate to fulfil the landlord's duty in the matter. (As to liability of contractor to tenant for injury caused by defects in building, see note to *Miner v. McNamara*, 21 L.R.A. (N.S.) 477.)

Exceptions.

A recognized exception to the general rule discharging a contractor from liability to third persons where the work has been completed and accepted is where the contractor has furnished an instrumentality or done work which was or should have been known to be imminently dangerous to life or limb of persons who were to make use of it, or where there was a concealment of a dangerous condition. See cases in earlier notes, 26 L.R.A. 504, and 32 L.R.A. (N.S.) 968.

Certain cases apply the general rule as laid down in *O'Brien v. American Bridge Co.* reported in 32 L.R.A. (N.S.) 980, and

of negligence at all; in such circumstances, the transaction leaves the field of negligence and passes into the domain of tort.

(March 9, 1915.)

ERROR to the District Court for Santa Fe County to review a judgment overruling a motion for judgment *non obstante veredicto* or for a new trial in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Reversed.

The facts are stated in the opinion.

Mr. Francis C. Wilson, for plaintiffs in error:

Defendants were independent contractors who had completed and turned over their work to the owner, by whom it had been accepted, and therefore were not liable thereafter to third persons for injuries resulting to such third persons from alleged defects in the work.

Thomp. Neg. 686; Whart. Neg. 2d ed. p. 430; Memphis Asphalt & Paving Co. v. Fleming, 96 Ark. 442, 132 S. W. 222, Ann. Cas. 1912B, 709; Boswell v. Laird, 8 Cal. 469, 68 Am. Dec. 345; 10 Mor. Min. Rep. 616; Young v. Smith & K. Co. 124 Ga. 475, 110 Am. St. Rep. 186, 52 S. E. 765, 4 Ann. Cas. 226, 19 Am. Neg. Rep. 132; Richards v. O'Brien Bros. 1 Ga. App. 107, 57 S. E. 907; Field v. French, 80 Ill. App. 78; Daugherty v. Herzog, 145 Ind. 255, 32 L.R.A. 837, 57 Am. St. Rep. 204, 44 N. E. 457; Necker v. Harvey, 49 Mich. 517, 14 N. W. 503; Gorham v. Gross, 125 Mass. 240, 28 Am. Rep. 224; Heizer v. Kingsland & D. Mfg. Co. 110 Mo. 605, 15 L.R.A. 821, 33 Am. St. Rep. 482, 19 S. W. 630; Marvin Safe Co. v. Ward, 46 N. J. L. 19; Losee v. Clute, 51 N. Y. 494, 10 Am. Rep. 638; Bailey v. New York, 3 Hill, 531, 38 Am. Dec. 669; First Presby. Congregation v. Smith, 163 Pa. 561, 26 L.R.A. 504, 43 Am. St. Rep. 808, 30 Atl. 279; Curtin v. Somerset, 140 Pa. 70, 12 L.R.A. 322, 23 Am. St. Rep. 220, 21 Atl.

discussed in note in 32 L.R.A.(N.S.) 968; namely, that "whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of another, a duty arises to use ordinary skill and care to avoid the danger."

And this rule was applied in Brown v. Smith, 121 Minn. 165, 141 N. W. 2, Ann. Cas. 1914A, 874, where it was held that plumbers employed by a first-story tenant to change the plumbing on the first floor may be held liable in damages to a station-

244; Fitzmaurice v. Fabian, 147 Pa. 199, 23 Atl. 444; Salliotte v. King Bridge Co. 65 L.R.A. 620, 58 C. C. A. 466, 122 Fed. 378; Thornton v. Dow, 60 Wash. 622, 32 L.R.A. (N.S.) 968, 111 Pac. 899; National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Winterbottom v. Wright, 10 Mees. & W. 109, 11 L. J. Exch. N. S. 415; Collis v. Selden, L. R. 3 C. P. 495, 37 L. J. C. P. N. S. 233, 16 Week. Rep. 1170; Earl v. Lubbock [1905] 1 K. B. 253, 74 L. J. K. B. N. S. 121, 53 Week. Rep. 145, 91 L. T. N. S. 830, 21 Times L. R. 71, 1 Ann. Cas. 755.

Messrs. Renehan & Wright, for defendant in error:

Defendants were independent contractors; they had completed and turned over their work to the owner, by whom it had been accepted. They were nevertheless liable to plaintiff for the injuries resulting to him from the defects in the work.

Thornton v. Dow, 32 L.R.A.(N.S.) 972, note; O'Brien v. American Bridge Co. 110 Minn. 364, 32 L.R.A.(N.S.) 980, 136 Am. St. Rep. 503, 125 N. W. 1012; Young v. Smith & K. Co. 124 Ga. 475, 110 Am. St. Rep. 186, 52 S. E. 765, 4 Ann. Cas. 226, 19 Am. Neg. Rep. 132; Miner v. McNamara, 21 L.R.A.(N.S.) 477, and note, 81 Conn. 690, 72 Atl. 138; Kahner v. Otis Elevator Co. 96 App. Div. 169, 89 N. Y. Supp. 185, 16 Am. Neg. Rep. 532; Devlin v. Smith, 89 N. Y. 470, 42 Am. Rep. 311, 11 Abb. N. C. 322; Bright v. Barnett & R. Co. 88 Wis. 299, 26 L.R.A. 524, 60 N. W. 418; Casey v. Wrought Iron Bridge Co. 114 Mo. App. 47, 89 S. W. 330.

Parker, J., delivered the opinion of the court:

The defendant in error will be referred to as plaintiff, and the plaintiffs in error as defendants, as they were situated in the court below.

One Jennie Schaeffer was the owner of an office building in the city of Santa Fe, and had employed defendants to install a stationary washstand, and to connect the

ary engineer on the sixth floor of the same building in case he is made ill by sewer gas emitted from a sewer pipe negligently left open by such plumbers.

So there is an exception to the general rule where the contractor's work was so imminently dangerous as to constitute a nuisance.

Thus, where contractors created a nuisance,—a cut 30 feet deep across a public street for a railroad, with no lights, signals, or railings to warn and protect travelers,—both the contractors and railroad company were held liable in Dunlap v. Raleigh, C. & S. R. Co. 167 N. C. 669, 33 S. E. 703, where a pedestrian fell into the cut and was injured.

J. D. C.

same with the waterworks system of the city, which was done, and the work accepted by the owner. During said time plaintiff was the tenant of the owner, and maintained his office for the practice of his profession of physician and surgeon in the room where the washstand was installed. In making such installation, it became necessary to remove a board from the floor, extending out from rear to front of the washstand. This board was replaced, after the installation, in such a manner that, when plaintiff stepped upon it while attempting to procure a glass of water for a patient, it gave way and injured the plaintiff by allowing his foot and leg to go through the floor. The washstand was installed April 9, 1912, and plaintiff used the same with safety until July 4, 1912, when the accident occurred. The washstand was installed close to the northwest corner of the room, and plaintiff ordinarily approached the same from the south side, thus not stepping upon the board in question; at least, not with his full weight. On the occasion of the accident he approached the washstand from the east or front of the same, and placed his whole weight upon the board, and it gave way under him. The defect in replacing the board consisted in failing to support the end, which extended out to the front of the washstand, with a cleat nailed to a joist, as was necessary to render it safe; the end of the board not reaching quite far enough to rest upon the joist. The case was tried to a jury and resulted in a verdict for plaintiff.

The theory upon which the case was submitted to the jury is stated in instruction 8a, and is to the effect that the defendants were independent contractors, as shown by the pleadings, and that the general rule of law is that they are not liable to third persons for injuries received, due to defective work after the same has been completed, turned over to and accepted by the owner, unless the work was so performed and in such a place as to constitute a nuisance *per se*, or so negligently defective as to be imminently dangerous to third persons. In addition to the general verdict, the jury made special findings, among which are the following:

"Question No. 1. State whether you find that, at the time plaintiff fell through the floor, he approached the washstand in an unusual manner, and thereby imposed upon the board alleged to have given way an unusual and extraordinary weight. Answer to Question No. 1. No.

"Question No. 2. State whether you find the board was replaced with sufficient firmness and security to permit its being used ordinarily without danger to a person of

ordinary weight and such person using the same in an ordinary manner. Answer to Question No. 2. No.

"Question No. 3. State whether you find there was imminent danger resulting from the manner in which the board in the floor was replaced to any person of ordinary weight in approaching and using the basin and stepping upon the said board in a normal and ordinary way. Answer to Question No. 3. Yes.

"Question No. 5. State whether you find that the defendants knowingly, intentionally, wilfully, maliciously, and fraudulently replaced the board so that the same could not sustain the weight of a person of ordinary weight stepping upon it. Answer to Question No. 5. No."

Defendants moved for a judgment *non obstante veredicto*, which motion was denied, and judgment was rendered on the general verdict. The motion for judgment *non obstante* was based upon the special finding No. 5, as above set out.

It thus appears that defendants were independent contractors, completed their contract, turned over their work to the owner, and the same was accepted by her. They had no contractual relations with the plaintiff, and owed him no contractual duty. It further appears from the special findings that they did not "knowingly, intentionally, wilfully, maliciously, and fraudulently" replace the board so that it would not sustain the weight of an ordinary person stepping upon it. This squarely raises the question of the liability of independent contractors to third persons after they have completed their work, and the same has been accepted by the owner.

The general rule upon this subject may be stated as follows: Where an independent contractor is employed to construct or install any given work or instrumentality, has constructed or installed the same, the same has been received and accepted by the employer, and the contractor has been discharged, he is no longer liable to third persons for injuries received as a result of defective construction or installation. 2 Cooley, Torts, 3d ed. p. 1486; 1 Thomp. Neg. 2d ed. § 686; 29 Cyc. 478; 16 Am. & Eng. Enc. Law, 209.

Certain exceptions to the general rule above stated exist, and they may be divided into two general classes, viz.: (1) Those where the thing dealt with is imminently dangerous in kind; and (2) those where the thing dealt with is not imminently dangerous in kind, but is rendered dangerous by defect.

In the first class of cases the thing dealt with is so imminently dangerous in kind as to imperil the life or limb of any person who uses it. In such circumstances, the

manufacturer owes a positive duty to every person into whose hands the thing shall lawfully come and be used in the ordinary manner in which it was intended for use. The liability arises out of the public duty to protect everyone to whom the thing shall lawfully come for its intended use, against the certain disaster which must result if proper care is not used. The degree of care exercised must be, at least, in proportion to the peril involved. 2 Cooley, Torts, 3d ed. p. 1488. Familiar examples of such things are poisonous drugs incorrectly labeled, patent medicines containing harmful ingredients, hair dressings which injure health, dangerous chemicals, unwholesome food, a defective gun, explosives, and the like. See *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, which is a leading case; *Blood Balm Co. v. Cooper*, 83 Ga. 457, 5 L.R.A. 612, 20 Am. St. Rep. 324, 10 S. E. 118; *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154; *Favo v. Remington Arms Co.* 67 App. Div. 414, 73 N. Y. Supp. 788; 2 Cooley, Torts, 3d ed. p. 1488; 29 Cyc. 480.

In such cases, not only must the highest degree of care and skill be employed by the manufacturer or vendor, but the law will not tolerate the slightest negligence on his part. It is a necessary rule of law, so that the health and lives of the people may not be jeopardized. With this class of cases, however, we have nothing to do in this case; the instrumentality in question here not being inherently dangerous in kind.

2. The floor board was rendered dangerous by reason of the defective method of replacing and supporting it. The jury found, specially, that the defect rendered it imminently dangerous to use the washstand in the regular and ordinary way.

In this class of cases, entirely different principles govern. In the first place, the defendant must know of the defect and its dangerous character. Under the proofs in this case, the defendants had no actual knowledge of the defect; the board having been replaced by their employee and servant. Their knowledge of the defect, if they are to be held to have any, must be imputed to them by reason of the act of the employee within the scope of his employment. That knowledge of the defect and the danger in such cases is necessary, see 29 Cyc. 482; 2 Cooley, Torts, 3d ed. p. 1488; 1 Shearm. & Redf. Neg. 6th ed., § 117, and the following cases:

In *O'Neill v. James*, 138 Mich. 567, 68 L.R.A. 342, 110 Am. St. Rep. 321, 101 N. W. 828, 5 Ann. Cas. 177, 17 Am. Neg. Rep. 561, a manufacturer of champagne cider sold the same to the employer of the plaintiff, but was not shown to have

had knowledge that the bottle, which exploded, was improperly charged with gas, and he was held not liable. The court said: "It will be observed that, where no contractual relations exist, the doctrine is recognized that there must be knowledge of the dangerous character of the thing sold before defendant can be held liable, and this doctrine is recognized in all the cases to which our attention has been called. . . . The plaintiff knew that champagne cider, as ordinarily manufactured and sold, was charged with a gas. As we have before stated, there is no proof from which the inference might be drawn that defendant had knowledge that the bottle was improperly charged. . . . Under the facts disclosed by the record, a verdict should have been directed in favor of defendant."

The court refers to and quotes from *Weiser v. Holzman*, 33 Wash. 87, 99 Am. St. Rep. 932, 73 Pac. 797, which was another case of an exploding champagne cider bottle, and arose on demurrer to the complaint. The complaint alleged that the respondent manufactured, sold, and delivered to one Pratt, under the name of champagne cider, a dangerous explosive, knowing it to be such, without warning Pratt of its dangerous character, and that the defendants wilfully, carelessly, and negligently manufactured and bottled the said champagne cider, and failed to properly charge the said cider with the proper amount of carbonic acid gas, and other substances used in manufacturing and bottling the same. There was a direct charge of knowledge on the part of the defendant in this case, and the court held that the complaint stated a cause of action for that reason, and for the further reason that the champagne cider was alleged to be a dangerous explosive. The court cited many cases.

It is to be noted that in the case from Michigan, *supra*, the bottler of the cider was the only person who had knowledge of the defect, if there was one, and the court refused to impute such knowledge to the manufacturer, and held, in effect at least, that the knowledge must be actual knowledge before liability would arise.

In the Washington case, *supra*, as before seen, the question arose on demurrer, and the complaint alleged knowledge.

Slattery v. Colgate, 25 R. I. 220, 55 Atl. 639, 14 Am. Neg. Rep. 467, arose on demurrer to the declaration, which failed to allege knowledge, on the part of the defendant, of the excess of alkali in shaving soap put upon the market by it, and which injured the faces of plaintiff's customers at his barber shop, whereby he lost his business. The court said: "The whole subject of the responsibility of a manufacturer to per-

sons using his products, on account of defects therein, has been recently fully discussed by this court in *McCaffrey v. Mossberg & G. Mfg. Co.* 23 R. I. 381, 91 Am. St. Rep. 637, 50 Atl. 651. We think the case can only be sustained if it can be brought within the second class referred to there (the article involved not being an inherently dangerous one, but one which may have become so by the acts or neglect of the manufacturer), in which case he is not liable unless he knows of the defect and practises deceit in exposing the defective product for sale. Alkali of some kind is a necessary ingredient of soap; and it is no deceit to include it in the manufacture of the article for the market. It is only the excess of alkali that can render the compound hurtful to the human skin. Unless the defendants knew of this excess, they cannot be held liable. It is not alleged that they had this knowledge, only that they were negligent."

In the former case of *McCaffrey v. Mossberg & G. Co.* the plaintiff was in the employ of a manufacturing jeweler, and while engaged in operating a drop press, in which was a heavy weight held by a hook, the hook broke, and the weight fell upon his hand and injured it. The defendant manufactured the machine and sold it to the employer of the plaintiff. The machine was negligently built and defective in this: That the hook was made of iron or steel of poor quality, and of insufficient size. The hook had been improperly welded, having cracks or crevices through the hook. The defendant knew, or had reason to know, and but for want of reasonable care would have known, that the machine, when it was sold, was a dangerous appliance. The defendant demurred to the declaration. The court, in passing upon the sufficiency of the declaration, divides the cases which form the exceptions to the general rule into three classes, as follows:

"(1) Where the thing causing the injury is of a noxious or dangerous kind; (2) where the defendant has been guilty of fraud or deceit in passing off the thing; (3) where the defendant has been negligent in some respect with reference to the sale or construction of a thing not imminently dangerous. The principle that governs the first class of cases is that one who deals with an imminently dangerous article owes a public duty to all to whom it may come, and whose lives may be endangered thereby, to exercise caution adequate to the peril involved. . . . A similar principle governs the second class of cases, in which the degree of danger in the thing itself may be less, but where the seller actually knows of the danger in the article and puts it forth by some fraud or deceit. In such cases the

breach of duty grows out of the fraud or deceit in the sale, and it extends to persons injured thereby, who may reasonably be deemed to be within the contemplation of the parties to the transaction. . . . The third class of cases relating to the sale of a thing not in its nature dangerous rests on the principle that as to such things there is no general or public duty, but only a duty which arises from contract, out of which no duty arises to strangers to the contract."

The court, after an exhaustive review of the cases, summarizes the doctrine as follows: "We think that the result of the cases on this subject clearly established the weight of authority in favor of the rule that where the cause of the injury is not in its nature imminently dangerous, where it does not depend upon fraud, concealment, or implied invitation, and where the plaintiff is not in privity of contract with the defendant, an action for negligence cannot be maintained."

In *Marquardt v. Ball Engine Co.* 58 C. C. A. 462, 122 Fed. 374, an opinion by Day, Circuit Judge, the same principle is applied to a case of injury by the breaking of a flywheel on an engine, by reason of the defective working of a valve. The court points out that there was an entire lack of proof that the makers knew or ought to have known that the use of such a valve was immediately or imminently dangerous to human life or safety, so as to make it a breach of duty owing to strangers to supply it to a customer who might use it in a business in which third persons would be employed.

In *Zieman v. Kieckhefer Elevator Mfg. Co.* 90 Wis. 497, 63 N. W. 1021, the supreme court of that state applied the same doctrine to a defective elevator, which fell and injured an employee of the purchaser of the elevator, and, for the lack of proof of knowledge of the defect, denied relief to the plaintiff.

In *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 605, 15 L.R.A. 821, 33 Am. St. Rep. 482, 19 S. W. 630, the plaintiff brought an action for damages against the manufacturer of steam threshing machines, to recover damages for the death of her husband, who received injuries from which he died, while assisting in operating a machine sold by the defendant to another person. The injury was caused by the cylinder of the thrasher flying into pieces, one of which struck the deceased above the eye and killed him. The petition stated that the defendant knew, when it constructed the machine, it would be used and operated by a number of persons in the employment of the person to whom it should be sold; that the defendant warranted the same to be free from defects

and of first-class material; that the cylinder was made of poor material, was defective in construction, and was too weak to stand the ordinary strain,—all of which defects were known to the defendant's agents at the time of the sale. The court held the defendant not liable upon the ground that there was no evidence that it knew that the cylinder was defective, and for that reason dangerous. The case points out that, where nothing more than negligence is shown, no right of action arises in favor of strangers to the contract.

The case of *Schubert v. J. R. Clark Co.* 49 Minn. 331, 15 L.R.A. 818, 32 Am. St. Rep. 559, 51 N. W. 1103, was a case of a defective step-ladder. The defect arose out of the use of poor, cross-grained, and decayed lumber, and the defendant knew that fact, and that the ladder was not of sufficient strength to stand the weight of a person using it. Neither the plaintiff nor any of the persons through whose hands the step-ladder had passed, from the manufacturer down to the user, the plaintiff, knew of the defect, and the same was concealed by the ladder being painted and varnished so that a person could not discover its defects. A demurrer was interposed to the complaint and overruled, and the defendant appealed. and the declaration was held to state a cause of action.

In *Huset v. J. I. Case Threshing Mach. Co.* 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865, a review is made of the authorities and principles governing this class of cases, and Circuit Judge Sanborn points out clearly that knowledge of the defective and dangerous condition of the instrumentality must be present with the manufacturer when he puts the thing out, in order to create a liability on his part to third persons, in those cases where the instrumentality is not, in and of itself, inherently dangerous to human life.

In *Tom v. Nichols-Fifield Shoe Machinery Co.* 132 C. C. A. 221, 215 Fed. 881, plaintiff's employer purchased a die cutting machine from defendant, to be set up and operated in his factory, and plaintiff, while operating the machine in the course of his duty, was injured by the fall of a heavy headpiece, due to a defect in the machine, or failure to properly adjust same when it was set up by defendant's employees. Defendant knew that it was an imminently dangerous instrumentality when it set it up, and not only concealed the defect, but gave the purchaser and his employees to understand that it was safe. The court cites the *Huset Case*, supra, and holds the defendant liable upon the ground of knowledge of the defect and its dangerous character.

In *O'Brien v. American Bridge Co.* 110 L.R.A.1915E.

Minn. 364, 32 L.R.A. (N.S.) 980, 136 Am. St. Rep. 503, 125 N. W. 1012, the court, after an exhaustive review of the English and American cases, held the contractor liable to third parties, because the bridge was an imminently dangerous instrumentality by reason of defects in construction, and because the defendant had actual, at least imputed, knowledge of the defects and the dangers.

The same principles were applied in *Pennsylvania Steel Co. v. Elmore & H. Contracting Co.* (C. C.) 175 Fed. 176, and in *Casey v. Wrought Iron Bridge Co.* 114 Mo. App. 47, 89 S. W. 330. These bridge cases might be well classified, it seems to us, as instrumentalities inherently dangerous in kind, in which case the law will not tolerate even plain negligence in the construction of the same to the damage of the members of the public. In fact, they are so classified in *Pennsylvania Steel Co. v. Elmore & H. Contracting Co.* supra; the court saying: "In my judgment it is immaterial that the dangerous thing made and turned over for use by others known to the maker is a structure, such as piers for a bridge, instead of some article of commerce, such as naphtha, or a drug, or a chemical compound."

See also exhaustive notes to *Woodward v. Miller*, 100 Am. St. Rep. 188, and *Thornton v. Dow*, 32 L.R.A. (N.S.) 968.

In this connection it is to be remarked that knowledge of a defect and its dangerous character often evidences malice, deceit, or fraud. If an independent contractor knowingly puts out an instrumentality so defectively constructed as to be a menace to life, or calculated to cause great bodily harm to anyone who uses it, he must have some reason for so doing. He may have malice toward some person or persons who will probably use the instrumentality; or he may desire to cheat and defraud his employer to his own profit, as in the bridge case, where mud, instead of cement, was used. On the other hand, he may have neither of such bad motives. In either event, with or without bad motives, if he has knowledge of the defect and its danger, he will be liable, and will be held to intend all the natural, usual, and probable consequences of his act.

Further in this connection we have said that knowledge of the defect and danger are required. We do not overlook the doctrine that negligence may be so gross and inexcusable as to show wanton disregard of the rights and interests of others. The defendant may not actually know of the defect and danger on account of his negligence, but that negligence may be so aggravated and outrageous, under the circumstances, as to show a willingness, if not an

intent, to injure others. Hence we see the expressions "knew or ought to have known," "should have known," "must have known," and the like, in books. The cases are not always clear as to the principle upon which the doctrine rests. The doctrine is not involved in this case, and we do not deem it proper to discuss it or define its limit. It may be suggested, however, that the doctrine might rest upon the consideration that where the facts are such as to show that the defendant was so situated with reference to the instrumentality that the defect and its dangerous character must be apparent to him, if he would look, then knowledge may be imputed to him. In other words, such circumstances are evidence of knowledge, and in most cases they will amount to proof of the same.

The words "ought to have known" or "should have known" are more properly applicable to cases of negligence only, while "must have known" express more nearly and properly the idea we have been discussing. If the defendant must have known, he did know, in legal contemplation. In discussing this exception to the general rule, Judge Cooley says: "If the defendant knew of the defective construction, then the case falls within the exception last stated; but if the defendant ought to have known and did not, which is all that the complaint positively alleges, then it was a case of simple negligence, and the decision would seem to be at variance with the general rule." 2 Cooley, Torts, 3d ed. 1491.

Another principle or doctrine is sometimes invoked to create liability to strangers on the part of an independent contractor, and it is what is mentioned as the doctrine of implied invitation. It is thus stated by Judge Cooley: "Another exception to the general rule which the authorities seem to establish is that where one undertakes with another to construct a place for the doing of certain work, such as a scaffold or staging, he will be liable to any who, while using the place in the performance of such work, are injured by reason of negligent or defective construction. There is some difference of opinion as to the grounds of liability in these cases, but implied invitation is the prevailing one." 2 Cooley, Torts, 3d ed. 1491.

For a fine discussion of this doctrine and the cases in which it has been applied, see *Bright v. Barnett & R. Co.* 88 Wis. 299, 26 L.R.A. 524, 60 N. W. 418.

With this doctrine we have nothing to do in this case. There was no implied invitation here. The instrumentality was not specially prepared for a particular purpose, nor for any particular person. It was an ordinary plumbing job, negligently performed. L.R.A.1915E.

If the plaintiff can recover, then any other tenant of the owner of the building may do the same, now or at any time in the future.

There is a conflict of authority as to the applicability of the doctrine of implied invitation. Some of the cases and text writers limit its application to the owner of buildings and structures upon his own premises which are negligently constructed so as to become imminently dangerous. See *Husct v. J. I. Case Threshing Mach. Co.* 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865. This limitation is denied in *Pennsylvania Steel Co. v. Elmore & H. Contracting Co.* (C. C.) 175 Fed. 176.

It is further to be observed that, where the contractor constructs a building or an instrumentality of the class here in question, it is doubtful whether the contractor could, in any event, be liable to third persons, after he has turned over the work to his employer. When the work is completed to the satisfaction of the owner and employer, he takes over the same and adopts the same as his own. Thereupon he assumes a duty, to those whom he invites to use the same, to take care that the thing is free from dangerous defects. If the owner knows, or, by the exercise of reasonable care, he could discover, the defect, in such case, his negligence intervenes and cuts off the causal relation between the fault of the contractor and the injury. See *Curtin v. Somerset*, 140 Pa. 70, 12 L.R.A. 322, 23 Am. St. Rep. 220, 21 Atl. 244; *Daugherty v. Herzog*, 145 Ind. 255, 32 L.R.A. 837, 57 Am. St. Rep. 204, 44 N. E. 457; *First Presby. Congregation v. Smith*, 163 Pa. 561, 26 L.R.A. 504, 43 Am. St. Rep. 808, 30 Atl. 279; *Miner v. McNamara*, 81 Conn. 690, 21 L.R.A.(N.S.) 477, 72 Atl. 138.

In *First Presby. Congregation v. Smith*, 163 Pa. 561, 26 L.R.A. 504, 43 Am. St. Rep. 808, 30 Atl. 279, it is said: "The Pennsylvania rule, deducible from all the cases, is that if the employer, at the time he resumes possession of the work, from an independent contractor, knew, or ought to have known, or from a careful examination could have known, that there was any defect in the work, he is responsible for any injury caused to a third person by defective construction."

In *Miner v. McNamara*, 81 Conn. 690, 21 L.R.A.(N.S.) 477, 72 Atl. 138, the owner received from the contractor a building which he knew to be structurally weak by reason of defects, and leased it to a tenant. The tenant sued the contractors, and they were held not liable. The decision is based upon the doctrine that the intervention of the negligence of the owner cut off the causal relation between the negligence of the contractor and the injury of the plain-

tiff. It is to be remarked that in this case both the contractor and the owner knew that the building was structurally weak and dangerous.

In this connection we wish to say that there seems to be much unnecessary obscurity in the cases, due, we believe, to a lack of discrimination between negligence and tort. If an independent contractor manufactures an instrumentality defectively, and the defect renders the same dangerous, and he does not know of the defect and its dangerous character, by reason of his failure to exercise due care, he is guilty simply of negligence. In such case he is liable only on his contract. But if he knows of the defect and its dangerous character, and puts out the thing, in deceit, fraud, malice, or perhaps other bad motive, he is not guilty of negligence at all. In such circumstances, the transaction leaves the field of negligence and passes into the domain of intentional tort. In such case, he may be liable to strangers to the contract for the usual, natural, and probable consequences of his act, provided no other conscious human agency intervenes and cuts off the causal relation between the tort and the injury.

Applying the doctrines and principles heretofore outlined to the facts in this case, it is clear that the defendants are not liable. They had no contractual relations with the plaintiff, and owed him no contractual duty. There is no evidence that they knew of the defect and its dangerous character. They were guilty simply of negligence. There is no implied invitation on their part to use a dangerous instrumentality. In such circumstances, the independent contractor is not to be held liable.

For the reasons stated, the judgment of the court below will be reversed, and the cause remanded, with instructions to award a new trial; and it is so ordered.

Roberts, Ch. J., and Hanna, J., concur.

Petition for rehearing denied May 15, 1915.

OKLAHOMA SUPREME COURT.

E. D. CUMMINGS, President of the Skirvin Operating Company, Plff. in Err.,
v.

E. Z. WALLOWER.

(— Okla. —, 149 Pac. 864.)

Corporation — by-law — right to adopt.

1. By § 1227, Rev. Laws 1910, the persons signing articles of incorporation, and

Headnotes by SHAEF, J.
L.R.A.1915E.

their associates and successors, shall be a body politic and corporate by the name and for the purposes stated in said articles. The subscribers thereto are therefore "stockholders," and the fact that they have not paid for the stock subscribed, or that stock certificates have not issued to them, does not affect their right to adopt by-laws.

Same — typewritten.

2. By-laws typewritten on a sheet of paper and pasted in a book kept in the office of the corporation, though the book be not designated as provided by statute, is a sufficient compliance with § 1248, Rev. Laws 1910, providing that "all by-laws adopted must be certified by a majority of the directors and secretary of the corporation, and copied in a legible hand in some book kept in the office of the corporation, to be known as 'the book of by-laws,' and that no by-laws shall take effect until so copied."

Same — statute — construction.

3. The statute last mentioned should be construed in connection with § 2947 of the Revised Laws of 1910, providing that writing (with the exception named therein) "may be made in any manner;" thus authorizing a writing such as that involved to be typewritten, as well as traced by hand with pen or pencil.

Same — certificate — necessity.

4. While § 1248 requires that all by-laws be certified "by a majority of the directors and secretary of the corporation," and copied in the manner set out in the second paragraph, it does not undertake to make the by-laws ineffective, unless so certified; and such certification is not required, in an action between directors of the company charged with knowledge of the by-laws and their contents.

Same — function of by-law.

5. The function of a "by-law" is to prescribe the rights and duties of the members with reference to the internal government of the corporation, the management of its affairs, and the rights and duties existing between the members *inter se*.

Same — demand for directors' meeting — authority.

6. A director of a private corporation may empower an agent or attorney for him and in his name to make and serve a demand for a special meeting of a board of directors.

Note. — Mandamus to compel calling of stockholders' or directors' meeting.

Generally the power of the courts to issue writs of mandamus to corporations and their officers is not limited to cases in which it is sought to enforce duties to the public, but the writ will also lie in proper cases to enforce private rights, and particularly those of members or stockholders. If a corporation refuses to perform a specific legal duty which it owes to a stockholder or member, or one entitled to membership, and his right is clear, he may

Mandamus — to compel meeting of directors.

7. Mandamus will lie to compel the president of a corporation to call a special meeting of the board of directors, there being a valid by-law requiring the issuance of the call, and where the necessary demand therefor has first been made.

Same — right to discharge petitioner — effect.

8. The right of the board of directors to discharge plaintiff in error as manager of the corporation cannot be considered a defense to an action for mandamus to compel the calling of a directors' meeting, though called for the purpose of considering his removal.

(May 18, 1915.)

enforce the same by mandamus, subject to the principle generally applicable to proceedings of this nature, that he must be without another adequate legal remedy for the protection thereof. Before application for the writ there must generally be an expressed and specific demand or request upon defendant to perform the act sought to be compelled, and a refusal thereof; but a demand is not necessary if it would be useless, or if the duty is plain, and defendant has expressed or shown a determination not to perform it, or if the duty is strictly public and enjoined by law, and no person is charged by law with the duty to make demand. 26 Cyc. 342.

The cases generally in this note hold or proceed upon the theory that before a mandamus will lie to compel corporate officers to act, there must have been a proper demand made and refusal; but in *Mottu v. Primrose*, 23 Md. 482, and *People ex rel. Walker v. Albany Hospital*, 61 Barb. 397, 11 Abb. Pr. N. S. 4, it is held not necessary to demand or request directors to hold an election where that duty is plainly imposed upon them by statute.

It is generally held that mandamus lies at the instance of a stockholder or member of a corporation to compel the proper officers of such corporation to call a meeting pursuant to charter, statute, or by-laws. *Bassett v. Atwater*, 65 Conn. 355, 32 L.R.A. 575, 32 Atl. 937 (special stockholders' meeting); *State ex rel. Lake Shore Teleph. & Teleg. Co. v. De Groat*, 109 Minn. 168, 134 Am. St. Rep. 764, 123 N. W. 417 (stockholders' meeting); *Re Paris Skating Rink*, L. R. 6 Ch. Div. 731, 46 L. J. Ch. N. S. 831, 25 Week. Rep. 767 (ordinary meeting of company pursuant to certain clauses in articles of association); *Gunton v. Ingle*, 4 Cranch, C. C. 438, Fed. Cas. No. 5,870 (where court finds election of officers illegal, it will grant mandamus to hold new election); *Congregational Soc. v. Sperry*, 10 Conn. 200 (to compel committee of ecclesiastical society to warn annual meetings for election of officers when statutory duty refused or neglected); *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806 (to compel the corporation and directors

ERROR to the District Court for Oklahoma County to review a judgment directing the issuance of a peremptory writ of mandamus to compel respondent, as president of the Skirvin Operating Company, to call a meeting of the board of directors of said corporation. Affirmed.

The facts are stated in the opinion.

Messrs. Choate & Choate and Warren K. Snyder, for plaintiff in error:

The calling of special meetings is discretionary with the president in the absence of by-laws.

Harris & Day, Code, 1261; *Smith v. Dorn*, 98 Cal. 73, 30 Pac. 1024; *Morawetz, Priv. Corp.* § 482.

holding over to call meeting to elect a new board where there has been a failure or refusal to elect directors as provided for by law); *O'Hara v. Williamstown Cemetery Co.* 133 Ky. 828, 119 S. W. 234 (election of trustees required by charter which *de facto* officers failed and refused to call on demand); *Granara v. Italian Catholic Cemetery Asso.* 218 Mass. 387, 105 N. E. 1073 (meeting for choice of officers and adoption of by-laws); *Mottu v. Primrose*, supra (compelling election pursuant to statute where board of managers illegally changed dates); *M'Neely v. Woodruff*, 13 N. J. L. 352 (to compel president and directors to notify election to be held within thirty days after day designated in charter, as required by law, where they neglect to do so); *State ex rel. Flagg v. Lady Bryan Min. Co.* 4 Nev. 400, 3 Mor. Min. Rep. 526 (to compel trustees to call election, as required by law); *State ex rel. Sears v. Wright*, 10 Nev. 167 (annual election of trustees); *People ex rel. Walker v. Albany Hospital*, supra (to compel officers to hold annual election of governors of hospital in accordance with statute where they neglect to perform duty required by by-law); *People ex rel. Miller v. Cummings*, 72 N. Y. 433 (to compel proper officers to notify and cause election of trustees, on refusal to perform the duty required of them by law); *Com. ex rel. McCalmont v. Keim*, 15 Phila. 1 (meeting of stockholders for election of officers); *Rex v. Birmingham*, 7 Ad. & El. 254, 1 Jur. 754 (to compel rector and churchwarden to convene a vestry for electing churchwarden for remainder of year where election was so improperly conducted that proceedings were void).

Where the officers of a corporation organized in Arizona, where it had no office, but located and doing business in California, were endeavoring to keep control of a corporation and its property by refusing to call a stockholders' meeting, as required by the articles of association and by-laws, for the election of a board of directors, it was held in *Potomac Oil Co. v. Dye*, 14 Cal. App. 674, 113 Pac. 126, 130, that the district court of Arizona, having acquired jurisdiction of the corporation which had

Mandamus does not issue to control discretion.

Dunham v. Ardery, 43 Okla. 619, L.R.A. 1915B, 232, 143 Pac. 331; *Kimberlin v. Commission*, 44 C. C. A. 109, 104 Fed. 652.

The assent of two thirds of the stockholders, as required in 1246 Harris-Day Code, or the vote of a majority of the stockholders, as required by the same statute, at meeting of the stockholders after two weeks' notice, was never had to adopt said purported by-laws.

1 *Thomp. Corp.* 2d ed. § 986; *Dunstan v. Imperial Gaslight Co.* 3 Barn. & Ald. 125, 1 L. J. K. B. N. S. 49; *Vercoutere v. Golden State Land Co.* 116 Cal. 410, 48 Pac. 375; *Boisot, By-Laws*, 2d ed. p. 3.

A writ of mandamus will not issue unless the right to maintain such action is clear.

Huddleston v. Noble County, 8 Okla. 614, 58 Pac. 749; *Territory ex rel. Crosby v. Crum*, 13 Okla. 9, 73 Pac. 297; *Eberle v. King*, 20 Okla. 49, 93 Pac. 748; *State ex rel. Stevenson v. Russell*, 21 Okla. 58, 95 Pac. 463.

failed and refused to require its officers or other agents to act, could, at the instance of complaining stockholders, command by mandamus a performance of the plain statutory duty imposed.

So it has been held that mandamus will lie to compel:

—the board of directors to call an annual meeting to elect directors, as required by the by-laws, *Stapler v. El Dora Oil Co.* — Cal. App. —, 150 Pac. 643; the court said: "Since all of the members of the board of directors reside in this state, wherein all of its property is situate and all its corporate business, including that of its board of directors, is transacted, the corporation, although organized under the laws of Arizona, must be deemed a resident of this state and subject to the jurisdiction of the courts thereof. Clearly, this court has jurisdiction of the questions presented, the circumstances of which strongly appeal to it for an exercise of its discretion in behalf of, rather than against, petitioners;"

—the officers of a corporation to call a special meeting of the stockholders, if a statute prescribes the mode for calling such meetings, since the statute thereby makes it the imperative duty to give the prescribed notice when properly requested, *Bassett v. Atwater*, 65 Conn. 355, 32 L.R.A. 575, 32 Atl. 937;

—the holding of an election in May, as prescribed by the by-laws, although the application had been resisted upon the ground that there had been no previous demand and refusal, and the ten days' public notice required by the by-laws had not been given, *Mottu v. Primrose*, supra, the court stating that a previous demand and refusal were not necessary to support an application for a mandamus in such cases, and that, as the object of the application for a mandamus L.R.A.1915E.

Messrs. McAdams & Haskell, for defendant in error:

The by-laws are valid and binding between the parties, and impose upon the president the plain ministerial duty to call meetings of the board of directors upon the demand of any director.

People ex rel. Wallace v. Sterling Burial Case Mfg. Co. 82 Ill. 457; *Corporations in* 10 Cyc. 381; 1 *Cook, Corp.* 6th ed. § 192; *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L.R.A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030; *Snyder v. Charleston & S. Bridge Co.* 65 W. Va. 1, 131 Am. St. Rep. 947, 63 S. E. 616; *Graebner v. Post*, 119 Wis. 392, 100 Am. St. Rep. 890, 96 N. W. 783; *Morrison v. Dorsey*, 48 Md. 461; *Ho Tung v. Man On Ins. Co.* 85 L. T. N. S. 617; *Lynch v. Perryman*, 29 Okla. 615, 119 Pac. 229, Ann. Cas. 1913A, 1065; *Bass & H. Furniture & Carpet Co. v. Harbour*, 42 Okla. 335, 140 Pac. 956.

Mandamus is often used to correct abuses of discretion when it has been made clearly to appear that the official refusing to do the act has either not exercised his discre-

tion was to obtain a peremptory writ, requiring the election to be held on the 3d Tuesday in May, notice was in fact given from the time the petition was filed;

—the holding of an election of governors of a hospital in accordance with statute within sixty days from the day fixed in the by-laws for elections, even though the directors had not been requested to hold an election, they having for several years failed to hold an election as required by the by-laws, *People ex rel. Walker v. Albany Hospital*, 61 Barb. 397, 11 Abb. Pr. N. S. 4;

—the president, officers, and members of the board of trustees of a certain church to convene a general meeting for election of a board of trustees, as provided in the charter of the corporation, *State ex rel. Bellamore v. Rombotis*, 120 La. 150, 45 So. 43, the court stated in the syllabus that the general rule in matters of mandamus is that where, after a petition for mandamus had been presented, the respondent does the act sought to be enforced thereby, the relator is not entitled to a peremptory writ; but that rule finds no application where the respondent, being the board of trustees of a corporation, is sought to be compelled to convene a general meeting of the members of the corporation to elect a new board of trustees, and where, the defense being that such an election has been held, it develops that the election relied upon is one which was convened at the instance of the president and secretary of the board without prior authority from the board itself;

—the calling of an election notwithstanding the board of trustees has omitted to fix the time of election of successors by by-law, as required by statute, *State ex rel. Flagg v. Lady Bryan Min. Co.* supra;

tion at all, or has wilfully chosen to act in manifest disregard of duty and the legal rights of individuals.

2 Spelling, Extr. Relief, § 1384; *Machen v. Machen & M. Electrical Mfg. Co.* 237 Pa. 212, 42 L.R.A.(N.S.) 1079, 85 Atl. 100, Ann. Cas. 1914B, 420; *Badger Oil & Gas Co. v. Preston*, — Okla. —; *Ireland v. Globe Mill. & Reduction Co.* 19 R. I. 180, 29 L.R.A. 429, 61 Am. St. Rep. 756, 32 Atl. 921; *Angell & A. Priv. Corp.* 5th ed. § 326; *Child v. Hudson Bay Co.* 2 P. Wms. 207; *Kennebec & P. R. Co. v. Kendall*, 31 Me. 470; *Chouteau Spring Co. v. Harria*, 20 Mo. 382; *People ex rel. Fleming v. Hart*, 25 Abb. N. C. 258, 11 N. Y. Supp. 673; *People ex rel. Kenny v. Winans*, 29 N. Y. S. R. 651, 9 N. Y. Supp. 249.

Sharp, J., delivered the opinion of the court:

The board of directors of the Skirvin Operating Company, an Oklahoma corporation, was, on the date of the institution of the present action, composed of E. D. Cummings, E. Z. Wallower, and W. B. Skirvin.

—the calling of a stockholders' meeting for the purpose of electing officers, where the statutory duty in this respect has been neglected or refused; and the writ can be directed to and served upon the officers individually, *Com. ex rel. McCalmont v. Keim*, supra;

—the calling of an election for the purpose of filling up board of directors, as required by charter, *Re Union Ins. Co.* 22 Wend. 591;

—the rector of an incorporated church to give the notice of the annual election of vestrymen, as required by statute and by the by-laws of the church, *People ex rel. MacLaury v. Hart*, 25 Abb. N. C. 250, 11 N. Y. Supp. 670;

—officers of a friendly society to sign a public notice to convene a general meeting of its members to consider the propriety of rescinding or altering the rules of the society, such being a statutory duty, *Reg. v. Aldham*, 15 Jur. 1035.

So it is stated in the syllabus of *M'Neely v. Woodruff*, 13 N. J. L. 352, that should the president and directors of an incorporated company neglect to notify an election to be held within thirty days after the day designated in the charter, as required by a statute, such neglect would not work a forfeiture of their charter, but the stockholders might, by mandamus or otherwise, compel the directors to do their duty immediately.

The court, however, will not interfere with the internal management of a corporation, or a discretion vested in the directors or shareholders with respect to the calling of meetings. Consequently, where, by the articles of association of a company, the directors or shareholders can summon a meeting, the court will not order the di-

E. D. Cummings was president and treasurer, E. Z. Wallower vice president, and W. B. Skirvin secretary, of said company. On January 7, 1915, there was served on said E. D. Cummings, as president of said Skirvin Operating Company, a written notice signed by E. Z. Wallower, acting through his duly authorized agents and attorneys, McAdams & Haskell, demanding that, as president of said corporation, said Cummings forthwith call a special meeting of the board of directors, to convene at the office of the corporation at Oklahoma City at the earliest possible date, allowing only the time necessary to give to each director three days' notice of the time, place, and purpose of such meeting, by letter addressed to his last-known postoffice address, as prescribed by the alleged by-laws of the corporation. The purpose for which the meeting was desired, it was said, was: "To consider the question of removal and discharge of the present manager of the corporation, and to remove and discharge said manager, and elect a new manager if, in the judgment of the board of directors, such

rectors to summon a meeting for the general purposes of the company. *Macdougall v. Gardiner*, L. R. 10 Ch. 606, 33 L. T. N. S. 521, 23 Week. Rep. 846.

So, a mandamus ordering a new election was refused in *Ex parte Mawby*, 3 El. & Bl. 718, 18 Jur. 906, 13 L. J. Mag. Cas. N. S. 153, 2 Week. Rep. 473, where, in an election of a churchwarden, the chairman of the vestry meeting rejected admissible votes, but it did not appear that this altered the result.

So it is held in *Harrison v. Simonds*, 44 Conn. 318, that the writ will not be granted where it appears that the object sought can be accomplished without serious difficulty without the aid of the court. Consequently, an office not being vacant when there is a *de facto* incumbent, the court will not grant mandamus to compel the filling of such office before such incumbent is ousted upon an information in the nature of a *quo warranto*.

So, a mandamus will not lie to the president of a corporation, commanding him to call a stockholders' meeting, where the charter gives to the board of directors the power to provide for general and special meetings of the stockholders, and where the board of directors have not, by resolution or by-law, made it the duty of the president to call such meeting. *Knoll v. Levert*, 136 La. 241, 66 So. 959.

It is held in *State ex rel. Ferencz v. Unida Gold Min. Co.* 32 Ohio C. C. 60, that mandamus is not the proper proceeding by which to require the secretary of a corporation to call a meeting of its stockholders. The court stated that there were two reasons justifying the ruling of the common pleas court in sustaining the demurrer. "First, the relator mistook his

action be to the best interest of the corporation. Also to consider the business and affairs of the company generally, and to take such action concerning the same as may be deemed advisable by the board."

Cummings refused to call the meeting, and thereupon action was filed in the district court and an alternative writ of mandamus issued. The case coming on to be heard, the relator introduced his evidence and rested, whereupon the respondent demurred to the evidence, which demurrer being overruled, he then moved the court for judgment in his favor on the plaintiff's evidence, which motion was likewise overruled, and an order made and entered directing that a peremptory writ of mandamus issue, as prayed for by the relator, commanding the respondent E. D. Cummings, as president of the Skirvin Operating Company, to call a meeting of the board of directors of said corporation, to convene at the office of said corporation at Oklahoma City, Oklahoma, within a time named. From the judgment the respondent has prosecuted an appeal to this court.

Relator's right to the writ is rested principally upon an alleged by-law of the corporation, providing that the president shall call such special meetings of the board of directors at any time upon the written demand of any one director; the purpose and object of the meeting being stated. On the part of the respondent, it is vigorously asserted that no such by-law was ever legally adopted by the stockholders of the corporation; that, such being the case, the calling of a special meeting of the board of directors by the president was discretionary

on his part, and could not be controlled by the writ of mandamus.

Section 1246, Rev. Laws 1910, provides that every corporation formed under chapter 15 of the statutes must, within one month after filing articles of incorporation, adopt a code of by-laws for its government, not inconsistent with the laws of the United States or of this state, and further provides that "the assent of stockholders representing a majority of all the subscribed capital stock . . . is necessary to adopt by-laws, if they are adopted at a meeting called for that purpose; and in the event of such meeting being called, two weeks' notice of the same, by advertisement in some newspaper published in the county in which the principal place of business of the corporation is located, . . . must be given. . . . The written assent of the holders of two-thirds of the stock . . . shall be effectual to adopt a code of by-laws without a meeting for that purpose."

At the trial there was introduced, over the objection of the respondent, certain purported records of the company, which were kept in a book called "Secretary's Record and Stock Account." These records consisted of typewritten pages pasted into said book. Included in these records is a stock subscription for one share each of the capital stock of the Hotel Operating Company, signed by C. L. Webb, J. Robbins, and I. M. Canfield. Afterwards, by amended articles of incorporation, the name of the corporation was changed to the Skirvin Operating Company. At a meeting held on August 6, 1913, as shown by the records, there were present all of the subscribers to the stock,

remedy. The object of the remedy by mandamus is to compel public officers and private individuals in matters relating to the public to perform their public duties. *Tillson v. Putnam County*, 19 Ohio, 415." The proper procedure to enforce the private rights of a stockholder in a corporation is pointed out in the case of *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 48 L.R.A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033, where it is held: "Injunction is the proper form of remedy to enforce the right of a stockholder in a private corporation, given by § 3254, Revised Statutes [General Code, 8672, 8673], to inspect the books and records of the corporation." Another cogent reason why the demurrer was properly sustained is that the courts of one state have no visitatorial or supervisory jurisdiction with regard to the internal affairs of a corporation of another state, which in nowise affect the rights of the citizen as such in common with all other citizens, and distinct from his private rights as a stockholder. This view is elucidated in the case of *Madden v. Penn Electric Light Co.* 38 L.R.A. 638. L.R.A.1915E.

Judgment for a peremptory mandamus should not be granted, upon the relation of a foreign holding corporation, to compel the secretary of another holding and foreign corporation to call a meeting of its stockholders for the purpose of taking action necessary to bring about a change in the articles of incorporation of two other foreign corporations. *State ex rel. Lake Shore Teleph. & Teleg. Co. v. De Groat*, 109 Minn. 168, 134 Am. St. Rep. 764, 123 N. W. 417.

The president and secretary of a mutual insurance company were held not the proper parties in *Dusenbury v. Looker*, 110 Mich. 58, 67 N. W. 986, to compel the company to issue the necessary notices to reconvene the stockholders' meeting for the purpose of holding an election in compliance with the minority law, where neither the articles of association nor the by-laws impose any duty or confer any right upon the president and secretary to call the meeting, but that power is vested exclusively in the board of directors.

J. D. C.

namely, C. L. Webb, J. Robbins, and I. M. Canfield, all of whom waived notice of the call for the meeting and participated therein throughout. Among other business transacted at said meeting was the acceptance of the statutory grant of corporate authority, as shown by the certificate of incorporation, issued by the secretary of state, the election of Webb, Robbins, and Canfield, as directors, after which the following appears: "Thereupon the chairman produced a set of by-laws which she stated she had caused to be prepared for governing the business of the company and of the directors and stockholders of the company. It was thereupon moved that said by-laws be adopted and that the same be ordered to be recorded in a book of by-laws and be recorded at length in the minutes of the meeting. Said motion was unanimously adopted, and the said by-laws are in words and figures as follows:"

Then follow *seriatim* the by-laws so adopted, those pertinent to the issues involved being as follows:

"The president may call special meetings of the board of directors at any time, and shall call such special meetings upon the written demand of any one director stating the purpose and object of the meeting.

"Notice of special meeting shall state the purpose for which the same is called. Notice of meetings of stockholders and directors shall be given by letter, postage prepaid, deposited in the United States mails, and addressed to the last-known postoffice address of stockholders or directors as the case may be.

"Three (3) days' notice shall be given of special meetings of the board of directors.

"The officers of the company shall perform such duties as usually appertain to like offices in like companies."

Many objections going to the validity of these by-laws are urged by counsel for plaintiff in error, but those principally relied upon, as stated by counsel, are: (1) That the by-laws were never legally adopted according to the formalities prescribed by our statute; (2) that they were not adopted by stockholders; (3) were never entered in a book of by-laws; and (4) were never certified.

The book containing the by-laws was produced in court by the respondent Cummings, in obedience to a subpoena duces tecum served upon him, to appear and bring with him the minute book and book of by-laws of the Skirvin Operating Company, and which book, Mr. Cummings testified, was obtained by him in the private office of the company. In fact, the authenticity of the records produced is not questioned. That

the by-laws were not adopted at a stockholders' meeting cannot be sustained. While it is true that, at the meeting of August 6th, Webb, Robbins, and Canfield are mentioned as subscribers to the articles of incorporation, and which fact further appears from their separate subscription to the capital stock of the corporation, at the meeting of directors held on the same day, and immediately following the adjournment of the stockholders' or subscribers' meeting, the former meeting is referred to as "the stockholders' meeting of the Hotel Operating Company." At the time the personnel of the shareholders and the board of directors was the same. *People ex rel. Wallace v. Sterling*, 82 Ill. 457; *Manufacturers' Exhibition Bldg. Co. v. Landay*, 219 Ill. 168, 76 N. E. 146. Whether at the time certificates of stock had been issued to the subscribers to the articles of incorporation is immaterial. Such was not necessary to constitute them stockholders. Section 1227, Rev. Laws 1910, provides that the persons signing the articles of incorporation, and their associates and successors, shall be a body politic and corporate, by the name and for the purposes stated in the articles. While by § 1234 a subscription to the stock of a corporation about to be formed is to be held for the benefit of a corporation when it is formed, and may be enforced by it. The moment the conditions required by law as preliminary to the granting of the charter to the corporation were complied with, the subscribers to its stock became stockholders, entitled as such to all the rights of such, and at the same time their liability to pay the amount of their subscription became fixed and absolute. 1 Cook, Corp. 6th ed. § 192; 10 Cyc. 389; *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L.R.A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030. As between themselves and the succeeding stockholders and directors, their failure to pay for their stock, if indeed such were a fact, and to have stock certificates issued and delivered, was, in the determination of their status, of no consequence. No attack is made on the validity of the articles of incorporation; instead, Cummings's rights, as asserted by him, arose by virtue of his subsequent acquirement of stock in said corporation, and his election as a director and president of the corporation on March 28, 1914, and his subsequent election as a director and president on October 14, 1914. The mere fact that the minutes of the meeting of August 6th referred to Webb, Robbins, and Canfield as subscribers to the articles of incorporation does not detract from their legal status as shareholders, and cannot be invoked to affect the validity, in this respect,

of the adoption of the by-laws. The by-laws, as shown by the secretary's minutes, were adopted by the unanimous vote of the shareholders.

The objections that the by-laws were never entered in a book known as the "Book of By-Laws," and were never certified, may be considered together. By § 1248, Rev. Laws 1910, it is provided that all by-laws adopted by a corporation must be certified by a majority of the directors and secretary of the corporation, and copied in a legible hand in some book in the office of the corporation, to be known as the "Book of By-laws," and that no by-laws shall take effect until so copied, and that the book shall be open to the inspection of the public during the office hours of each day except holidays. As already seen, the by-laws were copied into a book designated "Secretary's Record and Stock Account," were on typewritten sheets, and pasted into the book. We do not think the fact that the by-laws were typewritten, and were kept in the manner indicated, in a record bearing a different designation from that named in the statute, renders them void. 1 Thomp. Corp. 2d ed. § 975; Bornstein v. District Grand Lodge, 2 Cal. App. 624, 84 Pac. 271.

A "by-law" has been defined to be a permanent and continuing rule for the government of the corporation and its officers. North Milwaukee Town Site Co. v. Bishop, 103 Wis. 492, 45 L.R.A. 174, 79 N. W. 785. Other definitions, differing not materially from the above, may be found in 1 Thompson on Corporations, 2d ed. § 976. The function of a by-law as here involved is to prescribe the rights and duties of the members with reference to the internal government of the corporation, the management of its affairs, and the rights and duties existing between the members *inter se*.

Section 1248 of the statutes, prescribing that the by-laws shall be copied in a legible hand in a book of the corporation kept for that purpose, was taken from the Dakota statutes (Dak. Comp. Laws 1887, § 2922). This section became a law in that state February 16, 1877 (Dak. Rev. Codes 1877; Civil Code, § 405). This was before the day of the typewriter, and at a time when records were made by the handwriting of the draftsman. Section 2947, Rev. Laws 1910, provides that writing may be made in any manner, except that, when a person entitled to require the execution of a writing demands that it be made in ink, it must be so made. See also §§ 2828, 5539. Under § 1094 of the General Statutes of Connecticut of 1887, it was provided that "in actions against the representatives of deceased persons, no acknowledgment or promise shall be sufficient evidence of a new or

continuing contract to take the case out of the statute of limitations, unless the same be contained in some writing made or signed by the party to be charged thereby."

In giving effect to this statute, it was said by the court, in Deep River Nat. Bank's Appeal, 73 Conn. 341, 47 Atl. 675: "In the absence of any provision requiring such acknowledgment to have been written or subscribed by the hand of the deceased person, the meaning of the word 'writing,' as used in this statute, is not to be limited to words traced with a pen or pencil; nor the words 'writing made . . . by the party to be charged thereby,' to writings made by the hand of such person; nor the words 'writing . . . signed' by such person, to writings subscribed by the deceased with his own hand."

It was further said in the course of the opinion: "Proof that the letters containing the alleged acknowledgments were dictated by the deceased to a stenographer, and were by the latter, at the direction of the deceased, typewritten and signed with the deceased's name by means of a rubber stamp was proof: (1) That they were writings (Henshaw v. Foster, 9 Pick. 312, 318), since 'typewriting is a substitute for and the equivalent of writing;' (2) that they were made by the deceased, since he directed them to made, and adopted them after they were made, by directing them to be stamped with his name; and (3) that they were signed by him, since, in the absence of any express or implied requirement of law that one shall subscribe a writing with his own hand, he may properly sign it by means of such a stamp used by himself or by another at his direction. Schneider v. Norris, 2 Maule & S. 286, 15 Revised Rep. 825; Streff v. Colteaux, 64 Ill. App. 179; National Acci. Soc. v. Spiro, 24 C. C. A. 334, 4 U. S. App. 293, 78 Fed. 774; Hamilton v. State, 103 Ind. 96, 53 Am. Rep. 491, 2 N. E. 299; Chapman v. Limerick, 56 Me. 390; Dreutzer v. Smith, 56 Wis. 292, 14 N. W. 465."

In Hunt v. Dexter Sulphite Pulp & Paper Co. 100 App. Div. 119, 124, 91 N. Y. Supp. 279, 283, it was held that the service of a typewritten notice under the employers' liability act was the serving of a sufficient notice in writing. The opinion in part reads: "Typewriting has largely taken the place of handwriting, and may well be considered as handwriting. It would be too strict a construction of the statute to hold this notice invalid because in typewriting instead of handwriting."

Other cases in harmony with these views are: Benson v. McMahon, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240; Pelton v. Ottawa County, 52 Mich. 517, 18 N. W. 245; Frazer v. State, 159 Ala. 1, 49 So.

245; *Sears v. Sears*, 77 Ohio St. 104, 17 L.R.A.(N.S.) 353, 82 N. E. 1067, 11 Ann. Cas. 1008.

The main purpose of the statute was served when the by-laws in legible form were entered in some book kept for that purpose in the office of the corporation, and when this was done the statute made the by-laws effective.

Until after the institution of the present action, the by-laws were not certified by a majority of the directors and the secretary of the corporation, as provided in § 1248 of the statute. While the statute ordains the certification of the by-laws, it further provides, "and no by-laws shall take effect until so copied," referring to the requirement that the by-laws shall be copied in a legible hand in some book kept in the office of the corporation. Whatever the purpose of the distinction may be, the penalty goes only to a failure to copy, and not a failure to certify.

As we have seen, the statute prescribes that corporations shall adopt by-laws. Section 1247 provides that by-laws may provide for the time, place, and manner of calling and conducting its meetings. The by-law adopted gave to any one director complying with its provisions the right to demand that the president should call a special meeting of the board of directors, upon notice. The duty owing by Cummings, as president, was one in which he was vested with no discretionary powers. Duties of the character involved, being unattended with any degree of official discretion, are regarded as ministerial in their nature, and the officers at whose hands their performance is required are, as to such duties, ministerial officers. Courts have steadily refused to lend their extraordinary aid by mandamus to control in any degree the exercise of official discretion, wherever vested, yet as to official duties of a ministerial character, unattended with the exercise of any degree of discretion, and absolute and imperative in their nature, the law is otherwise. *Norris v. Cross*, 25 Okla. 287, 105 Pac. 1000; *Kimberlin v. Commission*, 44 C. C. A. 109, 104 Fed. 653. Courts may grant the writ of mandamus to compel officers, whose duty it is to call meetings, to make such call in case they neglect or refuse to do so. *Thomp. Corp.* 2d ed. § 5747; *High, Extr. Legal Rem.* § 80; *People ex rel. Miller v. Cummings*, 72 N. Y. 433; *M'Neely v. Woodruff*, 13 N. J. L. 352; *Bassett v. Atwater*, 32 L.R.A. 575, and note (65 Conn. 355, 32 Atl. 937).

The by-law in question having made it the duty of the president to call special meetings upon the written demand of any director, and due demand having been made, L.R.A.1915E.

and the president having refused to call such meeting, his failure to do so may properly be enforced by mandamus.

Another objection is that Wallower could not confer authority on another to make a formal demand in his name that the president call a special meeting of the corporation as provided by the by-laws. This, it is said, is the equivalent of giving a proxy to represent him as a director. The formal demand made on Cummings to call a special meeting of the directors was signed by "E. Z. Wallower, by McAdams & Haskell, his agents and attorneys." That express authority to make this demand in the manner indicated was given, is shown by a telegram from Wallower to McAdams & Haskell, dated January 7, 1915, and which reads: "You are hereby authorized to demand calling of directors' meeting Skirvin Operating Co. in my behalf and apply to Federal court for mandamus if refused."

There can be no question of Wallower's right to delegate authority to prepare and serve this notice in his name. It appears that the respondent Cummings, in addition to being president of the company, was its manager, and that, on account of a disagreement over the management of the hotel property, the meeting was desired for the purpose of considering the question of his removal and discharge as manager. The purpose of the meeting as evidenced by the notice was only to consider this question, and, in addition, to consider the business and affairs of the company generally. As to whether the board, when convened, had the authority to discharge Cummings as manager, has no place in this action, and need be given no further consideration.

The judgment of the trial court in directing the issuance of a peremptory writ of mandamus, commanding the respondent, E. D. Cummings, as president of the Skirvin Operating Company, to call a meeting of the board of directors of said company, was properly issued, and the judgment of the trial court is affirmed.

Petition for rehearing denied.

PENNSYLVANIA SUPREME COURT.

LENA DARBRINSKY, Appt.,

v.

PENNSYLVANIA COMPANY.

(248 Pa. 503, 94 Atl. 269.)

Negligence — death of child — negligence of parent — effect on rights of other parent.

A mother cannot hold a railroad company liable for negligently killing her minor

child where the negligence of the father proximately contributed to the accident, although the father was also killed in the same accident.

(Mestrezat, J., dissents.)

(March 15, 1915.)

APPEAL by plaintiff from an order of the Court of Common Pleas for Lawrence County refusing to take off a compulsory nonsuit in an action brought to recover damages for the alleged wrongful killing of plaintiff's minor son. Affirmed.

The facts are stated in the opinion.

Messrs. C. W. Fenton, F. R. Haun, and W. N. Anderson for appellant.

Messrs. Oscar L. Jackson and Charles R. Davis, for appellee:

The father was negligent.

McKahan v. Baltimore & O. R. Co. 223 Pa. 1, 72 Atl. 251, 16 Ann. Cas. 173; Hamilton v. Central R. Co. 227 Pa. 137, 75 Atl. 1058; Coppuck v. Philadelphia, W. & B. R. Co. 191 Pa. 172, 43 Atl. 70; Canfield v. Baltimore & O. R. Co. 208 Pa. 372, 57 Atl. 763; Kinter v. Pennsylvania R. Co. 204 Pa. 497, 93 Am. St. Rep. 795, 54 Atl. 276; Ritzman v. Philadelphia & R. R. Co. 187 Pa. 337, 40 Atl. 975, 4 Am. Neg. Rep. 728; Myers v. Baltimore & O. R. Co. 150 Pa. 388, 24 Atl. 747; Pennsylvania R. Co. v. Beale, 73 Pa. 504, 13 Am. Rep. 753; Nagle v. Pennsylvania R. Co. 43 Pa. Super. Ct. 400; McClure v. Lake Shore & M. S. R. Co. 41 Pa. Super. Ct. 227; Craig v. Pennsylvania R. Co. 243 Pa. 455, 90 Atl. 135; Manke-wicz v. Lehigh Valley R. Co. 214 Pa. 386, 63 Atl. 604; Evans v. Pennsylvania Co. 226 Pa. 370, 75 Atl. 591; Bistider v. Lehigh Valley R. Co. 224 Pa. 615, 73 Atl. 940; Knox v. Philadelphia & R. R. Co. 202 Pa. 504, 52 Atl. 90; Dehoff v. Northern C. R. Co. 229 Pa. 192, 78 Atl. 104; Mostoller v. Baltimore & O. R. Co. 233 Pa. 388, 82 Atl. 462; Plummer v. New York & H. R. R. Co. 168 Pa. 62, 31 Atl. 887.

A traveler must stop at the last safe place on the highway before crossing the railroad track.

Note. — The question whether contributory negligence of the parent is a bar to an action by the parent or administrator for the death of a child *non sui juris* is treated in the notes to *Vinnette v. Northern P. R. Co.* 18 L.R.A. (N.S.) 328, and *Nashville Lumber Co. v. Busbee*, 38 L.R.A. (N.S.) 754; and see later cases *Dickinson v. Stuart Colliery Co.* 43 L.R.A. (N.S.) 335, and *Lee v. New River & P. Consol. Coal Co.* 45 L.R.A. (N.S.) 940. It will be observed that some of the cases cited in those notes involve the question presented in *DARBINSKY v. PENNSYLVANIA Co.*, whether the negligence, of one parent is imputable to the other, assuming that the latter's own negligence would have precluded recovery. L.R.A.1915E.

McKahan v. Baltimore & O. R. Co. 223 Pa. 1, 72 Atl. 251, 16 Ann. Cas. 173; *Blotz v. Lehigh Valley R. Co.* 212 Pa. 154, 61 Atl. 832; *Urias v. Pennsylvania R. Co.* 152 Pa. 326, 25 Atl. 566; *Potter v. Pennsylvania R. Co.* 221 Pa. 550, 70 Atl. 852; *Corcoran v. Pennsylvania R. Co.* 203 Pa. 380, 53 Atl. 240; *Muckinhaupt v. Erie R. Co.* 196 Pa. 213, 46 Atl. 364; *Myers v. Baltimore & O. R. Co.* 150 Pa. 386, 24 Atl. 747.

Parents who suffer their children of tender years to wander along tracks of a railroad where they are run down and killed by a railroad car are guilty of such contributory negligence as will prevent a recovery for damages.

Westerberg v. Kinzua Creek & K. R. Co. 142 Pa. 471, 24 Am. St. Rep. 510, 21 Atl. 878; *Smith v. Hestonville, M. & F. Pass. R. Co.* 92 Pa. 450, 37 Am. Rep. 705; *Pollack v. Pennsylvania R. Co.* 210 Pa. 634, 105 Am. St. Rep. 846, 60 Atl. 312; *Glassey v. Hestonville, M. & F. Pass. R. Co.* 57 Pa. 172; *Cauley v. Pittsburgh, C. & St. L. R. Co.* 95 Pa. 398, 40 Am. Rep. 664; *Pennsylvania Co. v. James*, 81 *Pa. 194; 29 Cyc. 555.

The mother in this case cannot recover because of the negligence of her husband.

Gress v. Philadelphia & R. R. Co. 228 Pa. 482, 32 L.R.A. (N.S.) 409, 77 Atl. 810, 21 Ann. Cas. 142; *Toner v. South Covington & C. Street R. Co.* 109 Ky. 41, 58 S. W. 439.

Moschzisker, J., delivered the opinion of the court:

On December 13, 1909, the plaintiff's ten-year-old son was killed with his father, in a collision between a wagon driven by the latter and a train of the defendant company. In the suit to recover for the death of the plaintiff's husband (*Darbrinsky v. Pennsylvania Co.* 247 Pa. 177, 93 Atl. 279), we affirmed a compulsory nonsuit, saying: "We cannot regard this case in any other light than that of the driver . . . thoughtlessly and carelessly driving right in front" of a moving train.

The general question as to whether the negligence of the custodian of a child *non sui juris* is to be imputed to the parent in an action by the latter or by an administrator for the death or injury of a child is discussed in the note to *Gress v. Philadelphia & R. R. Co.* 32 L.R.A. (N.S.) 410.

The question considered in the above notes is, of course, to be distinguished from the question whether the contributory negligence of the parent or custodian is a bar to an action by the child himself for negligent injury. On that question see notes to *Chicago City R. Co. v. Wilcox*, 21 L.R.A. 76, and *Neff v. Cameron*, 18 L.R.A. (N.S.) 320.

The present action was instituted by the mother to recover damages for the loss of the child, who met his death through the contributory negligence of her husband, and raises the following question: The negligence of one parent being a proximate cause of the injury complained of, is the surviving parent barred in law from a recovery against another party who also contributed to the accident?

The question which we have before us never seems to have been passed upon in Pennsylvania under circumstances precisely like those at bar, although, in a number of cases involving the negligent killing of children, where both parents were alive and joined in the action, and the contributory negligence of one of them was shown, we decided that such negligence was attributable to the other parent, and that it formed a complete bar to recovery as against both of them. In *Johnson v. Reading City Pass. R. Co.* 160 Pa. 647, 652, 40 Am. St. Rep. 752, 28 Atl. 1001, the suit was by the father and mother, and it was held that the contributory negligence of the mother acted as a bar. In *Gress v. Philadelphia & R. R. Co.* 228 Pa. 482, 486, 32 L.R.A. (N.S.) 409, 77 Atl. 810, 811, 21 Ann. Cas. 142, the suit was by both parents to recover for the negligent killing of two children; it was held that the older child was guilty of contributory negligence, and that, since the father had committed the younger child to her care and "the accident . . . occurred through the contributory negligence of the sister, the latter's negligence must be imputed to the father," and there could be no recovery. In the recent case of *Rapaport v. Pittsburgh R. Co.* 247 Pa. 347, 93 Atl. 493, the suit was by the father to recover damages growing out of injuries to a minor child; we held that the contributory negligence of the mother (although she was not formally named as a plaintiff) barred the action, and judgment was entered for the defendant.

The cases just reviewed cannot be differentiated from the one at bar on the ground that, since in those instances both parents sued, the actions were joint, and therefore, one plaintiff not being entitled to recover, the other could not, for in the last case only one parent appeared as a plaintiff, and in *Kerr v. Pennsylvania R. Co.* 169 Pa. 95, 32 Atl. 96, we held that, in cases of this character, the right of action was not jointly in the parents, in the sense that one could never sue to recover for the death of a child without the other joining, but that, where the circumstances justified it, one parent might sue alone. This being so, the joinder of the two parents would not make a suit a joint action in the technical sense of that L.R.A.1915E.

term; the mere fact that two join as plaintiffs does not fix the status of the action—there must be a joint right to constitute a common suit a joint action. If, however, the cases cited are attempted to be explained on the theory that they were suits to enforce a joint right, that would not help the present plaintiff, for where a joint right exists each party is bound by the acts of the other, on the theory of implied authority, to such an extent that one cannot rid himself of the consequences of the other's acts within the scope of the implied authority; hence, where there is a joint right which begets joint obligations, a failure to perform these obligations by either party will affect the other, even though the suit to enforce the right may be brought by one alone; and the fact that in this particular case the other party lost his life in the course of his failure cannot change the rule. In the cases cited, we do not appear to have discussed the theory upon which one parent was held responsible for the negligent acts of the other, but there is nothing in any of them to indicate that the technical rules applicable to joint actions were at all considered. The true doctrine, and the one upon which the cases, no doubt, turned, is that, while the family relation exists, each parent at all times impliedly authorizes the other to act for him or her in the common care and control of their children, so that each becomes responsible for the acts of the other in that respect, and this implied authority does not rest upon the legal fiction of the unity of husband and wife, but is founded upon the family relation. As before said, the fact that, in the case at bar, the plaintiff's husband happened to have been killed in the very accident wherein his own negligence contributed to the death of their child can make no difference in the decision of the case; his carelessness constituted a proximate cause of the child's death, and it is imputed to and bars his wife the same as though he were alive and a party to the present action.

Moreover, the fact that the plaintiff rests upon a statutory right to bring her suit can in no way affect the conclusion reached. In several of the cases cited the right to prosecute the action rested upon the same statutory authority invoked in the present case, and in each of these a recovery was denied on the theory of imputed negligence. There was no right at common law to recover damages for negligence causing death. *Ibid.* This was first conferred in Pennsylvania by the act of April 15, 1851 (P. L. 669, §§ 18, 19), followed by the act of April 26, 1855 (P. L. 309), which specifies the persons now entitled to recover. While the statutes in

question give the right to pursue the wrongdoer after the death of a person injured, and designate who may bring suit and how the money recovered shall be divided, yet in each instance the foundation of the claim and the defenses which may be interposed are the same as though the victim of the trespass had not died. In *Hill v. Pennsylvania R. Co.* 178 Pa. 223, 230, 35 L.R.A. 190, 56 Am. St. Rep. 754, 35 Atl. 997, 999, we said: "Without these acts the cause of action for a specific act of negligence would have died with the person, and there could then be no recovery by anybody; but . . . under the acts, the action does not die, but survives to certain persons named. But it is an action for the same injury, and upon the basis of the same negligence. The acts accomplish the preservation of a right of recovery, but they do not give, or assume to give, another and additional remedy."

Also see *Hughes v. Delaware & H. Canal Co.* 176 Pa. 254, 260, 35 Atl. 190.

In *Bradford v. Downs*, 126 Pa. 622, 17 Atl. 884, a suit by the father, the injured child died subsequent to the commencement of the action, and after the statute of limitations had run the court permitted an amendment of the declaration, which comprehended a claim for loss of service occasioned by the death. We held that the cause of action remained the same, and that the amendment was no departure. All of which means that when a suit such as we have before us is brought by parents after the death of a child, the cause of action is just the same as though the victim had been injured and had not died; it is not on the minor's behalf to recover for the value of his life, but it is an independent action to regain the pecuniary damage suffered by the parents (*Pennsylvania R. Co. v. Zebe*, 33 Pa. 318, 6 Am. Neg. Cas. 232; *Pennsylvania R. Co. v. Keller*, 67 Pa. 300, 306; *Pennsylvania Co. v. James*, 81* Pa. 194); and in cases of this character, the fact that the statute keeps alive the cause of action, and confers the right to sue upon the parents, in no sense or manner relieves such parents from the application of the doctrine of imputed negligence, when, as here, one of them through his own carelessness has brought about or contributed to the loss in suit.

It would serve no useful purpose to review and distinguish the cases from other jurisdictions which hold that the contributory negligence of one parent does not bar the right of the other to recover for the death of a child; it is sufficient to say that such is not the Pennsylvania rule, and that most of these decisions from other states rest upon the peculiar phraseology of, and the construction put upon, their particular statutes. 7 Am. & Eng. Enc. Law, 2d ed. L.R.A.1915E.

445, states the general rule thus: "Imputable contributory negligence which will bar the plaintiff from recovery exists when the plaintiff, although not chargeable with personal negligence, has been, by the negligence of a person in privity with him, and with whose fault he is chargeable, exposed to the injury which he received through the negligence of the defendant",—and this was quoted with approval and applied in *Gress v. Philadelphia & R. R. Co.* supra, 228 Pa. 486. 29 Cyc. 555, thus states the rule: "While in most jurisdictions negligence of parents, or others *in loco parentis*, cannot be imputed to a child to support the plea of contributory negligence, when the action is for his benefit, yet when the action is by the parent in his own right, or for his benefit . . . the contributory negligence of the parent may be shown in evidence in bar of the action, and this although the action is brought by one parent and the negligence was that of the other."

And in *Pennsylvania Co. v. James*, 81* Pa. 202, we said: "A distinction is taken between the case of a father or mother bringing an action for the death of a child and a child bringing an action for personal injury. In the former the contributing negligence of the parent may be used in defense."

We can but conclude that the contributory negligence of the father was properly allowed as a complete defense in the present case.

The assignment of error is overruled, and the judgment is affirmed.

Mestrezat, J., dissenting:

This is an action brought by a mother to recover damages for the death of her son. Ignotto Darbrinsky and his ten-year-old son, Harry, were killed on December 13, 1909, as the result of a collision of a wagon driven by the father, with the defendant's train at a grade crossing in Lawrence county. At the time of the accident the son and his elder brother were sitting in the rear of the wagon. Lena Darbrinsky, the widow of Ignotto and the mother of Harry, brought suits for the death of her husband and son, and it clearly appeared on the trial that the defendant was negligent, but the cases were nonsuited on the ground that the father's negligence contributed to his own and his son's death. The plaintiff appealed in each case, and the majority of this court sustains the judgments of the common pleas. I do not agree that the evidence warranted the court in declaring Ignotto Darbrinsky guilty of negligence as a matter of law, but if it be conceded that his negligence was so clear as to authorize the court in so holding, I cannot assent to the proposition

that it prevents the plaintiff from recovering for the death of her son in this action. In other words, I do not agree that in an action brought under our statutes by a mother for the death of her son, the negligence of the father contributing to the death of their son can be imputed to the mother and thereby defeat the action. That is the question involved in this case, and it is answered in the affirmative by the majority of the court.

An action did not lie at common law for death caused by the negligence or violence of another, but the right to bring such action has been conferred by statute in most, if not all, the states of this country. The party seeking to recover must rely upon the statute which confers the right of action and declares who shall be the beneficiaries. In this state, the act of April 15, 1851 (P. L. 669), authorizes the widow or, in case there is none, the personal representative, of the deceased, to maintain an action whenever death is caused by unlawful violence or negligence. This was followed by the act of April 26, 1855 (P. L. 309), which declares that the persons entitled to recover the damages shall be the husband, widow, children, or parents of the deceased, and that the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and "that without liability to creditors." These statutes have been frequently construed by this court. The act of 1855 does not confer the right to bring an action for death caused by negligence, but simply determines the persons entitled to the damages for what the act of April 15, 1851 (P. L. 669), declared to be a tort. If there is no widow or children, the right of action is in the parents, and as the right is joint, both must join in the suit (Pennsylvania R. Co. v. Zebe, 37 Pa. 420); but if either the father or mother be dead, the right of action is in the survivor, and he or she has the sole right to bring the suit (Pennsylvania R. Co. v. Bantom, 54 Pa. 495). The damages recoverable by the widowed mother is estimated by the same standard as those recoverable by the father when he sues alone. *Ibid.* She claims through her child, not through her husband, and sues in her own right and for a cause of action conferred on her by the statute. She is not in privity with her husband as to the right conferred by the statute, and is not chargeable with his dereliction of duty. The pecuniary loss resulting from the child's death was wholly hers. *Kerr v. Pennsylvania R. Co.* 169 Pa. 95, 97, 32 Atl. 96. Her husband never had a right of action for his child's death. He was dead when the tort was consummated, which was the statutory basis of his widow's L.R.A.1915E.

right to sue. The damages are not a part of the estate of the deceased, nor are they recovered as such from the wrongdoer. They are compensation for injuries resulting to the person to whom the right of action is given, and can only be recovered when such injury is shown by the beneficiary, and to the extent of the pecuniary loss sustained by him. *Huntingdon & B. T. Road & Coal Co. v. Decker*, 84 Pa. 419. The parties entitled to the estate of the deceased have no claim or right to the amount recovered, nor have his creditors, the act declaring specifically that the sum recovered shall go to the statutory beneficiaries in the proportion they would take his personal estate in case of intestacy, and "that without liability to creditors." The only party interested, therefore, in the result or in the amount of damages recovered in this action, is the plaintiff, the mother of the deceased.

The mother, the plaintiff, can only be held responsible for such negligence contributing to the death of the child as was committed by herself or by her authorized agent or servant. If she had put the child in the custody or care of another whose negligence contributed to its death, her right of action would have been barred. The act of her agent or servant would, in law, have been her act, and would have prevented a recovery. It is contended, however, that by reason of the marital relation existing between the husband and wife, the former's negligence is imputable to the latter, but I submit that the proposition is clearly erroneous. The father was not the agent of the mother in the care and control of the child, nor intrusted with the custody of the child by the mother at the time of the accident. He had the right to its custody and control, and was exercising that right when the collision occurred which resulted in the child's death. If, therefore, the mother is to be deprived of the right to recover by reason of the negligence of the father, she will be held responsible for the negligent act of another who was not her agent or servant and over whom she had no control whatever. We are not familiar with any principle of law which sustains the proposition. If the husband's estate or his heirs, taking through him, were entitled to the damages recovered, or had any interest therein, his negligent act could be invoked to prevent a recovery, but, as already pointed out, the statute declares that, under the circumstances of this case, the mother alone is the beneficiary of the amount recovered under its provisions. She does not sue or take the money recovered by reason of the marital relation with her husband, or by reason of being his widow, or through him in any way whatever, but distinctly and solely by reason of the

right conferred upon her by the statute. The negligence of the father cannot be imputed to the child (*O'Toole v. Pittsburgh & L. E. R. Co.* 158 Pa. 99, 22 L.R.A. 606, 38 Am. St. Rep. 830, 27 Atl. 737; *Walsh v. Altoona & L. V. Electric R. Co.* 232 Pa. 479, 81 Atl. 551), and, of course, its tender years relieve it from the charge of negligence. It clearly could have maintained an action for injuries resulting from the collision had it survived. The mother's right of action, therefore, against the defendant company for the death of her child, is clear unless, as held by the majority of the court, her husband's negligent act, committed in her absence and without her knowledge, can be imputed to her, solely by reason of his implied agency in the care and control of the child growing out of the marital relation.

It is contended that the present case in which the mother brings the suit cannot be differentiated from the cases where the actions were brought by both parents and a recovery was defeated by the negligence of one of the plaintiffs. This contention is manifestly erroneous in view of the provisions of the statute conferring the right of action and the purpose of the legislation. The statutory cause of action is "unlawful violence or negligence" resulting in death, and the persons entitled to recover the damages are "the husband, widow, children, or parents of the deceased." We have frequently ruled, and it is a necessary conclusion from the statute, that in the case of the death of an infant caused by negligence, the action must be in the names of both parents, if they are living. Both parents are grouped among the persons entitled to recover damages, and by necessary implication the same damages, or damages estimated by a common standard. *Pennsylvania R. Co. v. Bantom*, 54 Pa. 495, 497. The action is joint, and the recovery is also joint, and inures to the benefit of both parents. It is therefore clear, under all the authorities, that the negligence of either plaintiff would defeat the action. It is settled law that where a right of action is given jointly to several parties, and a joint suit is brought to enforce it, a meritorious defense against one plaintiff will bar the action as to the other plaintiffs. *McDonald v. Simcox*, 98 Pa. 619; *McIntosh v. Dierken*, 222 Pa. 612, 72 Atl. 232. The purpose of the statute was to create a right of action in the designated beneficiaries, unknown to the common law, and the right can be defeated only by some act of the party or parties entitled to it. The right to sue is joint, and is in both parents, if living; and hence the negligence of both or either necessarily defeats it. If, however, the right is conferred on one of the parents where the other is dead,

as we have repeatedly held it is, then his or her right to sue and recover is not barred by any defense which could be successfully invoked against the dead parent if he or she were living and had joined in the suit. It is apparent, therefore, that the cases which were brought by both parents in which the negligence of one or both plaintiffs defeated a recovery are without force as a precedent in cases where the negligent parent is dead and the action is brought by the other parent.

Kerr v. Pennsylvania R. Co. 169 Pa. 95, 32 Atl. 96, was an action brought by a married woman who had been deserted by her husband, to recover damages for the death of their minor child, and the statement averred that the plaintiff was the only person entitled to recover for his death, as her husband, the father of the boy, had deserted her and their son more than eight years before the commencement of the suit, and through drunkenness and profligacy had failed and refused to provide in any way for either of them. We sustained her right to sue without joining her husband, which was the only question in the case, solely on the ground that the act of May 4, 1855 (P. L. 430), conferred on her the common-law rights and duties of her husband in relation to the child, and "her legal relation to her son [under that statute] was the same as if her husband had been dead." We did not and could not hold that the right of action was not joint and given to the parents when both are living, because the statute declares that it is, and in *Pennsylvania R. Co. v. Zebe*, 37 Pa. 420, we distinctly negated the proposition "that the father alone had a vested legal pecuniary interest in the services of the deceased; and the mother had no such interest therein," and held that "the suit was properly brought in the name of the father and mother of the child." We recognized this as the proper construction of the statute in the *Kerr Case*, and said: "The force of the objection that the action cannot be maintained by one of the parents is in the fact that the right is purely statutory and is given to both."

The question raised here is one of first impression in this state on the facts presented in the record, but the principle controlling its solution is settled by decisions in this and other jurisdictions. The very recent case of *Senft v. Western Maryland R. Co.* 246 Pa. 446, 92 Atl. 553, is a much stronger case for the defendant on the facts than the case at bar, and we there held that the negligence of the husband could not be imputed to his wife, who brought the suit to recover for injuries sustained in a collision by defendant's train with a one-seated automobile

in which the plaintiff and her husband were riding. The husband was driving the machine, and his wife was seated at his side. He was clearly guilty of negligence, but the court instructed the jury that his negligence could not be imputed to his wife. The jury found that the plaintiff was not negligent, and returned a verdict for her. The judgment entered on the verdict was sustained by this court, the chief justice who wrote the *per curiam* saying: "The negligence of the plaintiff's husband in not stopping before attempting to cross the track could not be imputed to her."

The doctrine announced by the majority of the court finds no support in the decisions in other jurisdictions. The right to recover for death caused by a wrongful act is of statutory origin, and the first statute conferring the right was Lord Campbell's act (Stat. 9 and 10 Vict.), enacted in England in 1846, and similar statutes have generally been adopted in the United States. *Pennsylvania R. Co. v. Adams*, 55 Pa. 499, 501; *Deni v. Pennsylvania R. Co.* 181 Pa. 525, 528, 59 Am. St. Rep. 676, 37 Atl. 558, 3 Am. Neg. Rep. 91. The decisions under the statutes of other states, while not binding authority here, are singularly unanimous in opposition to the conclusion of this court. A few of them may be cited. *Atlanta & C. Air Line R. Co. v. Gravitt*, 93 Ga. 369, 26 L.R.A. 553, 44 Am. St. Rep. 145, 20 S. E. 550, was an action brought by a mother to recover damages for the death of her minor son of tender years, caused by the negligence of the defendant company. It seems that at the time of the accident the custody of the child had been intrusted by the father to another whose negligence contributed to the child's death. It was held that the custodian was the representative and agent of the father, and that his negligence was the father's negligence and would prevent a recovery by the latter, but that, in a suit by the mother in her own right, as authorized by the statute, the negligence of the father was not chargeable to the mother merely because of the conjugal relation existing between them. In *Louisville, N. A. & C. R. Co. v. Creek*, 130 Ind. 139, 14 L.R.A. 733, 29 N. E. 481, it was held that the negligence of a husband will not, merely because of the marital relation, be imputed to his wife, who is injured while riding with him. In that case it is said: "A husband and wife may undoubtedly sustain such relations to each other in a given case that the negligence of one will be imputed to the other. The mere existence of the marital relation, however, will not have that effect. In our opinion there would be no more reason or jus-

tice in a rule that would, in cases of this character, inflict upon a wife the consequences of her husband's negligence, solely and alone because of that relationship, than to hold her accountable at the bar of Eternal Justice for his sins because she was his wife."

In the *Gravitt Case*, *supra*, the above extract from the opinion in the *Creek Case* is quoted, and the court adds: "This admirable statement of the law, we think, should be decisive of the question with which we are now dealing."

Wolf v. Lake Erie & W. R. Co. 55 Ohio, 517, 36 L.R.A. 812, 45 N. E. 708, was an action brought by the administrator of a deceased child under a statute which provided that every action for death shall be for the exclusive benefit of the wife or husband and children, or, if there be none, then for the parents and next of kin of the person whose death shall be so caused. It was held that the defense of contributory negligence is available against the beneficiaries, but the contributory negligence of some of the beneficiaries will not defeat the action as to others who are not guilty of such negligence. In that case the beneficiaries were the father and mother of the child, and the court said, in remanding the case for a new trial, that the father might recover if free from negligence, although the mother would not be entitled to recover if guilty of negligence which contributed directly to the child's death. In *Donk Bros. Coal & Coke Co. v. Leavitt*, 109 Ill. App. 385, it was held that where the death statute gives the benefit of an action to a father and mother of a deceased child, the right of the father to recover is not affected by the negligence of his wife to which he was not a party. The court says: "Appellee, the father, was not present. His absence was in the discharge of duties which he owed to his wife and child no less than toward appellant. There is no way of charging him with evidence even tending to prove his contributory negligence. He does not derive his right in the premises through the acts or omissions of his wife, but through the rights of his child and the negligence of appellant. This precise question has been determined by the supreme court of Ohio in the case of *Cleveland, C. & C. R. Co. v. Crawford*, 24 Ohio St. 631, 15 Am. Rep. 633, 12 Am. Neg. Cas. 419."

See *Phillips v. Denver City Tramway Co.* Ann. Cas. 1914B, 29, and note, (53 Colo. 458, 128 Pac. 460), citing the decisions on the subject in the several jurisdictions.

I would reverse the judgment and grant a new trial.

TENNESSEE SUPREME COURT.

WOODALL HOGAN, Appt.,
v.
NASHVILLE INTERURBAN RAILWAY.

(131 Tenn. 244, 174 S. W. 1118.)

Carrier — duty to transport cripple.

1. A railway company cannot refuse to transport an unattended young man merely because, by reason of infantile paralysis, he is obliged to use crutches, if he is capable of caring for himself without further assistance than the carrier is accustomed to afford passengers generally.

Same — statutory exception — repeal.

2. A statute exempting railroad companies from the duty of carrying persons whom they choose for any reason not to carry is abrogated by a subsequent statute declaring that all railway companies shall be common carriers; and making it unlawful for them to subject any person to an undue or unreasonable prejudice or disadvantage.

Injunction — against exclusion from cars.

3. Injunction lies to prevent a carrier from excluding a man from transportation upon its cars as a persecution for having brought a suit against it for damages.

Equity — jurisdiction to prevent continuing conduct.

4. Equity has jurisdiction to prevent a carrier from excluding from its cars a per-

son who has occasion to use them in his daily travel between his home and place of business, to prevent a multiplicity of suits.

(March 20, 1915.)

A PPEAL by complainant from a decree of the Chancery Court for Davidson County sustaining a demurrer to a bill filed to enjoin defendant from excluding plaintiff from transportation upon its cars. Reversed.

The facts are stated in the opinion.

Mr. Fitzgerald Hall, for appellant:

When a person's physical condition is neither dangerous nor conducive to substantial inconvenience, the mere fact that such condition is not perfect is no ground for refusal by a common carrier to transport such person as a passenger upon compliance or offer to comply by him with all the usual conditions of becoming a passenger.

Cincinnati, L. & A. Electric Street R. Co. v. Lohe, 68 Ohio St. 101, 67 L.R.A. 637, 67 N. E. 161, 13 Am. Neg. Rep. 663; Birmingham Mineral R. Co. v. Jacobs, 92 Ala. 187, 12 L.R.A. 830, 9 So. 320; Louisville & N. R. Co. v. Anchors, 114 Ala. 492, 62 Am. St. Rep. 116, 22 So. 279, 3 Am. Neg. Rep. 125; East Tennessee & G. R. Co. v. Nelson, 1 Coldw. 283; Memphis News Pub. Co. v. Southern R. Co. 110 Tenn. 684, 63 L.R.A.

Note. — Duty of carrier to accept as a passenger one physically or mentally disabled.

This note is supplementary to the note to Connors v. Cunard S. S. Co. 26 L.R.A. (N.S.) 171, where the earlier cases are collected.

As to right of carrier to reject passenger because of his bad character or misconduct on previous occasion, see note to Reasor v. Paducah & I. Ferry Co. 43 L.R.A. (N.S.) 820.

As to right of carrier to reject persons having a contagious disease, see note to Pullman Co. v. Krauss, 4 L.R.A. (N.S.) 103.

For notes as to duty toward sick, disabled, or intoxicated passenger, see Index to L.R.A. Notes, § 39, "Carriers."

Generally.

Supplementing note in 26 L.R.A. (N.S.) 171.

The court in Edgerly v. Union Street R. Co. 67 N. H. 312, 36 Atl. 558, in considering a carrier's right to eject a disorderly passenger, stated that it is the doctrine of all the adjudications and authorities that a carrier of passengers has the power of refusing to receive as a passenger, or to expel, anyone who is drunk, disorderly, or riotous, or who so demeans himself as to endanger or interfere with the comfort and convenience of other passengers; and that this is not only the right of the carrier, but is its duty.
L.R.A.1915E.

And a similar statement was made in Bogart v. Illinois C. R. Co. 144 Ky. 649, 36 L.R.A. (N.S.) 337, 139 S. W. 855, 1 N. C. C. A. 651, where the right to recover for the death of a passenger who contracted measles from another passenger was involved.

Insane persons.

Supplementing note in 26 L.R.A. (N.S.) 172.

In Louisville & N. R. Co. v. Brewer, 147 Ky. 166, 39 L.R.A. (N.S.) 647, 143 S. W. 1014, Ann. Cas. 1913D, 151, where a woman sought to recover for an injury which she alleged resulted from fright at a lunatic who was traveling on the same train with her, the court stated that a carrier cannot absolutely refuse transportation to insane persons, but that it has a right to require that they be in charge of an attendant. (Generally as to liability for frightening passenger, see note in 45 L.R.A. (N.S.) 433.)

Intoxicated persons.

Supplementing note in 26 L.R.A. (N.S.) 173.

In Thayer v. Old Colony Street R. Co. 214 Mass. 234, 44 L.R.A. (N.S.) 1125, 101 N. E. 368, Ann. Cas. 1914B, 865, in an action to recover for an injury resulting to a passenger from the ejection of an intoxicated passenger, the court stated that a carrier may lawfully exclude from its car

150, 75 S. W. 941; Zachery v. Mobile & O. R. Co. 75 Miss. 746, 41 L.R.A. 385, 65 Am. St. Rep. 617, 23 So. 434; Illinois C. R. Co. v. Smith, 85 Miss. 349, 70 L.R.A. 642, 107 Am. St. Rep. 293, 37 So. 643; Croom v. Chicago, M. & St. P. R. Co. 52 Minn. 296, 18 L.R.A. 602, 38 Am. St. Rep. 557, 53 N. W. 1128, 4 Am. Neg. Cas. 254; Wood's Browne, Carr. § 494; Hutchinson, Carr. 3d ed. §§ 512, 963, 966; Mathew v. Wabash R. Co. 115 Mo. App. 468, 78 S. W. 271, 81 S. W. 646, affirmed in 199 U. S. 605, 50 L. ed. 329, 26 Sup. Ct. Rep. 752.

A person being refused transportation by a common carrier without just reason can enjoin such illegal refusal to carry.

Weaver v. Davidson County, 104 Tenn. 320, 59 S. W. 1105; Memphis News Pub. Co. v. Southern R. Co. 110 Tenn. 687, 63 L.R.A. 150, 75 S. W. 941; Scofield v. Lake Shore & M. S. R. Co. 43 Ohio St. 571, 54 Am. Rep. 846, 3 N. E. 907; Gibson, Suit, in Ch. § 804; 1 Pom. Eq. Jur. 3d ed. § 338; 5 Pom. Eq. Jur. § 263; 6 Pom. Eq. Jur. § 633.

The act of 1875, chapter 130, Shannon's Code, § 3046, has been repealed by subsequent statute, and also violates the Constitutions of the state of Tennessee and of the United States. It is therefore null and void, and furnishes no protection to those who relied upon it.

persons who, from intoxication or by the use of indecent or profane language, might cause annoyance and discomfort to other passengers.

The right of a carrier to refuse to accept a drunken person as a passenger was also recognized in St. Louis, I. M. & S. R. Co. v. Dare, 99 Ark. 486, 138 S. W. 1009.

And in Chesapeake & O. R. Co. v. Gatewood, 155 Ky. 102, 159 S. W. 660, it was held that a carrier has the right to prevent a person entering a train as a passenger where he is so intoxicated as to affect his conduct, or to make him offensive to other passengers on the train, or to render him unable to care for himself.

And in Chesapeake & O. R. Co. v. Selsor, 142 Ky. 163, 33 L.R.A. (N.S.) 165, 134 S. W. 143, it was held that if a person, when he attempts to board a train as a passenger, is so far intoxicated as to affect his conduct, the carrier's servant has a right to refuse to receive him as a passenger, although he has bought a ticket.

And it was held that § 806, Ky. Stat. (Russell's Stat. § 5350), relating to the ejection of passengers, applied to those who have been received as passengers on a train, and has no application to persons who present themselves to be received as passengers, and does not change the common-law rule as to what persons the carrier is bound to receive. Chesapeake & O. R. Co. v. Selsor, *supra*.

In Parks v. Delaware, L. & W. R. Co. L.R.A.1915E.

Gribble v. Wilson, 101 Tenn. 612, 49 S. W. 736; Arnold v. Knoxville, 115 Tenn. 195, 3 L.R.A. (N.S.) 837, 90 S. W. 469, 5 Ann. Cas. 881; State ex rel. Pitts v. Nashville Baseball Club, 127 Tenn. 293, 154 S. W. 1151, Ann. Cas. 1914B, 1243; Henley v. State, 98 Tenn. 669, 39 L.R.A. 126, 41 S. W. 352, 1104; Ballentine v. Pulaski, 15 Lea, 633; Poe v. State, 85 Tenn. 495, 3 S. W. 658; Hunter v. Memphis, 93 Tenn. 571, 26 S. W. 828; Marr v. Enloe, 1 Yerg. 452; State v. Armstrong, 3 Sneed. 654; Memphis City R. Co. v. Memphis, 4 Coldw. 414; Fogg v. Union Bank, 1 Baxt. 437; Waterhouse v. Cleveland Public Schools, 9 Baxt. 398; Tillman v. Cocke, 9 Baxt. 429; Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 174, 34 L.R.A. 725, 36 S. W. 1041; State v. Staten, 6 Coldw. 233; Lawyers' Tax Cases, 8 Heisk. 638; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Vanzant v. Waddel, 2 Yerg. 270; Wally v. Kennedy, 2 Yerg. 554, 24 Am. Dec. 511; Jones v. Perry, 10 Yerg. 71, 30 Am. Dec. 430; Budd v. State, 3 Humph. 491, 39 Am. Dec. 189; Alexandria v. Dearmon, 2 Sneed, 122; State use of Roane County v. Burnett, 6 Heisk. 186; State v. Rauscher, 1 Lea, 97; Davis v. State, 3 Lea, 379; Hatcher v. State, 12 Lea. 370; Woodard v. Brien, 14 Lea, 523; Stratton Claimants v. Morris Claimants (Dibrell v. Lanier) 89 Tenn. 500, 12

85 N. J. L. 577, 89 Atl. 983, affirmed in 86 N. J. L. 696, 92 Atl. 1087, where a cripple whose appearance gave the impression that he was intoxicated sought to recover because the conductor refused to allow him to enter a day coach and compelled him to go to the smoker, the court said: "Whether an intoxicated person is entitled to be carried in a passenger coach or be not received at all will vary with varying circumstances. If intoxication is not to such an extent as to make the person's presence disgusting and objectionable to other travelers, or such as to substantially interfere with the comfort of passengers, then it seems he cannot be discriminated against."

Cripples.

The decision in HOGAN v. NASHVILLE INTERURBAN R. Co. appears to be the first which has passed on the duty of a carrier to accept a lame person as a passenger. It will be noticed that the court there holds that a carrier has no right, because of his physical infirmities, to refuse to accept as a passenger a person twenty-six years of age who has since infancy been lame and obliged to use two crutches to walk, but who for ten years has continually traveled on trains, street cars, etc., alone and unattended, and who is not, when ordinary care is exercised, in any more danger of injury than other persons. J. T. W.

L.R.A. 70, 15 S. W. 87; *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 257, 28 L.R.A. 796, 32 S. W. 5; *Henley v. State*, 98 Tenn. 665, 39 L.R.A. 126, 41 S. W. 352, 1104; *State ex rel. Astor v. Schlitz Brewing Co.* 104 Tenn. 71, 78 Am. St. Rep. 941, 59 S. W. 1033; *Condon v. Maloney*, 108 Tenn. 95, 65 S. W. 871; *Harding v. Goodlett*, 3 Yerg. 41, 24 Am. Dec. 546; *Memphis Freight Co. v. Memphis*, 4 Coldw. 419; *Clack v. White*, 2 Swan, 549; *Ryan v. Louisville & N. Terminal Co.* 102 Tenn. 120, 45 L.R.A. 303, 50 S. W. 744; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Brown v. Haywood*, 4 Heisk. 357; *Ho Ah Kow v. Nunan*, 5 Sawy. 552, Fed. Cas. No. 6,546; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676, 3 Am. Crim. Rep. 547; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Pembina Consol. Silver Min. Co. v. Pennsylvania*, 125 U. S. 188, 31 L. ed. 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 220, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Savings & L. Soc. v. Multnomah County*, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 105, 43 L. ed. 913, 19 Sup. Ct. Rep. 609; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Cooley*, Const. Lim. p. 557; *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60; *Lynn v. Polk*, 8 Lea, 130; *Girdner v. Stephens*, 1 Heisk. 280, 2 Am. Rep. 700.

Messrs. Pitts & McConnico, for appellee:

Under the common law a common carrier is not required to receive and carry indiscriminately all persons of all classes.

5 Am. & Eng. Enc. Law, 2d ed. 537 et seq.; *Columbus, C. & I. C. R. Co. v. Powell*, 40 Ind. 37, 3 Am. Neg. Cas. 100; *Atchison, T. & S. F. R. Co. v. Weber*, 33 Kan. 543, 52 Am. Rep. 543, 6 Pac. 877; *Cincinnati, I. St. L. & C. R. Co. v. Cooper*, 120 Ind. 469, 6 L.R.A. 241, 16 Am. St. Rep. 334, 22 N. E. 340, 3 Am. Neg. Cas. 251; *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89, 9 Am. Neg. Cas. 431; *Croom v. Chicago, M. & St. P. R. Co.* 52 Minn. 296, 18 L.R.A. 602, 38 Am. St. Rep. 557, 53 N. W. 1128, 4 Am. Neg. Cas. 254; *Meyer v. St. Louis, I. M. & S. R. Co.* 4 C. C. A. 221, 10 U. S. App. 677, 54 Fed. 116; *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. 262, 20 L. ed. 423; *Louisville, N. & G. S. R. Co. v. Fleming*, 14 Lea, 128; *Willetts v. Buffalo & R. R. Co.* 14 Barb. 585; *New Orleans, J. & G. N. R. Co. v. Statham*, 42 Miss. 607, 97 Am. L.R.A. 1915F.

Dec. 478; *Sheridan v. Brooklyn City & N. R. Co.* 36 N. Y. 39, 93 Am. Dec. 490, 9 Am. Neg. Cas. 619.

Williams, J., delivered the opinion of the court:

This case stands for trial on bill of complaint and a demurrer thereto; the appeal being that of complainant, Hogan, from a decree of the chancery court of Davidson county, sustaining the demurrer.

The complainant in his bill alleges that he is about twenty-six years of age, and resides near the city of Nashville; that he is a student and instructor in Vanderbilt University, in that city, and has been accustomed to use the cars of the defendant company almost daily since the line of that company was constructed for transportation into the city; that he has since infancy been lame as a result of infantile paralysis, and has been forced to walk ever since with two crutches; that for the last ten years he has continually traveled alone and unattended, riding trains, street cars, inter-urban cars, and goes everywhere a sound and healthy man can go; that in the use of defendant company's cars he was never injured but once, and that then his injury was due to the gross negligence of the servants of defendant; that in so riding he has never caused any trouble, or asked or received any assistance; that he "acts as other passengers, and has been treated as such;" that when ordinary care is exercised "there is no more danger of injuring him than any other person;" that, following the injury above referred to, complainant brought suit against defendant; that thereafter rumors reached him that the defendant was about to withdraw from him the right of passage on its cars; that yet later a communication was received by him from the company's general manager, as follows:

Nashville, Tenn., April 23, 1914.

Mr. Woodall Hogan,

R. F. D. No. 2,

Brentwood, Tenn.

Dear Sir:—

We regret to notify you that on and after May 1st, 1914, we will decline to convey you as a passenger on our line, unless you are at all times accompanied by an attendant. Your physical infirmity is of such a nature as to cause a continued source of possible injury to yourself and as a possible liability as against us. You are also advised that our trainmen and ticket agents will be notified not to receive you as a passenger unless you are accompanied by an attendant. We regret that conditions are such as require this action but deem it nec-

essary, as well for your protection as for the protection of ourselves.

Very truly yours,
[Signed] Meade Frierson,
General Manager.

The bill of complaint further recites: That on May 1, 1914, complainant, tendering the usual fare, demeaning himself properly, and offering to comply with all the usual and necessary conditions to become a passenger, presented himself to defendant for carriage on its line, but was absolutely refused; that in his work he is compelled to go into Nashville every day, and that his only means of transportation is defendant's line; that defendant is a common carrier.

That the refusal to receive him as a passenger is a persecution of complainant for not dropping the above-mentioned suit, and an attempted intimidation, with a view to forcing him to abandon his legal rights, and arbitrary and in violation of defendant's charter.

The demurrer interposed set out the following grounds:

(1) That the bill discloses such physical infirmity on the part of complainant as that it was not a part of defendant's duty at common law to receive him for passage.

(2) That by force of a valid statute defendant had a right to decline to carry complainant for any reason whatever deemed sufficient by it.

(3) That there is no case made for resort to injunctive process; complainant having an ample remedy at law.

The chancellor sustained the several grounds of the demurrer.

The rule, broadly stated, is that any person desiring transportation shall be entitled to be received as a passenger on payment of the fare, notwithstanding a seeming incapacity on his part to take care of himself, if, in point of fact, he "is competent to travel alone without requiring other care than that which the law requires the carrier to bestow upon all his passengers alike." 2 Hutchinson, Carr. 3d ed. § 966.

In the application of the rule to concrete instances, the authorities are not in exact agreement, but the points of difference are narrow ones.

The disability claimed to disqualify may be mental or physical. Thus, while a common carrier may not lawfully refuse absolutely to carry persons who are insane, it may do so where the proposing passenger is not properly attended or guarded. *Owens v. Macon & B. R. Co.* 119 Ga. 230, 63 L.R.A. 946, 46 S. E. 87; *Meyer v. St. Louis, I. M. & S. R. Co.* 4 C. C. A. 221, 10 U. S. App. 677, 54 Fed. 116. L.R.A.1915E.

In respect to physical disability, the carrier is not under obligation to receive as a passenger a person who, without an attendant, is unable, because of extreme age or tender years, to care for himself; and the same test applies to other physical limitations. The carrier may refuse to carry unless the applicant be in charge of one fit to serve as attendant.

The clearest and most comprehensive statement of the rules governing is that of the supreme court of Mississippi in a series of cases dealing with blind persons who offered themselves for passage. Blindness is by that court held to be prima facie a disqualification; that presumed the affliction of blindness unfits a person for safe travel by railway, if unaccompanied; that a showing of experience or ability to travel alone on the part of the offerer, brought to the knowledge of the railroad company's agent, may serve as a basis of liability on the part of the carrier for a refusal to accept him.

That court, on a point pertinent to the case in hand, said: "We are asked to hold that a regulation that no blind person whatever shall travel unaccompanied by an assistant, no matter how skilful or expert a traveler he may have been, or may be, and no matter how perfectly qualified in every other respect to travel on cars unaccompanied, is a reasonable rule. This cannot be sound. Each case must depend on its own facts, and the reasonableness of the refusal to sell the blind person a ticket must, on principle, depend not on a universal, arbitrary, and undiscriminating rule like this one, but on the capacity to travel unaccompanied of the particular blind person."

It was therefore held, where a blind person sued, and in his declaration averred that for several years he had traveled on defendant company's cars in the transaction of current business, and had never given cause of complaint to any of its servants, and that no objection had been offered to his riding on the company's train before the date of the exclusion complained of, that this statement of his cause of action was not demurrable, the court holding that it was sufficiently shown that plaintiff was able to take care of himself as a passenger. *Zachery v. Mobile & O. R. Co.* 74 Miss. 520, 36 L.R.A. 546, 60 Am. St. Rep. 529, 21 So. 246; *Id.*, 75 Miss. 746, 41 L.R.A. 385, 65 Am. St. Rep. 617, 23 So. 434; *Illinois C. R. Co. v. Smith*, 85 Miss. 349, 70 L.R.A. 642, 107 Am. St. Rep. 293, 37 So. 643. And see also *Illinois C. R. Co. v. Allen*, 121 Ky. 138, 89 S. W. 150, 11 Ann. Cas. 970.

We have not been cited any case that deals with a disability claimed to exist be-

cause of lameness or infirmity of the two lower limbs, making the use of crutches necessary. But we think it clear that the reasoning in behalf of disqualification of such a person for acceptance must be less obvious than in the case of a blind person. It is a matter of common knowledge that, where a man is deprived of the use of his lower limbs, the enforced constant use of his arms increases their strength, enabling him, especially in the case of a youth, to handle himself with considerable facility and safety on crutches. Such persons are seldom attended, and seldom need to be. To deny the right to be so carried to such a complainant is shown to be by the bill of complaint would be to put an unwarranted handicap on a class of men capable of being serviceable to society, and therefore on society itself, which the defendant company, if a common carrier, is under obligation to serve.

We readily decline to give assent to the contention of the railway company that, as a proposition of law, a man may be denied passage merely because fate has placed on him the necessity of using two crutches in locomotion; and we hold that the bill of complaint makes a case of improper exclusion of Hogan.

But it is insisted by the defendant company that it is not under the common-law duty of a common carrier in respect of the matter of accepting complainant as a passenger. This contention is based on a statute passed by the legislature of this state in 1875, doubtless to operate by way of a hedge against the enforcement of the "civil rights bill" passed by the Congress of the United States, which bill at that date had not been declared unconstitutional by the Supreme Court of the United States.

Acts 1875, chap. 130 (Shannon's Code, § 3046), is as follows: "The rule of the common law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement, is hereby abrogated; and hereafter no keeper of any hotel, or public house, or carrier of passengers for hire, or conductors, drivers, or employees of such carrier or keeper, shall be bound, or under any obligation to entertain, carry, or admit any person whom he shall, for any reason whatever, choose not to entertain, carry or admit to his house, hotel, carriage, or means of transportation, or place of amusement; nor shall any right exist in favor of any such person so refused admission, but the right of such keepers of hotels and public houses, carriers of passengers, and keepers of places of amusement and their employees to control the access and admission or exclusion of persons to or from their public houses, L.R.A.1915E.

means of transportation, and places of amusement, shall be as perfect and complete as that of any private person over his private house, carriage, or private theater, or places of amusement for his family."

On the other hand, it is urged by complainant that, if this act be constitutional, it was impliedly repealed by a later statute (Acts 1897, chap. 10), which undertakes to regulate railroads as carriers of passengers and freight. In § 14 of this last-named act it is provided that all corporations, trustees, receivers, and lessees operating railroads in this state are declared to be common carriers. A later section makes it unlawful for any corporation to subject any person to any undue or unreasonable prejudice or disadvantage.

We are of opinion that, if the defendant company be a railroad within the meaning of this statute, it, along with commercial railroads, was classed as, and operated by the last-quoted statute with the duties of a common carrier.

What, then, is the necessary import of the statutory phrase declaring railroad companies to be "common carriers?"

"'Common,' in its legal sense, used as a description of the carrier and his duty and the correlative right of the public, contains the whole doctrine of the common law on the subject. The defendants are common carriers. That is all that need be said. All beyond that can be no more than an explanation or application of the legal meaning of 'common' in that connection." *McDuffee v. Portland & R. R. Co.* 52 N. H. 430, 457, 13 Am. Rep. 72; *Indianapolis Traction & Terminal Co. v. Lawson*, 5 L.R.A. (N.S.) 721, 74 C. C. A. 630, 143 Fed. 834, 6 Ann. Cas. 666.

The true test of the character of a party, as to whether he is a common carrier or not, is his legal duty and obligation with reference to transportation. Is it optional with him whether he will or will not carry? or must he carry for all? If it be his legal duty to carry for all alike, then he is subject to all those stringent rules which, for wise ends, have long since been adopted and uniformly enforced, both in England and all the states, upon common carriers. *Piedmont Mfg. Co. v. Columbia & G. R. Co.* 19 S. C. 353, 364.

This court, in *McGregor v. Gill*, 114 Tenn. 521, 108 Am. St. Rep. 919, 86 S. W. 318, in drawing the distinction between public or common carriers and private carriers, said that a common carrier of passengers is one who undertakes for hire to carry all passengers indifferently who may apply for passage.

The result of the declaration in the act of 1897 was to place on railroad companies

at least the burdens of common carriers as those burdens are defined and prescribed by the common law. No longer may that particular class of carriers claim the benefit of the act of 1875 abrogating the rule of the common law touching the acceptance of those offering to become passengers.

But is the defendant, an interurban railway company, to be treated as being in the class with ordinary trunk or commercial railroad companies thus regulated? Here, again, the legislature has given the answer.

By Acts 1907, chap. 433, it is provided that any interurban railroad company incorporated under the laws of this state shall have and possess the same powers and privileges as are conferred by the general incorporation act upon railroad companies, and subject to the same general duties and obligations. The classification thus made by our legislature is in line with a strong tendency manifested by the courts of several states to judicially declare interurban railroads to belong to this class. *Chicago & N. W. R. Co. v. Milwaukee R. & K. Electric R. Co.* 95 Wis. 561, 37 L.R.A. 856, 60 Am. St. Rep. 136, 70 N. W. 678; *Diebold v. Kentucky Traction Co.* 117 Ky. 146, 63 L.R.A. 637, 111 Am. St. Rep. 230, 77 S. W. 674, 4 Ann. Cas. 445; *Birmingham Mineral R. Co. v. Jacobs*, 92 Ala. 187, 12 L.R.A. 830, 9 So. 320; *Katzenberger v. Lawo*, 90 Tenn. 238, 13 L.R.A. 185, 25 Am. St. Rep. 681, 16 S. W. 611.

We come now to the consideration of complainant's right to the remedy of injunction by which to restrain defendant company from excluding him from its passenger cars.

It is said in 6 Pom. Eq. Jur. § 633, that a writ of injunction, sometimes even mandatory in form, is granted to compel a carrier to transport freight or to furnish proper transportation facilities, and that unjust and illegal discrimination on the part of public service corporations may be so relieved against, and our case of *Memphis News Pub. Co. v. Southern R. Co.* 110 Tenn. 684, 63 L.R.A. 150, 75 S. W. 941, is cited.

In that case the bill of complaint was one for injunctive process to compel a common carrier to desist from discrimination, but the form of the injunction sought is not disclosed in the opinion, and it does not discuss that phase of the litigation; any disposition of the point being *sub silentio*.

However, in *Coe v. Louisville & N. R. Co.* (C. C.) 3 Fed. 775, Baxter, Circuit Judge, held that even a mandatory injunction was grantable to require a railroad company defendant to extend transportation facilities to complainant; and see *Chicago & A. R. L.R.A.1915E*.

Co. v. New York, L. E. & W. R. Co. (C. C.) 24 Fed. 516; *Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co.* (C. C.) 34 Fed. 481.

In several cases injunctions were granted to compel a public service corporation defendant to furnish a supply of gas, water, etc., to the complainant, which supply had been wrongfully cut off. *Whiteman v. Fayette Fuel-Gas Co.* 139 Pa. 492, 20 Atl. 1062; *Louisville & N. R. Co. v. Pittsburg & K. Coal Co.* 111 Ky. 960, 55 L.R.A. 601, 98 Am. St. Rep. 447, 64 S. W. 969; *Bourke v. Olcott Water Co.* 84 Vt. 125, 33 L.R.A. (N.S.) 1017, 78 Atl. 715, Ann. Cas. 1912D, 108.

These cases relate to the protection of a complainant in his property rights. We are cited no case which approves of the issuance of injunctive process to protect one in his right to be accepted and carried as a passenger by a public carrier; but we have not that bald question to decide.

The bill of complaint presents two phases in its allegations which, if sustained by proof to the satisfaction of a chancellor, might warrant the award of an interlocutory injunction:

First, it is alleged that the carrier's refusal to accept complainant for carriage is a persecution of complainant for having brought a suit for damages against the company and an attempted intimidation. This would, if established, evidence a palpable abuse of a public franchise that a court of equity should not hesitate to restrain by the exercise of its highest prerogative with promptitude.

Again, it is shown by the bill of complaint that the carrier threatens to continue the wrongful acts described therein. The modern authorities make it manifest that the rules of equity have grown less strict in respect to interference by a court of equity by way of injunction to restrain repeated wrongful acts, and even purely mandatory injunctions are now granted on clear showing made, where a defendant is guilty of a continuing wrong or threatens repeated perpetration of wrongs which would for remedy at law give rise to a multiplicity of suits, pending the determination of which the wrongs would continue. If a threatened wrong consist of a single act, which will be temporary in effect, the complainant may well be left to his remedy at law for damages. But if persistent repetition of a wrong is threatened, especially by a quasi public corporation, involving discrimination as between citizens, equity will move to afford in a single action its more adequate remedy of injunction. *Ainsworth v. Munoskong Hunting & Fishing Club*, 153 Mich. 185, 17 L.R.A.(N.S.) 1236, 126 Am. St.

Rep. 474, 116 N. W. 992, 15 Ann. Cas. 706; Colliton v. Oxborough, 86 Minn. 361, 90 N. W. 793; Ladd v. Osborne, 79 Iowa, 93, 44 N. W. 235; 1 High, Inj. 5.

Here the remedy sought may be by an injunction prohibitory in form, operating on future conduct, and not, strictly speaking, to restore a status by undoing a past act, and when this may be done a court of equity is less chary in exercising the power. It should, of course, in granting interlocutory injunctions of this character, act only after each party, complainant and defendant, has had an opportunity to present his case by affidavits, in an effort by the court to prevent an abuse of its process.

Deeming the bill of complaint to be framed in a manner that will admit of such procedure and relief, we are of opinion that the court below erred in sustaining this and the several grounds of demurrer interposed by the defendant company, and discussed in this opinion.

Reversed, with remand to the court below for further proceedings not inconsistent with the rulings herein embodied.

ARKANSAS SUPREME COURT.

DESHA BANK & TRUST COMPANY et al.

v.

M. W. QUILLING, JR., et al.

(— Ark. —, 176 S. W. 132.)

Limitation of actions — tolling — right to apply deposit account on note.

1. The mere existence of a deposit account of the maker of a note in the bank which holds the note, which the bank has a right to apply on the note, does not toll

Note. — Limitation of actions: right to apply indebtedness owed by creditor to debtor for purpose of tolling statute.

This note is supplementary to the note to Samuel v. Samuel, 42 L.R.A. (N.S.) 1155. But one case in point, aside from DESHA BANK & T. Co. v. QUILLING, seems to have been reported since that note.

In that case, Arthur & Co. v. Burke, 83 Wash. 690, 145 Pac. 974, it was held that the running of the statute against notes given for a balance due on account could not be tolled by applying thereto the proceeds of goods which, some two years prior to the giving of the notes, had been reconsigned by the debtor to the creditor with instructions to credit the proceeds when sold upon the balance, the debtor supposing at the time the notes were given that he had already received credit for the reconsigned goods. The court said: "In order to toll the statute of limitations the partial payment must have been a voluntary pay-
L.R.A.1915E.

the running of the statute of limitations against the note; actual application of the deposit being necessary to effect that result.

Appeal — questions not raised below.

2. Issues not raised by the pleadings or passed upon by the trial court cannot be considered on appeal, although there is evidence in the record bearing upon them.

(April 5, 1915.)

CROSS APPEALS from a decree of the Chancery Court for Arkansas County refusing to foreclose a deed of trust upon real estate and a lien upon defendants' property which had been given to secure payment of a certain promissory note; plaintiff appealing from so much as refused to recognize their claim upon a note held to be barred by the statute of limitations, and defendants appealing from so much as refused to recognize an alleged counterclaim. Affirmed.

The facts are stated in the opinion.

Mr. J. Bernhardt, for plaintiff:

There was a payment made and credited on the note December 1, 1910. The statute bar has not attached.

Real Estate Bank v. Hartfield, 5 Ark. 551; McGehee v. Blackwell, 28 Ark. 27.

Under the condition of the account between the parties, the plaintiff had a right under the law to apply any surplus funds in its hands belonging to Mrs. Quilling to her note.

Everton v. Day, 66 Ark. 73, 48 S. W. 900; Less v. Arndt, 68 Ark. 399, 59 S. W. 763; Gorman v. Pettus, 72 Ark. 76, 77 S. W. 907; Dunn v. McKnight, 79 Ark. 393, 96 S. W. 193; McAbee v. Wiley, 92 Ark. 245, 122 S. W. 623.

The indorsements of payments admitted

ment made or authorized or ratified by the party against whom the payment is invoked as tolling the statute. . . . A creditor cannot, by any act of his own, such as the giving of an unauthorized or surreptitious credit, toll the running of the statute. . . . The payment must be made under such circumstances as to show an intentional acknowledgment by the debtor of his liability for the whole debt as of the date of payment, from which arises a new implied promise, supported by the original consideration, to pay the residue. . . . The reconsignment of the goods was never made with the intention that moneys realized from their sale should be applied upon these notes. The notes were not excluded until almost two years later. The appellant's testimony that he understood when the notes were given that he had already received credit for all of the reconsigned goods is undisputed. It is negatively corroborated by the admission of the respondent's president that nothing was said about the goods at that time. Upon these

by the debtor himself or assented to by him, even impliedly, will toll the statute.

25 Cyc. 1377; *State Bank v. Woodydy*, 10 Ark. 638; *Wood v. Wylds*, 11 Ark. 754; *Ruddell v. Folsom*, 14 Ark. 213; *Dunnington v. Kirk*, 57 Ark. 597, 22 S. W. 430; *Nunn v. McKnight*, 79 Ark. 397, 96 S. W. 193; *Briggs v. Steele*, 91 Ark. 458, 121 S. W. 754.

Messrs. **John L. Ingram** and **O. P. Harnwell**, for defendants:

To take the case out of the statute of limitations it is mandatory that the alleged credit upon the particular debt should be made by Mrs. Quilling, or by her authority, and that must be shown by the evidence.

State Bank v. Woodydy, 10 Ark. 638; *Alston v. State Bank*, 9 Ark. 455; *Ford v. Nesbitt*, 72 Ark. 267, 79 S. W. 793.

The statute of limitations having been pleaded, the burden of proof is on the plaintiff.

McNeil v. Garland, 27 Ark. 343; *Memphis & L. R. R. Co. v. Shoecraft*, 53 Ark. 96, 13 S. W. 422; *Leigh v. Evans*, 64 Ark. 26, 41 S. W. 427; *Watkins v. Martin*, 69 Ark. 311, 65 S. W. 103, 425; *Simpson v. Brown-Desnoyers Shoe Co.* 70 Ark. 598, 70 S. W. 305.

Smith, J., delivered the opinion of the court:

The parties to this litigation had a great many business transactions, and differ very widely in their depositions as to the net result of them all. The litigation was begun on August 26, 1912, at which time appellants filed a complaint where it was alleged that appellee Maude Price Quilling had executed to H. Thane, trustee, a deed

of trust, on May 4, 1905, to secure a note for \$3,000, and that on December 1, 1910, she had paid on this note the sum of \$300, which payment had been indorsed on the note and also upon the margin of the recorded instrument. It was also alleged that Mrs. Quilling was further indebted to the bank in the sum of \$2,900, evidenced by a note executed on September 9, 1908, by her and M. W. Quilling, Jr., her husband. It was also alleged that on February 20, 1908, the interest of Mrs. Myrtle Kimberlin, a sister of Mrs. Quilling, in the estate of her father, N. B. Price, deceased, was acquired by M. W. Quilling, Jr., by purchase for \$1,000, and the title to said interest was taken in the name of Thane as trustee, with the understanding at the time that this interest should become additional security for the \$3,000 note; that the purchase price for this interest was advanced by the appellant bank and became a part of the indebtedness for which the \$2,900 note was given. It was also alleged that on March 3, 1912, Mrs. Quilling executed a note to the bank for an additional loan of \$100, and that there was an open account in favor of the bank for taxes and insurance advanced by the bank in the sum of \$315. The bank appears to have assumed control of the lands belonging to the Quillings, and to have made various sales of lands and town lots, and to have collected large sums as rents. Out of these transactions it is alleged that the Quillings were largely indebted to the bank, and a foreclosure of the deed of trust was prayed. On the other hand, the Quillings say the bank is indebted to them in the sum of approximately \$3,000, and judgment therefor was prayed. On September 3, 1913, appel-

facts we are clear that payments, no matter when made, from money realized from sales of the goods, were not payments made under such circumstances as to show an intentional acknowledgment by the debtor of his liability for the whole debt as of the date of the sales, from which a new promise could be implied to pay the residue. Had the reconignment of the shelf goods been made at the time the notes were given, and as a part of the same transaction as collateral to the notes, a different case would be presented. Even in such a case, however, it has been usually held that, where part payment of a note is made from money realized by the sale of collateral, a new promise is not to be implied as of the date of the sale of the collateral, nor as of any date later than the transfer of the collateral to the creditor."

And an indorsement by the creditor upon the notes after they have become barred by the statute, of a payment resulting from further small sales of the reconsigned goods, clearly cannot operate to renew the notes or L.R.A.1915E.

take them out of the operation of the statute of limitations. "Even assuming that a barred debt may be revived by part payment, the payment must be made under circumstances showing a clear and unequivocal intention on the part of the obligor to revive the whole debt. The naked fact of payment or entry of credit is wholly insufficient. Ibid.

And while, as appears from the earlier note (under the well-settled rule that a bank has a right to apply a deposit, or so much thereof as may be necessary, toward the payment of a matured indebtedness of the depositor to it), the application by a bank of a customer's deposit, on his note due to it, is sufficient to arrest the running of the statute of limitations as against the note, yet, as held in *DESHA BANK & T. CO. v. QUILLING*, the mere right of the bank to credit the deposit on the depositor's note does not toll the statute of limitations, but an actual exercise of that right is necessary.

A. C. W.

lee Cramer filed an intervention in the nature of an answer and cross complaint, in which it was alleged that the property upon which appellants claimed a lien was not the property of the Quillings, but had been acquired by his vendor under a foreclosure of a mortgage given by the Quillings, which would be junior to the bank's mortgage if that mortgage was unpaid, but prayed that the bank's mortgage be canceled. This pleading filed by Cramer set out the transactions between the bank and the Quillings, and denied that any payment had been made on the \$3,000 note, and alleged that the note was barred by the statute of limitations. It was further alleged that the conveyance to Thane, as trustee, by Mrs. Kimberlin, was in fact a mortgage given to secure the purchase money which was borrowed from the bank, but it was denied that it was intended to secure any additional sum, and it was further alleged that by the deed from Thane, as trustee, executed on May 9, 1913, to the Quillings, the bank released all liens of any sort against this interest. The Quillings filed separate answers, setting up substantially the same facts recited in the answer and cross complaint of Cramer, but the details of their transactions with the bank were set up with greater particularity. It was alleged by them that the interest of Mrs. Kimberlin in her father's estate, which had been purchased for the benefit of M. W. Quilling, had been exchanged for other property in the city of Little Rock, over all of which the bank assumed control and collected the rents. They denied that they were indebted to the bank in any sum, but stated the fact to be that the bank would be largely indebted to them if proper credits for rents and proceeds of sales were given. They denied that any payment had been made on the \$3,000 note, and pleaded the statute of limitations against it.

A wide range was covered in the taking of the proof, and the record before us is a voluminous one. There was no reference of the accounts to a master in the court below, with the result that all of the items in controversy below are controverted here. One of the principal questions of fact was the alleged credit of \$300 indorsed on the \$3,000 note. If there was no such credit, then this note was barred by the statute of limitations. At the time this credit was alleged to have been indorsed on the note the Quillings had an account with the bank. All funds belonging to either of them were kept as a single account, and debits and credits were charged and given without reference to the source from which the credits came, and L.R.A.1915E.

checks were drawn in one name. It was testified on behalf of the bank that there was a credit of \$371.68 to the Quilling account at the time the \$300 credit was indorsed on the note. No direction from the Quillings for placing this credit on the note is asserted, but the bank claims to have taken this action because the note was past due and unpaid. Appellees denied that there was any such appropriation. On the contrary, they say that on the date of the alleged credit the account stood overdrawn \$156, and they say the statements of their accounts, subsequently furnished them, showed that this alleged credit on the note was not charged against their account. The bank had the right to credit this deposit on the note, but this right to so credit the deposit did not toll the statute of limitations. It took the exercise of that right to accomplish that result. *Steelman v. Atchley*, 98 Ark. 294, 32 L.R.A. (N.S.) 1060, 135 S. W. 902.

The court below found that the \$3,000 note was barred by the statute of limitations; that the conveyance from Mrs. Kimberlin to Thane, as trustee, was intended to secure the bank for the purchase money advanced, and for that alone, and that that sum had been repaid. The court found that there was a balance due on the \$2,900 note, and also a balance due on the open account, and rendered judgment accordingly, but decreed that said sums were not secured by any lien. As has been said, both parties appealed, and each undertakes to show that the chancellor was grossly in error; but without discussing the evidence in detail, which would serve no useful purpose, we announce the conclusion that the finding of the court below does not appear to be clearly against the preponderance of the evidence.

Since the trial of this cause in the court below M. W. Quilling has died, and the briefs discuss the right of appellant to hold an insurance policy on the life of Quilling as collateral, and to apply the proceeds of the policy to the payment of any balance due the bank. No such issue was raised by the pleadings, and the question was not passed upon by the chancellor; and, while some testimony on the question appears in the record, the point was not fully developed, and for these reasons we decline now to pass upon that question, but leave it open for determination in appropriate future litigation.

The decree is affirmed.

Petition for rehearing denied.

MONTANA SUPREME COURT.

HOMER G. MURPHY, Appt.,
v.
ANNA E. NETT, Resp't.

(— Mont. —, 149 Pac. 713.)

Bank — Liability of executor for interest on deposit account claimed by rival.

A special administrator does not, by requesting a bank in which he has money belonging to the estate on deposit, to retain it until the claim of another seeking appointment as administrator, who has made demand for it, can be established, render himself liable to reimburse the bank for the interest which it is finally required to pay when he is removed and his rival's claims established, if, at the time the rival made demand for the fund and brought his action to recover it, he had no right to it.

(June 3, 1915.)

A PPEAL by plaintiff from a judgment of the District Court for Lewis and Clark County in defendant's favor in an action brought to recover interest on a deposit account retained by a bank at the request of the depositor after it had been claimed by a stranger who subsequently established title to it, and to whom the bank was compelled to account for interest. Affirmed.

The facts are stated in the opinion.

Note. — Liability of depositor who requests bank to hold noninterest bearing deposit against a claimant, to reimburse bank for interest which it is compelled to pay to claimant on the legal establishment of his claim to the deposit.

It seems to be quite generally held that a bank cannot discharge its legal obligation to its depositor by payment to a third person who claims the fund, unless the payment is made under legal duress. This question is considered in the note to *Jaselli v. Riggs Nat. Bank*, 31 L.R.A.(N.S.) 763. But this, of course, does not mean that the bank may disregard a notice from a third party claiming the deposit, and pay out the fund to the depositor after such notice. (See note to *Allen v. Puritan Trust Co.* L.R.A.1915C, 518, on liability of bank for failure to prevent misappropriation of trust funds by the fiduciary, which liability is practically the same as that of a bank that pays money to the depositor with notice that it belongs to a third party.) It would seem to follow, as held in *MURPHY v. NETT*, that even in the absence of a request by the depositor, it is the duty of the bank on receiving notice that the deposit is claimed by a third person, to hold the deposit until the claimant has established his legal right L.R.A.1915E.

Messrs. H. G. McIntire and S. H. McIntire, for appellant:

The bank in good faith, relying upon defendant's implied promise to indemnify and save it harmless from all damage by reason of its compliance with her request, refused to comply with the demand of Wiesner. This constituted a good consideration for the implied promise.

Rev. Codes, § 5001; *Schaeffer v. Miller*, 41 Mont. 417, 137 Am. St. Rep. 746, 109 Pac. 970; *Wickham v. Weil*, 43 N. Y. S. R. 155, 17 N. Y. Supp. 518; 2 Bl. Com. 443; *McSorley v. Faulkner*, 45 N. Y. S. R. 678, 18 N. Y. Supp. 480; *People v. Bennett*, 6 Abb. Pr. 343; *Hawkes v. Taylor*, 175 Ill. 344, 51 N. E. 611; *Thompson v. Woodruff*, 7 Coldw. 401; *Deane v. Hodge*, 35 Minn. 146, 59 Am. Rep. 321, 27 N. W. 917; *Wyoming Nat. Bank v. Brown*, 7 Wyo. 494, 75 Am. St. Rep. 935, 53 Pac. 291; *Hamilton v. Winterrowd*, 43 Ind. 393; *Day v. Connecticut General L. Ins. Co.* 45 Conn. 480, 29 Am. Rep. 693; *Nolan v. Swift*, 111 Mich. 56, 69 N. W. 96; *Miller's Appeal*, 100 Pa. 568, 45 Am. Rep. 394; *Armstrong v. Cleveland*, — Tex. Civ. App. —, 74 S. W. 789; *Brush Electric Light & P. Co. v. Montana*, 114 Ala. 433, 21 So. 960; *Gutta Percha & Rubber Mfg. Co. v. Houston*, 108 N. Y. 276, 2 Am. St. Rep. 412, 15 N. E. 402; *Adams v. Hilliard*, 59 Hun, 626, 37 N. Y. S. R. 314, 14 N. Y. Supp. 120; *Pence v. Beckman*, 11 Ind. App. 263, 54 Am. St. Rep. 505, 39 N. E. 169; *Jennings v. Bank of California*.

to compel payment. In *Detroit Sav. Bank v. Burrows*, 34 Mich. 153, it was held that "the implied obligation of a bank to its depositor to protect the interests of the latter do not go beyond the requirement of good faith in refusing to surrender the moneys confided to its custody except upon a lawful demand lawfully established." It would seem to follow from this that the court in *MURPHY v. NETT* properly took the position that the request to hold the money until the third party's claim should be legally established could not be a contractual basis for a recovery of the interest under the facts as presented. But on general principles it would seem that the bank ought to be subrogated to the rights of the third party where it performed its whole duty in the matter, even in the absence of a request. The bank would appear to have performed its whole duty by defending the action in good faith, and it was held in the Michigan case that a bank is not negligent for failure to move for a new trial on facts communicated to it by the depositor after the trial, when the depositor had neglected to defend in place of the bank, since the trial established the legality of the claim and the depositor should bear the burden of a further defense in his own behalf. It would seem, then, that if the judgment for interest was erroneous, the burden of an

79 Cal. 323, 5 L.R.A. 233, 12 Am. St. Rep. 145, 21 Pac. 852; Columbus, H. V. & T. R. Co. v. Gaffney, 65 Ohio St. 104, 61 N. E. 152; 5 Lawson, Rights, Rem. & Pr. § 2221, p. 3744; 1 Beach, Contr. § 639.

Defendant requested the bank to retain the money; thereby she constituted it her agent for that purpose, and under the law she is in duty bound to reimburse the agent for any and all loss sustained in the legal discharge of its duty as agent.

1 Lawson, Rights, Rem. & Pr. §§ 95, 97; Howe v. Buffalo, N. Y. & E. R. Co. 37 N. Y. 298.

Defendant was notified by the bank of the demand made upon it by Weisner.

The judgment against it is conclusive against her whether she appeared or not.

2 Black, Judgm. § 574; Andrews v. Davison, 17 N. H. 413, 43 Am. Dec. 606; Knickerbocker v. Wilcox, 83 Mich. 200, 21 Am. St. Rep. 595, 47 N. W. 123; Harvie v. Turner, 46 Mo. 444; Bever v. North, 107 Ind. 544, 8 N. E. 576; Lawrence v. Stearns, 79 Fed. 878; Sutherland v. Gent, 111 Va. 511, 69 S. E. 340; First Nat. Bank v. City Nat. Bank, 182 Mass. 130, 94 Am. St. Rep. 637, 65 N. E. 24.

Mr. S. H. Ballet, for respondent:

The bank knew that the money was a trust fund, that is to say, was money belonging to the Murphy estate, and that Mrs. Nett could hold the custody thereof only so long as she was the special administratrix of the Murphy estate.

5 Cyc. 530; Morrill v. Raymond, 28 Kan. 415, 42 Am. Rep. 167; Penn Bank v. Frankish, 91 Pa. 339; Commercial & Agri. Bank v. Jones, 18 Tex. 811; Carman v. Franklin

Bank, 61 Md. 467; Honig v. Pacific Bank, 73 Cal. 464, 15 Pac. 58; Duckett v. National Mechanics' Bank, 86 Md. 400, 39 L.R.A. 84, 63 Am. St. Rep. 513, 38 Atl. 983; Ryan v. North End Sav. Bank, 168 Mass. 215, 46 N. E. 620; Walker v. State Trust Co. 40 App. Div. 55, 57 N. Y. Supp. 525.

A contract which has for its object the commission of trespass upon the person or property of a third person is illegal.

Randall v. Howard, 2 Black, 585, 17 L. ed. 269; Marcy v. Crawford, 16 Conn. 549, 41 Am. Dec. 158; Avery v. Halsey, 14 Pick. 174; Favor v. Philbrick, 7 N. H. 326; Coventry v. Barton, 17 Johns. 142, 8 Am. Dec. 376; Ives v. Jones, 25 N. C. (3 Ired. L.) 538, 40 Am. Dec. 421; 2 Elliott, Contr. § 655; Moody v. Newmark, 121 Cal. 446, 53 Pac. 944.

Defendant's request of the bank to hold the money, and not turn the same over to Weisner, is not such a guaranty as the statute provides may not be in writing.

McCormick v. Johnson, 31 Mont. 266, 78 Pac. 500.

The action of Mrs. Nett in requesting and requiring the bank not to pay the money over to Weisner as special administrator of the Murphy estate is neither a guaranty or an indemnity on her part.

Surles v. Sweeney, 11 Or. 21, 4 Pac. 469; Wells v. Sibley, 31 N. Y. S. R. 40, 9 N. Y. Supp. 345; Dickinson v. New York, 92 N. Y. 584.

The duty imposed upon the bank to pay the money to Weisner was imposed by law. The violation of the duty was a tort.

Hayes v. Massachusetts Mut. L. Ins. Co. 125 Ill. 626, 1 L.R.A. 303, 18 N. E. 322;

appeal would be upon the depositor, and her failure to appeal, or to demand that the bank appeal at her expense, would preclude any claim of error in the judgment. The Michigan case is authority for the statement that the bank performs its whole duty to the depositor, after it has notified him of his opportunity to defend, by defending the action itself in good faith, although the defense is more or less perfunctory, in the nature of a defense to an amicable action. It would seem, therefore, that the plaintiff's case in *MURPHY v. NETT* would have been stronger if it had been tried upon the theory that, while the request to hold the fund did not amount to an agreement based upon a consideration, it did amount to a refusal to give up the fund without a suit; that the refusal legally compelled the bank to hold the fund, which was the direct cause of the loss, as the interest was counted from the date of the refusal; that the depositor, having forced the bank to defend, and having failed to indicate its course of procedure, was estopped to claim that it should have proceeded by interpleader, instead of defend-

ing the action brought by the third party. The fact that the depositor is the interested party, and that the bank has no real interest in the result of the suit, cannot be disguised no matter how many theories are evolved. And it would seem that when a party deliberately elects to stand upon his title, and by his election legally compels a disinterested stakeholder to defend for him, he ought to be compelled to comply with the judgment rendered on the trial. On the other hand, the bank had the use of the money during the interest period, and so was compensated in part at least. And in this particular case the depositor was an administratrix, hence had not a real substantial interest in the fund. So the court no doubt considered the fact that the equity was on the side of the defendant.

It must be observed that this note does not purport to cite an exhaustive list of cases upon the questions here discussed. A careful search fails to reveal any cases within the scope of the note as to facts, and, in the absence of such cases, only a few others have been cited by way of discussion.

J. W. M.

Atlanta Nat. Bank v. Davis, 96 Ga. 334, 51 Am. St. Rep. 139, 23 S. E. 190; J. M. James Co. v. Continental Nat. Bank, 105 Tenn. 1, 51 L.R.A. 255, 80 Am. St. Rep. 857, 58 S. W. 261; Schaffner v. Ehrman, 139 Ill. 109, 15 L.R.A. 134, 32 Am. St. Rep. 192, 28 N. E. 917; Junker v. Fobes, 45 Fed. 840; Abb v. Northern P. R. Co. 28 Wash. 428, 58 L.R.A. 293, 92 Am. St. Rep. 864, 68 Pac. 955; McBride v. Scott, 132 Mich. 176, 61 L.R.A. 445, 102 Am. St. Rep. 416, 93 N. W. 243, 1 Ann. Cas. 61, 13 Am. Neg. Rep. 335; Denver & R. G. R. Co. v. Sullivan, 21 Colo. 302, 41 Pac. 503; Tanner v. Bowen, 34 Mont. 121, 7 L.R.A. (N.S.) 534, 115 Am. St. Rep. 529, 85 Pac. 876, 9 Ann. Cas. 517.

Mr. W. D. Rankin also for respondent.

Brantly, Ch. J., delivered the opinion of court:

This action was brought by the plaintiff as assignee for value of a claim for the sum of \$787.08 alleged to have become due to the National Bank of Montana, located and doing business at Helena, under the circumstances set out in the amended complaint, as follows: That defendant Anna E. Nett was the duly appointed, qualified, and acting special administratrix of the estate of Edward J. Murphy, deceased; that on February 5, 1912, she had on general deposit in the bank to her credit as administratrix, subject to check, the sum of \$8,369.75; that on that day one Raymond A. Weisner, claiming to have been appointed special administrator upon the estate of the deceased, made demand upon the bank that it pay over to him the sum so deposited; that the bank notified the defendant of the demand by Weisner; that defendant, objecting to the payment by the bank to Weisner for the reason that she had not been removed from her office, requested the bank to refuse the demand and to retain the deposit in her name until it could be ascertained who was entitled to it; that relying upon the request of defendant and the promise implied by it that defendant would indemnify it against all loss by reason of its retention of the deposit, the bank refused the demand of Weisner; that on February 7th Weisner brought an action against the bank to recover the amount of the deposit, with interest from the date of demand; that the bank notified the defendant of the bringing of the action and requested her to make defense; that she failed to comply with this request; that the bank made its own defense; that on March 4, 1912, the defendant was removed from her office; that such proceedings were thereafter had in the action that on March 7, 1913, Weisner was awarded judgment L.R.A.1915E.

against the bank for the amount of the deposit, with interest at the legal rate from the date of his demand; that the interest which had accrued upon the deposit in the meantime was \$787.08; that the bank, having paid the judgment, made demand upon the defendant for reimbursement to the amount so paid as interest, and that the demand was refused. The court having sustained defendant's general demurrer and plaintiff declining to plead further, judgment was rendered for defendant. Plaintiff has appealed.

The question submitted is whether the ruling on the demurrer was correct. It will be observed that the theory upon which it is sought to fix liability upon the defendant is that, having requested the bank to retain the deposit until title to it could be determined, she thereby impliedly promised to indemnify it against any loss it might suffer by its compliance with her request.

Neither at the time Weisner made demand upon the bank nor at the time he brought his action was he entitled to the office of special administrator. Although it be conceded that upon the removal of the defendant on March 4, 1912, he became her successor and the deposit became subject to his order, at no time prior to that date was he other than a stranger to both the bank and the estate. According to the allegations of the complaint, which, for present purposes, must be accepted as true, the defendant was special administratrix. There cannot be two administrators upon an estate at the same time.

The administration is an entirety, and extends to the whole of the estate so far as its assets are within the jurisdiction where the appointment is made (Rev. Codes, § 7502; 1 Woerner, Am. Law of Administration, § 179), and the administrator has the exclusive right of control, subject to the orders of the district court, for the purpose of administration. *Re Higgins*, 15 Mont. 474, 28 L.R.A. 116, 39 Pac. 506. This is not less true of a special administrator. Although his powers are limited in extent, he has exclusive control over the estate for the time being, and until he is displaced by the appointment and qualification of the executor or general administrator. Rev. Codes, § 7474. But it is not important to inquire now what the status of Weisner subsequently became, nor whether the judgment in his favor was proper. We are now only concerned with the relations existing between the bank and the defendant at the time he undertook to assert his claim.

The deposit was for the purpose of exchange (Rev. Codes, § 5138), and by accepting it the bank became the mere debtor

of the defendant (§ 5187; *Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111). The relation thus assumed was not made different by the fact that the defendant was administratrix. She stood upon the same footing as any other creditor (5 Cyc. 514), and upon demand the bank was at its peril bound to pay the deposit to her. It could not question her right to it. 5 Cyc. 517. Now, what change was wrought by the fact that Weisner made an adverse claim to the deposit, and that she, upon notice, requested the bank to retain it in her name? Did her request, followed by notice of Weisner's action, imply a promise on her part to indemnify the bank against any loss it might suffer by obeying her request? If so, what was the consideration for the promise? A contract, whether express or implied, must be supported by a good consideration. A good consideration is "any benefit conferred or agreed to be conferred upon the promisor, by any other person, to which the promisor is not lawfully entitled; nor any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor. . . ." "An implied contract is one the existence and terms of which are manifested by conduct." Section 5014. Since the terms of such a contract are to be gathered from the conduct of the parties, their conduct must imply the promise of a valid consideration for the doing of something which one was not already bound to do, or the abstaining from doing something which it was his right to do. Weisner had not made the deposit. He was not the creditor of the bank, and could not become its creditor as administrator until the defendant had been removed. At the time he made demand his claim was wholly without foundation. Defendant was the creditor. It was therefore the bank's duty, without her request, to retain the deposit to meet its obligation to her. It was also its duty to notify defendant of Weisner's claim (Rev. Codes, § 5142); but the performance of this duty did not cast upon her the obligation to determine which of the two was its creditor; for, though it be assumed that when defendant was removed from office, the deposit became *ipso facto* subject to the order of Weisner, it was incumbent upon the bank to ascertain the fact of his appointment, in order that it might safely accept him as its creditor. The defendant was not bound to defend the action. The other alternative of the bank was to bring its own action to compel Weisner and the defendant to interplead, and by paying the amount of the deposit into court, relieve itself from lia-

L.R.A.1915E.

bility to either of them. It is not alleged, nor is it suggested by anything in the complaint, that the bank failed to resort to this course by reason of defendant's request. She was not bound, in any event, to indemnify the bank for doing its duty to her in the first instance, nor for its failure to resort to the second alternative. Therefore the bank was not induced to adopt the course it pursued by promise of indemnity implied by the conduct of the defendant. It is not alleged that Weisner accompanied his demand upon the bank by the exhibition to it of an order showing his appointment, nor that the defendant knew that he had been appointed to succeed her. These allegations would have presented a different case. Nor was defendant liable to the bank upon the theory that it was her agent, as for expenses incurred in her behalf. As we have seen, her request to the bank did not change its obligation to determine for itself who was its creditor. It therefore did not change its relation to her from that of debtor to that of agent.

We think the action of the lower court in sustaining the demurrer was correct. The judgment is therefore affirmed.

Sanner and Holloway, JJ., concur.

Petition for rehearing denied.

CONNECTICUT SUPREME COURT OF ERRORS.

WALTER DWY, Appt.,

v.

CONNECTICUT COMPANY et al.

(89 Conn. 74, 92 Atl. 883.)

Release — seal — reservation of right to sue others.

1. The attachment of a seal to a release of one joint tortfeasor from further liability does not destroy the operation of a clause in the instrument reserving the right to sue any other party or parties, where satisfaction for the injury has not been received.

Note. — Effect, in release of one joint tortfeasor, of reservation of right as against others.

Earlier cases on this question will be found in the note to *Abb v. Northern P. R. Co.* 58 L.R.A. 295, and in the note to *Eden v. Fletcher*, 19 L.R.A. (N.S.) 618.

It was held in *Flynn v. Manson*, 19 Cal. App. 400, 126 Pac. 181, that a release of one co-tortfeasor operated as a release of all, although the release provided that "it is

Joint debtors — recovery — single satisfaction.

2. But one satisfaction can be obtained for a personal injury negligently inflicted by several joint tortfeasors, and therefore, under a reservation of a right to sue others when releasing one, only such recovery can be had as, together with the amount received from the one released, will amount to satisfaction.

(January 26, 1915.)

APPEAL by plaintiff from a judgment of the Superior Court for New Haven County in defendants' favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Reversed.

the plaintiff's intention that the cause of action . . . against said defendants . . . shall exist and continue with the same force and effect as if the release had never been made." The court stated that, however conflicting may be the current of authority in respect to the proper construction of a release of the kind in question, it is a well settled principle of law that in actions *ex delicto* plaintiff can recover compensation but once; that where the demand is unliquidated, as in this case, the court cannot hold that the payment of any sum, however small, in consideration of a release, does not or cannot operate as compensation for the alleged injury.

So, also, the acceptance of a sum of money from one joint tortfeasor in satisfaction of a claim for damages, and the execution of a release and discharge under seal of such joint tortfeasor from all damages by reason of the injuries inflicted, reciting that such sum of money was received "in full compromise, payment, discharge, accord, and satisfaction," for or on account of such injuries, operate as a release of the other joint feisor, even though it is stipulated therein that the release of such tortfeasor shall not operate so as to discharge the other, and the right to sue the other joint tortfeasor is expressly reserved, the court stating that such an instrument is a release, and not a covenant not to sue. *Louisville & N. R. Co. v. Allen*, 67 Fla. 257, L.R.A.1915C, 20, 65 So. 8.

And where a matter in controversy with one of two or more alleged wrongdoers is as to a liability common to all of them, and the settlement is made on consideration relating to the existence of such liability and its extent, it is not competent for the claimant, by expressly or impliedly reserving the right to recover an additional amount from the others on account of the same liability, to defeat the effect of the release which he gives. *Farmers' Sav. Bank v. Aldrich*, 153 Iowa, 144, 133 N. W. 383. And this rule, the court stated, seemed particularly applicable to this case, where the release was given to bucket shop keepers in settlement of money misappropriated by a bank cashier L.R.A.1915E.

Statement by Prentice, Ch. J.:

The plaintiff's injuries were sustained while he was engaged as an employee of Fred T. Ley & Company, Incorporated, which corporation in turn was at the time engaged in doing work for and upon the premises of the Connecticut Company. He was at the time working under the direction of a foreman of the Ley company. His injuries were occasioned by an electric current of high voltage with which an iron structure upon which he was instructed and directed to work was charged. The complaint alleges that before taking his position upon this iron structure he was informed by the defendants that there was no danger from electricity, and that the defendants undertook to see to it that the current

and applied on transactions made for the benefit of such cashier and those whom the bank now sought to make liable for the residue of the money misappropriated and unsettled for, all of which money so misappropriated, having gone into the hands of the bucket shop keepers, and none into the hands of the defendant, could have been recovered from the bucket shop keepers, they being financially responsible.

On the contrary, the conflict of opinion disclosed by the earlier cases still prevails. Thus in *J. Rosenbaum Grain Co. v. Mitchell*, — Tex. Civ. App. —, 142 S. W. 121, it was held that a release from liability of one joint tortfeasor, with a reservation of rights against the other joint tortfeasor, will not release the latter from liability.

And in *St. Louis, I. M. & S. R. Co. v. Bass*, — Tex. Civ. App. —, 140 S. W. 860, it was held that where payment is made by one tortfeasor in settlement of the claim for damages against it only, and the right is reserved to demand damages of the other joint tortfeasor, the latter is responsible for such damages as may exceed the amount paid.

Walsh v. New York C. & H. R. R. Co. 140 App. Div. 1, 124 N. Y. Supp. 312, upon the authority of *Gilbert v. Finch*, 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133, set out at page 619 of the note in 19 L.R.A.(N.S.), declared that even an instrument under seal in which one joint tortfeasor is released from all liability, which reserves the right of action against the other joint tortfeasor, is not such a release as to come within the operation of the general rule that a release of one joint tortfeasor will release the other. This, however, was *obiter*, as there was no evidence in the *Walsh* Case of a release.

In *Judd v. Walker*, 158 Mo. App. 156, 138 S. W. 655, an instrument dismissing an action as to one joint tortfeasor, containing an agreement not to sue, but reserving all rights against the other tortfeasor, was construed as being not strictly a release, but a covenant not to sue, and so did not absolve the other tortfeasor from liability.

J. H. B.

was shut off. It also alleges that the defendants, their servants and agents, were negligent in failing to shut off the current, and in not keeping it shut off, while the plaintiff was at work upon this structure, and also in informing him that the current was shut off. Following the receipt of his injuries, the plaintiff, for a valuable consideration, executed and delivered to the Ley company the two following instruments under his hand and seal: "Know all men by these presents that I, Walter Dwy, of Waterville, county of New Haven, state of Connecticut, for and in consideration of the sum of \$100 to be paid by Fred T. Ley & Company, Incorporated, receipt whereof is hereby acknowledged, have remised, released, and forever discharged, and do hereby for myself, heirs, executors, administrators, and assigns, remise, release, and forever discharge to the said Fred T. Ley & Company, Incorporated, its successors and assigns, of and from all debts, demands, action, causes of action, suit, dues, sums and sums of money, account, reckoning, bond specialties, covenant, contracts, controversies, agreements, promises, doings, omissions, variances, damages, expense, executions, and liabilities whatsoever, both in law and equity, or which may result from the existing state of things, which against the said Fred T. Ley & Company, Incorporated, the said Walter Dwy now have or ever had from the beginning of the world to the day of the date of these presents, more especially on account of injuries I received on May 6, 1913, by being burned by electricity, I hereby reserving, or hereby reserving, my right to sue any other party or parties."

"I, Walter Dwy, in consideration of one hundred dollars (\$100) and other valuable consideration, do hereby release and discharge Fred T. Ley & Company, Incorporated, from all claims for damages on account of an accident occurring to me on the 6th day of May, 1913, and make no claim against my employer or hereby reserving my right to sue any other party or parties."

Messrs. Nathaniel R. Bronson and Lawrence L. Lewis, for appellant:

Where it is evident that the consideration paid was not intended to be full compensation, and although the agreement was in form a release, nevertheless, where the intent clearly was to preserve the right to claim liability on the part of those who were not parties to it, effect will be given to such intention by construing the agreement as in legal effect a covenant not to sue, and not a technical release.

Gilbert v. Finch, 173 N. Y. 455, 61 L.R.A. 810, 93 Am. St. Rep. 623, 66 N. E. 133; L.R.A.1915E.

Kropidlowski v. Pfister & V. Leather Co. 149 Wis. 421, 39 L.R.A.(N.S.) 509, 135 N. W. 839; Duck v. Mayeu [1892] 2 Q. B. 511, 62 L. J. Q. B. N. S. 69, 4 Reports, 38, 67 L. T. N. S. 547, 41 Week. Rep. 56, 57 J. P. 23; Price v. Barker, 4 El. & Bl. 760, 24 L. J. Q. B. N. S. 130, 3 C. L. R. 927, 1 Jur. N. S. 775; Edens v. Fletcher, 79 Kan. 139, 19 L.R.A.(N.S.) 618, 98 Pac. 784; McAllester v. Sprague, 34 Me. 296; Bloss v. Plymale, 3 W. Va. 393, 100 Am. Dec. 753; Carey v. Bilby, 63 C. C. A. 361, 129 Fed. 203; Walsh v. New York C. & H. R. R. Co. 204 N. Y. 58, 37 L.R.A.(N.S.) 1137, 97 N. E. 408; Robertson v. Trammell, 98 Tex. 364, 83 S. W. 1098, 37 Tex. Civ. App. 53, 83 S. W. 258; Ellis v. Eason, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; Bell v. Perry, 43 Iowa, 368; El Paso & S. R. Co. v. Darr, — Tex. Civ. App. —, 93 S. W. 166; Lovejoy v. Murray, 3 Wall. 1, 18 L. ed. 129; O'Shea v. New York, C. & St. L. R. Co. 44 C. C. A. 601, 105 Fed. 559; Missouri, K. & T. R. Co. v. McWherter, 59 Kan. 345, 53 Pac. 135; Barnum v. Cochrane, 139 Cal. 494, 73 Pac. 242; Johnson v. McCann, 61 Ill. App. 110; Nagle v. Hake, 123 Wis. 256, 101 N. W. 409, 17 Am. Neg. Rep. 393; Zimmerman v. Smiley, 62 Neb. 204, 86 N. W. 1059; Long v. Long, 57 Iowa, 497, 10 N. W. 875; Miller v. Beck, 108 Iowa, 575, 79 N. W. 344; McCrillis v. Hawes, 38 Me. 568; Galveston, H. & S. A. R. Co. v. Cade, — Tex. Civ. App. —, 93 S. W. 124; Thompson v. Bay, Circuit Judge, 138 Mich. 81, 101 N. W. 61; Louisville & E. Mail Co. v. Barnes, 117 Ky. 860, 64 L.R.A. 574, 111 Am. St. Rep. 273, 79 S. W. 261; Bailey v. Delta Electric Light, P. & Mfg. Co. 86 Miss. 634, 38 So. 354; Thomas v. Central R. Co. 194 Pa. 511, 45 Atl. 344; Kolb v. National Surety Co. 176 N. Y. 233, 68 N. E. 247; J. Rosenbaum Grain Co. v. Mitchell, — Tex. Civ. App. —, 142 S. W. 121.

The Fred T. Ley Company, to which concern the release was given, was not a joint tortfeasor with the defendants, but was a stranger to the transaction, and therefore the release given to that company would not operate to release the guilty parties, the defendants.

Channon v. Sanford Co. 70 Conn. 573, 41 L.R.A. 200, 66 Am. St. Rep. 133, 40 Atl. 462; Kentucky & I. Bridge Co. v. Hall, 125 Ind. 220, 25 N. E. 219; Missouri, K. & T. R. Co. v. McWherter, 59 Kan. 345, 53 Pac. 135; Thomas v. Central R. Co. 194 Pa. 512, 45 Atl. 344; Iddings v. Citizens State Bank, 3 Neb. (Unof.) 750, 92 N. W. 578; Dufur v. Boston & M. R. Co. 75 Vt. 165, 53 Atl. 1068, 13 Am. Neg. Rep. 461; James v. Isaacs, 12 C. B. 791, 22 L. J. C. P. N. S. 73, 17 Jur. 69, 1 Week. Rep. 21; Simpson v. Eggington, 10 Exch. 845, 24 L. J. Exch. N.

S. 312; *Pittsburgh R. Co. v. Chapman*, 76 C. C. A. 418, 145 Fed. 886, confirming 140 Fed. 784; *Wagner v. Union Stock Yards & Transit Co.* 41 Ill. App. 408; *Western Tube Co. v. Zang*, 85 Ill. App. 63; *Turner v. Hitchcock*, 20 Iowa, 310; *Wardell v. McConnell*, 25 Neb. 558, 41 N. W. 548; *Atlantic Dock Co. v. New York*, 53 N. Y. 64; *Wilson v. Reed*, 3 Johns. 175; *Meyers v. Acker M. & C. Co.* 65 Misc. 576, 120 N. Y. Supp. 828; *Scherzer v. Lincoln Traction Co.* 91 Neb. 407, 136 N. W. 62; *Hirschfield v. Alsberg*, 47 Misc. 141, 93 N. Y. Supp. 617; *Pickwick v. McCauliff*, 193 Mass. 70, 78 N. E. 730, 8 Ann. Cas. 1041.

Mr. Joseph F. Berry, for appellees:

The words of the releases are clear and unambiguous in their meaning, and no evidence would be admissible to vary their terms.

Downing v. Sullivan, 64 Conn. 1, 29 Atl. 130; *Robinson v. Clapp*, 65 Conn. 365, 29 L.R.A. 582, 32 Atl. 939; *White Sewing Mach. Co. v. Feeley*, 72 Conn. 184, 44 Atl. 36; *Fox v. Smith*, 73 Conn. 144, 46 Atl. 879; *Hildreth v. Hartford, M. & R. Tramway Co.* 73 Conn. 631, 48 Atl. 963; *McNamara v. Mattei*, 74 Conn. 170, 50 Atl. 35; *Marsh v. Bridgeport*, 75 Conn. 496, 54 Atl. 196; *Allen v. Ruland*, 79 Conn. 405, 118 Am. St. Rep. 146, 65 Atl. 138, 8 Ann. Cas. 344; *Leddy v. Barney*, 139 Mass. 304, 2 N. E. 107; *Brown v. Cambridge*, 3 Allen, 474; *Brewer v. Casey*, 196 Mass. 384, 82 N. E. 45.

The release of one joint tortfeasor, under seal, and the receipt of money for an injury from one defendant, discharge all. The execution and delivery of a release, under seal, for a consideration, discharge the obligation itself, and inure to the benefit of any party who is concerned or closely related to the tort causing the plaintiff's injury.

Ayer v. Ashmead, 31 Conn. 447, 83 Am. Dec. 154; *Gates v. Steele*, 58 Conn. 316, 18 Am. St. Rep. 268, 20 Atl. 474; *Allen v. Ruland*, 79 Conn. 405, 118 Am. St. Rep. 146, 65 Atl. 138, 8 Ann. Cas. 344; *Sparrow v. Bromage*, 83 Conn. 27, 27 L.R.A. (N.S.) 209, 74 Atl. 1070, 19 Ann. Cas. 796; *Carstesen v. Stratford*, 67 Conn. 428, 35 Atl. 276.

If the injured party has an election to sue one or more of the wrongdoers severally, his acceptance of satisfaction from one discharges the others also.

34 Cyc. 1088; *Cooley, Torts*, 3d ed. p. 234; *Robinson v. St. Johnsbury & L. C. R. Co.* 80 Vt. 129, 9 L.R.A. (N.S.) 1254, 66 Atl. 814, 12 Ann. Cas. 1060; *Hubbard v. St. Louis & M. River R. Co.* 173 Mo. 249, 72 S. W. 1073; *Hartigan v. Dickson*, 81 Minn. 284, 83 N. W. 1091; *Snyder v. Mutual Teleph. Co.* 135 Iowa, 215, 14 L.R.A. (N.S.) 321, 112 N. W. 776.
L.R.A.1915E.

The principle that a release of one joint tortfeasor operates as an extinguishment of the claim, and discharges all other tortfeasors who may have been concerned in the tort, is held to apply even though there is an express reservation against the others recited in the instrument.

Ayer v. Ashmead, 31 Conn. 447, 83 Am. Dec. 154; *Allen v. Ruland*, 79 Conn. 405, 118 Am. St. Rep. 146, 65 Atl. 138, 8 Ann. Cas. 344; *Williams v. LeBar*, 141 Pa. 149, 21 Atl. 525; *Seither v. Philadelphia Traction Co.* 125 Pa. 397, 4 L.R.A. 54, 11 Am. St. Rep. 905, 17 Atl. 338; *Gunther v. Lee*, 45 Md. 67, 24 Am. Rep. 504; *Abb v. Northern P. R. Co.* 28 Wash. 428, 58 L.R.A. 293, 68 Pac. 954; *Flynn v. Manson*, 19 Cal. App. 400, 126 Pac. 181; *Cleveland, C. C. & St. L. R. Co. v. Hilligoss*, 171 Ind. 417, 131 Am. St. Rep. 258, 86 N. E. 486; *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec. 534; *The St. Cuthbert*, 157 Fed. 799; *Ellis v. Eason*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; *McBride v. Scott*, 132 Mich. 176, 61 L.R.A. 445, 102 Am. St. Rep. 416, 93 N. W. 243, 1 Ann. Cas. 61, 13 Am. Neg. Rep. 335.

Prentice, Ch. J., delivered the opinion of the court:

This appeal presents a single question only, to wit: Did the execution and delivery by the plaintiff to the Ley company, his immediate employer, of the two instruments recited in the answer, operate to discharge the defendants from liability for the plaintiff's injury?

The plaintiff contends that it did not so operate for two reasons: (1) That the Ley company did not stand in the position of a joint tortfeasor; and (2) that, even if it did, the legal effect of the instruments, when properly construed, was not to release from liability any other joint tortfeasor.

We will consider the second of these propositions first.

It is an ancient and familiar legal proposition that a release or discharge of one or more of several joint tortfeasors, given for a consideration, is a release of all. While this statement has had general acceptance as expressive of the law, there has by no means been a uniformity of view either as to the reasons which underlie and support it, or as to the nature of the release and discharge which comes within its provisions. There are not a few cases which have held that the instrument, to operate as the release of all, must be a technical release,—that is, one under seal. *Eastman v. Grant*, 34 Vt. 387, 389; *Shaw v. Pratt*, 22 Pick. 305, 308; *Berry v. Gillis*, 17 N. H. 9, 13, 43 Am. Dec. 584; *Line v. Nelson*, 38 N. J. L. 358, 360; *Bloss v. Plymale*, 3 W. Va. 393, 407,

100 Am. Dec. 752. More have moved farther away from the ancient notion of the sanctity of a seal, and understand the rule as applicable to sealed and unsealed instruments alike. Some, while not confining the operation of the rule to technical releases, interpret its language literally, thereby bringing every instrument using the word "release" or "discharge" within the rule, whatsoever other language it may contain. Others interpret its language with regard for its underlying purpose, and conform its application to the intent of the parties as thereby disclosed, and to ultimate justice. Many, as we have done, frankly extend its terms so as to include satisfaction, whatever the evidence of it may be, with release and discharge as accomplishing the indicated result. *Ayer v. Ashmead*, 31 Conn. 447, 452, 83 Am. Dec. 154. Possibly these differences of attitude, and there are variations of them, are in part attributable to differing views entertained as to the underlying reason for the rule. Possibly, also, a failure to bear these differing views of the rule's foundation in mind has contributed to the confusion which exists in the adjudicated cases. At any rate a confusion does exist that renders harmonizing far from easy, and forcibly suggests that an intelligent solution of the problems presented in any given jurisdiction, in an attempt to make practical application of the familiar formula of words, can only be had by keeping steadily in mind the theory of the law which it represents as there accepted.

Lord Coke said that the rule had its origin in the fact that the release should be taken most strongly against the releasor, and the assertion reappears in several modern cases. *Carey v. Bilby*, 63 C. C. A. 361, 129 Fed. 203, 205; *Bronson v. Fitzhugh*, 1 Hill, 185, 186. Not infrequently it has been said that its reason was that the cause of action for the injury was one and indivisible, so that the release of one joint tortfeasor necessarily destroyed the right of action. *Duck v. Mayew* [1892] 2 Q. B. 511, 513, 62 L. J. Q. B. N. S. 69, 4 Reports, 38, 67 L. T. N. S. 547, 41 Week. Rep. 56, 57 J. P. 23; *Dufur v. Boston & M. R. Co.* 75 Vt. 165, 172, 53 Atl. 1068, 14 Am. Neg. Rep. 461; *Matheson v. O'Kane*, 211 Mass. 91, 94, 39 L.R.A.(N.S.) 475, 97 N. E. 638, Ann. Cas. 1913B, 267. Again it has been said that the reason is that the law considers that the one who has received the release committed the whole tort and occasioned the whole injury, and that it has satisfied the injured party. *Gilpatrick v. Hunter*, 24 Me. 18, 19, 41 Am. Dec. 370; *Abb v. Northern P. R. Co.* 28 Wash. 428, 58 L.R.A. 293, 92 Am. St. Rep. 864, 68 Pac. 954. Still again, reference being had to technical releases, the rule has been made to

rest upon a conclusive presumption said to attach to the presence of the seal that the sealer had been fully satisfied. *Ellis v. Eason*, 50 Wis. 138, 147, 36 Am. Rep. 830, 6 N. W. 518; *McBride v. Scott*, 132 Mich. 176, 178, 61 L.R.A. 445, 102 Am. St. Rep. 416, 93 N. W. 243, 1 Ann. Cas. 61, 13 Am. Neg. Rep. 335; *Carey v. Bilby*, 63 C. C. A. 361, 129 Fed. 203, 205. The reason most commonly assigned, especially in modern cases, and that which is most satisfactory in that it does not rest upon pure technicalities, but upon broad principles of justice and equity, is that the releasor is entitled to one satisfaction, and one only, and that an unqualified release or discharge implies the receipt of such satisfaction. *Lovejoy v. Murray*, 3 Wall. 1, 17, 18 L. ed. 129, 134; *McAllester v. Sprague*, 34 Me. 296, 298; *Gunther v. Lee*, 45 Md. 60, 67, 24 Am. Rep. 504; *Matthews v. Chicopee Mfg. Co.* 3 Robt. 711, 714.

We have adopted this last as the underlying reason for our rule, which, it should be borne in mind, expressly extends its statement to include all cases where satisfaction has been received. The language of this court states our theory of the law most clearly, and indicates the rule of interpretation to be given to the language used in expressing the rule of law, and in the application of it to concrete situations. In *Ayer v. Ashmead*, 31 Conn. 447, 452, 83 Am. Dec. 154, we said: "It is, as we suppose, settled law that a release, discharge, or satisfaction of one or more of several joint trespassers is a discharge of them all, in the same manner that a discharge of one of several joint debtors, or a payment and satisfaction of the joint debt by one, is a satisfaction as to all, since a party injured by a trespass committed by several can have but one satisfaction for his injury, no more than one who has a debt against several can be entitled to be more than once paid."

It needs no argument to demonstrate that, under the theory of the law thus stated, and more fully elaborated in the opinion and in the dissenting opinion of Judge Butler, there is no reason for the proposition that technical releases only come within its purview. What the law under our theory regards is not technical or artificially created conditions, but the substantial matter of acceptance of consideration in satisfaction for the injury received, and receipts in full and releases, sealed and unsealed, are only incidents which have their bearing upon the ultimate question. Different degrees of significance may attach to the several kinds of writing as evidence of satisfaction received, but behind them all alike lies the ultimate decisive fact sought after, of the acceptance or nonacceptance of consideration in full

satisfaction. *Lovejoy v. Murray*, 3 Wall. 1, 17, 18 L. ed. 129, 134. In our conception of the law no peculiar virtue attaches to a formal release except as an indication of satisfaction received. The rule, in our view of it, does not rest upon technicalities, nor does it set up a purely artificial standard unrelated to just and equitable results to be secured by its enforcement. The accepted formula is but an attempt to express in concise phrase the basic legal principle that satisfaction once had exhausts the right of action, and it should be interpreted and applied according to its spirit and purpose rather than its letter.

Jaggard, in his work on Torts (§ 117), has carried this theory of the law to its logical conclusion. He says that the essential thing is the satisfaction, and states the rule to be: "Wherever the person injured by the wrong of several joint tortfeasors has settled his claim for damages and received satisfaction from one of them, the cause of action is discharged as to all."

This statement, while differing in form, is not after all different in essence from the more familiar one hereinbefore stated. In effect, what this writer has done has been to substitute the thing signified for that which signifies it.

While the cases concur in holding that satisfaction furnishes the ultimate test, there are those, especially of a former time, which recognize, in addition to a satisfaction in fact, a satisfaction in law, arising where there is a release under seal. *Brown v. Marsh*, 7 Vt. 320, 327; *Bronson v. Fitzhugh*, 1 Hill, 185, 187. Here we come upon the ancient notion of the sanctity surrounding a seal, and of certain artificial consequences attending its use which we have largely outgrown. We also discover in it one phase of the theory represented by the doctrine, that it is only sealed releases which come within the application of the rule under discussion. This theory of the existence of a satisfaction in law can have no other foundation than one artificially created, or one which rests upon an assumed conclusive presumption that a sealed release, whatever its terms, implies full satisfaction of the wrong or obligation which formed its subject-matter. The former foundation we should be unwilling to recognize; the latter we shall have occasion to notice later.

In the present case the defendants pleaded, as evidence that the plaintiff had been satisfied, two instruments under his hand and seal and delivered by him to the Ley company, his immediate employer. One was a formal release in technical terms of all claims and demands against that company, and especially all claims and demands on account of the injury which forms the L.R.A.1915E.

subject-matter of the present action, but expressly reserving to the releasor the right to sue any other party or parties. The other was a less formal instrument of release containing the same reservation. The second adds nothing to the efficacy of the first, and may, for convenience's sake, be disregarded. No question is made of want of consideration, and there is no attempt to modify the terms of the writing by testimony *aliunde* or by showing an unexpressed intent. The plaintiff's sole claim rests upon the writings as written, and is to the effect that, when interpreted as they should be, they are not absolute, but qualified or limited, releases, and that therefore they do not come within our rule making them a bar to an action against the present defendants.

Our question is thus narrowed to one as to the operation of the accepted formula where the release given is not absolute in its terms, but embodies in it a reservation of a right to pursue others than the releasee. Many cases involving such releases and calling for their adjudication have been before the courts. They naturally group themselves into two classes according as the instruments were sealed or unsealed, since there are considerations affecting the former which do not concern the latter. Although the instruments here involved are sealed, the attitude assumed by the courts in the matter of interpretation and effect where they were not under seal is not only interesting, but also may have a very direct bearing upon our inquiry.

It has been held that a reservation of the right to enforce the releasor's claim against other joint tortfeasors than the one to whom the writing is given, or other indications therein that the releasor had received only part satisfaction, or that his intent was not to discharge his entire claim, but only to render the releasee immune from further claim, was of no effect, and was to be ignored, thereby making the writing operate as a general and unqualified discharge. *Ruble v. Turner*, 12 Va. 38, 44; *Abb v. Northern P. R. Co.* 28 Wash. 428, 58 L.R.A. 293, 92 Am. St. Rep. 864, 68 Pac. 954; *McBride v. Scott*, 132 Mich. 176, 178, 61 L.R.A. 445, 102 Am. St. Rep. 416, 93 N. W. 243, 1 Ann. Cas. 61, 13 Am. Neg. Rep. 335; *Flynn v. Manson*, 19 Cal. App. 400, 126 Pac. 181. The reason assigned for this construction has been that the primary and controlling matter embodied in the instrument, and expressive of the main purpose of the releasor, is the release, and that anything destructive of that purpose is so repugnant to the main provision that it must be disregarded. *Price v. Barker*, 4 El. & Bl. 760, 775, 24 L. J. Q. B. N. S. 130, 3 C. L. R. 927, 1 Jur. N. S.

775; *Walsh v. New York C. & H. R. R. Co.* 204 N. Y. 58, 63, 37 L.R.A.(N.S.) 1137, 97 N. E. 408. This doctrine, and the assumed foundation for it, have been repudiated in other jurisdictions. *Bloss v. Plymale*, 3 W. Va. 393, 407, 100 Am. Dec. 752; *Carey v. Bilby*, 63 C. C. A. 361, 129 Fed. 203, 206; *Edens v. Fletcher*, 79 Kan. 139, 143, et seq., 19 L.R.A.(N.S.) 618, 98 Pac. 784; *Musolf v. Duluth Edison Electric Co.* 108 Minn. 369, 375, 24 L.R.A.(N.S.) 451, 122 N. W. 499.

These cases and others to the same effect have for just cause condemned the reasons upon which those holdings differently have rested their conclusions, as purely technical and artificial, unmindful of the intent of the parties, and not conducive to just and equitable results. They have adopted as the true rule of construction the reasonable one that the entire writing should be examined to discover the intent and meaning of the parties, and have held that, when that intent was thus discovered, effect should be given to it. They have held that when it appeared that the intent was not to give an absolute release, but only a qualified one, reserving the right to proceed to obtain full satisfaction by a resort to other parties, the effect of an absolute release should not be given to the writing. Applying these principles to situations where the instrument used words of release, but accompanied them with an express reservation of the right to pursue others than the releasee, they have held that there was no presumption of receipt of full satisfaction, but rather the contrary, that the intent not to cut off the right of action against others was apparent, and that a reasonable construction of the instrument required that it be regarded as one whose purpose was to render the releasee immune from further claim, and that therefore it be treated as a covenant not to sue, or as having the legal effect of such covenant. *Matheson v. O'Kane*, 211 Mass. 91, 95, 39 L.R.A.(N.S.) 475, 97 N. E. 638, Ann. Cas. 1913B, 267; *Edens v. Fletcher*, 79 Kan. 139, 19 L.R.A.(N.S.) 618, 98 Pac. 784; *Musolf v. Duluth Edison Electric Co.* 108 Minn. 369, 375, 24 L.R.A.(N.S.) 451, 122 N. W. 499; *McAlister v. Sprague*, 34 Me. 296, 298; *Carey v. Bilby*, 63 C. C. A. 361, 129 Fed. 203, 206.

The position taken by these courts, and the argument in support of it, are well exemplified in a series of English cases all involving releases substantially like those before us. The instruments they had under consideration were under seal, and dealt with contractual obligations. But the principles of construction they support and their conclusions are none the less pertinent for either of those reasons. The seal adds rather than detracts from the sanctity of L.R.A.1915E.

the instrument, and at common law (modified by our statute, Gen. Stat. § 655) the effect of a release of one joint debtor upon the liability of the others is the same as the release of one joint tortfeasor. *Ayer v. Ashmead*, 31 Conn. 447, 452, 83 Am. Dec. 154.

In *Solly v. Forbes*, 2 Brod. & B. 38, 48, one of the earliest of these cases, the court said: "But against this objections of a technical and artificial nature have been raised, and we have been referred to many cases in which it has been held that a saving or condition repugnant to the nature of the grant is void, and that the grant remains absolute and unqualified, the condition no way operating in restraint of the grant. . . . Taking these cases, however, such as they are, the application sought to be established is altogether fallacious. It is assumed that wherever the word 'release' is made use of, it must operate absolutely and unconditionally, though immediately and in the same sentence followed by words which show it to be partial and particular only, and the general words being in no respect repugnant to the special words, but the latter a qualification merely of the former, leaving the release to operate to every purpose, except to the exclusion of the particular purpose which the parties have declared it to be their intention it shall not exclude. This being apparent, both in terms and meaning, what are the rules of law which apply narrowing them to the particular point? I pass over the general and leading principle, that the intent of the parties shall prevail as far as by law it may; and, further, that courts will be anxious so to construe the law as to give effect to that intent, provided it do not contravene any fundamental rules of the policy of the law. If a deed can therefore operate two ways, one consistent with the intent, and the other repugnant to it, courts will be ever astute so as to construe it as to give effect to the intent; and the construction, I need not add, must be made on the entire deed."

In *Price v. Barker*, 4 El. & Bl. 760, 775, decided many years later, the next step in the argument was well stated as follows: "To entitle the plaintiff to our judgment it must appear that the deed operated only as a covenant not to sue, and that the rights of the plaintiff, as against the surety, were preserved by the particular reservation in question, notwithstanding such covenant not to sue. With regard to the first question, two modes of construction are for consideration: one that, according to the earliest authorities, the primary intention of releasing the debt is to be carried out, and the subsequent provision for reserving remedies against co-obligors and co-contractors should be rejected, as inconsistent with the intention to

release and destroy the debt evinced by the general words of the release, and as something which the law will not allow as being repugnant to such release and extinguishment of the debt; the other that, according to the modern authorities, we are to mold and limit the general words of the release by construing it to be a covenant not to sue, and thereby allow the parties to carry out the whole of their intentions by preserving the rights against parties jointly liable. We quite agree with the doctrine laid down by Lord Denman in *Nicholson v. Revill*, 4 Ad. & El. 675, 6 Nev. & M. 192, 1 H. & W. 756, 5 L. J. K. B. N. S. 129, . . . that if the deed is taken to operate as a release, the right against a party jointly liable cannot be preserved; and we think that we are bound by modern authorities . . . to carry out the whole intention of the parties as far as possible by holding the present to be a covenant not to sue, and not a release."

In *Cocks v. Nash*, 9 Bing. 341, 348, Gaselee, J., observed; "I agree with my lord chief justice on both points. No doubt a deed may be construed as a release or a covenant not to sue according to the intent of the parties manifested by the contents of the deed; but the plaintiff cannot show that intent by parol evidence. In all the cases cited the court has extracted the meaning of the parties from the deed itself."

In *Thompson v. Lack*, 3 C. B. 540, 551, 16 L. J. C. P. N. S. 75, the doctrine of *Solly v. Forbes* was reaffirmed, and the release under seal declared not to operate to discharge the person against whom the reservation was made.

The law is well settled as to the effect of a covenant not to sue given by the injured person to one of joint tortfeasors. Such a covenant does not operate as a release of the others from liability, and cannot be pleaded in bar of an action against such others. *Duck v. Mayeu*, [1892] 2 Q. B. 511, 513, 62 L. J. Q. B. N. S. 69, 4 Reports, 38, 67 L. T. N. S. 547, 41 Week. Rep. 56, 57 J. P. 23; *Matheson v. O'Kane*, 211 Mass. 91, 94, 39 L.R.A. (N.S.) 475, 97 N. E. 638, Ann. Cas. 1913B, 267; *Chicago & A. R. Co. v. Averill*, 224 Ill. 516, 522, 79 N. E. 654; *McAllester v. Sprague*, 34 Me. 296, 298; *Snow v. Chandler*, 10 N. H. 92, 93, 34 Am. Dec. 140; *Brown v. Marsh*, 7 Vt. 321, 327.

It remains to consider situations created by instruments of release bearing a seal. The presence of a seal, of course, imports consideration received, and is an effective protection to the instrument from attack in that direction. Its presence also forbids a modification of the terms of the instrument by parol or writing not under seal or evidence of unexpressed intent. *Brooks v. Stuart*, 9 Ad. & El. 854, 1 Perry & D. 615, 8 L.R.A. 1915E.

L. J. Q. B. N. S. 184; Cocks v. Nash, 9 Bing. 341, 345, 4 Moore & S. 162, 2 L. J. C. P. N. S. 17; *Allen v. Ruland*, 79 Conn. 405, 411, 118 Am. St. Rep. 146, 65 Atl. 138, 8 Ann. Cas. 344.

It has also been said that the seal affixed to the release furnishes a conclusive presumption that the releasor has been fully satisfied, and the inevitable conclusion drawn from that proposition is that the releasor, having received full satisfaction, could have no further right of action against anybody. *Ellis v. Esson*, 50 Wis. 138, 147, 36 Am. Rep. 830, 6 N. W. 518; *McBride v. Scott*, 132 Mich. 176, 179, 61 L.R.A. 445, 102 Am. St. Rep. 416, 93 N. W. 243, 1 Ann. Cas. 61, 13 Am. Neg. Rep. 335; *Bronson v. Fitzhugh*, 1 Hill, 185, 186; *O'Shea v. New York C. & St. L. R. Co.* 44 C. C. A. 601, 105 Fed. 559, 561. Properly interpreted, this proposition is doubtless correct; that is to say, the conclusive presumption arises that full consideration has been received for the surrender or discharge which the instrument by its terms makes. So it is that when the instrument is in the form of an absolute and unqualified release, as most such instruments are, the releasor, when he endeavors to get behind it, is met by the irrebuttable presumption that satisfaction of the wrong or the obligation has been received. But, as addressed to qualified or limited releases whose terms expressly negative the receipt of full satisfaction, there is no reasonable basis for the presumption of the receipt of full satisfaction for the wrong or obligation due to the presence of the seal. The former result flows naturally from the fact that, owing to the writing and the seal thereon, full consideration for what the instrument expresses cannot be disputed, and modification *aliunde* is impossible. The same principle, applied to the latter situation, leaves the terms of the instrument to be considered and given effect. To interpret the proposition of these cases, therefore, as holding that the presence of a seal upon a writing containing formal words of release makes it of necessity an absolute one given in return for full satisfaction, no matter what its terms may express or fairly imply to the contrary, is to misinterpret the proposition.

The cardinal rule of interpretation is the discovery of the intent and meaning of the parties from the language used, and that rule applies to sealed as well as to unsealed writings. *Pierce v. Sweet*, 33 Pa. 158. The sanctity of the seal is not being invaded when the instrument is being examined to discover its true intent and meaning, or being enforced in accordance with the intent thus discovered. It is one thing to hold a sealed instrument immune from attack for want of consideration, and quite another to

ignore its terms and manifest intent, and accord to it a purely artificial construction not justified by its language, on account of its having a seal attached thereto. A seal is just as appropriate to a covenant not to sue as to a release.

Our examination of the cases has failed to disclose any in which a disposition was shown to extend the operation of the principle stated outside of its proper sphere. At least we recall no case in which a release with a reservation similar to those before us has been construed as an absolute release, or one which came under the operation of the main proposition with which our discussion opened by reason of a conclusive presumption of full satisfaction arising from the presence of a seal thereon. In fact, we have found very few cases involving sealed releases in which it was held for any cause or reason that the intent of the parties apparent from the language of the instrument was to be ignored, or, speaking more directly to the present point, that releases of one with express reservation of the right to proceed against other parties jointly liable were held to come within the provisions of the rule and to accomplish the release of all. *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504, is such a case, but its conclusion was based upon the doctrine, already referred to, that the reservation was repugnant to what preceded it, and therefore to be ignored. *De-long v. Curtis*, 35 Hun, 94, is another such case, but its authority has been destroyed by the later cases of *Gilbert v. Finch*, 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133, and *Walsh v. New York C. & H. R. R. Co.* 204 N. Y. 58, 37 L.R.A. (N.S.) 1137, 97 N. E. 408, both hereinafter more particularly noticed. *Babcock & W. Co. v. Pioneer Iron-Works (C. C.)* 34 Fed. 338, 341, is possibly another. No one of these cases contains a careful consideration of the question involved, and the basis upon which the decision of the last two was placed is not altogether clear, save that the receipt of satisfaction, in fact, appears to have been assumed.

Seither v. Philadelphia Traction Co. 125 Pa. 397, 4 L.R.A. 54, 11 Am. St. Rep. 905, 17 Atl. 338, is apparently much relied upon by the defendants, and is oftentimes cited as supporting the proposition for which they contend. That case was decided upon the simple ground that the sealed instrument embodying the release disclosed upon its face that the releasor had received satisfaction in fact. The fundamental proposition of the opinion, as the courts states it, is that "whenever the plaintiff has actually received satisfaction for the injury he has sustained, the cause of action is discharged." Page 402 of 125 Pa. L.R.A.1915E.

Turning now to the other side of the question, we find several tort cases, and carefully reasoned ones, presenting substantially the same conditions as here; that is, sealed releases containing express reservations of the right to pursue other parties, wherein it has been held that the terms of the so-called release were examinable to discover the intent of the parties, and to give effect to that intent. Specifically it was held in these cases that the reservation indicated that the release was not given in return for full satisfaction, and that the intent of the parties to be gathered therefrom was to give a qualified one which, while rendering the releasee exempt from further demand, would permit the pursuit of others to obtain the satisfaction not already received, and that effect would be given to this intent by construing the so-called release as a covenant not to sue, or as having the same legal effect as such a covenant. We have already had occasions to notice the group of English cases which have taken this position, and need not refer to them again. They are all distinctly in point, and emphatic in their conclusions.

Of the cases in this country to the same effect, where tort liability was concerned, the leading one is *Gilbert v. Finch*, *supra*. In it the court flatly repudiated the doctrine of some of the earlier cases in that state, and adopted that of the English cases. This conclusion was reaffirmed in *Walsh v. New York C. & H. R. R. Co.* *supra*, with the following pertinent comment (p. 63): "The early English cases, and some of the later cases in our sister states, literally follow the logic of this rule to the conclusion that any kind of a settlement, release, or satisfaction, even though expressly limited to certain parties and reserving all rights as against the others, operates to discharge all who participate in the wrong. The idea underlying thus rule is that the primary intention to release is the thing to be carried out, and all inconsistent reservations must be ignored as repugnant to the purpose of the release, which was to destroy the debt or obligation. It is one of those harsh, although strictly logical, common-law rules which has had to make way for the modern tendency to substitute justice for technicality wherever that is possible; for now the English courts are holding that the general words of a release, which are limited by specific reservations, are to be construed as a covenant not to sue the party to whom the instrument is given, thus effectuating the intention of the parties without affecting the joint liability."

The following cases in other jurisdictions have taken the same position: *Kropidlowski v. Pfister & V. Leather Co.* 149 Wis. 421,

425, 39 L.R.A.(N.S.) 509, 135 N. W. 839; *Derosa v. Hamilton*, 14 Pa. Co. Ct. 307. *Cleveland, C. C. & St. L. R. Co. v. Hilligoss*, 171 Ind. 417, 423, 131 Am. St. Rep. 258, 86 N. E. 485, also appears to assent to this doctrine.

As related to the analogous common-law liability of joint debtors, the ninth edition of *Parsons on Contracts* (vol. 1, page 28) makes this comprehensive statement, well supported by the American authorities, touching both sealed and unsealed releases: "But though the word 'release' be used, even under seal, yet if the parties, the instrument being considered as a whole and in connection with all the circumstances of the case and the relations of the parties, cannot reasonably be supposed to have intended a release, it will be construed as only an agreement not to charge the person or party to whom the release is given, and will not be permitted to have the effect of a technical release."

In support of this doctrine see *Whittemore v. Judd Linseed & Sperm Oil Co.* 124 N. Y. 565, 574, 21 Am. St. Rep. 708, 27 N. E. 244; *Benton v. Mullen*, 61 N. H. 125, 128; *First Nat. Bank v. Marshall*, 73 Me. 79; *Bradford v. Prescott*, 85 Me. 482, 487, 27 Atl. 461; *Merritt v. Bucknam*, 90 Me. 146, 152, 37 Atl. 885; *Dickinson v. Metacomet Nat. Bank*, 130 Mass. 132, 135; *Hale v. Spaulding*, 145 Mass. 482, 1 Am. St. Rep. 475, 14 N. E. 534; *Parmelee v. Lawrence*, 44 Ill. 405, 413; *Clark v. Mallory*, 185 Ill. 227, 233, 56 N. E. 1099.

Chitty, in the sixteenth edition of his work on *Contracts* (page 812) gives substantially the same statement of the law as supported by the English cases.

The reasoning of the cases, both English and American, which have refused to give to a release which upon its face negatives an intent to discharge the injured party's claim, and furnishes unmistakable evidence of the nonreceipt of satisfaction, the effect of precluding further recovery by him against anybody, is so convincing, and their conclusion so thoroughly consonant with justice and equity, as to compel our concurrence in them. We could not well do otherwise and retain our conception of the purpose sought to be accomplished by the rule, and of the ultimate test to be applied in effectuating that purpose,—to wit, the satisfaction of the injured party. Plainly the rule was not formulated out of a tender regard for joint tort feasons, and to furnish a shield for them against demands for satisfaction for their wrongs. In so far as it is a rule to be observed, its aim must be the accomplishment of just and equitable results to all concerned, through a single satis-

faction to be given and received for wrong suffered.

The defendants urge that *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154, and *Allen v. Ruland*, 79 Conn. 405, 118 Am. St. Rep. 146, 65 Atl. 138, 8 Ann. Cas. 344, are decisive in their favor of the question here. On the contrary, the principles enunciated in these cases are, as far as they go, in perfect harmony with our present conclusions. The chief significance of *Ayer v. Ashmead* lies in its clear recognition, already referred to, of satisfaction as furnishing the ultimate test. Beyond this feature of the opinion there is little either in its reasoning or conclusion of present pertinence. Ayer had brought separate actions against two joint trespassers, Grumley and Ashmead. While these suits were pending he settled with Grumley, giving him a receipt "in full for the damages and costs" in the case, and withdrew it. Ashmead in the action against him thereupon pleaded: (1) That the plaintiff had received the amount paid in full satisfaction and discharge of the trespass, and of all damages and costs therefor; and (2) that the plaintiff had executed a release discharging Grumley and the defendant from all damages on account of the trespass. Upon the trial Ashmead showed the situation as recited. It was admitted that the settlement with Grumley did not include, and was not intended to include, the suit on trial, and that it was understood by the parties to the settlement that the latter action would proceed as if no settlement had been made. Possibly a controversy as to Ayer's right to pursue Ashmead for the recovery of substantial damages might have arisen out of this situation. But no such controversy arose. It appears to have been assumed by the parties, the trial court, and this court, that the receipt of full satisfaction for the "damages and costs" in the case against Grumley, as evidenced by the receipt in full, implied that Ayer had been fully satisfied for the injury suffered. Full recovery therefor could have been had in the action against Grumley, and the receipt given professed to be in full for the damages recoverable in that case. The only question presented for determination or under discussion was as to the plaintiff's right to recover nominal damages as a means of obtaining costs in the pending action. The defendant contended that he was entitled to a verdict in his favor, and by its operation to a judgment for costs; the plaintiff that he should have a verdict for nominal damages carrying with it the right to costs. The contention was in reality one over costs. It was in this connection that the understanding as to the effect of the settlement with Grumley was deemed to be of

importance. As far as appears, it was not deemed to have importance as negating the receipt of full satisfaction for the plaintiff's injury. The fighting ground was the effect, as touching the matter of costs, of the settlement made while the suit against Ashmead was pending, that settlement being intended not to reach that suit. The majority opinion held that, as the plaintiff's right of action against the two joint trespassers had, as everybody assumed, been fully satisfied in the Grumley settlement, there was no foundation left for a recovery of nominal damages; the minority that, notwithstanding the basis for a new action or for the recovery of substantial damages was gone, a verdict for nominal damages was, under the circumstances, the proper one. The latter opinion, written by Judge Butler, is particularly enlightening as to the nature of the controversy before the court, the position assumed by the parties, and the narrow character of the issue under consideration and decided. The proposition favorable to the plaintiff for which he contended was that "the court in such cases, where two actions are pending, and one is discharged, may and should render a judgment in the other for nominal damages, distinct from and independent of the damages or debt sued for, as the basis of a judgment for cost." Page 456 of 31 Conn.

In *Allen v. Ruland* one of the joint tortfeasors had received from the injured party a sealed release absolute in its terms. The defendant undertook to import into that instrument, by parol evidence of intent, a reservation similar to that embodied in the release before us. We held that the proffered evidence was not admissible for that purpose. The question here was not presented or discussed even in a remote way. There is, however, this significant feature of the case, that it is difficult to understand why the question of the admissibility of this evidence for the purpose of converting the absolute release into a qualified one, reserving to the releasor the right to pursue others of the joint tortfeasors, was discussed and passed upon, if such change in its terms, if made, would have accomplished nothing in legal effect.

It has been suggested as an objection to the conclusion we have reached that the result of it is to permit the injured party to obtain more than full satisfaction. *McBride v. Scott*, 132 Mich. 176, 182, 67 L.R.A. 445, 102 Am. St. Rep. 416, 93 N. W. 243, 1 Ann. Cas. 61, 13 Am. Neg. Rep. 335; *Chapin v. Chicago & E. I. R. Co.* 18 Ill. App. 47, 50. Under our theory of the law and the rule, as we interpret it, this result is impossible L.R.A.1915E.

of attainment. Full satisfaction is in itself a bar to further recovery. *Ayer v. Ashmead*, supra. When the right of action is once satisfied it ceases to exist. If part satisfaction has already been obtained, further recovery can only be had of a sufficient sum to accomplish satisfaction. Anything received on account of the injury inures to the benefit of all, and operates as payment *pro tanto*. This is the familiar rule where consideration has been received in return for covenants not to sue or in part payment, and it is the logical and reasonable one. *Snow v. Chandler*, 10 N. H. 92, 95, 34 Am. Dec. 140; *Chamberlin v. Murphy*, 41 Vt. 110, 119; *Bloss v. Plymale*, 3 W. Va. 393, 409, 100 Am. Dec. 752; *Ellis v. Esson*, 50 Wis. 138, 154, 36 Am. Rep. 830, 6 N. W. 518; *Musolf v. Duluth, Edison Electric Co.* 108 Minn. 369, 24 L.R.A.(N.S) 451, 122 N. W. 499.

In view of these conclusions, we have no occasion to discuss the plaintiff's remaining proposition predicated upon the contention that the Ley company did not stand in the position of a tortfeasor with the defendants.

Turning now to the instruments before us, we find them to be in all essential respects similar to those under consideration in the cases cited in support of the proposition adopted by us. It is impossible to read either of them in its entirety without discovering unmistakable indications that it was not given by the plaintiff in return for satisfaction received for his injury, or as an absolute release. In neither of them is to be found recognition of satisfaction received, or anything to indicate any other end to be served by it than to render the releasee immune from further demand against it. To give to either the effect of an acknowledgment of a receipt of satisfaction, and to compel the releasor to accept its consideration in satisfaction, would be to give to it an artificial value it does not deserve, and to disregard its apparent character. If the intent of the parties to the release is to be effectuated, and justice accomplished, these instruments must be given the legal effect, consonant with the intent of the parties, of covenants not to sue the Ley company, and not of releases within the meaning and intent of the rule under discussion.

Notwithstanding these instruments, the plaintiff remains free to prosecute his action against these defendants for the recovery of such sum as, together with that already received by him from the Ley company, will afford him full satisfaction, and no more, for his injuries.

There is error, the judgment is set aside.

and the cause remanded for further proceedings according to law.

Wheeler, J., concurring (February 3, 1915):

I concur in the result, but not in the reasoning of the opinion. It has long been a principle of our law that the release for a consideration of one of several joint tortfeasors is a release of all. This rule works injustice. Courts struggle to take a given case out of its grasp, as the majority opinion vividly portrays.

In this case our court construes an instrument which in terms, so plain that all may read, is a straight release of Ley & Company, to be a covenant not to sue Ley & Company, because at the end of the release is a reservation of the right of the releasor to sue any other party. The parties to the instrument intended to release Ley & Company, but not to release the other joint tortfeasors. In order to avoid the consequences, under our rule, of the release of Ley & Company for \$100 for a serious injury, the court construes the instrument to be what manifestly the parties never intended it to be, *viz.*, a covenant not to sue Ley & Company. The court thus avoids the application of this harsh rule where the instrument contains a reservation of the right to sue other joint tortfeasors. But in all other cases where there is a release without the reservation, the rule applies, and action against other joint tortfeasors is barred, even though satisfaction has not been had for the injury. As far as the position of the court goes, it indicates its inclination to restrict this rule of law as far as it thinks that it may in order to do justice. I have a similar desire to do justice in this case, but I am unable to reach this desirable end by construing the language, "I hereby release and discharge Ley & Company from all claim for damage," to be a covenant not to sue Ley & Company, and not a release of Ley & Company.

The opinion of the court reveals how surely experience has shown the judicial mind that this rule works injustice. It operates thus: A person for a nominal sum releases one of several joint tortfeasors for a serious injury. The law says he may not recover of the others the balance of the damage suffered. Obviously he should receive satisfaction for his damage, and, if he has received partial satisfaction from one, he should receive from the others enough to give him complete satisfaction. This rule of law was established by the courts because it then seemed to bring about what should be done according to the then established judgment of society. This judgment of society or custom was incorporated in a precedent L.R.A.1915E.

which thus became the law. The result reached was not the assertion of the court's will, but of a result found by the established methods of the law. This rule of law was the result of growth. In such manner the common law has grown. And its flexibility and capacity for adaptation was pointed to as its peculiar boast and excellence by Justice Matthews in *Hurtado v. California*, 110 U. S. 530, 28 L. ed. 237, 4 Sup. Ct. Rep. 111.

So modifications of the rule may be had where the court ascertains that the rule does not represent what should be according to the settled judgment of society. And in like manner one rule may be abrogated and another set in its place. Before change should be made the utmost care should be exercised to ascertain whether by the orderly methods of the law such change is demanded. Where property rights of large consequence have become vested in reliance upon the rule, the court will not ordinarily change it.

Time has proved that the rule we are considering is wrong in principle, and in operation promotes injustice. It is not too much to say that the numerous opinions of the judges demonstrate this, and that the settled judgment of society and of the profession of the law concur in the belief that this rule does not represent what ought to be, and property rights have not become vested in reliance upon the rule. Under such circumstances it is better that the rule should be changed, rather than modified by exceptions which are sustained by a forced construction of men's agreements.

That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule. It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth found its health and life. It is not and it should not be stationary. Change of this character should not be left to the legislature.

Gen. Stat. § 655, provides that the discharge of several joint debtors shall not discharge the other joint debtor. The common law by this statute was changed as to contract obligations. Since our court is unable to change the rule as to tort obligations, this statute should be broadened so as to include all obligations, whether arising in tort or in contract.

I concur in holding that the court erred in overruling plaintiff's demurrer to defendants' substituted second defense.

MINNESOTA SUPREME COURT.

ROBERT LAMBRECHT, Resp't.,

v.

OTTO SCHREYER, Appt.

(129 Minn. 271, 152 N. W. 645.)

Assault — striking another's horse.

1. Striking a horse driven by another, from malice, wantonness, or recklessness, so that the driver is injured, is an assault.

Same — frightening horse.

2. One who whips up his own horses to great speed and passes the team of another, driving near and yelling loudly, if such acts are done recklessly and in such manner as to be likely to produce injury, and so that they do cause injury, commits an assault.

Headnotes by HALLAM, J.

Note. — Assault: striking or frightening animal as assault upon one in control.

An assault has been defined as a demonstration of an unlawful intent by one person to inflict immediate injury on the person of another then present. 2 R. L. C. 525. The act must be such as will convey to the mind of the other person a well-grounded apprehension of personal injury. Id. 533.

The question involved in LAMBRECHT v. SCHREYER, whether such an act may be predicated of the striking or frightening of an animal in control of another, has been presented in a few other cases.

Striking a horse hitched to a wagon in which a person is riding may be an assault upon the person, since it would probably result in a corporal injury to the person himself. Clark v. Downing, 55 Vt. 259, 45 Am. Rep. 612. 1 Stephens, Nisi Prius, 210, is cited in this case as authority for the proposition that the striking of a horse upon which the wife of the plaintiff was riding was an assault upon the wife.

In Marentille v. Oliver, 2 N. J. L. 379, an action of trespass for striking the horse of the plaintiff, attached to a carriage in which plaintiff was riding on the public highway, the court states, *obiter*, that to attack and strike, with a club with violence, the horse before a carriage in which a person is riding, appears to be an assault on the person.

In Bull v. Colton, 22 Barb. 94, an action before a justice of the peace, the complaint alleging the striking of plaintiff's horse while attached to the buggy in which he was riding, the justice, upon objection that the action was one for assault and battery, and was therefore beyond his jurisdiction, permitted the allegation as to the plaintiff being in the buggy to be struck from the complaint. The supreme court, in passing upon the question before it, held that the plaintiff had waived his action for assault and battery, and therefore the justice had jurisdiction; but, in doing so, stated that L.R.A.1915E.

Same — contributory negligence.

3. Contributory negligence of plaintiff is no defense to a civil suit for assault.

Evidence — res gestæ.

4. The testimony showed that defendant struck with a whip a horse plaintiff was driving, causing plaintiff's team to collide with a stump. Plaintiff, his wife and three children, were thrown or dragged from the vehicle. A daughter, who was not hurt, jumped out. As she did so, and while defendant was still shouting, gesticulating, and flourishing his whip and looking toward them, and while she was frightened from the occurrence, she said to her mother: "Schreyer struck our horses." Held, no error to receive this statement in evidence as a part of the *res gestæ*.

Same — assault — threats.

5. In a civil action for assault it is competent to prove threats of violence made by

there could be no doubt but that the plaintiff could have sustained an action in the supreme court for an assault upon his person, and recovered damages therefor and for the injury to his horse.

In *People v. Lee*, 1 Wheeler, C. C. 364, — a prosecution of one who attempted to run his cart against the prosecutor, who was driving his wagon into town and was overtaken by the defendant, — the court observed that the conduct of the defendant in attempting to run against the wagon of prosecutor was clearly an assault; that his horse and cart was merely a machine, and could be directed against the prosecutor as well as against any other inanimate object.

Damages were given in an action of battery for striking a horse on which the wife of the plaintiff rode, so that the horse ran away with her, whereby she was thrown down and another horse ran over her, whereby she lost the use of two of her fingers, in *Dodwell v. Burford*, 1 Mod. 24, but no question is raised, as appears from the report of this case, as to whether or not this constituted a battery.

But an indictment for assault which alleged that the defendant did unlawfully attack and assault one on the public highway, and did violently and unlawfully attempt to stop the United States mail wagon, which the said person was then driving, "by forcibly catching the bridle of his horse, the same being then and there an attempt on the part of said defendant to commit a violent injury on the person of him," was held in *Gober v. State*, 7 Ga. App. 206, 66 S. E. 395, not to show an assault actually committed on the person of the mail driver.

There is no assault upon a person driving a team of horses in a field in the act of gathering corn, by striking and beating the horses in a rude and angry manner with a stick, especially under a statute providing that every person who, in a rude, insolent, or angry manner, shall unlawfully touch another, shall be deemed guilty of an assault and battery. *Kirland v. State*, 43 Ind. 146, 13 Am. Rep. 386.

W. A. E.

defendant against plaintiff two years and four months before the assault.

(May 7, 1915.)

APPEAL by defendant from a judgment of the District Court for Brown County in plaintiff's favor, in an action brought to recover damages for an alleged assault. Affirmed.

The facts are stated in the opinion.

Messrs. Somsen, Dempsey, & Mueller, H. L. Schmitt, and J. W. Schmitt, for appellant:

It was prejudicial error to permit the witness Irma Lambrecht to testify to what she said immediately after the accident, because it was clearly hearsay and self-serving.

People v. Jung Hing, 212 N. Y. 393, 106 N. E. 105; *State v. Horan*, 32 Minn. 394, 50 Am. Rep. 583, 20 N. W. 905; 3 Wigmore, Ev. 1745-1750; *State v. Alton*, 105 Minn. 410, 117 N. W. 617, 15 Ann. Cas. 806.

It was error to receive evidence of alleged threats claimed to have been made by the defendant three years prior to the accident.

State v. Henn, 39 Minn. 476, 40 N. W. 572.

It was a question for the jury to determine whether or not plaintiff contributed to his injuries because of his own want of care.

Messrs. Pfander & Flor, for respondent:

The statements of the participants in the accident, as to what they said immediately upon the happening of the same, were properly received.

State v. Alton, 105 Minn. 410, 117 N. W. 617, 15 Ann. Cas. 806.

Evidence of threats by defendant towards plaintiff, in connection with the evidence that the ill-will continued to the time of the assault, was properly received.

Peterson v. Toner, 80 Mich. 350, 45 N. W. 346; *Macdougall v. Maguire*, 35 Cal. 274, 95 Am. Dec. 98; *Sharp v. People*, 29 Ill. 464; *People v. Deitz*, 86 Mich. 419, 49 N. W. 296; *State v. Henn*, 39 Minn. 476, 40 N. W. 572.

Striking a horse which a person is riding or driving is an assault on that person.

Marentille v. Oliver, 2 N. J. L. 379; *Bull v. Colton*, 22 Barb. 94; *Clark v. Downing*, 55 Vt. 259, 45 Am. Rep. 612.

Riding a horse so near as to endanger one's person, and create a belief in his mind that it is the intention of the rider to ride over him, constitutes an assault.

State v. Sims, 3 Strobh. L. 137.

An intent to commit violence, accompa-

nied by acts which, if not interrupted, will be followed by personal injury, is sufficient to constitute an assault, although the assailant may not be at any time within striking distance.

People v. Yslas, 27 Cal. 630; 3 Cyc. 1025, note 27.

Where defendant does an illegal or mischievous act which is likely to prove injurious to another, he is answerable for consequences which directly and naturally flow from his conduct, though he did not intend to cause the particular injury which followed.

Horne v. Mandelbaum, 13 Ill. App. 607; 3 Cyc. 1068, note 52.

In an assault case, the question of contributory negligence cannot be raised.

Kain v. Larkin, 56 Hun, 79, 9 N. Y. Supp. 89; *Whitehead v. Mathaway*, 85 Ind. 85; *Ruter v. Foy*, 46 Iowa, 132; 3 Cyc. 1082, note 56.

Hallam, J., delivered the opinion of the court:

Plaintiff and defendant are neighboring farmers. One day in December, 1914, plaintiff overtook defendant on a country road. Plaintiff, with several members of his family, was driving in a light two-seated surrey. Defendant was driving in a loaded lumber wagon. The parties had not been on good terms for some time, and it is claimed that, as plaintiff passed, something occurred to anger defendant, and that he followed, yelling and lashing his horses, and himself passed plaintiff just as plaintiff had reached the driveway leading into his house; that as defendant passed he drove very near plaintiff's team, and struck one of the horses with a whip, causing the team to become unmanageable, so that they ran into a stump, and plaintiff was injured. Plaintiff sued for damages for these injuries and recovered a verdict. Defendant appeals. The action is for assault.

1. The court charged the jury that if defendant struck one of the horses plaintiff was driving, from malice, wantonness, or recklessness, and that by reason thereof plaintiff was injured, this constitutes an assault upon plaintiff. This instruction was proper. Such acts do constitute an assault. *Marentille v. Oliver*, 2 N. J. L. 379; *Clark v. Downing*, 55 Vt. 259, 45 Am. Rep. 612.

2. The court further instructed the jury that if defendant whipped up his horses to great speed and yelled loudly and passed plaintiff and his team and vehicle, and if such acts were done "recklessly" and in such manner and so near to plaintiff as to be likely to produce injury, and such acts caused plaintiff's team to run away, and

caused injury to plaintiff, then, even though defendant did not in fact strike plaintiff's horse, his act would amount in law to an assault. We think this instruction also correct, and that such acts constitute in law an assault. *State v. Sims*, 3 Strobh. L. 137; *People v. Lee*, 1 Wheeler, C. C. 364.

3. It is claimed that plaintiff was negligent in the management of his team, and that the court should have submitted the question of contributory negligence to the jury, and should have instructed them that contributory negligence on his part would bar a recovery. We do not agree with this contention. Contributory negligence is a defense only in cases where the action is founded on the negligence of the defendant. It is not a defense to an action for assault. *Whitehead v. Mathaway*, 85 Ind. 85; *Ruter v. Foy*, 46 Iowa, 132; *Kain v. Larkin*, 56 Hun, 79, 9 N. Y. Supp. 89. It is urged that the use of the word "recklessly" in the charge characterizes the act of defendant as negligent only. But the word "recklessly" must not be taken and construed alone. It must be taken in connection with other accompanying words. Taking the whole language together, the act of which the court charged the jury was not in any sense a negligent act.

4. Two of plaintiff's daughters sat in the back seat of the surrey. Each of them testified that defendant struck one of plaintiff's horses with a whip. Each was permitted to testify further in substance as follows: That, upon colliding with the stump, plaintiff, her father, was dragged over the dashboard, her mother, two brothers, and another sister were thrown out, witness was not thrown out or hurt, but jumped out; that the minute she struck the ground, and while defendant was still in sight, "hollering and throwing up his hands and laughing" and holding up his whip and looking toward them, and while she was frightened from the occurrence, she said to her mother, "Schreyer struck our horses." It is contended that the court erred in permitting her to testify that she made this statement. We are not impressed with the importance of this testimony. It could not have added much weight to the testimony which the witness had just given on the stand that Schreyer did hit the horse, but we are of the opinion that there was no error in receiving this evidence.

Of course, it is not generally proper to bolster up the testimony of a witness by parol evidence given by himself or anyone else that he made similar statements on a previous occasion. But this rule has its exceptions. A statement or exclamation of a person who is the victim of a wreck or

collision or other exciting occasion, made immediately after the occurrence, and declaring the circumstances of it as observed by him, may be used testimonially as an assertion to prove the fact asserted. This is an exception to the general hearsay rule. The exception is based on the common experience of men that when a person is under circumstances of physical or mental shock, a stress of nervous excitement may be produced such that the mind is for the time, being controlled by the event, and such that considerations of self-interest are eliminated, and words are forced out without will and without fair opportunity to mold or modify them. *United States v. King* (C. C.) 34 Fed. 302, 314. Such statements when given in evidence derive their credit, not from the veracity of the speaker, but from the circumstances which prompted the statement. *Mitchum v. State*, 11 Ga. 615. To render the statement admissible: There must be a startling occasion, that is, some shock startling enough to produce nervous excitement and to render the utterance spontaneous and instinctive; the statement must be made before there is time or opportunity to design or contrive or devise anything to the speaker's own advantage, and while the nervous excitement still dominates the reflective power, that is, the mental shock must extend without interruption from the moment of the event to the moment of the statement or exclamation; the language must relate to the circumstances which prompted it. 3 Wigmore, Ev. §§ 1745 et seq.; *O'Connor v. Chicago, M. & St. P. R. Co.* 27 Minn. 166, 38 Am. Rep. 288, 6 N. W. 481.

In determining whether the statement made is part of the *res gestæ*, within these rules, the trial court has a wide range of discretion. *O'Connor v. Chicago, M. & St. P. R. Co.* supra; *Delaware, L. & W. R. Co. v. Ashley*, 14 C. C. A. 368, 28 U. S. App. 375, 67 Fed. 209; *Omaha & R. Valley R. Co. v. Chollette*, 41 Neb. 578, 586, 59 N. W. 921, 4 Am. Neg. Cas. 885; *Johnson v. State*, 129 Wis. 146, 5 L.R.A.(N.S.) 809, 103 N. W. 55, 9 Ann. Cas. 923. If the statement is made under circumstances bringing it within the rule of *res gestæ*, it is competent whether favorable or unfavorable to the person making it, since it is received not as an admission, but as testimonial evidence. *Rogers v. Manhattan L. Ins. Co.* 138 Cal. 285, 71 Pac. 348; *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 106, 30 L. ed. 299, 301, 7 Sup. Ct. Rep. 118. It may describe the circumstances of the accident, such as, "I fell over these old planks" (*Murray v. Boston & M. R. Co.* 72 N. H. 32, 61 L.R.A. 495, 101 Am. St. Rep. 660, 54 Atl. 289; *Travellers' Ins. Co. v. Mosley*, 8 Wall.

397, 19 L. ed. 437), or it may describe or name the person responsible for it as, "Here is the man who did it" (State v. Duncan, 116 Mo. 288, 292, 310, 22 S. W. 699; Com. v. Hackett, 2 Allen, 136; State v. Horan, 32 Minn. 394, 50 Am. Rep. 583, 20 N. W. 905). It may be made by one not injured, even by a bystander, for the nervous excitement which renders it admissible may exist in a mere bystander as well as in the person who is an actor in the affair. Wigmore, Ev. § 1755; State v. Duncan, 116 Mo. 288, 22 S. W. 699. And the testimony may be given by the person who made the statement. State v. Alton, 105 Minn. 410, 117 N. W. 617, 15 Ann. Cas. 806; Oliver v. Columbia, N. & L. R. Co. 65 S. C. 1, 43 S. E. 307. Applying these principles, it is quite clear that there was no error in holding, as the trial court did, that the statements made were part of the *res gestæ*, and in receiving them in evidence.

5. The court received in evidence threats of violence made by defendant toward plaintiff two years and four months before the occurrence out of which this cause of action arose. Such evidence was admissible. The lapse of time was such that the probative force of the testimony may have been little, but this goes to the weight of the testimony, not to its admissibility. State v. Hoyt, 46 Conn. 330; Keener v. State, 18 Ga. 194, 63 Am. Dec. 269; Com. v. Quinn, 150 Mass. 401, 23 N. E. 54; Peterson v. Toner, 80 Mich. 350, 45 N. W. 346.

Order affirmed.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. MINNESOTA LOAN & TRUST COMPANY, Exr., etc., of Curtis H. Pettit, Deceased, Plff. in Certiorari,

v.

PROBATE COURT OF HENNEPIN COUNTY et al.

(129 Minn. 442, 152 N. W. 845.)

Election — between will and inheritance — withdrawal.

1. Under the provisions of Gen. Stat.

Headnotes by DIBELL, C.

Note. — Revocation of consent given by one spouse to will of the other in the latter's lifetime.

As to sufficiency of husband's consent to wife's will, see note to Erickson v. Robertson, 37 L.R.A. (N.S.) 1133.

As to revocability of mutual wills, see notes to Frazier v. Patterson, 27 L.R.A. (N.S.) 508, and Brown v. Webster, 37 L.R.A. (N.S.) 1196. L.R.A. 1915E.

1913, §§ 7237-7239, 7243, the surviving spouse, who has consented to her husband's will and codicils added thereto, cannot arbitrarily withdraw her consent and elect to take under the statute instead of under the will.

Same — consent to will — disclosure.

2. Where the husband procures his wife to consent in writing to his will and to codicils added thereto, there is cast upon him the affirmative duty of making a fair disclosure of his property so that she may have knowledge of the effect of the will upon her rights, and intelligently determine whether she will consent; and if such disclosure is not made, the surviving wife, not being guilty of laches, and not being precluded from doing so by contract or estoppel, may, after his death, rescind her consent and elect to take under the statute.

Same — rescission.

3. Upon the record before us a case was presented permitting the wife to rescind her consent and renounce the will, and elect to take under the statute.

(May 28, 1915.)

CERTIORARI to the Probate Court for Hennepin County to review a decree permitting the widow of Curtis H. Pettit to take a distributive share of his estate in lieu of the provisions made for her by his will. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. J. M. Martin and C. E. Drake, for relator:

Ignorance due to negligence is not relievable in equity.

Dart v. Minnesota Loan & T. Co. 74 Minn. 426, 77 N. W. 288; Follansbee v. Johnson, 28 Minn. 311, 9 N. W. 882; Oxford v. Nichols & S. Co. 57 Minn. 206, 58 N. W. 865.

A surviving spouse has not, under our statutes, the strict legal right, after the death of the testator and before the probate of the will, to revoke a written consent to the provisions of such will at or about the time of its execution.

Erickson v. Robertson, 116 Minn. 90, 37 L.R.A. (N.S.) 1133, 133 N. W. 164, Ann. Cas. 1913A, 493.

This note deals with the question of the power of one spouse to revoke or withdraw a consent given to the will of the other spouse at the time of, or prior to, the execution of the will; or, if subsequent thereto, before the death of the testator. Cases are not included which turn on the question of the validity or effect of a marriage settlement or other valid contract between husband and wife settling their property rights, by which for a valuable considera-

Messrs. Cobb, Wheelwright, & Dille, also for relator:

The rights of all parties become fixed as of the date of the testator's death.

Dunnell's Dig. (Minn.) § 10204; State ex rel. Beals v. Probate Ct. 25 Minn. 22.

Messrs. Carleton & Carleton and Keith, Kingman, Cross, & Wallace, for respondents:

The statutes should be construed so as to protect the respondent.

Stromme v. Rieck, 107 Minn. 177, 131 Am. St. Rep. 452, 119 N. W. 948; Tracy v. Tracy, 79 Minn. 267, 82 N. W. 635.

The statutes should be construed together.

Radl v. Radl, 72 Minn. 81, 75 N. W. 111; Stromberg v. Stromberg, 119 Minn. 325,

tion it is agreed that one spouse may dispose of his or her property by will or otherwise; neither are cases included which turn on the question of the power of a married woman, with or without her husband's consent, to make valid testamentary disposition of property. As said in 40 Cyc. 1049: "While a husband may devise his property subject to any rights which his wife may have therein, it is obvious that he cannot cut off such rights by any testamentary disposition he may make. And similarly the wife cannot cut off the husband's rights in her property by testamentary disposition;" and so, where the husband or wife has attempted to dispose of property by will in which the other would have had an interest had no testamentary disposition thereof been made, the question has sometimes arisen whether the interest of the surviving spouse is cut off by his or her consent to the will, or whether such consent is revocable. The cases upon this question are somewhat in conflict. This, however, appears to be true largely because of the effect of local statutes. Unless controlled by statute, the courts, it appears, have usually held that the consent of a husband or wife to the will of the other in the latter's lifetime is not binding upon the consenting party, at least, before probate of the will, because generally there are not the necessary elements to render the principles of estoppel applicable, and such a consent is without force as a contract, being without consideration.

Under the Kansas statute providing that "no man, while married, shall bequeath away from his wife more than one half of his property, nor shall any woman, while married, bequeath away from her husband more than one half of her property. But either may consent, in writing executed in the presence of two witnesses, that the other may bequeath more than one half of his or her property from the one so consenting,"—it was laid down as a general rule in Neuber v. Shoel, 8 Kan. App. 345, 55 Pac. 350, that a written consent on the part of a wife to the disposition of the property made by her husband's will is binding on L.R.A.1915E.

138 N. W. 428; Boeing v. Owsley, 122 Minn. 190, 142 N. W. 129.

The statutes, construed together, provide for an election by the widow.

Jones v. Jones, 75 Minn. 53, 77 N. W. 551; Schacht v. Schacht, 86 Minn. 91, 90 N. W. 127; Nordquist v. Sahlbom, 114 Minn. 329, 131 N. W. 323; Boeing v. Owsley, 122 Minn. 190, 142 N. W. 129.

There must be something more than the mechanical act of writing an apparent consent.

Story, Eq. Jur. § 222; Parsons v. Lane (Re Millers' & Mfrs. Ins. Co.) 97 Minn. 98, 4 L.R.A. (N.S.) 231, 106 N. W. 485, 7 Ann. Cas. 1144.

The act being an act of waiver, choice, or election, it must be made freely, deliber-

her if properly executed, and cannot, after the death of the husband, be repudiated and avoided.

And where, after reading the will and learning the disposition which his wife intended to make of her property, the husband fairly and freely executed a consent to the will, in strict compliance with the statute, it was held in Chilson v. Rogers, 91 Kan. 426, 137 Pac. 936, that he could not, before the death of the wife, revoke the consent by giving her written notice of revocation. The court said: "When such written consent is made in accordance with the statute and delivered to the other spouse, it is a binding disposition of a property right unless some statutory authority can be found for revoking or setting it aside. Although definite provisions have been made for executing this consent, none can be found providing for revoking it. Careful provisions have been made for revoking wills, and it is a fair inference that if it had been the legislative intent that a formal written consent could be revoked, provisions would have been made for that purpose as to the time and manner in which it could be done. If the statutory written consent can be set aside at the option of the maker, as contended by appellant, then it would seem that a mere oral revocation would be effective, and it would be well-nigh impossible to meet a fraudulent claim of a surviving spouse that a withdrawal of consent had been orally made."

There is no more warrant for revoking the consent of one spouse to the will of the other, where the revocation is attempted in the lifetime of the testator, than where it is attempted after his death. Chilson v. Rogers, supra. And the court cited Keeler v. Lauer, 73 Kan. 388, 85 Pac. 541, to the proposition that it is not within the power of the husband, after the death of the wife, to nullify a consent to her will given by him in her lifetime.

The contention was overruled in Chilson v. Rogers, supra, that since a will may be revoked at the option of the maker, a consent to the making of the will should be equally open to revocation; at least, until

ately, and with full knowledge of all the facts of the case and of her rights.

Lindquist v. Dickson, 98 Minn. 369, 6 L.R.A.(N.S.) 729, 107 N. W. 958, 8 Ann. Cas. 1024; *Millikin v. Welliver*, 37 Ohio St. 460; *Stromme v. Rieck*, 107 Minn. 177, 131 Am. St. Rep. 452, 119 N. W. 948; *Slingerland v. Slingerland*, 115 Minn. 270, 132 N. W. 326.

The statute should be construed to require the consent to be given or to be made effectual after death.

Stromme v. Rieck, 107 Minn. 177, 131 Am. St. Rep. 452, 119 N. W. 948; *Re Rausch*, 35 Minn. 291, 28 N. W. 920.

Respondent was at liberty to rescind the consents.

Sorenson v. Carey, 96 Minn. 202, 104 N.

W. 958; *Re McFarlin*, 9 Del. Ch. 430, 75 Atl. 281; *Waggoner v. Waggoner*, 111 Va. 325, 30 L.R.A.(N.S.) 644, 68 S. E. 990; *Cowen v. Adams*, 24 C. C. A. 198, 47 U. S. App. 439, 78 Fed. 536; *Spratt v. Lawson*, 176 Mo. 175, 75 S. W. 642.

When the consent of a husband was necessary to make the will of a wife valid, it was held that a general assent for the wife to make a will was not sufficient.

George v. Bussing, 15 B. Mon. 558; *Van Winkle v. Schoonmaker*, 15 N. J. Eq. 384; *Henley v. Philips*, 2 Atk. 49; 1 Williams, Exrs. 6th Am. ed. 79; 1 Jarman, Wills, 82 note y; 1 Redfield, Wills, 3d ed. 21, 22, 23-25; *Rood, Wills*, § 144.

Respondent should not be held bound by her consents whenever, during six months

the will became operative. It was said that the consent is no part of the will, and, being a creature of the statute, cannot be annulled or recalled unless provision to do so is made by the statute; that, as it is an independent provision of statute, the common-law rules as to marital agreements and relations, or as to the mutual wills of husband and wife, are not applicable; also that the consent provided for by the statute is akin to the provision that a widow may elect to take under the law instead of under the will of her husband, both being provided for by statute, and no authority being given by statute to revoke an election; and that it is held that an election freely and intelligently made is a finality, which effectually concludes and estops the widow from setting aside her decision or reclaiming the relinquished right.

In *Hanson v. Hanson*, 81 Kan. 305, 105 Pac. 444, it was contended that the consent of the wife to the husband's will was void because it did not appear that she had any knowledge of the kind and value of his property; but the court disposed of this contention by saying that there was no evidence or claim that any fraud was practised in procuring the consent, and the disposition of the property made by the will was upheld. The contest was between beneficiaries under the will and heirs of the wife.

The discovery by the widow that the estate was larger than she had anticipated was held, in *Pirtle v. Pirtle*, 84 Kan. 782, 115 Pac. 543, not to afford a reason for setting aside her written consent to the will, given at the time it was executed, and permitting her to take under the statute, where it appeared that at the time of giving her consent she had a general idea of her husband's financial condition, knew of the bulk of his property and of the general state of his financial affairs, and, acting on this knowledge, procured the will to be drawn; that she was a woman of fair intelligence and reasonably well educated, and was fully advised, before she gave her consent, as to her rights under the statute.

It was held in *Erickson v. Robertson*, 116 L.R.A.1915E.

Minn. 90, 37 L.R.A.(N.S.) 1133, 133 N. W. 164, Ann. Cas. 1913A, 493, cited in *STATE EX REL. MINNESOTA LOAN & T. CO. v. PROBATE CT.* that the written consent by the husband, under the statute in that state, to the devise by the wife of her real property, did not require a consideration to support it.

On the other hand, in *Spratt v. Lawson*, 176 Mo. 175, 75 S. W. 642, it was held that the wife was not estopped by assent in writing to the will of her husband at the time it was executed from claiming dower instead of a provision given her in the will in lieu of dower, of much smaller value, and that, if the written consent be regarded as a contract, and it should be assumed that the wife could contract with her husband under the married woman's act, such a contract was void for want of consideration. It was said that, in this instance, the wife's acceptance of the will "was but the surrender of her rights to a one-half interest in a personal estate of \$30,000, to which she would have been entitled, and the surrender of a one-half interest in her husband's real estate, valued at fifteen or twenty thousand dollars more, for absolutely nothing. By the will the plaintiff was to have \$7,000 paid to her in seven annual instalments of \$1,000 each, out of a personal estate of the value of \$28,000 or \$30,000, and from which estate, without a will, she would have been entitled, at once, to double that amount or more." And so, the court said, it was certain that the widow was not estopped from asserting her statutory right of renunciation and election on the ground that her conduct at the time of the execution of the will induced the testator to devise to her property that otherwise, by operation of law, would have gone to the legatees, the acceptance of the will by the wife at the time of its execution not only resulting in no harm or injury to them, to warrant the invocation of the doctrine of estoppel, but the assent being wholly without consideration, and having no force as a contract.

And in *Kreiser's Appeal*, 69 Pa. 194, the court, in holding that a widow might elect to take under the statute instead of under

after the probate of the will, it may be for her interest to change, independently of any question of mistake, lack of knowledge, or otherwise.

Spratt v. Lawson, 176 Mo. 175, 75 S. W. 642.

Respondent should not be held bound by her consents because of her ignorance of the situation and of changed conditions.

Pom. Eq. Jur. 3d ed. § 849; *Re McFarlin*, 9 Del. Ch. 430, 75 Atl. 281; *Woodburn's Estate*, 138 Pa. 606, 21 Am. St. Rep. 932, 21 Atl. 16; *Waggoner v. Waggoner*, 111 Va. 325, 30 L.R.A.(N.S.) 644, 68 S. E. 990; *Larrabee v. Van Alstine*, 1 Johns. 307, 3 Am. Dec. 333.

Respondent is not bound by her consents because of constructive fraud.

Pom. Eq. Jur. 3d ed. § 951; *Ashton v. Thompson*, 32 Minn. 25, 18 N. W. 918; *Prescott v. Johnson*, 91 Minn. 273, 97 N. W. 891; *Shevlin v. Shevlin*, 96 Minn. 398, 105 N. W. 257; *Slingerland v. Slingerland*, 115 Minn. 270, 132 N. W. 326; *Kline v. Kline*, 57 Pa. 120, 98 Am. Dec. 206; *Warner's Estate*, 210 Pa. 431, 59 Atl. 1113;

her husband's will, to which, at the time of its execution, she had assented in writing, said regarding the validity and binding effect of the assent: "It is certainly void at law, and cannot be sustained as a legal instrument against a *feme covert*. She cannot bind herself in law by any such method. She had no one with whom to contract; not with her husband, for they are, legally speaking, one person; besides, she is presumed to be under his control and coercion. She would have no protection whatever if an instrument of this kind could be enforced against her. She could always be controlled by love or fear, overawed by threats, or cajoled by promises. She certainly did not contract with the legatees; they were not parties. The will was not binding on the husband; he could change it the next day; why, then, should she alone be bound, and her husband loose? If she could thus release her interest in his goods, she could in his lands, and thereby the safeguard of a separate examination by a competent and disinterested officer be dispensed with and set at naught. Is this arrangement binding in equity? Would it be enforced by a chancellor? We answer no, unless it could be shown that it was made by the *feme covert* with full knowledge of all the facts,—the value of the property she was receiving, and the interests she was giving up. Besides, if there was any inequality equity would not bind her. Being under legal disability, the bargain must be clearly for her benefit; at least, not to her disadvantage, or chancery would leave the other parties in interest to their remedy at law. . . . This election, made at the time the will was executed,—during coverture, in the presence of the husband,—we consider of no moment whatever. The party was then in-
L.R.A.1915E.

Bierer's Appeal, 92 Pa. 265; *Warner v. Warner*, 235 Ill. 448, 85 N. E. 630; *Taylor v. Taylor*, 144 Ill. 436, 33 N. E. 532.

Dibell, C., filed the following opinion:

Certiorari to the probate court of Hennepin county to review a decree adjudging that *Deborah M. Pettit*, the widow of *Curtis H. Pettit*, deceased, take a distributive share of the estate of the deceased under the provisions of the statutes, the same as if the decedent had died intestate, in lieu of the provisions made for her by the terms of his will and the codicils thereto.

The relator is the Minnesota Loan & Trust Company, as executor and trustee under the will of the deceased, and as testamentary guardian of certain minors, grandchildren of the deceased. It is not conceded that the trust company is a testamentary guardian, and it is unimportant in this controversy.

Curtis H. Pettit made his will on January 22, 1908. He made four codicils, dated, respectively, October 29, 1908, August 31, 1909, September 9, 1909, and March 14,

competent to make it; for an infant, *feme covert*, or a lunatic will not be bound by an election; . . . Her contract is void at law, and equity follows the law. . . . A *feme covert* is not bound by an exchange of land made by her husband, though she declared herself pleased. . . . It is said that this agreement of the wife is binding as a postnuptial contract and family arrangement. We are aware that equity lends its aid to carry out and enforce such arrangements when entered into for the peace of families where contests have arisen or are likely to arise; but we look upon this as an ordinary contract between husband and wife, in which the one party, who is presumed to be under coercion, agrees to bind herself, whilst the other remains free,—can revoke the will at pleasure. There is no equality, and consequently no equity in such a postnuptial settlement, which, after all, is nothing more or less than a bargain between husband and wife." See, however, *McBride's Estate*, 81 Pa. 303, where a husband was held to have waived his curtesy in land in that state by consenting to the will of his wife.

It was also held in *Kreiser's Appeal*, supra, that the principles of estoppel did not apply so as to prevent an election by the wife after the husband's death.

Also in *Van Winkle v. Schoonmaker*, 15 N. J. Eq. 384, it was held that the consent of the husband to the will of his wife was revocable at his pleasure before probate,—at least, if the rights of third parties, acquired under the will before the attempted revocation, have not intervened. It was objected that the consent in this instance was inoperative because given by the husband under a mistaken apprehension that, under the statute, the wife had a right,

1913. To the will and to each of the codicils Deborah M. Pettit, his wife, formally consented in writing. Pettit died on May 11, 1914. The will was probated on June 15, 1914. Before the probate of the will, Mrs. Pettit filed an instrument in the probate court purporting to withdraw and rescind the consents which she had made to the will and to the four codicils, and by appropriate action she renounced the will and elected to take under the statute. Conceding that she had the power, her actions accomplished the purpose intended.

The ultimate question is whether Mrs. Pettit could, after the death of her husband, rescind her consents to the will and the codicils, and elect to take under the statute instead of under the will.

We have had the benefit of the briefs and arguments of counsel put before us in such a way as to be of direct aid. Some authorities are cited from other states. We have found a few additional ones. They are of aid, but they come from states having dissimilar statutes, and often different policies of administration. They have all been con-

sidered. The research of counsel has not produced a line of controlling authorities, nor has our search been more fruitful. The question is a new one; and without putting of record the evidence of the researches of counsel and the court, or following counsel in their contentions, we state with little argument or discussion the result we reach and what we think to be the equitable and working rule applicable.

1. The determination of the question stated involves a consideration of certain statutory provisions of the law of descents. For convenience we refer to them under the section headings of Gen. Stat. 1913, as follows:

"7237. Homestead.—The homestead of such decedent shall descend, free from any testamentary or other disposition thereof to which the surviving spouse, if there be one, shall not have consented in writing. . . ." Rev. Laws 1905, § 3647; Gen. Stat. 1913, § 7237.

"7238. Lands Other Than Homestead.—The surviving spouse shall also inherit an undivided one third of all other lands of

without his consent, to dispose of her property. Regarding this objection and the revocable nature of the consent, the court said: However consonant the objection may seem to our ideas of justice, I do not perceive upon what principle it can rest. As a general rule, it is clear that a party cannot be relieved, even from his contract, by reason of a mistake in law. Here is a mere waiver of his interest in the property bequeathed by the wife. The husband consents that the wife shall dispose of his property, or of her property in which he has an interest. The consent is founded upon no consideration. It is not legally binding. It may be revoked at the husband's pleasure. It is personal to the husband, and no more than a waiver of his rights as her administrator. It can only give validity to her will in case he survives his wife. But how can it be said to be void or inoperative by reason of a mistake of his rights? If no legal rights have been acquired under the consent, it is clearly inoperative. If such rights have been acquired, it is not perceived how they can be lost by reason of an error in law committed by the husband. . . . The consent is not obligatory, but is revocable at the pleasure of the husband at any time before probate granted. It is nothing more nor less than a consent that the will be admitted to probate. If that is revoked, probate cannot be granted." But see *Beals v. Storm*, 26 N. J. Eq. 372, quoted in *Steward v. Middleton*, — N. J. Eq. —, 17 Atl. 294, where, under a statute enacted in 1864, it was said that the husband's assent to the will of his wife was an effectual waiver of his claim to her property after her decease,—a renunciation of his reserved rights,—and was conclusive not only against him, but against his creditors, also.

L.R.A.1915E.

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Also in *George v. Bussing*, 15 B. Mon. 558, the rule was laid down that the husband might revoke his consent to his wife's will during her life, or after her death, before probate.

In *Kelley v. Snow*, 185 Mass. 288, 70 N. E. 89, it was held that a husband was not bound by his consent in writing to the will and codicil of his wife, where, after the giving of such consent, she made another codicil which radically changed the other provisions of the will, although it did not change the bequest to him.

A distinction has been made between cases of election and cases of consent to the will in respect to the necessity of an explanation to the wife of her rights in order to render the election or consent valid. It has been held that, "in case of an election by a widow to take under the will of her deceased husband it is essential that the probate court explain to her its provisions and her rights under it, and also her rights under the law in the event of her refusal to take under the will. But in case of a written consent by her that the husband dispose of more than one half of his property to others than his wife, it is only essential that she act freely and understandingly." *Weisner v. Weisner*, 89 Kan. 352, 131 Pac. 608.

The findings of the trial court in *Weisner v. Weisner*, supra, however, that the wife did not understand the effect of the consent upon her property rights, and that she acted under the strong persuasion and implied threat of her husband in his last sickness, so that such consent was not given freely and understandingly, were upheld, and the judgment setting aside the consent and giving her an election whether or not she desired to accept the provisions of the will was affirmed. It cannot be, the court

which decedent at any time during cover-
ture was seized or possessed, to the disposi-
tion whereof, by will or otherwise, such sur-
vivor shall not have consented in writing,
except such as have been transferred or sold
by judicial partition proceeding or ap-
propriated to the payment of decedent's
debts by either execution or judicial sale,
by general assignment for the benefit of
creditors, or by insolvency or bankruptcy
proceedings, and subject to all judgment
liens. . . . " Rev. Laws 1905, § 3648, as
amended by Laws 1907, chap. 36, § 1; Gen.
Stat. 1913, § 7238.

"7239. Election, etc.—If the will of a de-
ceased parent makes provision for a surviv-
ing spouse in lieu of the rights in his estate
secured by statute, unless such survivor,
by an instrument in writing filed in the pro-
bate court in which such will is proved
within six months after the probate thereof,
shall renounce and refuse to accept the pro-
visions of such will, such spouse shall be
deemed to have elected to take thereunder.
. . . . " Rev. Laws 1905, § 3649; Gen.
Stat. 1913, § 7239.

"7243. . . . (6) The residue, if any,
of the personal estate shall be distributed
as follows: One third thereof to the sur-
viving spouse, if any, free from any testa-
mentary disposition thereof to which such
survivor shall not have consented in writing.
. . . . " Rev. Laws 1905, § 3653, Gen. Stat.
1913, § 7243.

The omission in paragraph 6 of the last
section of a reference to a disposition other
than a testamentary one is likely because
when the provision came into the probate
Code there was no personal property belong-

ing to either spouse which such spouse
might not convey without the consent of
the other.

Section 7239 gives a right of election, in
the cases to which it is applicable, to take
under the statute instead of under the will.
Unless an election is made to take under
the statute, the survivor takes under the
will. Prior to the statute providing for the
statutory election, which is § 65 of the Pro-
bate Code of 1889 (Laws 1889, chap. 46),
there was no statutory election. There
was, however, an equitable right of elec-
tion whether to accept the benefits of the
will or take under the statute as there is
now when the election statute is not ap-
plicable. See *Tracy v. Tracy*, 79 Minn.
267, 82 N. W. 635; *Sorenson v. Carey*, 96
Minn. 202, 104 N. W. 958; *Washburn v.*
Van Steenwyk, 32 Minn. 336, 20 N. W.
324; *Radl v. Radl*, 72 Minn. 81, 75 N. W.
111. So, in referring to the election stat-
ute, Justice Philip E. Brown, in *Boeing v.*
Owsley, 122 Minn. 190, 142 N. W. 129, said:
"It confers no substantive right, but merely
provides for a statutory estoppel to set at
rest, after the expiration of the prescribed
period, all question as to whether the sur-
vivor has elected to take under the will,
and not under the statute, the failure to
elect within such time being 'equivalent to
an assent to the disposition of the property
as fixed by the will.'"

If the surviving spouse consents to the
making of the will, she must take what is
given her by it, and may not elect to take
under the statute. See *Radl v. Radl*, 72
Minn. 81, 75 N. W. 111; *Jones v. Jones*,
75 Minn. 53, 77 N. W. 551; *Sorenson v.*

said, that the legislature intended that a
wife, under the stress of expected widow-
hood, and actuated by a desire to please her
husband, who, on his deathbed, expressed
with tears his intense desire for her to con-
sent to the terms of a will presented to her
without previous warning or consideration,
should be held bound by such consent when
it fairly appears that she did not under-
stand its effect on her property rights, and
acted under the strong persuasions and im-
plied threat of her husband in his last sick-
ness, and especially so when she moves
promptly for revocation before others' in-
terests become involved.

In *Woods v. Shelton*, 126 Tenn. 607, 150
S. W. 856, the court said that the consent
of the husband to the will of his wife, re-
quired in that state, in order for her to
make a valid will of her general estate,
might be written or verbal, express or im-
plied; that it might be given in the lifetime
of the wife, or after her death, and that
after probate of the will it is irrevoca-
ble and binding upon him. The consent in
this case, however, was after the death of
the wife.
L.R.A.1915E.

In *Sorenson v. Carey*, 96 Minn. 202, 104
N. W. 958, where the wife consented in
writing to the husband's will at the time of
its execution, the court stated that if it
were conceded that such consent was not
equivalent to an election to abide thereby,
which question it did not determine, the ac-
tion of the wife after the husband's death
in appropriating personal property given
her by the will, coupled with such consent,
amounted to an election to take under the
will.

See also *Brook v. Turner*, 2 Mod. 170,
set out in note in 37 L.R.A.(N.S.) 1133,
where it was held that the consent given by
the husband to the will of his wife was
binding upon him.

And in *Maas v. Sheffield*, 10 Jur. 417, it
was held that the assent of a husband to his
wife's will could not be withdrawn; but
the husband, both before and after the wife's
death, had in this instance assented to the
will, and the assent after the death of the
wife seems to be the principal ground for
holding the assent irrevocable.

R. E. H.

Carey, 96 Minn. 202, 104 N. W. 958; Erickson v. Robertson, 116 Minn. 90, 37 L.R.A. (N.S.) 1133, 133 N. W. 164, Ann. Cas. 1913A, 493.

The result, therefore, is that Mrs. Pettit, because of her consent to the codicils and the will, must take under the will, unless she may avoid them by the application of some recognized legal principle; and she cannot arbitrarily rescind and renounce the will.

2. The difficult question is whether the wife, after the death of her husband, may rescind her consent to his will and its codicils and elect to take under the statute, her right to act as she chooses not being affected by an estoppel in favor of others, nor by a contractual obligation.

We take the correct holding to be that when a trust and fiduciary relation exists, as there does between husband and wife, the wife having a legal right in case of the death of her husband to some share in his property, and reposing trust and confidence in him, there is cast upon the husband, in taking a consent to the making of his will, or to a codicil to it, the affirmative duty of making to his wife a fair disclosure of his property and her rights, so that her consent will be an actual one, based upon an intelligent knowledge of his property and the effect of her consent, as distinguished from one merely formal. As great a duty of disclosure as that stated is required in antenuptial settlements. If this is not done, and the consent is not fairly and reasonably obtained by putting the wife in possession of the facts which she ought to know in order to determine her course intelligently, she may, after his death, if she proceeds without laches, renounce her consent and elect to take under the statute. If the provision of the statute relative to descents, giving effect to a consent by one spouse to the will of another, without a reserved right of election after the death of the other, does not work justly under such a rule, it should not work at all. We have in mind no other trusts or fiduciary relation at all resembling that here involved where the law requires one party to submit to a surrender, at the instance of the other, of valuable rights, though the surrender is made in compliance with all legal forms, if made in ignorance of the existence of such rights or without fair opportunity for investigation, the other party having full knowledge. The rule stated we adopt.

3. The remaining question is whether the rule we adopt is applicable to the situation presented. Of this there is no substantial doubt.

The probate court finds that Mrs. Pettit gave her consent without consideration and L.R.A.1915E.

without knowledge of the condition and value of the estate, without knowledge of the property she would receive under the will and codicils, and without knowledge of the nature and extent of her own rights. It is found that the provisions made by the will and codicils are inadequate to enable her to live in her accustomed way.

The amount and condition of Mr. Pettit's property at the time of the making of the will are not satisfactorily shown by the record. Mrs. Pettit had no knowledge. It is clear that Mr. Pettit carried an indebtedness of a large amount; that he lost and gained through stock investments; that he had properties both productive and nonproductive, some being a continuous charge on his estate; that he had mining properties under operation and productive of a large income; and that altogether his estate was a very considerable one. His will provided that his wife, in addition to certain gifts of property pertaining to the home, should have, during her life, one half of his net income.

The first codicil did not affect Mrs. Pettit's income. The second provided for the disposition of copper stocks to constitute a trust fund for various charitable purposes. This would have affected Mrs. Pettit's income had it not been that the copper stock proved to be substantially worthless. By the third codicil Mr. Pettit took the profits from certain mining property devoted to Mrs. Pettit's income under the will, the very cream of his productive property, and provided that such profits should not longer be a part of her income, but should be reinvested as principal. The fourth codicil related to the powers of the trustees and did not affect Mrs. Pettit's income.

If there had been no omission to disclose except at the time of taking the consent to the third codicil it may be that a proper adjustment could be made by restoring the property to the estate; but there was a failure to disclose, at the time of the will.

From what is said it is not to be understood that there was a thought on the part of Mr. Pettit of defrauding Mrs. Pettit by the making of the will or by the addition of the codicils. They were each seventy-five years of age when the will was made, and they had lived together happily, she reposing entire confidence in him, for fifty-one years as husband and wife. It is rather to be inferred that Mr. Pettit did not intend the situation which has arisen; but he did take the consents from Mrs. Pettit, without a disclosure, and if they are given effect an inequitable result follows.

Judgment affirmed.

MINNESOTA SUPREME COURT.

FRANK PABST et al., Respts.,
v.
EMIL FERCH, Appt.

(126 Minn. 58, 147 N. W. 714.)

Notice — possession of real estate — aiding sale.

1. The general rule that actual possession and occupancy of land are notice to third persons of the rights and interests therein of the person so in possession has a qualified application, where the possessor stands by and participates in a sale of the land by the holder of the legal title, and fails to give the purchaser notice of rights which are not disclosed by the record, or are not apparent from an inspection of the premises.

Estoppel — to remove fixtures.

2. In such case, if the possessor be a tenant, his silence will estop him from subsequently insisting upon the right to remove fixtures placed by him upon the land, under an agreement for removal, where such

fixtures are in nature and character apparently permanent improvements, and such as ordinarily may be found attached to and a part of real property.

Landlord and tenant — sale — fixtures.

3. As to fixtures of that character, the purchaser is under no legal obligation to make inquiry of the tenant in possession, where the latter participates in the negotiations for the sale, is cognizant of the terms thereof, and asserts no rights in or to the same.

Fixtures — pumping engine.

4. A gasoline engine and equipment placed upon a farm by a tenant for use in pumping water from a well, and under agreement for removal, are not prima facie a permanent improvement, and a purchaser of the farm is under legal obligation to inquire of the tenant respecting his rights thereto.

Evidence — declarations of ancestor.

5. The heirs of a deceased person are not incompetent to give in evidence declarations or conversations of the deceased, where neither they nor the estate can be made liable for the result of the action.

Headnotes by BROWN, Ch. J.

(June 12, 1914.)

Note. — Agreement between landlord and tenant for removal of fixtures by latter as affecting third persons.

- I. Vendor and purchaser.
 - a. Rights of purchaser, 822.
 - b. Liability of lessor, 825.
- II. Mechanics' lien, 826.
- III. Mortgage.
 - a. By lessor, 826.
 - b. By lessee, 828.
- IV. Execution sale, 829.
- V. Insurance, 830.
- VI. Bankruptcy, 830.
- VII. Other lessees, 831.

I. Vendor and purchaser.

a. Rights of purchaser.

PABST v. FERCH appears to represent the general rule, that an innocent purchaser without notice is not affected by the right of the tenant to remove the improvement.

A purchaser of a house was held entitled to the gas fixtures and chandeliers where the tenant showed him the premises and made no claim to the fixtures, although he had purchased the same from his landlord and could have asserted title if he had done so in time. *Taylor v. Lee*, — Tex. Civ. App. —, 139 S. W. 908.

And a purchaser under a mortgage foreclosure without notice was held entitled to a building erected on the land over a cellar, although the party building had the right to remove the same. It was also held that a grantee of this purchaser having notice would be entitled to the building. *Powers v. Dennison*, 30 Vt. 752.

A tenant claiming the right removed window frames after she had surrendered possession of the premises. A purchaser of l.R.A.1915E.

the land seized the windows by force about 100 rods from the premises, and was held not guilty of assault and battery. The former tenant claimed that the prior owner agreed to allow these frames to be removed. *State v. Elliot*, 11 N. H. 540.

In *Friedlander v. Ryder* (*Friedlander v. Hewitt*) 30 Neb. 783, 9 L.R.A. 700, 47 N. W. 83, a grantee of the lessor sought to enjoin the removal of buildings from the property by the lessee's assignee and a creditor of the same having an execution. It was claimed that the tenant had the privilege of removal, but it was held that a removal could not be had after the premises had been surrendered.

Buildings were erected by a tenant with the privilege of removal. It was held that where the purchaser at the foreclosure sale had no notice of the agreement, the buildings became a part of the realty. *Union Cent. L. Ins. Co. v. Tillery*, 152 Mo. 421, 75 Am. St. Rep. 480, 54 S. W. 220.

And in *Gibbs v. Estey*, 15 Gray, 587, it was held that, as against a grantee, assent given to remove a building would have to be given prior to its erection in order to constitute the building personal property; that consent to its removal after the building was partly completed would not affect a grantee.

A landlord erected a barn under an agreement with his tenant that on the sale of the land the tenant was to remove the barn and pay a certain price. The land was sold to a grantee with notice of this agreement. He sold to a third party having no notice. It was held that the latter could maintain an action of trover against the tenant for removing the barn after his purchase. *London v. Platt*, 34 Conn. 517. The erection

APPEAL by defendant from an order of the District Court for Le Sueur County denying a new trial after a verdict in plaintiffs' favor in an action brought to recover the value of certain articles of personal property alleged to have been taken by defendant and converted to his own use. Reversed.

The facts are stated in the opinion.

Messrs. Moonan & Moonan, for appellant:

Defendant was clearly shown to be the owner of the property.

Ogden v. Garrison, 82 Neb. 302, 17 L.R.A. (N.S.) 1135, 117 N. W. 714; Northwestern Lumber & Wrecking Co. v. Parker, 125 Minn. 107, 145 N. W. 964.

The temporary attaching of any part of the property to the freehold would not deprive it of its character as chattels.

Ogden v. Garrison, and Northwestern Lumber & Wrecking Co. v. Parker, supra; Osgood v. Howard, 6 Me. 452, 20 Am. Dec. 322; White Enamel Refrigerator Co. v. Kruse, 121 Minn. 479, 140 N. W. 114; Shapira v. Barney, 30 Minn. 59, 14 N. W. 270.

The sale of the smokehouse by the fee

owner to defendant made it personal property, and gave him the right to remove it, even if it could be construed otherwise to be a fixture.

Wright v. Macdonnell, 88 Tex. 140, 30 S. W. 907; Ogden v. Garrison, supra.

Even if the property possessed the character of fixtures, it is of a character known in law as "trade fixtures" attached by a tenant for trade purposes, and removable during the tenancy.

Northwestern Lumber & Wrecking Co. v. Parker, supra; Northwestern Mut. L. Ins. Co. v. George, 77 Minn. 319, 79 N. W. 1028, 1064; Merchants' Nat. Bank v. Stanton, 55 Minn. 211, 43 Am. St. Rep. 491, 56 N. W. 821; Stout v. Stoppel, 30 Minn. 56, 14 N. W. 288.

Where erections or improvements are made upon land by one having no estate therein, by permission or license of the owner, an agreement that the fixtures shall remain the property of the person making them will be implied, in the absence of any fact or circumstance appearing which shows a contrary intention.

Merchants' Nat. Bank v. Stanton, 55

by the owner was held to make the barn real estate. Then the agreement with the tenant would be within the statute of frauds.

And an innocent purchaser without notice was held not affected by an agreement made between a tenant of his grantor and the owner of an advertising fence, giving the latter the right of removal. James Leo Co. v. Jersey City Bill Posting Co. 78 N. J. L. 150, 73 Atl. 1046. The fence was held to be a part of the realty.

In James Leo Co. v. Jersey City Bill Posting Co., supra, it was said that the rule in Alabama, Maine, and New York was different from that in New Jersey in regard to the right of an innocent purchaser.

And an agreement allowing a billboard to be removed by the tenant was held to be a personal covenant affecting only the covenantor, and not to affect or bind a purchaser of the land who had no notice of the agreement. Cochrane v. McDermott Advertising Agency, 6 Ala. App. 121, 60 So. 421.

But a purchaser of a lot under execution sale, with notice that the tenant had the right to remove the building, was held not entitled to maintain an action on the case against the one who removed the house. Coleman v. Lewis, 27 Pa. 291.

And a tenant was held entitled to maintain replevin against his landlord's grantee where the tenant built a house with the privilege of removal, and the grantee refused to permit removal. Adams v. Tully, 164 Ind. 292, 73 N. E. 595. In this case the grantee bought with notice of the tenant's rights.

A tenant built a fence with the privilege of removing it. A purchaser of the land had notice of the tenant's claim before he L.R.A.1915E.

paid for the land, and could have protected himself. It was held that the tenant had the right to remove the fence. Jones v. Cooley, 106 Iowa, 165, 76 N. W. 652.

And where a purchaser knew that a fence had been built while the land was in possession of a tenant of the grantor, it was held that, if the fence was built so that a person viewing the premises would be bound to know that it was built for temporary purposes only, the grantee could not prevent its removal where the tenant had the right of removal. Esther v. Burke, 139 Mo. App. 267, 123 S. W. 72.

A fence built by a tenant with the privilege of removal was held to be personal property as against the grantee of the landlord. The grantee was held entitled to maintain an action against his grantor for the loss of the same. Mott v. Palmer, 1 N. Y. 564, distinguished in Hilton & D. Lumber Co. v. Murray, 47 App. Div. 289, 62 N. Y. Supp. 35.

And where a purchaser of property had notice of long possession by occupants and their ownership of cribs placed on the land, it was held that a recovery could not be had by the purchaser against the tenants for removing the cribs. Fischer v. Johnson, 106 Iowa, 181, 76 N. W. 658.

An owner of land and the mortgagee recognized an agreement allowing a building to be removed. A purchaser of the land with knowledge of this agreement was held not entitled to an injunction against the removal of the building. Morris v. French, 106 Mass. 326.

And where an ice house was built under an oral agreement that it might remain five years, and then the land was sold with a proviso in the deed recognizing the above

Minn. 211, 43 Am. St. Rep. 491, 56 N. W. 821.

It was competent to show the agreement between the landlord and the tenant relative to the ownership of the property, under which defendant placed and continued the property on the land.

Northwestern Mut. L. Ins. Co. v. George, 77 Minn. 319, 79 N. W. 1028, 1064; *Merchants' Nat. Bank v. Stanton*, supra.

The heirs of a deceased person offered as witnesses by defendant had no such interest in the outcome of this case as would disqualify either, under the statute preventing testimony of conversations with or admissions of a deceased person.

Bowers v. Schuler, 54 Minn. 99, 55 N. W. 817; *Lowe v. Lowe*, 83 Minn. 206, 86 N. W.

11; *Pitzel v. Winter*, 96 Minn. 499, 5 L.R.A. (N.S.) 1009, 105 N. W. 673; *Hageman v. Powell*, 76 Neb. 514, 107 N. W. 749; *Re Bresler*, 155 Mich. 567, 119 N. W. 1104; *Wylie v. Charlton*, 43 Neb. 840, 62 N. W. 220.

There is no evidence which tends to show an estoppel, or which would in any way justify the conclusion on the part of the trial court that appellant was estopped from asserting the ownership of the property described in the complaint.

O'Mulcahy v. Holley, 28 Minn. 31, 8 N. W. 906; *Bliss v. Waterbury*, 27 S. D. 429, 131 N. W. 731.

Defendant's possession of the property was notice to the plaintiffs of all defendant's rights therein, including all agree-

agreement, it was held that the grantee of the building had the right to remove the same within the time. The building was held to be personal property. *Ham v. Kendall*, 111 Mass. 297.

And evidence of an agreement that the lessee might remove buildings was held to be properly admitted. *Ryder v. Faxon*, 171 Mass. 206, 68 Am. St. Rep. 417, 50 N. E. 631. In this case the lessee sold the buildings to a third party, who in turn made a bill of sale to the lessee's wife. The court said: "The intention of the latter [lessee] has much to do with the question, and if his intention is that the fixture shall remain his personal property, and that intention is made known, and his acts are consistent therewith, the fixture may remain his personal property, although there may be no agreement to that effect between him and the lessor."

And where the grantees of title had notice of the right of a lessee to remove a building before taking the deed, it was held that the right of removal continued. *Searle v. Roman Catholic Bishop*, 203 Mass. 493, 25 L.R.A. (N.S.) 992, 89 N. E. 809, 17 Ann. Cas. 340.

And where a tenant put a cotton gin condenser and feeder on a plantation with the intention of removing the same, and this was known to the landlord, it was held that a purchaser from the tenant could remove the same. *McMath v. Levy*, 74 Miss. 450, 21 So. 9, 523.

In a suit to recover possession the defense was that the building was held under plaintiff's grantor with the right to remove it. It was held that the answer constituted no defense against acquiring the possession of the lot, but that would not operate as an impairment of the right of the defendant to remove the building within a reasonable time. *Goodman v. Hannibal & St. J. R. Co.* 45 Mo. 33, 100 Am. Dec. 336.

And where a building was erected by one upon the land of another with his consent, upon an agreement that it might be removed at the will of the builder, it was held to be a personal chattel as between the L.R.A.1915E.

builder and a grantee with notice of the agreement. *Priestly v. Johnson*, 67 Mo. 632.

In *Pile v. Holloway*, 129 Mo. App. 593, 107 S. W. 1043, the case of *Priestly v. Johnson*, supra, was approved, which said: "A house erected under an agreement with the owner of the land that the builder shall have the right to remove it is personal property as between the builder or anyone claiming under him, and the owner of the land or anyone purchasing from him with knowledge of the agreement."

And a lessee in possession of premises was held not chargeable with notice of a conveyance by his lessor, but the grantee was held chargeable with notice of all the tenant's rights, among which was the right to remove any building which he or his undertenants might erect. *Dubois v. Kelly*, 10 Barb. 496. In this case there was a positive agreement allowing the removal. The court said: "The law would have implied such an agreement had none been expressed."

A tenant who erected buildings with the privilege of removal was held not deprived of the right by reason of a sale of the premises to a grantee with notice, and a renewal of the lease by the grantee. *Hertzberg v. Witte*, 22 Tex. Civ. App. 320, 54 S. W. 921. The court said that this would be the rule regardless of whether the grantee "acknowledged or recognized his right under the agreement during, and after the expiration of, the term of the subsequent lease."

And a tenant's right to remove his building was held superior to the rights of a purchaser, where he had notice of the rights of the tenant in possession. *Morin v. Bremer*, 61 Wash. 62, 111 Pac. 1058.

Purchasers of premises assigned to pay debts were held to have no title to certain mill fixtures, where the assignee's deed gave no title to the same and the purchasers never claimed title under the deed, and they did not lease the fixtures to the tenant in possession when they renewed the lease. The tenant did not waive his rights by accepting the lease, and there was evidence that the purchasers agreed that the title to the fix-

ments giving him the right to remove the property, and all agreements under which he placed it upon the land and continued it thereon, and which gave him any interest in it.

Morrison v. Marsh, 4 Minn. 422, Gil. 325; *Ludowese v. Amidon*, 124 Minn. 288, 144 N. W. 965; *Wood v. Price*, Ann. Cas. 1913A, 1210, and note, 79 N. J. Eq. 620, 81 Atl. 983; *Western U. Teleg. Co. v. Burlington & S. W. R. Co.* 3 McCrary, 130, 11 Fed. 1; *Groff v. Ramsey*, 19 Minn. 44, Gil. 24; *Wilkins v. Bevier*, 43 Minn. 213, 19 Am. St. Rep. 238, 45 N. W. 157; *Wolf v. Zabel*, 44 Minn. 90, 46 N. W. 81; *Groff v. State Bank*, 50 Minn. 234, 36 Am. St. Rep. 640, 52 N. W. 651; *Garbutt v. Mayo*, 13 L.R.A. (N.S.)

tures should remain in the tenant, who had the right under a prior lease to remove them. *Second Nat. Bank v. O. E. Merrill Co.* 69 Wis. 501, 34 N. W. 514. The court said: "Under the facts and circumstances attending the acceptance of the new lease in the case at bar, and construing the lease in view of such attendant facts and circumstances, we think it ought to be construed as not intended by either party to cover any other property than that purchased by the bank at the assignee's sale, and that it would be an unauthorized construction of the general words of the lease to hold that they were intended to cover the fixtures and machinery."

And where a shop was built under a license from the owner of the land, it was held to belong to the licensee, and a grantee who took possession was liable in conversion. *Hilborne v. Brown*, 12 Me. 162.

Tenants under a guardian's lease had the right to remove the improvements. The disabilities of the minors were removed by an order of the court in Oklahoma. They then conveyed to the tenants the land. On coming of age they conveyed to a third party, who brought suit to recover the property. It was held that the second deed avoided the first, and the tenants would have six months from the expiration of the lease to remove the improvements. *Beauchamp v. Bertig*, 90 Ark. 351, 23 L.R.A. (N.S.) 659, 119 S. W. 75.

And under Colo. Civ. Code, § 1945, providing that if a lessee remains in possession after the expiration of the hiring, and the landlord accepts rent, the parties are presumed to continue the same terms,—it was held that where a lease gave a bank the privilege of removing a safe, and the purchaser of the property allowed the tenant to hold over with only an increase of rent, the bank could remove the safe and vault. *Woods v. Bank of Haywards*, 10 Cal. App. 93, 106 Pac. 730.

In *Mitchell v. McNeal*, 4 Colo. App. 36, 34 Pac. 840, it was said: "If, by the terms of the agreement between the lessor and the lessee, the lessee should erect a structure on the property which by their con-

100, note; *Ogden v. Garrison*, 82 Neb. 302, 17 L.R.A. (N.S.) 1135, 117 N. W. 714.

Mr. S. B. Wilson, for respondents:

Where there is a duty to speak, estoppel may arise from silence as well as words.

11 Am. & Eng. Enc. Law, 2d ed. 427, 428.

Omission to assert a right may constitute estoppel.

De Bussache v. Alt, L. R. 8 Ch. Div. 314, 47 L. J. Ch. N. S. 381, 38 L. T. N. S. 370, 2 Eng. Rul. Cas. 289; *Cheatham v. Wilber*, 1 Dak. 335, 46 N. W. 580; *Georgia R. & Bkg. Co. v. Hamilton*, 59 Ga. 171; *Atlanta v. Gates City Gaslight Co.* 71 Ga. 106; *Athens v. Georgia R. Co.* 72 Ga. 800; *Ross v. Thompson*, 78 Ind. 90; *Angell v. Johnson*, 51 Iowa, 625, 33 Am. Rep. 152, 2 N. W. 435; *Masterson v. West End Narrow Gauge*

tract was to remain a chattel with the right of removal, it would hardly be seriously argued that the grantor could escape the force of the agreement, or the grantee become the owner of that which was the property of the tenant because of a subsequent transfer." It was also held that a lease that could be made by parol would be obligatory on a grantee of the lessor.

A grantee of premises, where his grantor had contracted with the tenant that the lumber used was to remain the property of the tenant, was held not liable in conversion where said grantee conveyed the property to another who refused to allow the removal of the lumber. This was because the first grantor would be liable if the deed conveyed the lumber, and if the deed did not pass title the last grantee would be the party liable. *Horak v. Thompson*, — Iowa —, 83 N. W. 889.

b. Liability of lessor.

Where the tenant fails to exercise his right of removal until it is too late, he cannot then maintain an action against the lessor. But if the lessor sells the improvement to a third party, the lessor will be liable to the tenant.

A deed by a lessor of a sawmill was held not to render him liable in trover for the tenant's machinery, where the tenant had the right of removal, but failed to exercise it, and demanded the same from the grantee. *Davis v. Buffum*, 51 Me. 160. The court said: "The demand of the plaintiffs in September, after they had quitted the premises, constituted no conversion."

And a grantor was held not liable in trover where the tenant built on the property under an agreement that the building was to remain his personal property, and the lessor made no reservation in his deed. The tenant remained on the property employed by the grantee, who charged him rent for the building. *Heighes v. Dollarville Lumber Co.* 113 Mich. 518, 71 N. W. 870. The court said: "If the house was his, the Danaher-Melendy Company got no title, and the plaintiff has a right to remove it at his

R. Co. 72 Mo. 342; State, Kiernan, Prosecutor, v. Jersey City, 40 N. J. L. 483; Boardman v. Lake Shore & M. S. R. Co. 84 N. Y. 182.

If the owner of goods stands by and voluntarily allows another to treat them as his own, by reason of which a third person buys them in good faith, the former cannot recover from the purchaser.

Pence v. Arbuckle, 22 Minn. 417; Stevens v. Ludlum, 46 Minn. 160, 13 L.R.A. 270, 24 Am. St. Rep. 210, 48 N. W. 771; Norman v. Eckern, 60 Minn. 531, 63 N. W. 170; Western Land Asso. v. Banks, 80 Minn. 317, 83 N. W. 192; Dimond v. Manheim, 61 Minn. 178, 63 N. W. 495; Pom. Eq. Jur. § 802; Horn v. Cole, 51 N. H. 287, 12 Am. Rep. 111.

pleasure, during the continuance of his lawful occupancy of the lots."

But where a landlord told a third party that a tenant had the right to sell the lumber or houses made of lumber, and subsequently removed them himself, it was held that he was liable in a suit for conversion brought by the purchaser. Harris v. Powers, 57 Ala. 139, subsequent appeal in 68 Ala. 410.

And where the lessor agreed to pay the lessee for improvements or allow him to remove the same, it was held that the tenant could maintain an action against the landlord for conversion, where he had sold the premises with the improvements to a third party. Smyth v. Stoddard, 203 Ill. 424, 96 Am. St. Rep. 314, 67 N. E. 980.

II. Mechanics' Lien.

The cases dealing with the effect of an agreement as to removal of fixtures on the right to a mechanics' lien are gathered in the notes in 6 L.R.A.(N.S.) 485, 41 L.R.A.(N.S.) 296, and 45 L.R.A.(N.S.) 100. Forbes v. Mosquito Fleet Yacht Club, 175 Mass. 432, 58 N. E. 615; Asheville Woodworking Co. v. Southwick, 119 N. C. 611, 26 S. E. 253; and Rider v. Kohler, 39 Phila. Leg. Int. 338, not mentioned in those notes, also throw light upon the question.

III. Mortgage.

a. By lessor.

It is generally held that where chattels are placed on real estate with the intent and under an agreement that they are to remain chattels, a mortgage made by the lessor will not affect the right to remove them, if the right is asserted in time. To this rule there are some exceptions.

So, where there was an agreement between the landlord and tenant that a chattel should remain personal property, it was held that a prior mortgagee could not recover a mantel, grate, and tiling placed on the property after the mortgage foreclosure, but prior to the time for redemption, which were removed by the tenant. Pioneer Sav. L.R.A.1915E.

In determining whether an article originally personal property has become a fixture, the fact and character of the annexation and its adaptability to the use of the land, the intent of the parties concerned, and the relation to the freehold of the party making the annexation, should be taken into consideration.

Northwestern Lumber & Wrecking Co. v. Parker, 125 Minn. 107, 145 N. W. 964; White Enamel Refrigerator Co. v. Kruse, 121 Minn. 483, 140 N. W. 114.

Brown, Ch. J., delivered the opinion of the court:

This action was brought to recover the value of certain articles of personal property alleged to have been wrongfully taken

& L. Co. v. Fuller, 57 Minn. 60, 58 S. W. 831.

A boiler was erected by a tenant with the privilege of removal, and placed on the premises after a trust deed was made. It was held that the plaintiffs, who purchased the land at their foreclosure sale, did not acquire title to the boiler, which was not described in their trust deed. Winner v. Williams, 82 Miss. 669, 35 So. 308.

And where the lease provided that the tenant should have the right to remove his improvements, it was held that a prior mortgagee would hold subject to this right, and that a conveyance of these improvements to the mortgagor, and a deed of trust by him as a part of the same transaction, would be superior to the first mortgage. Belvin v. Raleigh Paper Co. 123 N. C. 138, 31 S. E. 665.

And a prior mortgagee of real estate was held to have no claim against chattels put on the property by a tenant with the privilege of removal, subject, however, to the limitations that the mortgagor and the tenant should not impair the security. Broadus v. Smith, 121 Ala. 335, 77 Am. St. Rep. 61, 26 So. 34. This was on the ground that the thing affixed never became a fixture, but remained personal property.

And a mortgagee was held not entitled to enjoin the removal of buildings erected by a lessee with the privilege of removal, when the buildings were erected after the mortgage was made by the lessor. Equitable Guarantee & T. Co. v. Hukill, — Del. —, 85 Atl. 60. The court said: "There is then, in this case, a legal intention of both lessor and lessee not to make the trade fixtures or improvements a part of the land, and as between these persons the buildings remained chattels, removable during the term, and the complainant, the mortgagee, has no equitable ground of complaint, because it is not alleged or shown that the value of the security which he had when the mortgage was made, and on which he relied, is impaired by the annexation and removal of the buildings by the tenant during the term and prior to a foreclosure."

A firm had the right to remove build-

by defendant and converted to his own use. The trial court ordered judgment for plaintiffs for the full amount claimed, and defendant appealed from an order denying a new trial.

The facts, in brief, are as follows: In March, 1911, Ludwig Ferch was the owner of a tract of land in Le Sueur county, which was then in the actual possession and occupancy of defendant, his son, as tenant. At the time stated the senior Ferch entered into a contract for the conveyance of the land to plaintiffs, the conveyance to be made upon payment of the purchase price as provided for by the contract. In and by the contract the vendor reserved the right to remove from the land a machine shed situated thereon, and also a log stable. De-

fendant, then holding possession of the land as tenant, was present pending the negotiations for the sale of the land, and interposed no claim to any part of the property here involved, which was upon the premises at that time. Plaintiffs, with knowledge of defendant's possession, made no inquiry of him respecting any right he might have to any of the property. Thereafter, and before the expiration of his lease, defendant removed from the farm the articles of property in controversy, on the claim that he was the owner thereof and had placed them upon the farm under the agreement with his father that he might remove the same at the termination of the lease. It was contended by plaintiffs that all the articles were so attached to the land as to become

ings from leased ground. The lessor bought out the interest of one of the firm, conveyed the land, and gave a mortgage on it, the vendee giving the new firm a new lease to terminate the same time as the former lease. It was held that the possession by a member of the firm was notice to the mortgagee and that the buildings were chattels. *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362.

In *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211, 43 Am. St. Rep. 491, 56 N. W. 821, it was said that "hence, in those states where a mortgage is, as with us, a mere security, there is a general tendency to repudiate the old rule as inapplicable, and to hold that, as to fixtures placed on the mortgaged premises subsequently to the execution of the mortgage, there is no absolute presumption that they were annexed for the benefit of the realty, and that, where the intention or agreement of the mortgagor and the party making the annexation was that the thing annexed should not become part of the realty, the absence of a concurrent agreement to that effect on part of a prior mortgagee will not, of itself, make the annexation a part of the mortgage security."

A recorded lease gave the privilege of removing the greenhouse and heating apparatus at the end of the lease. The lease was sold. A trust deed was foreclosed and the purchaser gave a deed to plaintiff, who brought suit for possession of the lots and improvements. The only defense was a claim of ownership of the improvements. The greenhouse was held to be a trade fixture, and it would have made no difference if it had been all erected after the execution of the deed of trust. *Kelly v. Austin*, 46 Ill. 156, 92 Am. Dec. 243; *Royce v. Lashaw*, 15 Colo. App. 420, 62 Pac. 627.

In *Wight v. Gray*, 73 Me. 297, it was said that "there is some tendency to hold, as in *Tift v. Horton*, 53 N. Y. 380, 13 Am. Rep. 537, that where the fixture was erected by a tenant of the mortgagor under an agreement with him that it should remain the tenant's chattel, the mortgagee cannot interpose before taking possession of the premises, to prevent the carrying out of such an L.R.A.1915E.

agreement. But this distinction is of no importance here, as the mortgagee was in full possession at the date of the trespass alleged."

But where a building was placed on land under an agreement with the owner of the land that it should be and remain personal property, and that it should be removable, and there was a previous mortgage which was foreclosed, and the land sold to a party who was notified of the claim on the building, it was held that the building put on the land without the consent of the mortgagee was a party of the realty and covered by the mortgage. *Meagher v. Hayes*, 152 Mass. 228, 23 Am. St. Rep. 819, 25 N. E. 105. The court said: "The foreclosure of the mortgage was by sale, and the right of the mortgagee to sell the building as part of the mortgaged property could not be affected by agreements in regard to it to which he was not a party, nor by notice of the claims of the defendants given to one who buys the house at the sale."

In *Miles v. Ankattel*, 29 Ont. Rep. 21, *Ferguson, J.*, said: "I had at first some doubts on account of the plaintiff being a mortgagee, for it seems to be a rule that if a mortgagor lease the mortgaged premises and the tenant erects fixtures with an understanding with the mortgagor that they will be removable at the end of the term, they become a part of the realty, and as against the mortgagee cannot be removed by the tenant."

A mortgage was made by the landlord, and subsequently he agreed with the tenant that he could leave certain fixtures on the premises and sell them to a succeeding tenant, or remove them. After the mortgagees entered on their mortgage, it was held that they could refuse the tenant leave to enter. *Thomas v. Jennings*, 66 L. J. Q. B. N. S. 5, 75 L. T. N. S. 274, 45 Week. Rep. 93.

In *Lynde v. Rowe*, 12 Allen, 100, it was said that "if, after the execution of a mortgage of real estate, fixtures are added by a tenant at will of the mortgagor, his right to remove them after an entry by the mortgagee for the purpose of foreclosure must be determined by the rule which prevails

part thereof, and were not removable fixtures; and, further, that, by standing by, with full knowledge of the sale of the farm to plaintiffs, and failing to make known his claim to the property, defendant estopped himself from claiming the same. Practically all the evidence offered by defendant to sustain his claim to the property was excluded by the trial court as incompetent. The father had died before the commencement of the action, and the evidence offered tended to show conversations with him by witnesses who, the trial court held, were interested in the result of the action, and for this reason their testimony was excluded. The court, however, recognized a claim of ownership by defendant, but found, as a fact, that by his silence when the land was

sold he was estopped to assert such claim. Upon this theory the court ordered judgment for plaintiffs for the value of the several articles of property so taken from the land. By this ruling the trial court held that it was incumbent upon defendant to make known his claim of title to each article of property involved, notwithstanding the fact that he was in the actual possession of the property at the time of the sale to plaintiffs, of which fact plaintiffs had full notice, and for his failure to do so, though no inquiry was made by plaintiffs, he forfeited his claim to the same. We dispose of the case upon the theory adopted by the trial court.

Though the principles of the law of fixtures are well settled, there are no fixed

as between mortgagor and mortgagee, and not that which prevails as between landlord and tenant."

In *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537, it was said: "It is to be borne in mind, too, that in England and in Massachusetts the rights of a mortgagee of land in the mortgaged premises are greater than in this state. He is regarded as the owner, and the mortgagor in the light of a tenant. So that things annexed to the land become fixtures upon the land of the mortgagee as it were. See case last cited, *Walmsley v. Meine*, 7 C. B. N. S. 133; *Butler v. Page*, 7 Met. 40, 39 Am. Dec. 757.

b. By lessee.

A lessee having the right to remove his improvement is held entitled to give a mortgage thereon, which will be valid, and the mortgagee will have the same right as the tenant.

A lessee had the privilege of removing an elevator. A deed of trust was given by the lessee. After two years it was claimed that the property was subject to sale under execution where possession was not taken by the mortgagee, but it was held to be a chattel real, and the lien of the trust deed to be paramount to the right of the purchaser at execution sale. *Knapp v. Jones*, 143 Ill. 375, 28 N. E. 820, 32 N. E. 382, affirming 38 Ill. App. 489.

An elevator was built under a license authorizing its removal by the licensee. A mortgage of the elevator given by the licensee was held to be a chattel mortgage, and was foreclosed. *Deering v. Ladd*, 22 Fed. 575.

A hotel was held to be personal property, and the title passed by chattel mortgage. A purchaser under execution sale was held to have no title as against the mortgagee. The tenant who placed the building on the lot and gave the mortgage had the right of removal. *Docking v. Frazell*, 38 Kan. 420, 17 Pac. 160. The question of intention to make the article a permanent accession to the freehold was held to be pre-eminent.

And where a building was erected by a L.R.A.1915E.

tenant with the privilege of removal, and it was subsequently mortgaged by the tenant, it was held that the mortgagee could maintain replevin, and could lawfully enter the land to enforce the writ. *Hartwell v. Kelly*, 117 Mass. 235.

A tenant having the right of removal mortgaged the building. The successor of the tenant refused to allow the mortgagee to remove the building. It was held that the mortgagee could maintain trover, as the interested parties all recognized the building as chattel property. *Smith v. Benson*, 1 Hill, 176.

A chattel mortgage of nursery stock given by tenants who had the right of removal was held superior to a landlord's lien, of which the mortgagee had no notice. *Duffus v. Bangs*, 43 Hun, 52, affirmed in 122 N. Y. 423, 25 N. E. 980.

And a plaintiff who foreclosed his mortgage on a building was held to have good title thereto as purchaser, as against trustees of a railroad that subsequently condemned the property, where the owner of the building had the right from his lessor to remove the same. *Hager v. Brainerd*, 44 Vt. 294.

A mortgage given by the tenant of his lease was held to pass fixtures that he had the right to remove, and to give a superior lien over a bill of sale subsequently made, although the mortgage was not registered. *Meux v. Jacobs*, L. R. 7 H. L. 481, 44 L. J. Ch. N. S. 481, 32 L. T. N. S. 171, 23 Week. Rep. 526.

14 & 15 Vict. chap. 25, § 3, provides that if any tenant shall, with the consent in writing of the landlord, erect any farm building or put up any building or machinery for trade and agriculture, they shall be removable by him. It was held that where a lessee mortgaged his fixtures, and then surrendered his lease to the landlord, who granted a new term to another, the mortgagee had a right to enter and sever the fixtures. *London & W. Loan & Discount Co. v. Drake*, 6 C. B. N. S. 798, 28 L. J. C. P. N. S. 297, 5 Jur. N. S. 1407, 7 Week. Rep. 611.

A chattel mortgagee of a tenant who had

rules or standards applicable alike to all cases, by which to determine what are or are not removable as such. Each case must be determined in the light of its own particular facts. *Wolford v. Baxter*, 33 Minn. 12, 53 Am. Rep. 1, 21 N. W. 744; *White Enamel Refrigerator Co. v. Kruse*, 121 Minn. 479, 140 N. W. 114. As between landlord and tenant, specific articles of personal property attached to real estate might be removable as fixtures, and entirely the reverse be true as between the tenant and a purchaser of the realty without notice of the tenant's rights. As between such purchaser without notice and the tenant, it may safely be stated, as a general rule, that the purchaser of land takes all articles of personal property which are annexed thereto at

the time of the purchase, where in character they are such as ordinarily are attached as permanent improvements of the particular class of realty. This would, of course, exclude all such chattels, though in some form or other attached to the land, as apparently were brought and placed thereon for some domestic use or convenience, such as trade fixtures, and such as ordinarily are not essential or indispensable to the use and enjoyment of the land or the purposes to which it may have been improved or adapted. *Bronson, Fixtures*, 28; *Wolford v. Baxter*, 33 Minn. 14, 53 Am. Rep. 1, 21 N. W. 744; *Farmers' Loan & T. Co. v. Minneapolis Engine & Mach. Works*, 35 Minn. 543, 29 N. W. 349; 2 Notes to Minn. Rep. 665, and authorities there cited;

the right to remove a building at the expiration of the lease was held to have no right to remove the same after a considerable lapse of time after the term expired. *Smith v. Park*, 31 Minn. 70, 16 N. W. 490.

In *Siebold v. La Rue*, 83 Misc. 70, 144 N. Y. Supp. 658, which was an action by the mortgagee of a tenant against the lessor for conversion of an engine and boiler, the defendant offered on the trial to allow the mortgagee to take the property provided he restored the building to its proper condition. It was held that the plaintiff failed to make out a case.

A mortgage of a leasehold estate and a hotel given by a tenant having the right of removal is valid between the parties. *McLeod v. Barnum*, 131 Cal. 605, 63 Pac. 924. Cal. Civ. Code, § 2947, provides that a mortgage, unless accompanied by the affidavit required by statute, and acknowledged and recorded, is void as to creditors and subsequent purchasers for value.

IV. Execution sale.

It is generally held that the interest of a tenant can be sold as personalty under an execution against him, where he has the right to remove the improvements.

A house built by a tenant with the privilege of removing the same was held subject to levy under execution against the tenant. *Foster v. Mabe*, 4 Ala. 402, 37 Am. Dec. 749.

If the lessee had the right to remove fixtures, it was held that the same could be sold under execution against the tenant. *State v. Bonham*, 18 Ind. 231.

And where the owner of real property agreed with his tenant that the latter should retain the ownership of vault doors and iron partition with the privilege of removal, they were held to be subject to a sale on execution against the tenant. *Broadus v. Smith*, 121 Ala. 335, 77 Am. St. Rep. 61, 26 So. 34.

A lessee had the privilege of removing casing used in boring for oil. An execution was levied on this property in the hands of a successor. It was held that a L.R.A.1915E.

purchaser at execution sale could maintain replevin against a grantee who had notice of the rights of these parties. *Churchill v. More*, 4 Cal. App. 219, 88 Pac. 290.

A mining company lessee purchased electric machinery, giving a chattel mortgage which provided that none of the property should become realty. It was held that a levy of an attachment made on the property by the lessor was strong evidence that it regarded the property as chattel, and not real estate. *Hewitt v. General Electric Co.* 164 Ill. 420, 45 N. E. 725, reversing 61 Ill. App. 168.

An elevator was built on a railroad right of way under a license that was temporary. It was sold under an execution sale of real estate connected with the elevator by shafting. It was also sold under execution sale as personalty on execution from a justice. This last sale was held to give superior title, as the building was a personal chattel. *Walton v. Wray*, 54 Iowa, 531, 6 N. W. 742.

And an execution sale was held to give title to a shop built on plaintiff's property by permission, and its removal by the purchaser was held to be no trespass. *Doty v. Gorham*, 5 Pick. 487, 16 Am. Dec. 417.

In *Wells v. Banister*, 4 Mass. 514, where a son built a house on the land of his father, who was summoned as trustee for his son's debts, the court said: "The most that can be made of the consent of the father to build upon his land is a right to occupy the land without rent; and perhaps a right in the son, or persons claiming under him by purchase or execution, to enter and remove the buildings, without being subject to any other than nominal damages in an action of trespass."

In a contest between a purchaser at an execution sale as real estate, and a purchaser as an execution sale as personal property, of an engine boiler and machinery placed on the land, it was held that the title of the last-named was superior. The lease provided that this property should not become part of the realty. *Hershberger v. Johnson*, 37 Or. 109, 60 Pac. 838.

In *Hawtry v. Butlin*, L. R. 8 Q. B. 293, 42 L. J. Q. B. N. S. 163, 28 L. T. N. S.

Northwestern Lumber & Wrecking Co. v. Parker, 125 Minn. 107, 145 N. W. 964; 13 Am. & Eng. Enc. Law, 608.

It is well settled that the purchaser of real property which is in the actual possession of a third person, whether as tenant or otherwise, is chargeable with notice of all the rights of such person, and, to protect himself, is bound to make proper inquiry to ascertain what those rights are. *Sassen v. Heagle*, 125 Minn. 441, 52 L.R.A. (N.S.) 1176, 147 N. W. 445. The rule is too well settled to require an extended citation of authorities. It is equally true, as a general rule, that a person, whether as tenant or otherwise, claiming some right or interest in or to real property, or to some part thereof, who stands by and permits a sale thereof by the holder of the legal title without making known his claim, is estopped thereafter to urge such claim as against the purchaser. He is precluded by his conduct from insisting upon his rights whatever they may be.

These rules and principles of the law are well settled, apply to this case, and imposed reciprocal duties upon both parties; upon the purchaser the duty to inquire concern-

ing the rights of the tenant in possession; and upon the tenant, being cognizant of the intended sale of the property and participating in the negotiations therefor, the duty to make known his rights in the premises. We have then only to determine whether plaintiffs were under legal obligation to make inquiry concerning the rights of defendant in respect to any of the different articles of the property in controversy, and whether defendant was in duty bound to make known his claim to any of them.

At the time defendant took possession of the land, he erected thereon an inclosure in which to confine ducks and young chickens. It was made of wire attached to posts set into the ground, and was an inclosure of some 17 rods in dimension. From all appearances this was a permanent improvement, and such as might ordinarily be found upon a well-equipped farm, differing in no essential respect from a pasture for cattle similarly inclosed. Plaintiffs therefore had the right to assume that it was a part of the farm as a permanent improvement, and were under no legal duty to inquire of the tenant whether he claimed the right to remove it. On the contrary, in view of the

532, 21 Week. Rep. 633, which was a contest between a mortgagee and an execution creditor who had seized trade fixtures, it was held that a mortgage of the lease and fixtures was an assignment of personal chattels within the bills of sale act, and required registration, and the execution creditor had preference.

But where a contract gave the lessee the right to carry on business as long as a creamery was in use on the premises, with the right of removal of all buildings in the event of abandoning the creamery business, it was held that such property was not subject to a levy as real estate, but passed to an assignee for creditors as personal property. *Melhop v. Meinhart*, 70 Iowa, 685, 28 N. W. 545.

After a tenant removed from the property leaving his improvements, it was held that a creditor with an execution against the tenant obtained no rights, even if the tenant could have removed his improvements. *Friedlander v. Ryder* (*Friedlander v. Hewitt*) 30 Neb. 783, 9 L.R.A. 700, 47 N. W. 83.

For execution, see *Coleman v. Lewis*, 27 Pa. 291, subdiv. I. a; *Horn v. Clark Hardware Co.* 54 Colo. 522, 45 L.R.A. (N.S.) 100, 131 Pac. 405; *Church v. Griffith*, 9 Pa. 117, 49 Am. Dec. 548; *Knapp v. Jones*, 143 Ill. 375, 28 N. E. 820, 32 N. E. 382, subdiv. III. b.

V. Insurance.

Where the tenant has the right to remove the buildings, it seems that he has an insurable interest in the same.

Where a tenant insuring represented the building to be "my own," and he had the right to remove the improvements, it was L.R.A.1915E.

held that his ownership was neither a leasehold nor a fee, but might, relatively to the contract of insurance, be considered as an absolute interest in a movable subject. *Nichols v. Farmers' Mut. Ins. Co. Fed. Cas. No. 10,242.*

Where a lessee had the right to remove his buildings and insured them as his property, it was held that the policy was valid notwithstanding a provision, "if the interest in the property to be insured be a leasehold interest or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing; otherwise the insurance shall be void." *Hope Mut. Ins. Co. v. Brolaskey*, 35 Pa. 282.

In *Washington Mills Emory Mfg. Co. v. Commercial F. Ins. Co.* 13 Fed. 646, it was said that, in *Fowle v. Springfield F. & M. Ins. Co.* 122 Mass. 191, 23 Am. Rep. 308, "in both the opinion of the court and the dissenting opinion, the case of *Hope Mut. Ins. Co. v. Brolaskey* is referred to apparently with approval."

Tex. Rev. Stat. Act 2971 provides that a fire insurance policy, in case of total loss, shall be held to be a liquidated demand for the full amount of the policy, provided this shall not apply to personal property. A tenant with a five-years lease had build a brick building with the privilege of removal, which was burned. It was held not to be personal property within the application of this section. *Orient Ins. Co. v. Perlin-Orendorff Co.* 14 Tex. Civ. App. 512, 38 S. W. 60.

VI. Bankruptcy.

A lease provided, as to shipbuilders' fixtures, that at its expiration they should be-

character of the inclosure and the manner it was attached and fixed to the land, defendant, knowing of the contemplated sale to plaintiffs, was bound to assert his alleged right of removal. From all appearances, the inclosure was a part of the farm, and plaintiffs had the right to act accordingly. 39 Cyc. 1710; 13 Am. & Eng. Enc. Law, 2d ed. 608.

Defendant also purchased material and erected a small building upon the farm adjacent to a well thereon in which to house a gasolene engine used in pumping water, and this he removed. We think, on the facts disclosed, and so hold, that he had no right to remove this building. In view of the fact that he was aware of the contract of sale, and that therein certain other buildings were excluded therefrom, it was incumbent upon him to assert his right to remove the particular building. It was a structure upon the farm, and, to all intents and purposes, designed as a permanent fixture thereon. His possession of the property was not sufficient notice of his alleged claim, and there was nothing to indicate to plaintiffs that he might have a possible right to remove it. *Powers v. Dennison*, 30 Vt. 752;

Prince v. Case, 10 Conn. 375, 27 Am. Dec. 675.

Defendant also purchased and installed within the building just referred to a gasolene engine, equipping it with a pump jack and certain pipes, and used as a convenience in pumping water from the well. These were not fixtures, within the decisions of this court in *Wolford v. Baxter*, 33 Minn. 12, 53 Am. Rep. 1, 21 N. W. 744, and *White Enamel Refrigerator Co. v. Kruse*, 121 Minn. 479, 140 N. W. 114, and defendant was under no special duty to notify plaintiffs of his claim thereto. The engine was not so fixed to the land as an essential to the use of the farm as to justify the inference that it was placed there as a permanent improvement, and plaintiffs should have inquired of defendant concerning the same. Having failed to do so, they can now have no valid right to recover for its removal. The situation in respect to these articles of property is entirely different from that presented by the building and chicken inclosure. Those structures had the appearance of being permanent, and such as ordinarily might be found upon such property, thereby justifying a purchaser in acting accordingly.

long to the lessor; as to the other fixtures, that the lessee should have the right of removal; that in the event of bankruptcy the lessor could enter and take possession of the shipbuilders' fixtures. It was held that in such event the assignee in bankruptcy of the tenant had a right to enter within a reasonable time and take the other fixtures. *Stansfield v. Portsmouth*, 4 C. B. N. S. 120, 27 L. J. C. P. N. S. 124, 4 Jur. N. S. 440, 6 Week. Rep. 296.

A lease provided that certain articles scheduled should be the property of, and be removable by, the lessees. There was a provision so that if the lessees should be bankrupts, the term should cease. It was held that a petition in bankruptcy caused a forfeiture of the term, and the receiver in bankruptcy was entitled to the property named. *Ex parte Gould*, L. R. 13 Q. B. Div. 454.

A lease authorized a tenant, at the end of the term, to remove all fixtures put in by him that could be removed without injury to the premises, provided he had kept his covenants. It was held that drawers carefully fitted to the shop were furniture and belonged to the assignee in bankruptcy of the tenant. The trade fixtures were liable to be held for rent. *Ex parte Morrow*, 1 Low. Dec. 386, Fed. Cas. No. 9,850.

Where a landlord allowed an assignee in bankruptcy to leave the tenants' machinery on the premises for sixteen days, it was held that this did not prevent the landlord from asserting a claim against the estate for occupancy after the bankruptcy occurred. *Re Breck*, 8 Ben. 93, Fed. Cas. No. 1,822. *Batchford, J.*, said: "The tenants had a right, as against the landlord, to remove the

machinery, and the bankruptcy court had such right."

VII. Other lessees.

The lessees of a hotel were permitted to restrain the removal of a platform by a prior lessee, where the parties in possession had no notice of an agreement allowing the prior lessee to remove it. *Trask v. Little*, 182 Mass. 8, 64 N. E. 206.

A tenant offered fixtures to a landlord who wrote: "I have no objection to your leaving them on the premises and making the best terms you can with the incoming tenant." The latter declined to take them, and after two months refused permission to the former tenant to enter and remove them. It was held that the letter, not being under seal, did not affect the new tenant, and that trover would not lie for unsevered articles. *Roffey v. Henderson*, 17 Q. B. 574.

And where a lessee had the right to remove buildings, it was held that his successor would not have this right where no such terms were made with the lessor. *Talbot v. Cruger*, 151 N. Y. 117, 45 N. E. 364.

Cases involving trade fixtures only are not included in this note.

See *Zabriskie v. Greater American Exposition Co.* 62 L.R.A. 369, note—"Mechanics' liens upon buildings distinct from the land."

See *Horn v. Clark Hardware Co.* 45 L.R.A.(N.S.) 100, note—"Agreement between landlord and tenant as to removal of fixtures and improvements by latter as affecting third persons claiming a mechanics' lien." I. T.

Whereas the engine and equipment was *prima facie* personal property, not essential or necessary to the use of the farm, and sufficient to put plaintiffs, as purchasers, upon inquiry.

The situation presented as to all this property is one where the parties were, to a certain extent, as already stated, under obligation to each other; the plaintiffs, as purchasers of the land, to inquire respecting the rights of defendant, the tenant in possession; and the defendant to inform plaintiffs of rights claimed by him which were not open and apparent. Neither party complied with the obligation, and each, therefore, was entitled to act upon appearances such as ordinarily are presented in respect to improvements upon farm land. And, by the failure of defendant to point out to plaintiffs at the time of the sale his claim to those portions of the property which appeared to be permanent fixtures, he forfeited his rights, and cannot now complain. And by the failure of plaintiffs to inquire of defendant in respect to the engine and equipment, apparently a temporary farm convenience and *prima facie* removable personal property, they forfeited all right to now insist that such articles passed to them by the transfer of the land.

It follows, then, that the trial court erred in awarding judgment to plaintiffs for the value of the engine and equipment, though it was right in granting recovery for the other articles. A new trial must therefore be had, unless the parties are disposed to end the controversy in harmony with the views here expressed, which may be accomplished by an application to the trial court to amend its findings of fact and conclusions of law accordingly.

If, however, a new trial is had, in view of that result, and as a guide to further proceedings in that respect, we hold that it was error to exclude the testimony of the witnesses offered by defendant to establish the alleged agreement under which he claimed the right to remove the property from the farm. The witnesses were the widow and son of decedent, who testified that they knew what the agreement was and the tenor and effect thereof. Those parties had no such interest in the outcome of this litigation as to render them incompetent under the statute excluding evidence of conversations with deceased persons. The estate of decedent had been closed, and the property thereof distributed to the heirs. In any event the estate was not liable over to defendant for any loss suffered in consequence of a recovery by plaintiffs, nor were the heirs liable. Neither decedent nor anyone representing his estate was under any obligation to protect defendant in his claim L.R.A.1915E.

to this property. At most, it was a privilege granted him to remove it, and was, as to part of the property, lost by his failure to make known his claim thereto before the sale was completed. The loss could in no possible view of the law be charged back to his father's estate, for defendant alone was responsible therefor.

Order reversed.

NEBRASKA SUPREME COURT.

RE ESTATE OF GUSTAV A. WIESE, Deceased.

ALICE A. WIESE, by Next Friend, Appt.

(— Neb. —, 153 N. W. 556.)

Will — competent witness — definition.

1. The term "competent witnesses," as used in the statute relating to the execution of wills, means a person who, at the time of making the attestation, could legally testify in court to the facts which he attests by subscribing his name to the will.

Same — devisee as witness.

2. A devisee may be a competent subscribing witness to a will.

Same — probate — question at issue.

3. In a proceeding to probate a will, the question to be decided is whether the instrument offered is the will of the decedent.

Same — creation of trust — witness.

4. A trust estate created by a will is not invalidated because the trustee is one of the two subscribing witnesses.

(June 5, 1915.)

APPEAL by contestant from an order of the District Court for Douglass County, affirming an order of the Probate Court admitting to probate the will of Gustav A. Wiese, deceased. Affirmed.

The facts are stated in the opinion.

Headnotes by ROSE, J.

Note. — The question whether the competency of an attesting witness to a will is to be determined as of the time of attestation or of probate is discussed at length in the note to *Bruce v. Shuler*, 35 L.R.A. (N.S.) 686, which is referred to in the opinion in *RE WIESE*.

The note to *Conoway v. Fulmer*, 34 L.R.A. (N.S.) 963, also referred to in that opinion, deals generally with the contents of a will as affecting the right to probate.

The question whether the rule excluding testimony of an interested person in a controversy with decedent's estate applies to will contests or other controversies over the succession to the estate, is treated at length in the note to *Whitehead v. Kirk*, 51 L.R.A. (N.S.) 187.

Messrs. William Baird & Sons, for appellant:

John F. Flack, one of the witnesses, had such an interest in the attempted bequest as renders void that portion of the will.

Belledin v. Gooley, 157 Ind. 49, 60 N. E. 706; Wamsley v. Crook, 3 Neb. 344; Tecumseh Nat. Bank v. McGee, 61 Neb. 709, 85 N. W. 949; Dickenson v. Columbus State Bank, 71 Neb. 260, 98 N. W. 813; Kroh v. Heins, 48 Neb. 691, 67 N. W. 771; Davidson v. Davidson, 2 Neb. (Unof.) 90, 96 N. W. 409.

The courts erred in failing to distinguish between the attempt to invest the trust company with the trust estate in question and the appointment of it as executor.

Jones v. Broadbent, 21 Idaho, 555, 123 Pac. 476; Re Creighton, 88 Neb. 107, 129 N. W. 181; Merrick v. Kennedy, 46 Neb. 264, 64 N. W. 989; Kennedy v. Merrick, 46 Neb. 280, 64 N. W. 960; McDonough v. Loughlin, 20 Barb. 238; Boyd v. McConnell, 209 Ill. 396, 70 N. E. 649; Kessler's Estate, 221 Pa. 314, 128 Am. St. Rep. 741, 70 Atl. 770, 15 Ann. Cas. 791; Stinson's Estate, 232 Pa. 218, 36 L.R.A.(N.S.) 504, 81 Atl. 207.

It is not within the power of the court of equity to create the trust.

Lane v. Ewing, 31 Mo. 75, 77 Am. Dec. 632; Beideman v. Sparks, 61 N. J. Eq. 226, 47 Atl. 811; 1 Perry, Tr. § 92; 40 Cyc. 1775.

Messrs. T. F. Wiles and John C. Cowin for appellees.

Rose, J., delivered the opinion of the court:

This is an appeal from the affirmance of an order probating the will of Gustav A. Wiese, who died in Omaha, November 29, 1912. Testator bequeathed his wearing apparel to his brother and devised the residue of his estate to the City Trust & Safe Deposit Company of Omaha, trustee. After making specific provisions for the benefit of his two sisters, he directed the trustee to invest the remainder of the trust estate in mortgages or bonds and to divide the net income between his widow and his daughter until 1925, when they are to share equally the balance of the trust estate if the widow survives and has not remarried. The daughter objected to the probating of that part of the will relating to the trust estate on the ground that John F. Flack, one of the two subscribing witnesses, was president of, and a stockholder in, the corporation named as trustee. The objection was overruled and the will was probated. Upon appeal to the district court, the order of the probate court was affirmed. From the affirmance, contestant has appealed to this court. L.R.A.1915E.

The attestation of a will by two competent witnesses is a statutory requirement. Rev. Stat. 1913, § 1290. A "competent witness" is one "who, at the time of attesting a will, would be legally competent to testify in a court of justice to the facts which he attests by subscribing his name to the will." O'Brien v. Bonfield, 213 Ill. 428, 72 N. E. 1090; note in 35 L.R.A.(N.S.) 688, to Bruce v. Shuler, 108 Va. 670, 62 S. E. 973, 15 Ann. Cas. 887.

Contestant insists that Flack was not a "competent witness" to the will, within the meaning of the following provision of the Code:

"No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness." Rev. Stat. 1913, § 7894.

This section was construed in McCoy v. Conrad, 64 Neb. 150, 89 N. W. 665, as follows: "In a contested proceeding for the probate of a will, the heirs at law of the alleged testator are not disqualified by the statute as witnesses to transactions and conversations with the deceased."

In that case statutes of several other states were discussed and the Nebraska statute was distinguished. The decision follows Brown v. Bell, 58 Mich. 58, 24 N. W. 824. In the Michigan case the chief beneficiary was permitted to testify in support of the will. The conclusion of the court is that in a will contest there is no "representative of a deceased person." In Lautenshlager v. Lautenshlager, 80 Mich. 285, 45 N. W. 147, the Brown Case is followed, the court remarking that the question would admit of argument, if an open one. In the Michigan cases a legatee was permitted, in a contest with heirs, to testify to transactions with the deceased person. According to those precedents, Flack was a competent subscribing witness.

In a probate proceeding the question to be decided is whether the instrument offered is the will of the decedent. Note in 34 L.R.A.(N.S.) 963, to Conoway v. Fulmer, 172 Ala. 283, 54 So. 624.

Contestant also insists that the trust which testator attempted to create is void as being prohibited by the statute providing:

"All beneficial devises, legacies, and gifts whatsoever, made or given in any will, to a subscribing witness thereto, shall be wholly void, unless there be two other competent subscribing witnesses to the same." Rev. Stat. 1913, § 1293.

It is insisted that, because the trustee's

president was one of the two subscribing witnesses, the devise is "wholly void," since the trustee will receive compensation for its services. The proponent contends that the trustee will receive no gift under the will, and that its only benefit will be compensation for services. It has been held, though authority is divided, that the fees which would accrue to an executor, who was also an attesting witness, are not within the prohibition quoted. *Re Williams*, 50 Mont. 142, 145 Pac. 957; *Jones v. Grieser*, 238 Ill. 183, 87 N. E. 295, 15 Ann. Cas. 787. English courts, however, under a similar statute have said that an executor, who is also a subscribing witness to a will, cannot receive a legacy providing compensation for services. *Re Barber*, L. R. 31 Ch. Div. 665, 55 L. J. Ch. N. S. 373, 54 L. T. N. S. 375, 34 Week. Rep. 395; *Re Pooley*, L. R. 40 Ch. Div. 1, 58 L. J. Ch. N. S. 1, 60 L. T. N. S. 73, 37 Week. Rep. 17. While this question was argued by the parties, it is not necessary to a decision, and will not now be determined.

The purpose of the legislation is to prevent fraud in the execution of wills by depriving a subscribing witness, unless there are two other competent witnesses, of all benefit under the will. The instrument itself and the trust created by it are valid. The policy of the law is to carry out the expressed intention of the testator. The beneficiaries of the trust should not be deprived of their rights by the acts of the trustee. It is a fundamental rule that equity will not allow a trust to fail for want of a trustee; and if it were held that the devise, so far as the interest of the trustee is concerned, were void, a court of equity would appoint a competent trustee to carry out the trust. It follows that the will was properly admitted to probate.

Affirmed.

Barnes, Fawcett, and Hamer, JJ., not sitting.

IOWA SUPREME COURT.

S. B. STONEROOK, Appt.,

v.

LOIS J. WISNER, by Guardian *ad Litem*,
et al.

(— Iowa, —, 153 N. W. 351.)

Guardian and ward — sale of ward's property — caveat emptor.

The doctrine of *caveat emptor* does not apply to a sale by a guardian of his ward's real estate under order of court, so as to deprive the purchaser of a city lot of relief because of diminution in value of the L.R.A.1915E.

property on account of a public right of way over a portion of the lot of which neither party was aware.

(June 30, 1915.)*

APPEAL by complainant from a decree of the District Court for Hardin County sustaining a demurrer to a bill filed to secure an abatement from the purchase price of certain real estate purchased at guardian's sale. Reversed.

The facts are stated in the opinion.

Mr. F. M. Williams, for appellant:

Money paid by mistake is recoverable at law.

Fidelity Sav. Bank v. Reeder, 142 Iowa, 373, 120 N. W. 1029; *Johnson v. Saum*, 123 Iowa, 145, 98 N. W. 599.

Equity relieves from mistake of law as well as fact.

Benson v. Markoe, 37 Minn. 30, 5 Am. St. Rep. 818, 33 N. W. 38; *Bottom v. Lewis*, 121 Iowa, 27, 95 N. W. 262.

The easement is an encumbrance.

Wetmore v. Bruce, 118 N. Y. 319, 23 N. E. 303.

Mutual mistake of fact relieves from deed.

Lewis v. Mote, 140 Iowa, 698, 119 N. W. 152; *Hood v. Smith*, 79 Iowa, 621, 44 N. W. 903; *Re Price*, 67 N. Y. 231; *Evants v. Strode*, 11 Ohio, 480, 38 Am. Dec. 744; *Baker v. Massey*, 50 Iowa, 399.

Equity will permit a mistake to be required into, and, on satisfactory proof, corrected.

Canedy v. Marcy, 13 Gray, 373; *Irwin v. Wilson*, 45 Ohio St. 426, 15 N. E. 209; *Watson v. Brown*, 113 Iowa, 312, 85 N. W. 28; *Hood v. Smith*, 79 Iowa, 621, 44 N. W. 903; *Byers v. Chapin*, 28 Ohio St. 300.

When property is sold for specific pur-

*A decision was reached in this case on March 9, 1911, and an opinion handed down affirming a judgment. A petition for rehearing having been filed, the court reversed the judgment in the opinion printed herewith, thereby making the former opinion unimportant.

Note. — Applicability of rule of caveat emptor to sales by guardian of minors as regards ward's title.

It is not intended to include in this note cases of defects in the proceedings to sell the ward's land or of fraud in regard thereto, but only defects of the ward's title. The sales here treated are those made under court authority.

For applicability of rule of *caveat emptor* to sales for partition, see note to *Peake v. Renwick*, 33 L.R.A.(N.S.) 409.

For cases on the question how far a purchaser at execution or judicial sale is pro-

pose, and fails, the rule of *caveat emptor* does not apply.

Rodgers v. Niles, 11 Ohio St. 48, 78 Am. Dec. 290.

A grantee will be relieved of performance of contract where title is doubtful owing to street located on lot.

People's Sav. Bank v. Alexander, 2 Sadler (Pa.) 287, 3 Atl. 821; Champlin v. Laytin, 18 Wend. 407, 31 Am. Dec. 382.

The purchaser will be relieved from the completion of his purchase, and his deposits will be restored, when it appears the contract was one he never intended to make and was entered into without fault or negligence on his part.

Fairchild v. Fairchild, 59 How. Pr. 351; Long v. Weller, 29 Gratt. 347; Redd v.

Dyer, 83 Va. 331, 5 Am. St. Rep. 275, 2 S. E. 283; Doty v. Sandusky Portland Cement Co. 46 Ind. App. 440, 91 N. E. 569; McGowan v. Bailey, 146 Pa. 572, 23 Atl. 387, 17 Mor. Min. Rep. 425; Durkin v. Cobleigh, 156 Mass. 108, 17 L.R.A. 270, 32 Am. St. Rep. 436, 30 N. E. 474; Saville v. Chalmers, 76 Iowa, 325, 41 N. W. 301; Trayer v. Reeder, 45 Iowa, 272; Bogart v. Burkhalter, 1 Denio, 125; Rackemann v. Riverbank Improv. Co. 167 Mass. 1, 57 Am. St. Rep. 427, 44 N. E. 990; Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533; Eberts v. Selover, 44 Mich. 519, 38 Am. Rep. 278, 7 N. W. 225; Rowley v. Flannelly, 30 N. J. Eq. 612; Fly v. Brooks, 64 Ind. 50; Fullen v. Providence County Sav. Bank, 14 R. I. 363; Columbus & T. R. Co. v. Steinfeld,

tected as a bona fide purchaser, see the note to Riley v. Martinelli, 21 L.R.A. 33.

For liability of execution creditor for return of purchase price upon failure of title to property sold on execution, see the note to Dresser v. Kronberg, 36 L.R.A.(N.S.) 1218.

For liability to purchaser, of mortgagee who sells under a power in the mortgage, see the note to Dirks Trust & Title Co. v. Koch, 49 L.R.A.(N.S.) 513.

STONEROOK v. WISNER was decided on a rehearing, and the court reaches a different conclusion from that on the first hearing, which is reported in 130 N. W. 120.

While it is frequently said that guardian's sales are judicial sales, and that the purchaser is subject to the rule of *caveat emptor*, most of the cases where these statements are made are cases where the defect was one in relation to the sale or its authority as distinguished from defects in the title of the ward. Still the same conclusions are to be found in cases involving the title of the ward.

Thus, in cases concerning defects of the title of the ward it has been held that the guardian's sale is a judicial sale. Headley v. Hoopengartner, 60 W. Va. 626, 55 S. E. 744; Black v. Walton, 32 Ark. 321 (*dictum*) and also that the rule of *caveat emptor* applies to it, see *infra*.

In Black v. Walton, *supra*, the court said: "A sale made by a guardian of his ward's land, under an order of the probate court, is a judicial sale, and as a general rule a purchaser at such sale acts at his peril. The guardian sells such estate only as his ward has in the land, and the purchaser must make inquiry as to the title and the authority of the guardian to sell. The guardian makes no warranty of title for his ward, and if he covenants for title, he only binds himself personally. The rule *caveat emptor* applies to such sales."

In the comparatively few cases arising upon defects in the ward's title, the decisions in general seem to have resulted in a reasonably fair manner. It may well be that the intimation, in STONEROOK v. WISNER, of a modern tendency to avoid hard L.R.A.1915E.

applications of the doctrine of *caveat emptor* is correct. Probably in general the courts, instead of denying the doctrine, would hold that it was subject to modification in certain circumstances.

The rule of *caveat emptor*.

Thus it is the general rule that as to the ward's title the rule of *caveat emptor* applies to sales by a guardian of minors under court authority. Black v. Walton, *supra* (*dictum*); Byrd v. Turpin, 62 Ga. 591; Headley v. Hoopengartner, *supra*; see also Dickey v. Beatty, 14 Ohio St. 389, and Erwin v. Garner, 108 Ind. 488, 9 N. E. 417, *infra*.

In Headley v. Hoopengartner, *supra*, the court said: "This sale being a judicial sale, the rule *caveat emptor* applies, and although the title fails or the lessees may not get as much oil as they thought they were purchasing, they will not be relieved from the payment of the consideration. The court sold just such title as was vested in the infants, could have sold nothing else; and the purchasers were bound to know this. They purchased at their own risk, and are held to know the source and condition of the title."

In Byrd v. Turpin, 62 Ga. 591, the court said: "The guardian sold what his wards had. He did not attempt to convey otherwise than as his office authorized him. The deed on its face undertook to convey no larger estate than he and his wards held and possessed. As they held and possessed the premises, so was the purchaser to hold and possess this, in effect, the deed says. And such is the general range and limit of sales by guardians. If there is due leave from the ordinary to sell, and no fraud nor misrepresentation, the maxim which the purchaser has to face is, *caveat emptor*." (In that case, however, the purchaser knew of the defect and paid less on that account.)

A sale or lease by a guardian under court order of the oil and gas in the ward's lands is a judicial sale, and the rule of *caveat emptor* applies thereto where the fractional parts purported to be sold were

42 Ohio St. 449; Baldwin v. Foss, 71 Iowa, 389, 32 N. W. 389; Wright v. Dickinson, 67 Mich. 580, 111 Am. St. Rep. 602, 35 N. W. 164; Hancock v. Cossett, 45 Fed. 754; Megie v. Bennett, 51 N. J. Eq. 281, 27 Atl. 917; First Nat. Bank v. Conger, 37 Iowa, 474.

Messrs. C. A. Rogers and George W. Ward, for appellee:

Where property is sold at a judicial sale there is no warranty as to the title or condition of the property. The purchaser has no right to rely upon the representations of the agent or officer making the sale, but must inquire for himself, and see that he is getting what he considers that he is bargaining for, as the rule of *caveat emptor* applies in full force.

greater than passed to the infants owing to like sales or leases by their ancestor overlooked by the purchasers. Thus, where the purchaser had agreed to pay a stipulated royalty he was not relieved from the payment of such royalty, after the sale was confirmed and deed made, on the ground that the infants' father, in his lifetime, had leased a part of all the oil and gas produced on the lands; nor could the proceedings be reopened and corrected, but they were final and conclusive upon all the parties thereto, except for after-discovered mutual mistake of material facts, or fraud. Headley v. Hoopengartner, supra, where it appears that the leases by the father were of record.

A purchaser from a guardian under court order will take with notice of one then in possession under a contract for title from the infants' father. McIntosh v. Bowers, 143 Wis. 74, 126 N. W. 548.

In Dickey v. Beatty, 14 Ohio St. 389, where it was claimed by one who had purchased from a guardian under court order certain described land that by mistake the proceedings and deed did not cover as much land as was intended, it was held to be error to reform the guardian's deed, as if the purchaser thought he was getting more; "the doctrine of *caveat emptor* is well applied."

But in Shipp v. Wheelless, 33 Miss. 646, while the relief asked was denied, the court intimated that a purchaser in a proper case would be protected against his bonds for purchase money given on a guardian's sale under court order, where under the will giving the infants an interest in the property it could not be separately sold at the time, and the sale was therefore void.

The same principle applies in cases holding that the guardian has no right to protect the purchaser against claims.

Thus, in the briefly reported case of Hunt v. Hunt, 1 Thomp. & C. Add. 6, it was held that a guardian selling his ward's right, title, and interest to certain lands by order of court may not appropriate part of the purchase money to paying off a mortgage on the property, as the purchaser had no

17 Am. & Eng. Enc. Law, 1010, 1011; Hale v. Marquette, 69 Iowa, 376, 28 N. W. 647; Sumner v. Williams, 8 Mass. 162, 5 Am. Dec. 83; Foster v. Young, 35 Ia. 27.

Ladd, J., delivered the opinion of the court:

Briefly stated the petition makes a case as follows: That in August, 1904, the guardian of Lois J. Wisner, a minor, undertook to sell to the plaintiff the east one third of lot 8 in block 24 in the town of Iowa Falls, Iowa; that plaintiff made such purchase for the purpose of improving the same by erecting thereon a permanent business building to cover its entire length of 132 feet; that said guardian, claiming his ward to be the owner of all said property,

claim on the infant or on her ancestor's estate for the payment of the mortgage; the sale being a sale of the infant's interest, and nothing more.

So, where after a guardian had sold his ward's land by court order, the land by order of court was sold by the administrator of the ward's ancestor for payment of debts, and the guardian to protect his purchaser bought the property in at the administrator's sale, the guardian was held liable on his bond for the money paid by him for the purchase at the administrator's sale. State ex rel. Chesser v. Clark, 28 Ind. 138, where the court said: "The guardian has no power to bind his ward by covenants in the deed; his power is to sell and convey under the order of court. The deed of conveyance is only a quitclaim, and passes the interest of the ward in and to the land sold." It seems that the purchaser at the guardian's sale knew that the ancestor's estate was unsettled.

It will be observed in the foregoing cases that the defect was one of law, or that the purchaser had actual or constructive notice, except in the Hunt Case, where the facts are not reported.

—minor not estopped to purchase outstanding title.

A minor is not estopped to acquire a superior title as against the purchaser at his guardian's sale. Young v. Lorain, 11 Ill. 624, 52 Am. Dec. 463 (where the court said that the guardian could not bind the infant by any covenants).

And it has been held that the minor may claim a fractional interest which he later took as forced heir, having only an expectancy in it at the time the property was sold, although the sale purported to include such fractional interest. Thus where by the local law lands of a decedent passed, two thirds to his children and one third to his wife, and on her death his children took her one third as forced heirs, having nothing but an expectancy during her life, a sale by order of court by a guardian of the minor children of the interest of his wards in the real estate of which their fa-

obtained an order of court authorizing him to sell the same, and plaintiff, believing and relying thereon, made the purchase at the agreed price of \$4,800, and proceeded to expend money in considerable sums in excavating the basement story and constructing the foundations of the new building, when it was discovered that 12 feet of the rear end of said lot had been appropriated by or dedicated to the public as an alley or public way, and that the deed made by said guardian conveyed to plaintiff the title to but 120 feet in depth instead of 132 feet. It is further alleged that the guardian and plaintiff entered into said contract of purchase under a mutual mistake as to the title of the ward in said property; that neither of them knew or

believed that any part of said lot had been acquired by the public, and entered into the agreement of sale and the subsequent conveyance in good faith, believing that the grantor was conveying and the grantee receiving the absolute title to the very property therein described. It is further alleged that said mistake was not discovered until the work of constructing the building had progressed to a considerable extent, putting plaintiff to much trouble and expense in changing his building plans, and that under the circumstances it was impracticable to put all parties *in statu quo* by a rescission of the purchase. He avers that the lot as actually acquired by him was worth at least \$1,200 less than it would have been had he been given title to its en-

ther died seised will not pass the minor's part of the widow's one third, and after her death the minors may claim it. *Erwin v. Garner*, 108 Ind. 488, 9 N. E. 417; where the interest of the infants was correctly stated in the original petition, and order for sale to be four ninths, and in an amended petition and order was incorrectly stated to be four sixths, subject to the life estate of the widow, who was guardian, and the sale was made under the second order.

But if a sale was made on faith of an entry for a patent, the infant could not, on obtaining the patent, claim the land. *Young v. Lorain*, supra (*dictum*). Or as the court said in *Young v. Dowling*, 15 Ill. 481: "Undoubtedly, if at the time of the sale the infant had but an equitable title, and subsequently acquires the legal title, that equity will compel him to convey to the purchaser such subsequently acquired legal title, but that would be upon the ground that he acquired the legal title by reason of the equitable title which had been regularly sold, and that he took the legal title simply as trustee. In such a case equity could undoubtedly enforce the trust."

—guardian personally bound by covenants.

It may be here noted that if the guardian inserts a covenant for title in the deed he will be personally liable therefor. This was held where guardians selling under order of court covenanted that the property was free from encumbrances whereas it was subject to a mortgage executed by the infant's father, *Donahue v. Emery*, 9 Met. 63. So, where a guardian under court order sold land of his ward, including a lot to which he had no title, and covenanted for himself and his ward that he was sole owner and that the premises were free from encumbrance, *Holyoke v. Clark*, 54 N. H. 578. Similarly, a testamentary guardian was held personally liable on his covenants for title in a deed of his ward's property in *Whiting v. Dewey*, 15 Pick. 428.

Relief of purchasers.

Notwithstanding the general rule, it L.R.A.1915E.

has been held that relief will be granted the purchaser where he has relied on misrepresentations by the guardian, and also in cases of mutual mistake of fact.

Accordingly, a purchaser has been relieved when he relied on a false representation of the guardian, even though it was innocent. Thus it has been held that a purchaser at a guardian's sale will not be compelled to complete his bid when he relied upon representations of the guardian made to him prior to the sale, that the property belonged to the minors when it did not so belong, although the guardian acted in good faith, supposing he spoke truly. *Black v. Walton*, 32 Ark. 321 (an action for the purchase money.)

Re Jackson, 6 Hun, 513, affirmed in 67 N. Y. 231, *infra*, the court considered that the statements in the petition amounted to a representation that the ward owned a one-half interest subject to dower.

In *Johnson's Appeal*, 114 Pa. 132, 6 Atl. 556, the court two years after a guardian's sale restored the parties to their original condition on petition of the purchasers, the guardian's successor still having the purchase money, where land described in the petition and deed as "containing 200 acres be the same more or less" only contained 52 acres, and the sale was effected by the grandfather of the infants, who was a surveyor, and the purchaser relied on his representations, although he was not, it seems, actually the agent of any party.

Re Price, 67 N. Y. 231, affirming 6 Hun. 513, the court gave relief to a purchaser who suffered loss on account of an unknown heir, it not appearing that there was any lack of diligence in the discovery. In that case a guardian under court order sold the infant's right, title, and interest in the land of her ancestor, the petition showing that the infant was entitled to one half subject to dower, and thereafter an additional unknown heir appeared and recovered one third of the property. The purchaser at the sale, who had sold the property with warranty, and was thus obliged for the benefit of his grantee to buy out the new heir, was held entitled to recover one third

tire area; that as a matter of fact \$400 of the agreed purchase price is still unpaid, and he asks the court to decree an abatement from the purchase price proportionate to the loss in the area of said lot, and that the same be applied in satisfaction or cancellation of the unpaid balance of said price as of the date of such sale. The demurrer denies the sufficiency of the petition to state a cause of action, because it appears that said conveyance was made by the guardian of a minor under leave and order of court; that the rule of *caveat emptor* applies to purchases so made, and neither law nor equity affords him any remedy for loss or damage so sustained. The demurrer was sustained, and plaintiff electing to stand upon his petition, it was ordered dismissed, and he appeals.

The ruling of the trial court evidently proceeded on the theory that the doctrine of *caveat emptor* should be applied. That doctrine was applied in *Holtzinger v. Edwards*, 51 Iowa, 383, 1 N. W. 600, where the purchase was under an execution and there was a prior judgment lien which the purchaser failed to discharge, the court holding that, having taken his chances in buying, the purchaser was not entitled to relief. In *Hale v. Marquette*, 69 Iowa, 376, 28 N. W. 647, the administrator sold certain land, the plaintiff being the purchaser, and it was claimed that certain necessary parties were not given notice of the proceedings and that therein there was a breach

of the condition in the deed, that the administrator "do covenant . . . that in conducting said sale I have complied with all the requirements of the law and of the said court." It was there conceded that the doctrine of *caveat emptor* applies in the absence of fraud, and the breach of the covenant was relied on. The court held that the administrator was without power to bind the estate by any covenants in a deed; that he might only sell such title as the deceased debtor had. In *Ritter v. Henshaw*, 7 Iowa, 97, a lot was sold under execution, and upon it being shown that a mortgage constituting a prior lien had been foreclosed and the lot sold thereunder, plaintiff acquired no title whatever under the sale. It was set aside, the court saying: "The doctrine of *caveat emptor* has its legitimate force in precluding any idea of a warranty by the defendant in execution, or by the sheriff; but in all the numerous cases, it is not viewed as having an application to bar the creditor or the purchaser from his appropriate relief."

Relief in event of a purchase at sheriff's sale of real estate on which the judgment is not a lien at the time of the levy, unknown to the purchaser, is provided for in § 4034 of the Code. See also *Rosenberger v. Hawker*, 127 Iowa, 521, 103 N. W. 781.

In *Crawford v. Foreman*, 127 Iowa, 661, 103 N. W. 1000, the court held the doctrine of *caveat emptor* applicable where the purchaser made his bid with full knowledge of

of the purchase price from the guardian as such, the ward being still a minor. The court after referring to the statute said: "We have given this synopsis of the statute to show that the special guardian is an officer of the court, and that, until the infant arrives at majority, and until the purchase money has been, in fact, paid over to the infant, and as long as it remains in the hands of the special guardian, the court has control over it and control over all the proceedings in the application. Doubtless, a court of equity has control of the proceedings before it, in any manner, and may correct irregularities and rectify mistakes therein, at any reasonable time after they occur; and it seems, from the continuing authority given to the court in the matter of a sale of the real estate of an infant, that it has, in especial manner, supervision and control of the proceedings therein. Indeed, it is the court itself, through its officers, the special guardian and the referee, which is the actor between its ward, the infant, and the purchaser. Surely, it is incidental to the jurisdiction of a court in any case once moved before it, and not yet passed from its control, to overhaul any of the proceedings for irregularity or for errors made by its officers, and, by further order, to amend them, so as to protect a party likely innocently to suffer thereby." L.R.A.1915E.

In *STONEROOK V. WISNER* there was also a mutual mistake as to fact, and the decision may well be supported by the *Price Case*.

It may be noted that a widow who under a legal court order as guardian of her minor children executes a deed of trust for money borrowed by her as guardian cannot set up against the deed any claim to dower and homestead, where the deed recited that she, "guardian as aforesaid, hereby covenanting for herself, her heirs, executors, and administrators that she is seised of a good and indefeasible title in fee simple; that the premises are free and clear from every encumbrance; that she has full right to sell and convey the same in the manner aforesaid; and that she will warrant and defend the title unto the said party of the second part and his heirs, against the lawful claims of all persons whomsoever;" the deed providing, further, that on default the grantee "will be empowered to execute a deed in fee simple for the premises aforesaid, or so much as he may sell, with all the covenants touching title herein contained, to the purchaser, which deed will be absolute, and prevent said party of the first part, or her heirs or assigns, from setting up any claim thereto, either in law or in equity." *Foster v. Young*, 35 Iowa, 27.

B. B. B.

the facts. In no case in this state has the doctrine been extended to guardian sales; though, without much consideration as to whether applicable, it has been applied in other states in cases too numerous for citation. This has been on the theory that the officer tenders for sale the title only which his ward has to dispose of, and that the purchaser must ascertain for himself what this is. Another reason has also been given, and it is, that from the nature of the transaction there is no one to indemnify the purchaser for any loss he may sustain. *The Monte Allegre*, 9 Wheat. 616, 6 L. ed. 174.

Ordinarily the doctrine is applicable only where there has been a mistake, for if this were not true there would not likely have been a sale, and it is a little difficult to understand how there could have been a mutual mistake, such as alleged in the petition herein, when neither party had any knowledge of the existence of the easement, and the contract contained no reference thereto and was not intended to have done so. As indicated in *Ritter v. Henshaw*, supra, there is ample reason for not permitting the guardian to bind his ward with any covenant in the conveyance or elsewhere, but there is every reason for insisting that the guardian in representing his ward act honestly with those with whom he deals, and that he convey precisely what he undertakes to sell, and that if he shall fail or neglect to do so that the court shall see to it that no advantage be taken thereof. In New York the rule of *caveat emptor* is not applied to judicial sales; the purchaser having the right to demand a marketable title free from reasonable doubt as to its validity. There he bids on the assurance that there is no undisclosed defect in the title, and, of course, the consideration naturally is regulated by this implied condition. *Crouter v. Crouter*, 133 N. Y. 55, 30 N. E. 726. See note to *Peake v. Renwick*, 33 L.R.A. (N.S.) 409. The same rule seems to obtain in Maine. *Dresser v. Kronberg*, 108 Me. 423, 36 L.R.A. (N.S.) 1218, 81 Atl. 487, Ann. Cas. 1913B, 542.

There is a conflict of authority as to whether the doctrine applies to sales under decrees in equity, but the great weight of authority is to the effect, as stated by Mr. Freeman in his note to *Burns v. Hamilton*, 70 Am. Dec. 570, 574, that "in equity sales the purchaser is entitled to receive a title free from equities and encumbrances of which he had no notice, and if by the sale he will not receive such a title, he will not, upon his making objection, be compelled to complete his purchase, but will be released therefrom, unless the title can be made good, or other just relief awarded." L.R.A.1915E.

See cases collected in note to *Peake v. Renwick*, supra; *Hunting v. Walter*, 33 Md. 60; *Bolivar v. Zeigler*, 9 S. C. 287. Contra, *McManus v. Keith*, 49 Ill. 388; *Owsley v. Smith*, 14 Mo. 153.

It seems that the doctrine is not extended to mistake in the quantity of land where sold by the acre, even though strictly applied to defects in title. *Castleman v. Castleman* (*Singleton v. Castleman*) 67 W. Va. 407, 28 L.R.A. (N.S.) 393, 68 S. E. 34. There is a decided tendency in the decisions to avoid conclusions in the hard application of the doctrine in the early cases, and to apply where possible the more just principles which obtain in sales under decrees in equity. The reason ordinarily stated for not applying the doctrine in equity sales is that the court in a sense is the seller and controls the sale up to the very time the conveyance is confirmed. See *Boorum v. Tucker*, 51 N. J. Eq. 135, 26 Atl. 456. See also cases collected in notes to *Mount v. Brown*, 69 Am. Dec. 362, 368, and *Burns v. Hamilton*, supra. The court in ordering a sale of land by the guardian exercises complete control over its officer in making the sale, in determining the terms, and the matter of its confirmation, and the reasons for declaring the doctrine of *caveat emptor* not applicable to sales under equity decrees are precisely as persuasive when applied to guardian sales under the orders of court. A sale under partition proceedings is but a mode by which the parties themselves, through a statutory method, proceed to dispose of property for division of the proceeds among themselves, and, this being so, the purchaser has the same equity against being compelled to go on with his purchase as if the purchase had been made by the parties outside of court, and for this reason if the purchaser discovers the defect in time to save himself, he is not without remedy. *Smith v. Brittain*, 38 N. C. (3 Ired. Eq.) 347, 42 Am. Dec. 175; *McMichael v. McMichael*, 51 S. C. 555, 29 S. E. 403. In *Bolivar v. Zeigler*, supra, it is said that "although the sale in this case was made by the sheriff, yet it was not a compulsory sale under process of execution, where the rule of *caveat emptor* does apply, but a sale for partition at the instance of the parties, and must be governed by the same principles as applied to such sales, when made by the commissioner in equity."

The guardian represents the interest of the individual ward. The application for the sale of land is for the interest and advantage of such individual, and the court can properly direct a sale for no other purpose; and in so doing and fixing the terms it exercises complete control over its officer, and the sale, after made, may be rejected

by the court, or confirmed, at its election. It seems to be as completely under the control of the court as sales under decrees in equity, and precisely the same reasons obtain for not applying thereto the doctrine of *caveat emptor*. It may be that *caveat emptor* applies to sales under execution, and possibly to those by an administrator, on the ground also that there is no one to indemnify the purchaser for any loss he may have sustained; but this is not true with reference to the sale of land owned by one under guardianship. In the latter case there is always someone who in good conscience should indemnify the purchaser, when the sale is made under such circumstances as shall indicate that the purchase price, in whole or in part, has been received for something sole which did not belong to the ward. If it can be said that in such a case the ward, through his guardian, should be relieved from restitution when demanded, when under like circumstances an adult would be required to return the purchase money or a *pro rata* share thereof, we have failed to discover the reason therefor. While the guardian should not be held to warrant the title of land sold in behalf of his ward, he should be required by the court, in the interest of common honesty, to convey to the purchaser what in behalf of the ward he undertakes to sell, and on failure to do so should be compelled to make proper reparation. Here, according to the allegations of the petition, the lot was sold as an entirety, the easement was alike unknown to the guardian and to the purchaser, and neither negotiated with reference thereto. It was not disclosed in the records of which the abstract was an exemplification, and to permit the ward to profit by the sale of the 12 feet which had previously been appropriated as an easement would be inconsistent with fair dealing, and encourage dishonesty on the part of the ward. In a sense, the court, as under decrees in equity, is the seller and should see to it that the purchaser receives precisely what its officer, the guardian, has bargained, especially when the defect has been discovered before the sale has been confirmed, or, as in this case, before the entire purchase price has been paid. In our opinion the doctrine of *caveat emptor* should not be extended to sales by guardians under the order of court, and on that ground the demurrer should have been overruled.

The decree of the District Court is reversed.

All the Justices concur.
L.R.A.1915E.

MAINE SUPREME JUDICIAL COURT.

LEON V. WALKER, Admr., etc., of Emma S. Schoppee, Deceased,
v.

PORTLAND SAVINGS BANK.

(— Me. —, 93 Atl. 1025.)

Executor — forgery of decedent's name — ratification.

One appointed administrator of decedent's estate after forging an order upon decedent's bank account in his own favor cannot ratify the order so as to absolve the bank from liability to an administrator *de bonis non* on the theory that he was acting as executor *de son tort*, if the making of the order was the only act he did as representative of the estate before his appointment.

(May 11, 1915.)

REPORT by the Supreme Judicial Court for Cumberland County for the opinion of the full bench upon an agreed statement of facts, of an action brought to recover a deposit account alleged to have been wrongfully paid by defendant to one having no title to it. Judgment for plaintiff.

The facts are stated in the opinion.

Mesars. Libby, Robinson, & Ives, for plaintiff:

A savings bank is liable to its depositor if it pays out his deposit upon a forged order.

Ladd v. Androscoggin County Sav. Bank, 96 Me. 520, 52 Atl. 1016.

A bank, knowing that one of its deposits is impressed with a trust, as in case of a deposit in the name of a person deceased, is liable if it pays out such deposit for a purpose which it has notice constitutes a breach of trust.

Allen v. Puritan Trust Co. 211 Mass. 409, L.R.A.1915C, 518, 97 N. E. 916; Duckett v. National Mechanics' Bank, 86 Md. 400, 39 L.R.A. 84, 63 Am. St. Rep. 513, 38 Atl. 983; 5 Cyc. 530; Farmers' Loan & T. Co.

Note. — Research has disclosed no case other than WALKER v. PORTLAND SAV. BANK, passing upon the question of ratification by an executor or administrator of his own forgery of decedent's name. The rule is laid down by Woerner on "American Law of Administration" (2d ed. § 187), that the decisive test to ascertain whether the acts done before administration are legalized or ratified by the subsequent grant of administration to the one doing them is whether such acts would have been valid had he been the rightful administrator; and (§196) that only such acts of an executor *de son tort* are legalized and made valid by the subsequent grant to him of letters of administration as would have been valid had he been the rightful administrator. Tested by

v. Fidelity Trust Co. 30 C. C. A. 247, 56 U. S. App. 729, 86 Fed. 541; Ward v. City Trust Co. 192 N. Y. 61, 84 N. E. 585; East Hartford v. American Nat. Bank, 49 Conn. 539; Parks v. Knickerbocker Trust Co. 137 App. Div. 719, 122 N. Y. Supp. 521.

Even though a bank has not actual knowledge that a breach of trust is being committed, yet if it has knowledge of such facts as would reasonably lead it to suspect that fact, it is liable.

Allen v. Puritan Trust Co. 211 Mass. 409, L.R.A. 1915C, 518, 97 N. E. 916; Duckett v. National Mechanics' Bank, 86 Md. 400, 39 L.R.A. 84, 63 Am. St. Rep. 513, 38 Atl. 983; Ward v. City Trust Co. 192 N. Y. 61, 84 N. E. 585; Farmers' Loan & T. Co. v. Fidelity Trust Co. 30 C. C. A. 247, 56 U. S. App. 729, 86 Fed. 541; East Hartford v. American Nat. Bank, 49 Conn. 539; Shaw v. Spencer, 100 Mass. 388, 1 Am. Rep. 115, 97 Am. Dec. 107; Loring v. Brodie, 134 Mass. 453.

The bank negligently transferred this \$1,000, upon forged order, into an account which it opened in the name of Ephraim Schoppee on its books. This did not alter the legal status of the money as continuing to belong to Emma S. Schoppee's Estate.

Allen v. Puritan Trust Co. 211 Mass. 409, L.R.A. 1915C, 518, 97 N. E. 916; American Exch. Nat. Bank v. Loretta Gold & S. Min. Co. 165 Ill. 103, 56 Am. St. Rep. 233, 46 N. E. 202; Cutler v. American Exch. Nat. Bank, 113 N. Y. 593, 4 L.R.A. 328, 21 N. E. 710; Armstrong v. National Bank, 90 Ky. 431, 9 L.R.A. 553, 14 S. W. 411; Commercial Nat. Bank v. Hamilton Nat. Bank, 42 Fed. 880; Ihl v. Bank of St. Joseph, 26 Mo. App. 129.

The bank's own misconduct in making the transfer did not relieve it from continuing

to have notice that all the funds were trust funds.

Allen v. Puritan Trust Co. 211 Mass. 409, L.R.A. 1915C, 518, 97 N. E. 916; Morrill v. Raymond, 28 Kan. 415, 42 Am. Rep. 167; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; Union Stock Yards Nat. Bank v. Gillespie, 137 U. S. 411, 34 L. ed. 724, 11 Sup. Ct. Rep. 118; Manhattan Bank v. Walker, 130 U. S. 267, 32 L. ed. 959, 9 Sup. Ct. Rep. 519; Hunter v. Robins, 117 Fed. 920.

The bank was negligent in both instances when it honored the forged orders.

Ladd v. Augusta Sav. Bank, 96 Me. 510, 58 L.R.A. 288, 52 Atl. 1012; Kelley v. Buffalo Sav. Bank, 69 L.R.A. 317, and note, 180 N. Y. 171, 105 Am. St. Rep. 720, 72 N. E. 995, 17 Am. Neg. Rep. 337.

Acts validated by appointment of an executor *de son tort* as administrator must have been within the scope of a rightful administrator's authority.

Schouler, Exrs. & Adms. § 195; 18 Cyc. 213, 214; Gouldsmith v. Coleman, 57 Ga. 425; Sparrow's Succession, 39 La. Ann. 698, 2 So. 501; Murray's Estate, 56 Or. 132, 107 Pac. 19; Bellinger v. Ford, 21 Barb. 311; Wiswell v. Wiswell, 35 Minn. 371, 29 N. W. 166; Conrad v. Archer, 7 N. Y. S. R. 646; Roumfort v. McAlarney, 82 Pa. 193.

Mr. Ardon W. Coombs, for defendant:

The appointment of Arthur G. Eaton as administrator related back to the death of Mrs. Schoppee, and made valid his receipt of the property for which he was responsible as executor *de son tort*.

Alvord v. Marsh, 12 Allen, 603; Shillaber v. Wyman, 15 Mass. 322; Hatch v. Proctor, 102 Mass. 351; 1 Williams, Exrs. 6th ed. 598; Rattoon v. Overacker, 8 Johns. 126; Re American Bd. of Comrs. for Foreign

this rule it seems that the act in the reported case, performed by the one who was afterward appointed administrator, was not of such a nature that it was legalized by the grant of letters of administration; and the decision appears sound also that such an act did not constitute the one doing it an executor *de son tort*. The nature of the office of executor *de son tort* would seem to preclude the acceptance of the view that one becomes an executor *de son tort*, so that his subsequent appointment as administrator would legalize the act, by presenting to a bank, as in that case, a forged check, purporting to be signed by the decedent, and receiving the money thereon. It is said in 18 Cyc. 1354, 1355: "An executor *de son tort* is a person who, without authority, intermeddles with the estate of a decedent, and does such acts as properly belong to the office of an executor or administrator, and thereby becomes a sort of quasi executor, although only for the purpose of being sued L.R.A.1915E.

or made liable for the assets with which he has intermeddled. . . . A person makes himself chargeable as executor *de son tort* by acts of such a character as indicate that he is possessed of authority to administer upon the estate."

In Shillaber v. Wyman, 15 Mass. 322, the defendant in scire facias on a judgment against him as executor *de son tort* pleaded that before the suing out of the writ he had been duly appointed administrator of the estate of the decedent; that it was insolvent, and had been fully administered. It was held, without discussion, however, of the special allegations of fraud and embezzlement therein, that a replication to the plea was bad that after the death of the intestate, and before the bringing of the original action, the defendant had by fraud carried away, embezzled, and converted to his own use property of the intestate, and that the original action was begun long before he was appointed administrator.

Missions, 27 Conn. 353; Head v. Sutton, 31 Kan. 616, 3 Pac. 280; Pinkham v. Grant, 78 Me. 158, 3 Atl. 179; Hodge v. Hodge, 90 Me. 505, 40 L.R.A. 33, 60 Am. St. Rep. 285, 38 Atl. 535; Beall v. New Mexico, 16 Wall. 535, 21 L. ed. 292; Tarbell v. Jewett, 129 Mass. 457; Merservey v. Kalloch, 97 Me. 91, 53 Atl. 876.

Bird, J., delivered the opinion of the court:

The administrator *de bonis non* of Emma S. Schoppee, deceased, brings this action of the case against the defendant bank for the recovery of \$1,000 alleged to have been paid by it to one Arthur G. Eaton, and charged against the deposit of said Emma S. Schoppee. The action is here upon report upon the agreed statement of the parties.

Upon the facts agreed, it is manifest that the defendant made the payment or transfer under such circumstances as to render it liable to the depositor herself, had she been alive at the time of payment. Ladd v. Augusta Sav. Bank, 96 Me. 510, 518, 58 L.R.A. 288, 52 Atl. 1012; Bourgeois v. Penobscot Sav. Bank, 107 Me. 528, 80 Atl. 1131. The defendant does not contend otherwise.

The transfer upon the forged order of deceased, made payable to the order of Eaton, to Ephraim Schoppee, the appointee of Eaton, was made upon the 11th day of April, 1910, and on the same day Eaton deposited the bank book issued in the name of Ephraim Schoppee with the Fidelity Trust Company, accompanied by an order for \$1,000 purporting to be signed by Ephraim Schoppee, whose signature was forged by Eaton, upon defendant as security for the payment of his (Eaton's) note for like amount, payable May 16, 1910. On the 18th day of April, 1910, Eaton was appointed, and qualified as administrator of decedent.

But defendant bank claims that Eaton, in so receiving payment of the sum of \$1,000, was acting as executor *de son tort*, and that its act, as well as his, was legalized and validated by his subsequent appointment as administrator of Emma S. Schoppee, and that its payment to him binds her estate. See Pinkham v. Grant, 78 Me. 158, 3 Atl. 179.

An executor *de son tort* is one who derives no authority from the testator, but who assumes the office by virtue of his own interference with the estate of one deceased. He intrudes himself into the office without lawful authority. Such intermeddling or intrusion is in effect holding out one's self as executor, and authorizes the L.R.A.1915E.

conclusion that he hath the will of deceased wherein he is named as executor, but has not yet taken the probate thereof. Hinds v. Jones, 48 Me. 348, 349. An executor *de son tort* is a person who, without any authority from the deceased or the ordinary, does such acts as belong to the office of an executor or administrator. 2 Bacon, Abr. 387. An executor in his own wrong is one who wrongfully intermeddles with the goods of the deceased, or does any other act characteristic of the office. Allen v. Hurst, 120 Ga. 763, 48 S. E. 341. The slightest circumstance may make a person executor *de son tort* if he intermeddles with the assets in such a way as to denote an assumption of the authority or an intention to exercise the functions of an executor. Demanding payment of debts due to the deceased, paying the deceased's debts, carrying on his business, disposing of his goods, may make a person executor *de son tort*, but setting up a colorable title to the deceased's goods is not enough. 14 Laws of England (Halsbury) 147, 148.

And in discussing the acts of the executor, named in a will, which will prevent his afterwards refusing to prove the will, it has been said: "But if an executor seizes the testator's goods, claiming a property in them himself, though afterwards it appears that he had no right, yet this will not make him executor, for the claim of property shows a different view and intention in him than that of administering as executor." 2 Bacon, Abr. 406.

Again it has been stated that an executor *de son tort* is a person who, without authority, intermeddles with the estate of a decedent and does such acts as properly belong to the office of an executor or administrator, and thereby becomes a sort of quasi executor, although only for the purpose of being sued or made liable for the assets with which he has intermeddled. 18 Cyc. 1354.

To constitute intermeddling, the person sought to be charged as executor *de son tort* must take possession or some control of property belonging to the decedent; without this the performance of acts which are in their nature such as an executor or administrator would do cannot make one an executor *de son tort*.

An agent sold goods of an intestate in his lifetime and collected the purchase money after his death. It was held that he was not an executor *de son tort*, even as to creditors, because his right to collect was colorable, which gives character to the transaction, as showing that it was not done as

executor or as an officious intermeddler. *Outlaw v. Farmer*, 71 N. C. 31, 34.

In *Parker v. Kett*, speaking of stewards *de facto*, Holt, Ch. J., says: "And this is agreeable to the reason of the law in other cases, as a legal act done by an executor *de son tort* will bind the rightful executor (*Coulter's Case*, 5 Coke, 30b), and yet he is but an executor *de facto*; and, if the rightful executor shall bring trover against him, he shall recover only so much in damages as he has administered unduly; and the reason is because the creditors are not bound to seek farther than him who acts as executor." 1 Ld. Raym. 658, 661.

How far he is bound, in his character of rightful administrator, by his own acts done while executor *de son tort*, may be a question, but it is certain that he can ratify and make valid, by relation, all those acts which would have been valid had he been the rightful administrator. *Outlaw v. Farmer*, 71 N. C. 31, 35; *McClure v. People*, 19 Ill. App. 105, 107.

Generally speaking, all lawful acts done in the professed administration of the estate by a person purporting to act as executor, which a rightful executor would have been bound to perform in due course of administration, bind the estate. But, where the alleged executor does one single act only of an administrative character, that act is not binding on the estate. To render an act binding, it must be shown that, at the time in question, the executor *de son tort* was acting in the character of an executor. 14 Laws of England (Halsbury) 149.

In light of the foregoing, we are unable to hold that Eaton dealt with the defendant as executor *de son tort*, or that the defendant had reason to believe him such. See *Smith v. Porter*, 35 Me. 287, 291. He produced what purported to be the written order upon the bank of the decedent. It was payable to him individually and in no representative capacity. If genuine, it must have been executed and delivered before the decease of decedent, payable by statute within thirty days after her decease. In no sense can it be held that Eaton thus appeared to defendant or could be viewed by it as one collecting and receiving payment of assets of the estate, but rather as one receiving a sum transferred to him by decedent in her lifetime and no longer part of her estate. Such being the case, it must follow that while he, having possession of the funds, might have been charged with them in his representative capacity after his appointment as administrator, we cannot assent to the proposition that his

appointment legalized or validated the payment of the bank to him under the circumstances. The doctrine of validation by subsequent appointment was adopted, at least, originally, to relieve the executor *de son tort* from the suits of creditors.

And while we conceive it to be true that little more than the reception of assets of an estate may be needed to constitute one an executor *de son tort* as to creditors, something more than the payment alone of assets of an estate even is required to constitute one an executor *de son tort* with the result that the payment is legalized and validated by his subsequent appointment as administrator. In other words, payment to one who seeks it, not as a representative of the estate, but as an individual with pretended rights against the estate, which induce the payment, is not legalized as to the party making the payment by a subsequent appointment of the wrongdoer as administrator. See *Lee v. Chase*, 58 Me. 432, 435. *Hodge v. Hodge*, 90 Me. 605, 40 L.R.A. 33, 60 Am. St. Rep. 285, 38 Atl. 535, is relied upon by defendant as conclusive. It is, however, but authority for the position that, as the law then was, an administrator *de bonis non* of a deceased administrator could not recover of the representative of the deceased administrator assets of the decedent which the deceased administrator received before appointment, but administered in whole or in part. It is not, however, authority to the effect that such administrator *de bonis non* might not bring his action against one who improperly and illegally made payment of assets to an executor *de son tort*, although the latter be later appointed administrator.

While it may be true that it is now law that the administrator *de bonis non* is bound by acts of his predecessor, lawfully performed within the scope of his duties, it has never been held that he is affected or prejudiced by such as were fraudulent or illegal. See *Woolfork v. Sullivan*, 23 Ala. 548, 58 Am. Dec. 305, 307.

By the amendment of 1903 (Pub. Laws, chap. 193), the authority of an administrator *de bonis non* was extended, and it was made his power and duty to collect from his predecessor or his heirs, etc., and from all other sources, all the property and assets of the estate of the deceased, including the proceeds from the sale of real estate, not already distributed.

Judgment for plaintiff for the sum of \$1,000, with interest as claimed in plaintiff's specification in his writ.

MINNESOTA SUPREME COURT.

W. E. TRYON, Appt.,
v.

TOWN OF MOYER et al., Respts.

BENSON HOSPITAL ASSOCIATION,
Appt.,
v.

SAME, Respts.

(130 Minn. 198, 153 N. W. 307.)

Pauper — medical treatment — liability of relative.

In an action for the reasonable value of medical and hospital care, treatment, and services rendered to a dependent relative in an emergency case, where there is an urgent requirement for both physician's services and hospital care, imperative and admitting of no delay, it is held that plaintiffs may recover from a relative upon whom rests the statutory duty to support such dependent relative, compensation for the reasonable value of such services, even though such services were rendered without the knowledge of the relative sought to be charged.

(June 25, 1915.)

A PPEAL by plaintiffs from orders of the District Court for Swift County sustaining demurrers to complaints filed to recover for medical and surgical services rendered to an indigent. Reversed.

The facts are stated in the opinion.

Mr. C. L. Kane, for appellants:

One who has furnished support or medical care and treatment to an indigent child may recover from a relative upon whom a statutory duty rests to furnish such support and care, in an action directly against such relative.

Headnote by SCHALLER, J.

Note. — Liability of relative for medical services to pauper.

But two cases have been found which have considered the question under annotation, and these accord with the decision in *TRYON v. MOYER*.

Thus, under a statute which provides that "any county having expended any money for the relief or support of a poor person . . . may recover the same . . . from relatives by an action brought within two years from the payment of such expenses," etc.,— it was held in *Hamilton County v. Hollis*, 141 Iowa, 477, 119 N. W. 978, that children of parents maintained at the poor house were liable, among other things, for medical attendance at the expense of the county.

Also, under a statute which provides that "the father and grandfather and the mother and grandmother and the children and

Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444; *Manthey v. Schueler*, 126 Minn. 88, 147 N. W. 824.

Relatives are liable for medical services furnished for an indigent person, under a statute requiring such relatives to support him.

Walbridge v. Walbridge, 46 Vt. 617; *Lufkin v. Harvey*, 125 Minn. 458, 147 N. W. 444; *Porter v. Powell*, 79 Iowa, 153, 7 L.R.A. 176, 18 Am. St. Rep. 353, 44 N. W. 295.

Mr. John I. Davis, Tom Davis, and Ernest A. Michel, for respondents.

Schaller, J., delivered the opinion of the court:

The above cases arise out of the same transaction. The one is an action for the reasonable value of medical and surgical services rendered to Rosie Dornfeld by the plaintiff, a physician and surgeon; the other an action for the reasonable value of services and care rendered to said Rosie Dornfeld in its hospital by the plaintiff, the Benson Hospital Association. The defendant Ernest Dornfeld demurred to the complaint in each action. In each case the demurrer was sustained, and in each case plaintiff appealed.

We adopt the following statement from the respondent's brief in both cases:

"(1) That the town of Moyer operates under what is known as the town system of providing for the poor.

"(2) That on the 28th day of December, 1913, Martin Dornfeld and his wife and daughter, Rosie Dornfeld, being an only child, were legal residents of the town of Moyer, and that the defendant Martin Dornfeld and wife and daughter, Rosie, had no means of support, and were public charges on the town of Moyer.

"(3) That on the 28th day of December, 1913, the said Rosie Dornfeld was seriously

grandchildren of every poor person not able to work shall, at their own charge, being of sufficient ability, relieve and maintain such poor person at such place as the court quarter sessions of the county where such poor person resides shall order and direct." it was held that the court had authority to order a grandchild to pay the necessary expenses incurred in the last illness of an indigent grandmother. *Roberts's Estate*, 2 Pa. Co. Ct. 647.

As to liability of public for medical services to indigent person in the absence of notice or request, see note to *Sheridan County v. Denebrink*, 9 L.R.A. (N.S.) 1234.

The constitutionality of legislation making the estate of one committed to an insane asylum, or his relatives, liable for cost of his maintenance there is treated in note to *Kaiser v. State*, 24 L.R.A. (N.S.) 295.

J. H. B.

injured, and as a result thereof was taken by a physician to a hospital at Benson, Minnesota, and there received certain hospital aid and care.

"(4) That after the said Rosie Dornfeld was at the hospital at Benson the plaintiff notified the supervisors of the town of Moyer that she was under their care, and that the supervisors instructed the hospital to give her care and attention.

"(5) That Ernest Dornfeld, the defendant, is the grandfather of Rosie Dornfeld, and is able, financially, to respond for the expenses of her care and attendance, but that he has refused to pay therefor."

The appellant contends that the only question here is:

"Can a stranger who has furnished support or medical care and treatment to an indigent child recover from a relative upon whom a statutory duty rests to furnish such support and care in an action directly against such relative?"

Respondent contends that the question is:

"Can such stranger recover against such relative without giving notice to such relative of such support, without the relative having notice that such support is being given, and without any fact from which it can be inferred that such relative has either directly or impliedly agreed to pay for such support or service?"

The question presented by this record, however, is whether one who has furnished to a dependent relative medical care and treatment or hospital care and services in an emergency case, where there is an urgent requirement for both physician's services and hospital care, imperative and admitting of no delay, recover from a relative upon whom rests the statutory duty to support such dependent relative, compensation for the reasonable value of such services, even though such services were rendered without the knowledge of the relative sought to be charged.

The statute (§ 3067, Gen. Stat. 1913) provides:

"Every poor person who for any reason is unable to earn a livelihood shall be supported by his children, parents, brothers, and sisters, grandchildren, or grandparents; and relatives having sufficient ability shall be called on for such support in the order above named: Provided, that a person who becomes a pauper from intemperance or other bad conduct shall not be entitled to support from any relative except parent or child. Every such relative who refuses or fails to support any poor person whom he is bound by law to support, when directed by the board or council of the county, town, city, or village in which such person has a settlement, shall forfeit and pay to such L.R.A.1915E.

county, town, city or village, for the use of the poor thereof, \$15 per month, to be recovered in any court having jurisdiction."

This statute imposes upon the relatives named and in the order named a duty to support their indigent relatives. The duty is created by the statute, and does not depend upon contract. It is a duty which devolves primarily upon the relatives; it cannot be evaded or shifted upon others. *Manthey v. Schueler*, 126 Minn. 87, 147 N. W. 824. Cases may arise in which notice to the relative may be required, but we are not dealing with such a case.

It sufficiently appears from the complaint that Rosie Dornfeld was very seriously injured; that she required the promptest attention; that it was imperatively necessary to operate immediately in order to save the child's life. It appears that everything was done for the child that could have been done by defendant Dornfeld himself, and that the services rendered were reasonably proper and necessary. Under these circumstances, it cannot be successfully contended that the duty rested upon either plaintiff to give notice to the defendant Dornfeld before doing that which it was imperatively necessary should be done in order to save the child's life.

In the case of *Robbins v. Homer*, 95 Minn. 201, 103 N. W. 1023, it was held that, where a poor person suffers from an accident which requires immediate attention of a surgeon, who renders the services, the surgeon may recover reasonable compensation from the town which has the care and support of the poor therein, although the surgeon had not been requested by the authorities to attend the patient. "It does not seem just or consistent with sound public policy that the duty should not be performed at all, nor can it be said that the unfortunate pauper who has met with an accident requiring instant succor is to be remediless. The county or town must provide for him as soon as may be. To decline this mandate of humanity and duty wilfully by those upon whom it is imposed would subject such officials to prosecution for misconduct in office."

It was there held that, where the necessity for the surgeon's services was urgent, imperative, and admitting of no delay, the town was liable for services rendered by the physician, even though no previous request was alleged or shown. This doctrine was adhered to in the same case of *Robbins v. Homer*, 100 Minn. 547, 110 N. W. 1134.

We do not think that the question as to whether or not a legal duty is cast on the relatives who are able to do so to support their indigent relatives is open to question

in this state. *Mantley v. Schueler*, supra. There was a legal duty on the part of defendant Dornfeld to support and care for his granddaughter. An emergency arose. The necessity for medical, surgical, and hospital services was immediate, urgent, and imperative. Plaintiffs having performed the services, it follows that the defendant Dornfeld is primarily liable to pay for the reasonable value of such services, at least until such time as he himself could act in the premises. The complaint in both cases states a cause of action against the defendant Dornfeld.

The orders sustaining the demurrer in both cases must be reversed.

MINNESOTA SUPREME COURT.

I. COHEN, Appt.,
v.

THOMAS W. TODD et al., Respts.

(130 Minn. 227, 153 N. W. 531.)

Landlord and tenant — assignment of lease — liability.

1. The assignee of a lease, who assumes no obligation by contract to pay rent, is liable for rent during the time he holds the lease, but, after he makes a reassignment and delivers possession to a second assignee, his liability for rent thereafter to accrue ceases. This is on the principle that his liability during the time he holds the lease is founded on privity of estate, and, as soon as such privity of estate ceases, the liability ceases with it.

Same — consent to assignment — waiver.

2. A covenant in a lease requiring written consent of the lessor to any assignment of the lease may be waived by the lessor, and it is waived by acceptance of rent from the assignee with knowledge of the assignment.

(July 2, 1915.)

APPEAL by plaintiff from a judgment of the Municipal Court of Minneapolis in defendants' favor, in an action brought to recover rent accruing after reassignment and delivery of possession by the defendant assignee of a lease, to a second assignee. Affirmed.

The facts are stated in the opinion.

Headnotes by HALLAM, J.

Note. — The liability of an assignee for rent accruing after the assignment is discussed at pages 978 et seq., of the note to *Kanawha-Gauley Coal & Coke Co. v. Sharp*, 52 L.R.A. (N.S.) 968, which covers the general subject of the liability of lessee, sublessee, or assignee for rent accruing after assignment or sublease. The specific ques-

Mr. A. C. Middelstadt, for appellant:

Whenever a lessee grants or transfers the whole term for which the premises are leased, leaving no reversionary interest in himself, it amounts to an assignment of all the covenants therein contained.

Cameron Tobin Baking Co. v. Tobin, 104 Minn. 333, 116 N. W. 838; *Ohio Iron Co. v. Auburn Iron Co.* 64 Minn. 404, 67 N. W. 221.

A sublessee is bound by whatever affects the title as found in the principal lease, although not recorded.

Stees v. Kranz, 32 Minn. 313, 20 N. W. 241; *Moline v. Portland Brewing Co.* 73 Or. 532, 144 Pac. 572; 18 Am. & Eng. Enc. Law, 668; *Leadbetter v. Pewtherer*, 61 Or. 168, 121 Pac. 799, Ann. Cas. 1914B, 464; *Pad-dell v. Janes*, 84 Misc. 213, 145 N. Y. Supp. 868.

Even though the second assignment was made with the landlord's consent, his acceptance of rent from the second assignee did not discharge the first assignee from liability therefor, as there was no new lease made, nor any act inconsistent with the original lease.

Zinwell Co. v. Ilkovitz, 83 Misc. 42, 144 N. Y. Supp. 815; *Ireland v. Hall*, 148 App. Div. 833, 133 N. Y. Supp. 577; *McLean v. Caldwell*, 107 Tenn. 138, 64 S. W. 16; *Hogg v. Reynolds*, 61 Neb. 758, 87 Am. St. Rep. 522, 86 N. W. 479; *McDonald v. May*, 96 Mo. Ap. 236, 69 S. W. 1059; *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161, 34 L.R.A. 62, 44 N. E. 1093; *Darmataetter v. Hoffman*, 120 Mich. 48, 78 N. W. 1014.

The assignee of a lease, who has gone into possession of the premises thereunder, is liable to the landlord for rent.

Schlesinger v. Perper, 70 Misc. 250, 126 N. Y. Supp. 731; *Hoover v. Weber*, 154 Ill. App. 263; *Watson v. Smith*, 180 Ill. App. 289; *Le Gierse v. Green*, 61 Tex. 128; *De Pere Co. v. Reynen*, 65 Wis. 271, 22 N. W. 761, 27 N. W. 155; *Consolidated Coal Co. v. Peers*, 166 Ill. 361, 38 L.R.A. 624, 40 N. E. 1105; *Schachter v. J. T. Tuggle Co.* 8 Ga. App. 561, 70 S. E. 93.

Subletting for the entire remainder of the term amounts to an assignment of the lease, and creates a privity of estate between the original lessor and sublessee, and the latter is bound to pay the rent under the leased term.

Lyon v. Moore, 259 Ill. 23, 102 N. E.

tion as to the effect of a reassignment by the original assignee upon his liability for rent is treated at pages 988 et seq., of that note.

As to waiver of provision for consent to assignment of lease, see note to *Field v. Copping*, 36 L.R.A. (N.S.) 488.

179; *Taylor v. Marshall*, 255 Ill. 545, 99 N. E. 638; *Sexton v. Chicago Storage Co.* 129 Ill. 318, 16 Am. St. Rep. 274, 21 N. E. 920; *Crowley v. Gormley*, 59 App. Div. 256, 69 N. Y. Supp. 576; *Brosman v. Kramer*, 135 Cal. 36, 66 Pac. 979; *Samuel H. Chute Co. v. Latta*, 123 Minn. 70, 142 N. W. 1048.

A written lease cannot be changed by parol evidence.

Millis v. Ellis, 109 Minn. 81, 122 N. W. 1119; *Backus v. Sternberg*, 59 Minn. 403, 61 N. W. 335; *Dickinson Co. v. Fitterling*, 72 Minn. 483, 75 N. W. 731, 69 Minn. 162, 71 N. W. 1030; *Rees v. Lowy*, 57 Minn. 381, 59 N. W. 310.

Acceptance of rent by the lessor from subsequent assignees does not discharge the original assignee of liability.

Zinwell Co. v. Ilkovitz, 83 Misc. 42, 144 N. Y. Supp. 815; *Moline v. Portland Brewing Co.* 73 Or. 532, 144 Pac. 572; *Paddell v. Janes*, 84 Misc. 213, 145 N. Y. Supp. 868.

Privity exists between the successive holders, when the latter takes under the earlier, as by descent, or by will, grant, or voluntary transfer of possession.

Sherin v. Brackett, 36 Minn. 152, 30 N. W. 551; *Boughton v. Harder*, 46 App. Div. 352, 61 N. Y. Supp. 574; *Patton v. Pitts*, 80 Ala. 373; *Hartley v. Phillips*, 198 Pa. 9, 47 Atl. 929.

Mr. L. O. Rue, for respondents:

The lease does not restrict assignment by assignee.

Boyd v. Fraternity Hall Asso. 16 Ill. App. 574; *Gould v. Sub-Dist. No. 3*, 8 Minn. 427, Gil. 382; 24 Cyc. 963b; *Reid v. John F. Wiessner Brewing Co.* 88 Md. 234, 40 Atl. 877; *Pennock v. Lyons*, 118 Mass. 92; *Crawford v. Bugg*, 12 Ont. Rep. 8; *Dougherty v. Matthews*, 35 Mo. 520, 88 Am. Dec. 126.

An assignee is not liable after reassignment.

24 Cyc. 1180; 1 *Tiffany, Land. & T. p.* 968; *Trask v. Graham*, 47 Minn. 571, 50 N. W. 917; *Sutliff v. Atwood*, 15 Ohio St. 192; *Donelson v. Polk*, 64 Md. 501, 2 Atl. 824; *Durand v. Curtis*, 57 N. Y. 11; *Bailey v. Richardson*, 66 Cal. 421, 5 Pac. 910; *Consolidated Coal Co. v. Peers*, 166 Ill. 361, 38 L.R.A. 624, 46 N. E. 1105; *Carter v. Hammett*, 18 Barb. 608; *Siefke v. Koch*, 31 How. Pr. 383.

The lessee is liable both by privity of estate and privity of contract; but the assignee is liable only by privity of estate, and liable only for rents accruing while such privity of estate exists.

Rees v. Lowy, 57 Minn. 381, 59 N. W. 310; *Consumers' Ice Co. v. Bixler*, 84 Md. 437, 35 Atl. 1086; *Craig v. Summers*, 47 Minn. 189, 15 L.R.A. 236, 49 N. W. 742; L.R.A.1915E.

Cameron Tobin Baking Co. v. Tobin, 104 Minn. 333, 116 N. W. 838.

Waiver may be shown by parol.

Karalis v. Agnew, 111 Minn. 522, 127 N. W. 440; *Nichols v. Root*, 35 Minn. 303, 29 N. W. 160; *Nichols, S. & Co. v. Knowles*, 31 Minn. 489, 18 N. W. 413; *Weisbrod v. Dembosky*, 25 Misc. 485, 55 N. Y. Supp. 1.

Plaintiff is estopped from holding defendants liable.

Bowen v. Haskell, 53 Minn. 480, 55 N. W. 629; *Field v. Copping*, 65 Wash. 359, 36 L.R.A.(N.S.) 488, 118 Pac. 329; *Garcewich v. Woods*, 36 Misc. 201, 73 N. Y. Supp. 154; *Katz v. Miller*, 148 Wis. 63, 133 N. W. 1091, Ann. Cas. 1913A, 1199.

Hallam, J., delivered the opinion of the court:

1. This is an action to recover from an assignee of a lease rent which accrued after he had made a reassignment and delivered up possession to a second assignee. The action cannot be maintained. The assignment to defendant was a naked assignment. Neither by the terms of the assignment, nor in any other manner, did defendant assume any contract obligation to pay rent. As long as he held the property under his assignment, the law required him to pay rent according to the terms of the lease. But when he again assigned the term and delivered up possession to a second assignee, his liability for rent thereafter to accrue ceased. This has been the rule of the common law consistently followed for more than two hundred years. *Pitcher v. Tovey*, 4 Mod. 71; *Valliant v. Dodemede*, 2 Atk. 546; *Taylor v. Shum*, 1 Bos. & P. 21, 4 Revised Rep. 759, 15 Eng. Rul. Cas. 503; *Tiffany, Land. & T.* 1131; 2 *Underhill, Land. & T.* 1090; *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *Patten v. Deshon*, 1 Gray, 325, 329; *Consumers' Ice Co. v. Bixler*, 84 Md. 437, 35 Atl. 1086; *Durand v. Curtis*, 57 N. Y. 7; *Washington Natural Gas Co. v. Johnson*, 123 Pa. 576, 10 Am. St. Rep. 553, 16 Atl. 799, 16 Mor. Min. Rep. 165. The rule is founded on sound reason. The assignee, having assumed no contract obligation, cannot be sued on contract. His liability during the time he holds under the lease is founded on privity of estate. After he has surrendered the premises either to the lessor or to another assignee there is no longer privity of estate. There is then no principle of law or equity upon which to predicate liability for rent to accrue, and liability no longer exists. This is but an application of the general principle that an assignee of a lease is liable on covenants running with the land, but, being liable solely in privity of estate, he is liable only for obligations maturing or breaches occur-

ring while he holds the estate as assignee, and not for those which occurred before he became assignee or after he ceased to be such. *Trask v. Graham*, 47 Minn. 571, 50 N. W. 917.

2. Plaintiff contends that the assignment by defendant to his assignee never became operative. A covenant of the lease forbade any assignment of the term without the written consent of the lessor. The lessor consented in writing to the first assignment (that is, to the assignment made by the lessee to defendant) but did not consent in writing to the assignment made by defendant. Defendant contends that the covenant against assignments, except with the written consent of the lessor, has no application to a second assignment made by the lessee's assignee. We need not concern ourselves with that question. The fact is the lessor knew of the assignment by defendant, and after it was made he collected rent for several months from defendant's assignee and other successive assignees. A covenant against assignments without the written consent of the lessor is one inserted for the lessor's benefit, and he may waive the requirement of written consent by his conduct. 1 *Tiffany, Land. & T.* § 152; *Taylor, Land. & T.* 9th ed. §§ 411, 412, 497; *The Elevator Case* (C. C.) 17 Fed. 200; *Warner v. Cochrane*, 63 C. C. A. 207, 128 Fed. 553; *Livingston County Teleph. Co. v. Herzberg*, 118 Ill. App. 599. When, with knowledge of the second assignment, he receives rent from the second assignee, such conduct, unexplained, is conclusive evidence of a waiver, for it is a recognition of the assignee as a tenant. 2 *Underhill, Land. & T.* § 630; *Randol v. Tatum*, 98 Cal. 390, 33 Pac. 433; *Colton v. Gorham*, 72 Iowa, 324; 33 N. W. 76; *O'Keefe v. Kennedy*, 3 Cush. 325; *Porter v. Merrill*, 124 Mass. 534; *Murray v. Harway*, 56 N. Y. 337, 342; *Field v. Copping*, 65 Wash. 359, 36 L.R.A.(N.S.) 488, 118 Pac. 329; *Adams v. Shirk*, 55 C. C. A. 25, 117 Fed. 801; *Waldron v. Hawkins*, 32 L. T. N. S. 119. After receiving rent from the assignee with knowledge of the assignment, the lessor could not, with either consistency or good faith, assert that an assignment was never made.

Judgment affirmed.

FLORIDA SUPREME COURT.

JOHN FLOWERS et al., Pliffs. in Err.,
v.

STATE OF FLORIDA.

(— Fla. —, 68 So. 754.)

Larceny — cow — taking hide.

1. Where the evidence shows that the defendant
Headnotes by TAYLOR, Ch. J.
L.R.A.1915E.

defendants ran down and caught a living cow, the property of another, on her range in the woods, and killed her by cutting her throat, and stripped off her hide, and sold such hide to a dealer in the city, leaving her entire carcass in the woods, where she was killed, held, that this constituted larceny of such cow.

Evidence — conclusions from tracks.

2. Where a witness testifies fully as to the physical signs, tracks, etc., around and about the scene of a crime, it is not improper to permit such signs, tracks, etc., so found, to be illustrated by pantomime of the conclusions carried to the mind by such silent evidence surrounding the scene of the crime.

Same — testimony as to.

3. Where a witness describes fully the visible signs, tracks, etc., around and about the scene of a crime, it is not error to permit him to convert into living words the story told by the silent evidences deduced from such signs, tracks, etc.

(May 18, 1915.)

Note. — Larceny: killing animal and carrying away part of the carcass as larceny of the animal.

Larceny is the taking and carrying away of the mere personal goods of another with intent to steal the same. 25 Cyc. 10.

In *Croom v. State*, 71 Ala. 14, cited by the court in *FLOWERS v. STATE*, no part of the carcass of the animal appears to have been carried away. The same is true of the case of *Kemp v. State*, 89 Ala. 52, 7 So. 413.

In *Musquez v. State*, 41 Tex. 226, it was held that an indictment for theft of oxen was sustained by proof of the fraudulent killing of the oxen and selling their hides. *McPhail v. State*, 9 Tex. App. 164, is to the same effect.

But the Texas statute omits the words "carried away" in defining theft, and in so doing dispenses with proof of such asportation as might otherwise have been material. *Walker v. State*, 3 Tex. App. 70; *Musquez v. State*, supra; *Coombes v. State*, 17 Tex. App. 258, overruling *Martin v. State*, 44 Tex. 172; *Hall v. State*, 41 Tex. 287.

In *Rawlins's Case*, 2 East, P. C. 617, "Rawlins was indicted for stealing six lambs; and the fact proved was, that the carcasses of the lambs, without their skins, were found on the premises where they had been kept, and that the prisoner had sold the skins (which were identified), the morning after the offense was committed. There was no count in the indictment for killing with intent to steal the carcass, or any part thereof; but as the lambs must have been removed from the fold, the jury were directed to find the prisoner guilty, which they accordingly did. But a doubt occurring whether, as the statute 14 Geo. II. chap. 6, specifies feloniously driving away, and feloniously killing with intent to steal the whole or any part of the carcass, as well as

ERROR to the Criminal Court of Record for Duval County to review a judgment convicting defendants of larceny of a cow. Affirmed.

The facts are stated in the opinion.

Mr. A. G. Hartridge for plaintiffs in error.

Messrs. T. F. West, Attorney General, and C. O. Andrews, Assistant Attorney General, for the State:

It would not be a defense to this charge

feloniously stealing in general, although there must, in such cases, be some removal of the thing, it did not intend to make these different offenses, the case was submitted to the judges in Mich. term 1800, who all held the conviction right; for any removal of the thing feloniously taken constitutes larceny."

And in *State v. Alexander*, 74 N. C. 232, where it appeared that a hog was shot down, and its ears cut off and part of one of the hams skinned, but the skin had not been severed from the animal, the court, holding that the larceny of the hog had not been made out, said: "To complete the crime of larceny, it is not sufficient that the defendant had the control of the article, that is, had the power to remove it, but there must be an asportation of the thing alleged to have been stolen. It is true, a very slight asportation will be deemed sufficient, yet there must be some removal to complete the offense. The case here shows that there was no removal of the hog, but that it remained *in situ*, as it had been shot down. In *State v. Jones*, 65 N. C. 395, it was held that the turning of a barrel of turpentine, which was standing upon its head, over upon its side, with a felonious intent, was not such an asportation as constituted larceny. So, in *State v. Butler*, 65 N. C. 309, which is a case almost identical with this, it was held that an indictment at common law, for stealing a cow, is not supported by proof that the cow was shot down and her ears cut off by the defendant with a felonious intent, because there was no asportation of the cow,—the thing charged to have been stolen."

Merely shooting down an animal with felonious intent is not an asportation sufficient to constitute larceny of the animal at common law. *Ibid*.

To supply this defect in the common law and to afford protection to the owners of domestic animals, several statutes were passed in England at various times which were replaced by 24 and 25 Vict. chap. 96. *Ibid*. It is believed that in most of the states of the Union similar statutes have been enacted.

In *State v. Butler*, *supra*, it is decided that to cut off and take away the ears or tail of a cow might be malicious mischief, or might be indictable under the act of 1806, chap. 37, providing the killing or wounding live stock with intent to steal it; but it would not be common-law larceny, as such articles are of no value as articles of property.

L.R.A.1915E.

that the flesh of the cow was not used as food or otherwise.

McPhail v. State, 9 Tex. App. 164; *Rapalje, Larceny*, p. 9; *Musquez v. State*, 41 Tex. 226; *Rawlins's Case*, 2 East, P. C. 617; *Croom v. State*, 71 Ala. 14; *Kemp v. State*, 86 Ala. 52, 7 So. 413; *Frazier v. State*, 85 Ala. 17, 7 Am. St. Rep. 21, 4 So. 691; *State v. Gilbert*, 68 Vt. 188, 34 Atl. 697.

And the element of asportation in the statutory crime of larceny of neat cattle is supplied by evidence showing that defendant drove the animal a distance of about 600 yards, then killed it and removed and carried away the hide and other parts of the animal, thereby depriving the owner of the immediate possession of it. *Wilburn v. Territory*, 10 N. M. 402, 62 Pac. 968, 14 Am. Crim. Rep. 500.

In *Lundy v. State*, 60 Ga. 143, the court said: "The sole question made in this case is whether or not the asportation of the cow alleged to have been stolen is sufficiently proven to authorize the verdict. The facts are, that the cow was shot in the woods, and when about half skinned, the defendant and his companion became frightened and left the carcass of the cow before it was wholly skinned, or any part of the cow or skin actually carried off the ground where the cow was shot. The sum of the authorities is to the effect that whilst there must be a carrying away of the *corpus delicti* to complete the larceny, the slightest change of location, whereby complete dominion of the article is transferred from the true owner to the trespasser, is sufficient evidence of the asportation. 2 Russell on Crimes, 152, and cases cited there. This cow was alive, in the woods, under the dominion and in the legal possession of her owner. Whilst in this condition, she was shot by the defendant, who, with his companion, took possession of her, handled her, moved her about sufficiently to accomplish the task of skinning her to a considerable extent, had complete dominion over her, and would have taken her off, skin and all, in all human probability, but for their fright at the barking of a dog, and the apprehended approach of a number of men. The position of the cow must have been changed from that in which her owner left her free to move. If she was shot standing or running, it is clear that she changed position; if she was lying down, her position, in all likelihood was changed when she was shot; in the handling her to be skinned, as far as they had progressed, the trespassers must have moved the carcass about somewhat; they had taken her out of the dominion of her owner, and deprived her not only of her freedom of locomotion, but of her position, where her owner willed that she should remain at her will; and their act of skinning her is conclusive that her being shot by them was not merely malicious mischief, but that the shot was fired with the felonious intent to appropriate her to their own

Taylor, Ch. J., delivered the opinion of the court:

The plaintiffs in error, hereinafter referred to as the defendants, were tried, convicted, and sentenced in the criminal court of record for Duval county for the crime of larceny of one cow of the alleged value of \$30, and by writ of error seek reversal of such judgment of conviction.

The second assignment of error is that

use,—to eat beef which belonged to another without paying for it, or to sell it without title, or perhaps, to do both,—eat some and sell the balance. Strict law, as we understand it, authorized the jury to say that there was a sufficient taking and carrying away to constitute larceny, and the policy of the state demands its rigid enforcement." And see *Williams v. State*, 60 Ga. 368, 27 Am. Rep. 412.

In *State v. Gilbert*, 68 Vt. 188, 34 Atl. 697, it was held that the crime of larceny was established if the defendants feloniously killed the steer and carried away the meat and appropriated it to their own use, and in so doing, moved the steer, while alive, from the place where they found it.

In *Frazier v. State*, 85 Ala. 17, 7 Am. St. Rep. 21, 4 So. 691, it is decided that if one shoots and kills a hog with felonious intent, covering it with boughs in a thicket to conceal it until he can return and secretly remove it, and afterwards removes it with the consent of the owner, fraudulently obtained, he may be convicted of larceny of the hog.

An instruction in the prosecution for the larceny of a steer, stating in substance that if the defendant caused the steer to be killed with intent to deprive the owner of it, he may be convicted notwithstanding he had not actually carried said animal away, is erroneous. It omits to state that asportation is one of the necessary elements of larceny, and that the killing of the steer must have been with intent to steal it. Under this instruction the jury would have been authorized to convict the defendant even though the steer had been killed as an act of malicious mischief, and without any felonious intent whatever, and without removing it from the spot where it fell. If he had caused it to be killed from a feeling of malice towards the owner, with the intention to leave the carcass to decay where it fell, and thus deprive the owner of it, all the requirements of the instruction would have been fulfilled, and it would have been the duty of the jury to convict. *People v. Murphy*, 47 Cal. 103.

Cross v. State, 64 Ga. 443, holds that evidence to the effect that a hog was heard to squeal, that the witness ran to him, that defendant ran off from him, that the hog was dead, being knocked on the head, is enough to show the taking and carrying away with intent to steal. Citing *Lundy v. State* and *Williams v. State*, supra.

Accused in a prosecution for cattle theft may be guilty although he did not kill the

the verdict is contrary to the evidence. It is contended in support of this assignment that the information charges the defendants with the larceny of one cow, and that the proofs show that only the hide of the cow was taken and carried away and the entire carcass of the cow left in the woods. This contention is untenable. The proofs show that the cow in question had a young calf between six and eight weeks old, and that

animal or carry away the meat, and therefore an instruction that the state must prove that the accused killed the animal or was concerned in carrying away the meat is properly refused as being too restricted. *Lujan v. State*, — Ariz. —, 141 Pac. 706.

In *State v. Fields*, 282 Mo. 158, 170 S. W. 1132, *State v. Lowe*, 56 Kan. 594, 44 Pac. 20, and *State v. Johnson*, — La. —, 68 So. 843, the prosecutions were under statutes for wilfully, etc., killing animals with intent to steal the same.

In *Rex v. Williams*, 1 Moody, C. C. 107, it was held that, on an indictment under 14 Geo. II. chap. 6 (a) for killing sheep with intent to steal the whole carcass, proof of killing with intent to steal part was sufficient to support the charge. In this case the first count of the indictment charged the accused with stealing three sheep, but the judges, it seems, were of the opinion that this count was not supported, a removal of the sheep while alive being essential to constitute larceny.

In *Rex v. Clay*, Russ. & R. C. C. 387, it is held that cutting off part of a sheep while it is alive, with intent to steal it, will support an indictment for killing with intent to steal, if the cutting off must have occasioned the sheep's death.

In *Hunt v. State*, 55 Ala. 138, it is decided that under a statute making it grand larceny to steal any cow, sheep, hog, or other animal therein specified, if a person kills a hog accidentally, or recklessly, and afterwards steals and carries away the carcass or any part of it, less than \$25 in value, he is not guilty of grand larceny; but if he kills the animal with intent to steal its carcass, or any part thereof, and afterwards carries such intent into effect, he is guilty of grand larceny, without regard to the value of the part so stolen and carried away. This is because the statute applies only to the "live" animals named, and not to their carcasses.

In *People v. Smith*, 112 Cal. 333, 44 Pac. 663, it is stated that if one should kill one of the animals mentioned in the Penal Code, §§ 486-488, for the purpose of stealing it, and then take and carry away the whole or a part of the body, it would be grand larceny.

In *Nightengale v. State*, 94 Ga. 395, 21 S. E. 221, it is decided that where one kills a cow, not intending to steal it, he is not guilty of cattle stealing, although immediately afterwards the *animus furandi* enters his mind and he thereupon steals and appropriates the carcass. W. W. A.

while they were on their range in the woods within a mile or two of their owner's home the cow was chased by two men, caught by them and killed by having her throat cut, her hide was stripped off and sold by the defendants to a dealer in hides in the city of Jacksonville, the entire carcass of the cow, including its head, horns, and hoofs, with some small portion of the hide around the horns, head, and hoofs, being left in the woods where she had been killed and skinned, the young calf being found alive keeping watch and ward within 40 or 50 yards of its mother's dead carcass some two or three days after she was killed. The hide sold by the defendants was positively identified by the owner as being the hide that came off his cow whose carcass had been left in the woods stripped of its hide, and he positively identified the carcass as being that of his cow, that he had missed for a day or two, by the remnants of hide left around its head, horns, and hoofs. Under these circumstances this made out a case of larceny of the cow as charged in the information. *Musquez v. State*, 41 Tex. 226; *McPhail v. State*, 9 Tex. App. 164; *Kemp v. State*, 89 Ala. 52, 7 So. 413; *Croom v. State*, 71 Ala. 14; *Rawlins's Case*, 2 East, P. C. 617; *Rapalje, Larceny*, § 8.

What we have said disposes of the third assignment of error.

The fourth assignment of error complains of the state's attorney propounding leading questions to witnesses. Where a witness is unfriendly or unwilling, it is permissible to propound leading questions. We do not think the defendants have made any error to appear in this or the eighth assignment that makes the same complaint as to leading questions to witnesses. The trial court, according to the transcript, on objections being made to the leading character of the questions, checked the counsel propounding them at once.

The fifth assignment of error complains of the court permitting one of the state's witnesses to go through a pantomime before the jury in illustration of two men chasing, catching, throwing, and cutting the throat of a cow, and testifying to his conclusions as to how the crime was accomplished. There was no error here; the witness testified fully as to the physical signs, tracks, etc., around and about the dead carcass of the cow, and we do not think that it was improper for him to illustrate such signs, tracks, etc., so found there, by pantomime of the conclusions carried to the mind by such silent evidences surrounding the scene of the crime.

The sixth assignment complains of a state's witness being permitted to testify as to the finding of a living young calf L.R.A.1915E.

within 40 or 50 yards of the dead carcass of the cow in question some two days after she was killed. This evidence was objected to on the ground that the defendants were charged with stealing a cow, and not a calf. There was no error here. The evidence was not offered for the purpose of proving the larceny of the calf, but it was admissible as tending to identify the dead carcass as being the mother of the waiting calf, both of whom were known to their owner as his property, and both of whom he had missed for two or three days.

The seventh assignment of error complains of a state's witness being permitted to testify as to two men chasing the cow in question, their catching her and she getting loose, and their again catching her and killing her. There was no error here. The witness simply converted into living words the story told by the silent evidences deduced from the signs, tracks, etc., whereabouts that were visible to his eyes, and that he described. We think the evidence was ample to sustain the verdict found, and, having discussed all the assignments of error argued and presented here without the discovery of error, the judgment of the court below in said cause is hereby affirmed at the cost of Duval county, the plaintiffs in error having been adjudged to be insolvent.

Shackleford, Cockrell, Whitfield, and Ellis, JJ., concur.

NORTH DAKOTA SUPREME COURT.

HART-PARR COMPANY, Appt.,

v.

FRANK FINLEY, Respt.

(— N. D. —, 153 N. W. 137.)

Contract — sale — anticipatory breach.

1. Before time fixed for delivery, defendant gave notice of cancelation of his written and accepted order of plaintiff for a traction engine. Plaintiff refused to permit cancelation, insisting upon performance, with defendant repudiating the contract and declaring that he would not accept or pay for the machine. Plaintiff thereafter tendered it, and, upon defendant's refusal to accept it, left the engine at defendant's farm against his protests and without his consent. Plaintiff claims title passed as on a delivery, and sues for the purchase price, \$2,400, and freight \$104 additional.

Headnotes by Goss, J.

Note. — The general question as to the right to recover the purchase price where the purchaser wrongfully repudiates his contract is discussed in a note appended to

Held, the doctrine that there can be no anticipatory breach of an executory contract of purchase and sale, adopted in *Stanford v. McGill*, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938, is overruled, and the overwhelming weight of authority, both English and American, followed.

Sale — cancellation — tender — effect.

2. The unconditional notice of cancellation, though not acquiesced in by plaintiff, operated to relieve defendant from damages resulting from the acts done by plaintiff in performance of the contract subsequent to notice of cancellation, and relieved defendant from freight charges incurred by plaintiff after such notice of cancellation.

Same — right to recover freight.

3. Though plaintiff could keep the contract alive and insist upon its performance up to the time for delivery, and could incur freight expense in so doing after notice of cancellation, its right to recover for it depends upon defendant's subsequent withdrawal of his repudiation and subsequent performance.

Damages — cancellation of sale — freight.

4. The incurring of the freight charge after notice of cancellation received is an enhancement by plaintiff of its own damages, and not recoverable, unless suit can be maintained for the purchase price.

Sale — vesting of title — recovery of price.

5. Unless the contract stipulates the contrary, delivery and acceptance of property and vesting of title thereunder and payment of the purchase price therefor are concurrent acts, and, until delivery and acceptance, title does not vest, and the purchase price, payable only on the vesting of title, is not recoverable in a suit for the purchase price.

Same — delivery — vesting of title.

6. To constitute a valid delivery on sale of personal property, there must be an acceptance of it by the purchaser or his agent. Constructive delivery may be an exception.

Same — repudiation — passing of title.

7. In the face of a refusal to receive delivery and the property in performance of a contract of purchase and sale, the purchaser standing on a repudiation of it declared while the contract was wholly executory, with repudiation not subsequently waived or withdrawn, title cannot be cast upon the purchaser by operation of law.

Same — attempted delivery — effect.

8. The attempted delivery did not vest title, and suit for the purchase price cannot be maintained, nor can the freight

charges incurred after notice of cancellation be recovered.

Contract — construction.

9. The contract cannot be construed as authorizing a recovery independent of delivery of property or vesting of title in defendant, but instead is a contract of purchase and sale with payment conditioned upon the passing of title.

(April 20, 1915.)

APPEAL by plaintiff from a judgment of the District Court for Grand Forks County in defendant's favor in an action brought to recover the purchase price of an engine claimed by plaintiff to have been sold and delivered to defendant, and the freight charges thereon. Affirmed.

The facts are stated in the opinion.

Messrs. George R. Robbins and George A. Bangs, for appellant:

Plaintiff is entitled to recover under the contract.

2 *Mechem, Sales*, § 1415; *Burnley v. Tufts*, 66 *Mass.* 49, 14 *Am. St. Rep.* 540, 5 *So.* 627; *National Cash Register Co. v. Hill*, 136 *N. C.* 272, 68 *L.R.A.* 100, 48 *S. E.* 637; *National Cash Register Co. v. Dehn*, 139 *Mich.* 406, 102 *N. W.* 965; *Tufts v. Griffin*, 107 *N. C.* 47, 10 *L.R.A.* 526, 22 *Am. St. Rep.* 863, 12 *S. E.* 68; *White v. Solomon*, 164 *Mass.* 516, 30 *L.R.A.* 537, 42 *N. E.* 104; *American Soda Fountain Co. v. Vaughn*, 69 *N. J. L.* 582, 55 *Atl.* 54; *La Valley v. Ravenne*, 78 *Vt.* 152, 2 *L.R.A.* 97, 112 *Am. St. Rep.* 898, 62 *Atl.* 47, 6 *Ann. Cas.* 684; *Marion Mfg. Co. v. Buchanan*, 118 *Tenn.* 238, 8 *L.R.A.(N.S.)* 590, 99 *S. W.* 984, 12 *Ann. Cas.* 707; *Jessup v. Fairbanks, M. & Co.* 38 *Ind. App.* 673, 78 *N. E.* 1050; *Kilmer v. Moneyweight Scale Co.* 36 *Ind. App.* 568, 76 *N. E.* 271; *Phillips v. Hollenberg Music Co.* 82 *Ark.* 9, 99 *S. W.* 1105; *Whitlock v. Auburn Lumber Co.* 145 *N. C.* 123, 12 *L.R.A.(N.S.)* 1214, 58 *S. E.* 909.

Upon the performance of the contract by the plaintiff, the title to the goods vested in the defendant, and the plaintiff is entitled to recover the purchase price.

35 *Cyc.* 527, 599, note 9; 24 *Am. & Eng. Enc. Law*, 1118-1120, note 1; *Dowagiac Mfg. Co. v. Higinbotham*, 15 *S. D.* 547, 91 *N. W.* 330; *International Harvester Co. v. Pott*, 32 *S. D.* 82, 142 *N. W.* 652; *Martyn v. Western P. R. Co.* 21 *Cal. App.* 589, 132

Pate v. Ralston, 51 *L.R.A.(N.S.)* 735. At page 742, the specific question is discussed as to the rule where the contract of sale contemplates some act by the purchaser before title is vested in him. The cases there cited are in harmony with *HART-PARR Co. v. FINLEY*, to the extent of sustaining the holding that where, contemporaneously with

the delivery and passage of title to property, the purchaser is to execute his note in payment thereof, no title passes by tender of delivery where the purchaser repudiates the contract prior thereto, and gives the seller notice thereof, since, under such circumstances, mere tender of delivery by the seller does not pass the title.

Pac. 602; *Cuthill v. Peabody*, 19 Cal. App. 304, 125 Pac. 926.

Prior repudiation does not constitute a breach of the contract.

Stanford v. McGill, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938.

Mr. L. E. Birdzell, with *Mr. O. B. Burtness*, for respondent:

Where a contract provides for the transfer of title to chattels at a future date, title will not vest in the purchaser, if the contract is repudiated before delivery.

Chapman v. Ingram, 30 Wis. 290; *Moody v. Brown*, 34 Me. 107, 56 Am. Dec. 640; *Burdick, Sales*, § 363; 1 *Mechem, Sales*, § 729; 2 *Mechem, Sales*, §§ 1191, 1698; *Nichols & S. Co. v. Paulson*, 6 N. D. 400, 71 N. W. 136; *Acme Food Co. v. Older*, 64 W. Va. 255, 17 L.R.A.(N.S.) 807, 61 S. E. 235; *Hallidie v. Sutter Street R. Co.* 63 Cal. 575.

Upon breach of contract to purchase chattels, the remedy is an action to recover damages for such breach. This remedy is exclusive, and the measure of damages is not the purchase price.

Mechem, Sales, §§ 1698, 1699; *Burdick, Sales*, 2d ed. § 364; *Nichols & S. Co. v. Paulson*, 6 N. D. 400, 71 N. W. 136; *Minneapolis Threshing Mach. Co. v. McDonald*, 10 N. D. 408, 87 N. W. 993; *Reeves & Co. v. Bruening*, 13 N. D. 157, 100 N. W. 241; *Dowagiac Mfg. Co. v. Mahon*, 13 N. D. 516, 101 N. W. 903; *Coleman Mfg. Co. v. Blanchett*, 16 N. D. 341, 113 N. W. 614; *Chapman v. Ingram*, 30 Wis. 290; *Tufts v. Weinfeld*, 88 Wis. 647, 60 N. W. 992; *Acme Food Co. v. Older*, 64 W. Va. 255, 17 L.R.A.(N.S.) 807, 61 S. E. 235; *Unexcelled Fire-Works Co. v. Polites*, 130 Pa. 536, 17 Am. St. Rep. 788, 18 Atl. 1058; *Heiser v. Mears*, 120 N. C. 443, 27 S. E. 117; *Danforth v. Walker*, 37 Vt. 239; *American Pub. & Engraving Co. v. Walker*, 87 Mo. App. 503; *Tufts v. Lawrence*, 77 Tex. 526, 14 S. W. 165; *McCormick Harvesting Mach. Co. v. Balfany*, 78 Minn. 370, 79 Am. St. Rep. 393, 81 N. W. 10; *Sherman Nursery Co. v. Aughenbaugh*, 93 Minn. 201, 100 N. W. 1101; *Funke v. Allen*, 54 Neb. 407, 69 Am. St. Rep. 716, 74 N. W. 832.

A purchaser, no less than any other contractor, has a right to arrest performance while the contract is executory.

Davis v. Bronson, 2 N. D. 300, 16 L.R.A. 655, 33 Am. St. Rep. 783, 50 N. W. 836; 1 *Mechem, Sales*, § 1699; *Collins v. Delaporte*, 115 Mass. 159; *Clark v. Marsiglia*, 1 Denio, 317; *American Pub. & Engraving Co. v. Walker*, 87 Mo. App. 503; *Gibbons v. Bente*, 51 Minn. 499, 22 L.R.A. 80, 53 N. W. 756; *Chicago Bldg. & Mfg. Co. v. Barry*, — Tenn. —, 52 S. W. 451; *Parker v. Russell*, 133 Mass. 74. L.R.A.1915E.

Goss, J., delivered the opinion of the court:

This action is to recover \$2,400 damages as the purchase price of an engine plaintiff claims to have sold and delivered defendant, together with an additional \$104 freight charge thereon. June 10, 1912, defendant executed and delivered the usual written machinery order to plaintiff. It was duly accepted. Before the stipulated time for delivery, defendant notified plaintiff he would not receive the engine, and to cancel his order. Plaintiff refused cancellation, insisting upon full performance. On receipt of defendant's written notice of revocation, and on June 29th, plaintiff wrote defendant as follows: "Referring to your letter of June 22d, in which you ask us to cancel your order, wish to say that we cannot do this. . . . The order contains no provision for cancellation, and like any other contract it cannot be abrogated or annulled without the consent of all the parties thereto. We will ship you the engine promptly on July 15th [the date specified for shipment in the order], and will carry out our part of the contract in every detail. We shall then insist that you carry out yours, and you have absolutely no grounds whatever upon which to refuse to do so."

Defendant's reply, duly received, was: "Yours of the 28th of June, refusing to cancel order, at hand. . . . Now I positively will not receive said engine, and do not think you are giving me a square deal in trying to hold me up. If it is a case of damages, make a statement and I will consider it. But if you wish to go to law, I am ready."

On July 15th, the earliest date fixed for performance, plaintiff tendered the engine to defendant f. o. b. at Forest River, according to the terms of the contract. He refused to accept it or to execute and deliver his notes or pay the freight. On August 13th, and within the stipulated period for performance, plaintiff took said tractor to the home of defendant, and unconditionally tendered it to him in performance of its obligation. Defendant refused to receive the engine, which plaintiff then left at his farm, against his expressed wishes and protest and without his consent. The freight from the factory to Forest River was \$104.

These are the findings. The appeal is from the judgment of dismissal, raising only the legal conclusions to be drawn from the findings. The decision is the answer to whether a suit can be maintained for the purchase price and freight added, as for damages suffered by the failure of the defendant to receive the stock engine ordered for future delivery to him, where, before the time for delivery, he had given plain-

tiff his unequivocal and unconditional notice of cancellation of his order, and that he would neither receive the engine nor pay for it, with defendant refusing to receive or pay for the engine and insisting upon his repudiation.

Plaintiff claims: (1) That the attempted cancellation and notice were ineffectual for any purpose, and amounted to but defendant's offer that the contract might be canceled, which offer was rejected, leaving the written contract in force, under which, however, it was not obliged to tender the engine in the face of the defendant's offer and refusal to receive it, but nevertheless it claims it did deliver it to him, and thereby parted with its title, and therefore can recover damages as for the purchase price; and (2) irrespective of the passing of title, the order should be construed as authorizing a recovery for \$2,400 and freight, inasmuch as such is plaintiff's contract rights, because payment was not conditioned upon the passing of title as a condition either precedent or concurrent. Defendant asserts that: (1) Title did not vest in defendant, as the contract was repudiated before delivery, upon which repudiation an action for damages only for such breach is accorded to the seller, with the measure of damages recoverable fixed by § 7156, Comp. Laws 1913, as declared, where the title does not pass to the purchaser; and (2) that a purchaser has a right to stop performance of an executory contract of purchase and sale by notice of its cancellation, and the question of breach of contract by anticipation is not involved; and (3) that, upon notice of cancellation, it became the duty of the seller to mitigate its damages, rather than enhance them, and that freight paid for the shipment made after notice of cancellation was such an enhancement of its damages.

The questions presented are whether: (1) This purchaser had a right to cancel his executory contract of purchase while it remained wholly executory; (2) the effect of his attempted cancellation thereof; (3) the measure of damages for the breach; and (4) the effect of cancellation to mitigate such damages.

The difficulty is not in passing upon the issues in the light of the common law alone or of our statutes but declaratory thereof, but instead arises in their solution in harmony with both the common law and consonant in reason with the holding and the principles announced in *Stanford v. McGill*, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938, wherein was repudiated the common-law doctrine that there could be an anticipatory breach of a wholly executory contract of purchase and sale. *Stanford v. McGill* is L.R.A.1915E.

the bulwark behind which the plaintiff is entrenched. Under the doctrine of that case, it reasons that this attempted cancellation is ineffectual, except to relieve it from the necessity of making a tender; that the contract never was breached until refusal to accept the tendered property; that the attempted cancellation in no wise relieved defendant from his obligation to purchase and pay the purchase price, inasmuch as it constituted but a mere offer, the rejection of which left the contract unaffected, and under which it has performed promptly and punctually upon the first day upon which it could elect to perform; and that it thereby cast title upon defendant and can recover the purchase price therefor; that it can recover as damages for freight paid, because, if it can disregard the cancellation at its pleasure, that cannot logically furnish a foundation for minimizing such damages necessarily incurred in moving the machine to Forest River, that it might be there for tender on July 15th; that, under the reasoning of *Stanford v. McGill*, it had the right to expect that, notwithstanding defendant's attempted repudiation, he would nevertheless repent thereof upon a tender made to him, and perform; that accordingly it had the right to make shipment and place itself in readiness to perform its part on the first day possible; that it is therefore entitled to recover at least the freight, inasmuch as that damage should not be mitigated on any plea that it should take notice of a futile attempt at cancellation and anticipate that defendant's refusal would be the result of the tender, to do which is diametrically contrary to one of the chief reasons for the holding in *Stanford v. McGill*. And appellant can confidently inquire why it should be compelled to recognize an attempted repudiation for purposes of mitigation of damages, inoperative under *Stanford v. McGill*, to relieve defendant from his performance, and when the attempted repudiation itself did not affect the original rights of plaintiff under the contract. How can you mitigate as to the amount of the necessary expense of performance when the contract is unaffected by the attempted repudiation and consequently valid as an entirety during the time the expense to be mitigated was incurred? Plaintiff propounds, in effect, these questions for answer.

"A party to an executory contract may always stop performance on the other side by an explicit direction to that effect, though he thereby subjects himself to the payment of such damages as will compensate the other for the loss he has sustained by having his performance checked at that

stage of its progress." 2 Mechem, Sales, § 1091.

This is the settled law even in Massachusetts (which, together with North Dakota and Nebraska, is the only state rejecting the doctrine of anticipatory breach of executory contracts), as there declared in *Collins v. Delaporte*, 115 Mass. 159-162, in these words: "A party to an executory contract may stop its performance by an explicit order, and will subject himself only to such damages as will compensate the other party for being deprived of its benefits,"—and is also recognized as the law in *Parker v. Russell*, 133 Mass. 74. But the application of this general rule of law seems inconsistent with the doctrine that there can be no anticipatory breach, but yet that the notice, although not operating to affect the contract rights in the least, nevertheless, as to damages recoverable, may in effect "stop performance." As all the law is to this effect, our holding could be based upon this principle alone as to this phase of the case. However, to do so, and to cite, affirm, or leave intact the declared doctrine in *Stanford v. McGill*, would seem to be applying a general rule of law unharmonious with logical results of the principles and reasoning in that case.

Recent authorities sustain the doctrine of anticipatory breach. 6 R. C. L. §§ 384-387; *O'Neill v. Supreme Council*, A. L. H. 1 Ann. Cas. 422, and note, (70 N. J. L. 410, 57 Atl. 463), the opinion of which is by Justice Pitney, and contains an elaborate discussion and citation of authority, English and American. *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780, declares that "the doctrine that there may be an anticipatory breach of an executory contract by an absolute refusal to perform it has become the settled law of England as applied to contracts for services, for marriage, and for the manufacture or sale of goods,"—citing the leading English case of *Hochster v. De La Tour*, 2 El. & Bl. 678, and other English cases, and stating: "This doctrine, which thus obtains in England, has been almost universally accepted by the courts of this country."

In the course of that Federal opinion, *Stanford v. McGill* is cited, and it, together with *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384, followed as the authority in *Stanford v. McGill*, is repudiated. It says: "We think that there can be no controlling distinction on this point between the two classes of cases, and that it is proper to consider the reasonableness of the conclusion that the absolute renunciation of particular contracts constitutes such a breach as to justify immediate action and recovery therefor. The parties to a con-

tract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract, so far as performance is concerned, and that the other party must accept this position, why should there not be speedy action and settlement in regard to the rights of the parties? Why should *locus penitentiae* be awarded to the party whose wrongful action has placed the other at such disadvantage? What reasonable distinction *per se* is there between liability for a refusal to perform future acts to be done under a contract in course of performance, and liability for a refusal to perform the whole contract, made before the time for commencement of performance?"

To the same effect, see *Wester v. Casein* Co. 206 N. Y. 506, 100 N. E. 488, Ann. Cas. 1914B, 377; *Holt v. United Secur. L. Ins. & T. Co.* 12 Ann. Cas. 1105, and note (74 N. J. L. 795; 11 L.R.A.(N.S.) 100) 67 Atl. 118, and the second trial of the same case in 76 N. J. L. 585, 21 L.R.A.(N.S.) 691, 72 Atl. 301; *Kelly v. Security Mut. L. Ins. Co.* 9 Ann. Cas. 661, and note (186 N. Y. 16, 78 N. E. 584); *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 30 L.R.A. 33-48, 38 N. E. 773; *Brady v. Oliver*, Ann. Cas. 1913C, 376, and note (125 Tenn. 595, 41 L.R.A.(N.S.) 60, 147 S. W. 1135); *Greenwall Theatrical Circuit Co. v. Markowitz*, 97 Tex. 479, 65 L.R.A. 302, 79 S. W. 1069; *Oklahoma Vinegar Co. v. Carter*, 94 Am. St. Rep. 112, and note (116 Ga. 140, 59 L.R.A. 122, 42 S. E. 378); *Krebs Hop Co. v. Livesley*, Ann. Cas. 1913C, 758, and note (59 Or. 574, 114 Pac. 944, 118 Pac. 165); 35 Cyc. 528, 583-586.

All these recent decisions repudiate the doctrine of *Stanford v. McGill*. Justice Pitney, after citing scores of decisions supporting anticipatory breach, has the following to offer, found in *O'Neill v. Supreme Council* A. L. H. 70 N. J. L. 410, 57 Atl. 463, 1 Ann. Cas. 423: "So far as observed, the only states dissenting from the doctrine are Massachusetts, Nebraska, and North Dakota. *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384; *Carstens v. McDonald*, 38 Neb. 858, 57 N. W. 757; *King v. Waterman*, 55 Neb. 324, 75 N. W. 830; *Stanford v. McGill*, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938. The latter decision is based partly, and the Nebraska decisions principally, upon the authority of *Daniels v. Newton*, which is the leading case upon this side of the question. . . . But in *Parker v. Russell*, 133 Mass. 74, it was held that a refusal of performance of a substantial part

of the contract after the time for entering upon performance has begun entitles the injured party to treat the entire contract as absolutely broken, and to recover immediately his damages, based upon the whole value of the contract, including compensation for nonperformance in the future as well as in the past. In *Ballou v. Billings*, 136 Mass. 307, it was held that, for purposes of rescission by the promisee, notice that the promisor will not perform has the same effect as an actual breach. These and other cases show that even in Massachusetts the reasoning on which the decision in *Daniels v. Newton* was based is hardly carried to its logical conclusion."

When *Stanford v. McGill* was decided, there may have been some doubt about what the trend of authority might be in the future, but the contrary rule has since been unanimously followed, and the law generally applicable to executory sale contracts settled in harmony therewith. As no property rights can be involved, inasmuch as no rule of property could have grown out of that decision, no harm can come from harmonizing the law in this jurisdiction with that generally prevailing. Accordingly *Stanford v. McGill* to that extent is overruled. The notice of repudiation given was such as might have authorized plaintiff to have considered the entire contract as breached, and brought its action immediately for damages, had it so elected. But this it did not do, and the option to do so rested with it; and, at the time stipulated for performance, plaintiff was charged with notice previously given that the defendant would not receive the property, which obviated necessity of a tender or of any further act by it. Comp. Laws 1913, §§ 5775 and 5824. It could treat the contract as subsisting "up to the time when performance should commence, for the purpose of insisting that the other party, who has previously repudiated it, shall then and finally determine whether he will comply with its terms, or persist in his resolution not to perform upon his part. But the party who has not broken his compact is not allowed to treat it as in force for the purpose of performing in direct opposition to the refusal of the other to abide by its terms, and then enforce the payment of the contract price." 6 R. C. L. 1026; *Danforth v. Walker*, 37 Vt. 239; *Davis v. Bronson*, 2 N. D. 300, 16 L.R.A. 655, 33 Am. St. Rep. 783, 50 N. W. 836; *Collins v. Delaporte*, 115 Mass. 159; *Gibbons v. Bente*, 51 Minn. 499, 22 L.R.A. 80, 53 N. W. 756; note in 33 Am. St. Rep. 795, 796; *Kadiash v. Young*, 108 Ill. 170, 48 Am. Rep. 548; *John A. Roebing's Sons' Co. v. Lock Stitch Fence Co.* 130 Ill. 660, 22 N. E. 518; *Acme Food* L.R.A.1915E.

Co. v. Older, 17 L.R.A.(N.S.) 807, and note (64 W. Va. 255, 61 S. E. 235).

As to the assertion that title was vested in defendant, and that therefore it could sue for the purchase price, title could not be cast upon defendant in the face of his persistent refusal to accept title or the engine. There are cases where delivery may be constructively made or may be presumed, but that is not ours. The contract remains executory, and no title passes as on an executed sale until the buyer accepts a delivery of the property. Comp. Laws 1913, § 5536; *Nichols & S. Co. v. Paulson*, 6 N. D. 400, 71 N. W. 136; *Coleman Mfg. Co. v. Blanchett*, 16 N. D. 341, 113 N. W. 614; *Reeves & Co. v. Breuening*, 13 N. D. 157, 166, 100 N. W. 241; *Coleman Mfg. Co. v. Feckler*, 20 N. D. 188, 195, 196, 126 N. W. 1019; *Westby v. J. I. Case Threshing Mach. Co.* 21 N. D. 575, 589, 590, 132 N. W. 137.

Plaintiff has cited, as sustaining a recovery with the purchase price as the measure of damages, with title cast upon defendant, a score of cases of conditional sale contracts where the property sold was delivered, but title for some cause was reserved, as is usual, for security purposes. Such is not precedent, as title passes in contemplation of law under a conditional sale contract, when the seller sues for the purchase price; the goods having been delivered, and it being solely at the option of the seller whether he will treat the title as vested, or retain it to otherwise enforce what in either event must be payment of purchase price. The purchaser in possession under a conditional sale contract has no option in that matter; the election being the right of the seller. Such are treated as executed sales for a purchase price for property delivered and received. This is already settled law here (*Dowagiac Mfg. Co. v. Mahon*, 13 N. D. 516-524, 101 N. W. 903, and *Poirier Mfg. Co. v. Kitts*, 18 N. D. 558, 120 N. W. 558); the latter decision holding that a vendor in a conditional sale contract may elect to waive his title and sue for purchase price. See *Frisch v. Wells*, 23 L.R.A.(N.S.) 145, and note (200 Mass. 429, 86 N. E. 775), on effect of an action for the purchase price being a waiver of vendor's right under a conditional sale contract to recover the property *in specie*. Appellant cites *Dowagiac Mfg. Co. v. Higinbotham*, 15 S. D. 547, 91 N. W. 330, as sustaining his theory that title passed without acceptance of the property by defendant. That case must be understood as one in which a delivery was made to the carrier authorized to receive it as the agent of the consignee, with title passing on such delivery. Consult opinions in *International*

Harvester Co. v. Pott, 32 S. D. 82, 142 N. W. 652.

Appellant cites 35 Cyc. 527, reading: "Where the buyer refuses to accept the goods or a part thereof, the seller, if he makes a proper tender, may nevertheless maintain an action for the price."

This is misleading unless considered in connection with the subject-matter immediately preceding it. The principle stated applies only where title has passed by an actual or constructive delivery, as an examination of the very cases cited will demonstrate, among which are *White v. Solomon*, 164 Mass. 516, 30 L.R.A. 537, 42 N. E. 104, the opinion in which, by Justice Holmes, is squarely to the contrary. An excerpt bearing on this question will be found later in this opinion. It was there held that payment was not conditioned on title passing because of the peculiar stipulations of the contract. *National Cash Register Co. v. Dehn*, 139 Mich. 406, 102 N. W. 965, is also cited as sustaining said text, which an examination will show to have been a conditional sale contract where title was retained for security with a prior delivery had, with title for such purpose waived and vested by the suit for the purchase price. Nearly every case cited as sustaining the text is likewise distinguishable. The true rule here applicable is found at 35 Cyc. 592. *Cuthill v. Peabody*, 19 Cal. App. 304, 125 Pac. 926, cited by appellant, has no application, as title is there held to have passed; the opinion stating: "Of course, in a case where the title to the property contracted for has not passed to the vendee, the vendor, upon a breach of the contract, would have no cause of action for the purchase price."

The purchase price cannot be recovered as the measure of damages, in the absence of a provision in the contract to the contrary, unless title to the goods has vested in the purchaser, as the transfer of title and payment therefor are in contemplation of law concurrent acts, and "if the buyer refuses to accept the goods, even wrongfully, he cannot be sued for the price, because the event on which he undertook to pay the price has not happened." *White v. Solomon*, 164 Mass. 516, 30 L.R.A. 537, 42 N. E. 104; *Reeves & Co. v. Bruening*, 13 N. D. 156, 166, 100 N. W. 241; *Minneapolis Threshing Mach. Co. v. McDonald*, 10 N. D. 408, 87 N. W. 993, construing § 7156, Comp. Laws 1913.

Plaintiff claims the right to recover independently of the passing of title, as on a contract stipulating for the payment of money without the passing of title being a condition either precedent or concurrent to payment. There are two equally con-

clusive answers to this contention: First, there is no basis in the pleadings for such a claim as it sues as for recovery of a purchase price of property sold and delivered; and, secondly, the contract itself negatives such a claim, showing on its face to be a contract for the purchase and sale of personal property with payment by notes stipulated to be made as a condition concurrent upon delivery of such property, with title the consideration for the notes. *Acme Food Co. v. Older*, 64 W. Va. 255, 17 L.R.A. (N.S.) 807, 61 S. E. 235.

To summarize in conclusion: Defendant had the right to tender a breach of the contract by notice that he would never perform, which repudiation plaintiff might have elected to accept as a present and immediate breach. *Stanford v. McGill*, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938, is to this extent overruled. Instead it elected to keep the contract alive until the stipulated time for performance arrived, when, defendant not having withdrawn his renunciation, it could dispense with tender of performance and sue for damages. This it elected not to do, but chose to make a tender and afford defendant a further opportunity to receive it, in the event of which reception of the property he could have been sued for the purchase price. However, he refused to receive either property or title, standing upon his repudiation of the contract, but thereby rendering himself liable for all damages accruing to the other party because of such breach. The measure of damages for breach is by § 7156, Comp. Laws 1913, and the common law, governed by a different rule from where title has been vested, in which event it is to be deemed to be the contract price. Comp. Laws 1913, § 7155. As this suit is for the contract price for goods sold and delivered, it is not maintainable. There is an entire failure of proof of damages. As to the freight paid, the findings do not disclose but what this expense was incurred after notice of repudiation operated to check further performance. That defendant did not observe it, if the freight expense was incurred thereafter, was at plaintiff's own election, and taken at the hazard that it could induce defendant to later perform the contract. It is in contemplation of law an enhancement of damages after notice of repudiation, and is not recoverable.

Judgment affirmed.

A petition for rehearing having been filed, the following response was handed down on June 15, 1915:

Appellant's counsel has petitioned for a rehearing. They assert that §§ 5775, 5821, and 5824, Comp. Laws 1913, "preserve a

right to defendant to withdraw his repudiation; the time within which such right to withdraw may be made expires only with maturity of the obligation; the right thus preserved is as valuable to defendant as it is to plaintiff; the right thus preserved is merely the right which has been created or fixed by the contract." That these sections "together necessarily, obviously, and clearly provide that the contract remains in force." And (2) that these sections cover the subject under consideration to the exclusion of the common law.

The statutes cited constitute no guaranty to the repudiator of an executory contract that the other party must, in the face of notice given of a determined repudiation, nevertheless suffer the violator to remain in full enjoyment of all rights under the contract he would possess, had he not repudiated. No such intent is manifest from the statutes in question. It is to the other party not in default to whom these statutes speak and for whose benefit they stand. They have been in force since long before the decision of *Stanford v. McGill*, and will apply after the overruling of the doctrine of that case as fully as they did before. In fact, they have no application whatever to the subject under discussion,—that of anticipatory breach. They support neither contention concerning it, nor aid in determining which of the two should be selected as the law of this jurisdiction. As to the second contention, it is already answered by the statement that these statutes are not upon the subject under investigation. But, if they were, the Codes are not exclusive where the statute is silent, but only where it speaks. A sufficient discussion of this question will be found in the decision of this court in *Reeves & Co. v. Russell*, 28 N. D. 265, 148 N. W. 654, where a similar contention, citing the same cases here relied upon, is treated at length.

Exception is taken by plaintiff to what counsel terms the overruling by *dictum* of *Stanford v. McGill* as to the doctrine of anticipatory breach, and that this "should not be lightly done; . . . that, eliminating freight, there has been no enhancement or increase of damages." In answer it may be said that, "eliminating freight," there would have been no necessity for counsel or the court to discuss anticipatory breach of contract; "eliminating freight," there would have been no issue made of enhancement of damages; "eliminating freight," there could have been no *dictum* concerning *Stanford v. McGill*. But there was no possibility of "eliminating freight" in considering the issues, as plaintiff has sued for its recovery and assigned error on its denial thereof. Necessity for its discussion is set forth in L.R.A.1915E.

the opinion. There is no desire to lightly overrule any precedent, but at times it is as wise as it is necessary to recognize a mistake, when convinced that it is such. Counsel concede, as they must, that the almost unanimous weight of authority and precedent support our action and the conclusions announced. It is deemed better to overrule this precedent than, by citing it, indirectly affirm it. All other questions presented in the petition for a rehearing are but an additional argument to that presented before the opinion was written, and are already answered in the opinion.

The petition is denied.

SOUTH DAKOTA SUPREME COURT.

JAMES H. MCCOY

v.

J. E. HANDLIN, State Auditor.

(— S. D. —, 153 N. W. 361.)

Judge — interest — jurisdiction — want of other tribunal.

1. A judge is not deprived of jurisdiction of a suit to compel a public officer to issue warrants for an extra statutory allowance to another occupant of the same bench, the result of which will determine his own right to a similar allowance, because of his interest, if there is no other judicial tribunal to which the question can be presented.

Mandamus — to compel issuance of state warrant.

2. The proceeding to compel a state au-

Note. — Judges: effect of fact that judge otherwise disqualified is only one who has power to decide case.

As to right of judge who may be affected by the result to hear election cases, see note to *State ex rel. Null v. Polley*, 42 L.R.A. (N.S.) 788.

In accord with the decision in *McCoy v. Handlin*, the authorities are almost unanimous in holding that an exception to the rule that a judge is disqualified from serving in a cause in which he is interested, prejudiced, related to the parties, etc., exists where the judge is the only one having power to decide the case, and justice would be denied if he were held to be disqualified, the exception being based on the ground of necessity.

Thus, in *State ex rel. Wickham v. Nygaard*, 159 Wis. 396, 150 N. W. 513, where the statute provided that in case any judge of any court of record should be interested in any action or proceeding in such court: . . . such judge should not have power to determine such action or proceeding, or to make any order therein except with the

ditor to issue warrants for specific allowances made by statute for state officers is governed by the statutory provision authorizing the issuance of mandamus to any officer to compel the performance of an act which the law specially enjoins as a duty resulting from an office, and not by the provision authorizing suit against the state by any person deeming himself aggrieved by the refusal of the auditor to allow any just claims, and providing that, if judgment is recovered, the auditor shall audit the amount of the judgment, which shall be paid out of the state treasury, since the latter provision applies only in cases where the auditor is vested with some judgment or discretion as to the amount, if any, which shall be allowed.

Same — remedy at law — adequacy.

3. The remedy by action at law to secure a state appropriation for official expenses is not adequate so as to prevent the issuance of a writ of mandamus to compel its payment, if the action at law cannot be tried before the date when the appropriation would lapse.

Same — remedy by suit.

4. The remedy by suit is not adequate for one entitled by law to a warrant on the state treasury for the payment of money, so as to prevent the issuance of a writ of mandamus to compel the issuance of the warrant.

consent of the parties, the supreme court was held to have jurisdiction of certiorari proceedings to set aside an income tax assessed on the salary of a circuit judge, although the judges of the supreme court were indirectly interested, the decision being based upon the ground that there was no other tribunal qualified to decide the case, and upon the provision of the Constitution that "every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely and without being obliged to purchase it, completely and without denial, promptly, and without delay, conformably to the laws."

And where the Constitution makes the county court the sole judge of election contests, and the law makes no provision for substituting another commissioner for one who is interested, such court is, by reason of the necessity of the case, bound to determine an election contest, although one of the commissioners composing the court is interested in the case. *Stafford v. County Ct.* 58 W. Va. 88, 51 S. E. 2.

In *Re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88, which is a leading case upon the question under consideration, the county judge to whom the statute gave exclusive jurisdiction to appoint commissioners in proceedings to drain lands in his county was held to have jurisdiction to appoint commissioners to act in a proceeding affecting land in which the judge was interested, notwithstanding the fact that it was provided

Judge — salary — extra allowance — constitutionality.

5. An extra allowance of a specified sum per month to such of the judges of the supreme court as take up their residence at the capital, to meet the extra expenses thereby caused, is not prohibited by constitutional provisions that such judges shall receive no fees or perquisites whatever for any duties connected with their offices, that their salaries shall not be increased, and that no judge shall receive any compensation, perquisite, or emolument for or on account of his office in any form whatever except his salary.

(June 18, 1915.)

APPPLICATION for a writ of mandamus to compel the issuance of warrants for expenses incurred by applicant as a member of the Supreme Court, in taking up his residence at the state capitol. Granted.

The facts are stated in the opinion.

Messrs. Gaffy, Stephens, & Fuller and John Sutherland for plaintiff.

Mr. Joe Kirby, for defendant:

Nemo debet esse iudex in propria sua causa.

Co. Litt. § 212; *Washington Ins. Co. v. Price*, 1 Hopk. Ch. 1; *Oakley v. Aspinwall*; 3 N. Y. 547.

by statute that no judge should sit in a cause in which he was interested, and although the exclusive jurisdiction was conferred upon the judge by statute, and not by the Constitution. It appears that subsequent to the judge's action in this case an act was passed giving other judges power to act in case a county judge was interested.

In *People ex rel. Jones v. Sherman*, 66 App. Div. 231, 72 N. Y. Supp. 718, affirmed in 171 N. Y. 684, 64 N. E. 1124, although the mayor of a city preferred the charges against police and fire commissioners, he was held to have jurisdiction to hear and try the charges where the only provision of law by which such commissioners could be removed from office was that authorizing the mayor to pass upon charges against them, it being held that the mayor had jurisdiction in such case on the ground of necessity, in order to prevent injustice and the possible retention in office of unworthy officials.

And a like result was reached in *People ex rel. Shannon v. Magee*, 55 App. Div. 195, 66 N. Y. Supp. 849, it being held that although a police commissioner was prejudiced against a janitor and station-house keeper, he nevertheless had jurisdiction to try a charge against the janitor where, by statute, the commissioner was the only tribunal authorized to try such charges.

So, in *People ex rel. Burby v. Auburn*, 85 Hun, 601, 33 N. Y. Supp. 165, where the common council was the only tribunal created by statute to take proceedings for the removal of a city attorney, it was held

The decisions are not worthy of consideration, not one of them rings true, where a judge has given as an excuse for presiding over a case in which he was interested, that there was no other tribunal.

3 Humes, Philosophical Works, pp. 39, 40; Chipman, Government, 44; Hesketh v. Braddock, 3 Burr. 147.

The attempted grant constitutes a perquisite.

Wren v. Luzerne County, 9 Pa. Co. Ct. 22; Vansant v. State, 96 Md. 110, 53 Atl. 711.

Per Curiam:

Chapter 239, Laws 1911, provides: "That whenever a judge of the supreme court whose legal residence shall be at some place other than the state capital shall have changed his place of actual residence to the capital there shall be paid to such judge in consideration of expenses incident to removal to the capital, the increased expenses of living at a place other than his legal residence, the expenses of traveling to and from such legal residence the fixed sum of \$50 for each month payable upon the certified vouchers of such judge filed in the office of the state auditor."

This law, if valid, went into effect on July 1, 1911. Ever since that date, and up

to April, 1915, the judges of this court, having changed their places of actual residence to the city of Pierre in order that they might better discharge the duties of their office, did, at the end of each month, and upon warrants issued by the state auditor, each receive the said sum of \$50. The present state auditor refused to issue warrants to the several members of this court for the amounts claimed by them to be due, under the above law, for the month of April, 1915, wherefore the plaintiff, one of the judges of this court, instituted this proceeding in this court, and seeks a writ requiring the issuance to him of a warrant for the sum of \$50, being the amount claimed to be due him as aforesaid. Defendant, in answer to the alternative writ issued herein, contends:

(1) That the writ should be vacated, quashed, and set aside (a) because plaintiff has a plain, speedy, and adequate remedy in the ordinary course of law; (b) because, under § 25, Code Civ. Proc., plaintiff is compelled to proceed in an action against the state, and not against the state auditor. (2) That, owing to their interest in the question involved herein, all the judges of this court are disqualified from hearing, considering, and participating in this proceeding. (3) That said chapter 239, supra, is unconstitutional, being in conflict with

that the council had jurisdiction to act, notwithstanding that members of the council might have formed such an opinion or taken such action as would disqualify them if they were a judge or jury in an action in court.

And in Galey v. Montgomery County, 174 Ind. 181, 91 N. E. 593, Ann. Cas. 1912C, 1090, although the board of county commissioners signed the petition asking for an election, and might therefore be interested, nevertheless they were held to have power to order an election under the petition where there was no provision for action by any other body, or for the selection of any other body, it being held that the rule as to disqualification must yield to necessity.

And, although a statute provides that no judge of any court, chancellor, or county commissioner shall sit in any cause or proceeding in which he is interested, where the jurisdiction of the court of county commissioners is exclusive in proceedings for the allowance of claims, the commissioners have jurisdiction to pass on claims notwithstanding the fact that some of them are interested in the matter, otherwise there would be a failure of justice, which it cannot be supposed the legislature intended. Jeffersonian Pub. Co. v. Hilliard, 105 Ala. 576, 17 So. 112.

In Heydenfeldt v. Towns, 27 Ala. 424, in considering the validity of the appointment by the orphans' court of commissioners to audit claims against an estate in the distribution of which it was claimed the judge

was interested as a creditor, the appointment was held not to be void, the court stating that it is unquestionably the general rule that it is improper for a judge to try any cause in which he has an interest that would disqualify him as a witness, but that it is doubtful whether the rule would extend to a case where no other judge could try and determine the cause.

And in Com. v. Emery, 11 Cush. 406, a police court judge was held to have exclusive jurisdiction of offenses concerning the sale of intoxicating liquors although, as an inhabitant of the city where the offense was alleged to have been committed, he would have an interest in the penalty, the court remarking that a minute, theoretic, and remote interest does not disqualify one from acting as judge when all who can act are so interested.

And supporting the rule that when a judge's disqualification, if permitted to prevail, would deprive a party of the only tribunal in which relief could be sought, the necessity of the case will prevail and he will be allowed to sit, see also the following cases set out in the opinion in McCoy v. HANDLIN: Galey v. Montgomery County, 174 Ind. 181, 91 N. E. 593, Ann. Cas. 1912C, 1090; Pearce v. Atwood, 13 Mass. 324; People ex rel. Morris v. Edmonds, 15 Barb. 529; Re Leefe, 2 Barb. Ch. 39; Washington Ins. Co. v. Price, 1 Hopk. Ch. 1; Paddock v. Wells, 2 Barb. Ch. 331; Converse v. McArthur, 17 Barb. 410; State ex rel. Null v. Polley, — S. D. —, 42

§ 2, art. 21, and § 30, art. 5, of the Constitution of this state. While defendant contends that plaintiff has a plain, speedy, and adequate remedy in the ordinary course of law, the only remedy suggested, either in defendant's answer or brief, is an action against the state under § 25, Code Civ. Proc., which action can be brought in this court only. Thus we have three questions presented: (1) Has plaintiff sought the proper remedy? (2) Has this court, owing to the interest of its members in the ultimate question raised, the right and power to consider and determine the same? (3) Is chapter 239, Laws 1911, constitutional?

The question which would naturally suggest itself as the one to be first determined is whether this court is without right or power to sit, owing to the undisputed fact that each member thereof has a direct and financial interest in the ultimate question before it. Defendant says: "It is true that, if this court does not act, there is probably no other tribunal that can try Judge McCoy's case. . . . Judge McCoy will in this case, I am certain, have to wait until the people have provided some other tribunal. At present they have provided only one. That one is the state auditor. His judgment is now final. No appeal is provided from him, and you, the honorable judges

of this court, on account of your interest, cannot sit. It is not left to your discretion to determine whether or not you shall be fair. It becomes an absolute ban prohibiting you from acting."

It is certainly a novel and a startling proposition that, under a Constitution vesting the judicial powers of the state in her courts, an inferior executive officer has the right and power to disregard the plain provisions of a statute and refuse to perform a purely ministerial act required of him thereunder, thus depriving another of a property right conferred by such statute; and, when the proper judicial tribunal directs that he perform such act or show cause why he shall not do so, he can rightfully say in his return: "I believe the statute to be unconstitutional, and I deny to the judiciary of the state the right to determine the correctness of my views, because it chances that the judges in whom is vested the power to direct my acts all have a financial interest in the question to be determined."

The mere statement of such a proposition makes plain its fundamental weakness. This is not the first time that the right of this court to act in a matter wherein its members were interested has been questioned. Believing that the terms of office

L.R.A.(N.S.) 788, 138 N. W. 300; Jefferson County v. Milwaukee County, 20 Wis. 140; State ex rel. Cook v. Houser, 122 Wis. 534, 100 N. W. 904; Dimes v. Grand Junction Canal, 3 H. L. Cas. 759, 17 Jur. 73.

The rule that a judge ordinarily disqualified on account of interest, prejudice, relationship, etc., may nevertheless sit, where he is the only one having power to decide the case, was also declared in the following cases, in which it was unnecessary, however, for the court to decide the point: Com. v. McLane, 4 Gray, 427; Bliss v. Caille Bros. Co. 149 Mich. 601, 113 N. W. 317, 12 Ann. Cas. 513; Ten Eick v. Simpson, 11 Paige, 177; Wilcox v. Supreme Council, R. A. 66 Misc. 253, 123 N. Y. Supp. 83; People ex rel. Pond v. Saratoga Springs, 4 App. Div. 399, 39 N. Y. Supp. 607; Philadelphia v. Fox, 64 Pa. 169; Thellusson v. Rendelsham, 7 H. L. Cas. 429, 28 L. J. Ch. N. S. 948, 5 Jur. N. S. 1031, 7 Week. Rep. 563; Great Charte v. Kennington, 2 Strange, 1173.

In State, Winans, Prosecutor, v. Crane, 36 N. J. L. 394, however, there was held to be no legal necessity that interested commissioners of highways sit for the purpose of making a return of a public road and of assessments for damages, although there was not a sufficient number of disinterested commissioners to make such return and assessments. The court said: "The failure here would only deprive the township of a road which the inhabitants could more than likely get along without, until the legisla-

ture provided for the difficulty, or until the disability was removed. I have known a whole county in this state to be unable to lay out a new road for a year, by reason of the failure of townships to properly elect or appoint surveyors of the highways, and for defective oaths of those elected, and I judge it is no uncommon thing in some parts of the state to be embarrassed in that respect. The public, generally, do not suffer very much, for awhile, in such an emergency."

And in Anonymous, 1 Salk. 396, the mayor of Hereford was laid by the heels for sitting in judgment in a case where he himself was lessor of the plaintiff in ejectment, although he, by the charter, was the sole judge of the court.

In People ex rel. Miller v. Elmendorf, 51 App. Div. 173, 64 N. Y. Supp. 775, motion to dismiss appeal denied in 165 N. Y. 626, 59 N. E. 1128, appeal dismissed in 165 N. Y. 676, 59 N. E. 1128, a police patrolman was held not to have had his day in court nor any valid trial where the charges against him were preferred by the mayor, before whom the trial was had, and who was interested in procuring witnesses against the defendant, and had declared that he would get rid of the officer, the court remarking that it might be that there was no other court in which the case could be tried, but that this fact did not create such a grave necessity as to warrant a condemnation without a trial. J. T. W.

of a majority of the judges of this court would expire in January, 1913, an election had been called for the selection of their successors, and nominations of candidates had been filed in the office of the secretary of state. The relator in *State ex rel. Null v. Polley*, — S. D. —, 42 L.R.A. (N.S.) 788, 138 N. W. 300, contended that there was no authority, under the Constitution of this state, for electing successors of said judges prior to November, 1917. If such contention were correct, the then current term of office of said judges would continue until January, 1918. These judges were therefore directly interested in the issue raised. Their right to sit and determine such issue was questioned. If such judges could not act, it left the secretary of state the final "tribunal" to determine when such terms of office expired, because, without these judges, there was no court to determine such issue. The then members of this court unanimously held that, embarrassing though it was to determine an issue wherein a judge was directly interested, the interested judges were in duty bound to act, as the relator was entitled to have his contention passed upon. Let us suppose that the then secretary of state had thought that there was no authority for holding an election for judges that year, and had refused to call an election and certify the nominations filed with him. Let us suppose further that, when a writ was asked of this court requiring him to make return as to why he did not call an election and certify such nominations, this court had said: "This court refuses to act because a majority of its members are disqualified, owing to interest."

Would such a holding "ring true," when its result would have been to perpetuate in office the members of this court until such time as the secretary of state might change his mind or "the people have provided some other tribunal?" We would be content to dispose of the contention that there is no tribunal to which plaintiff can go for relief, by a mere citation of the case of *State ex rel. Null v. Polley*, supra, if it were not for three things: (1) Because of what defendant's counsel has seen fit to say of this court's decision in the above case; (2) because of the deep, and, in every respect, proper interest which the people of this state have in every question presented in the present case; and (3) especially because we recognize the supreme importance of our making the legality, the propriety, and, above all, the duty of our acting herein so clear that the people's confidence in the integrity of this court shall not be shaken.

With the maxim that "no man should be a judge in his own cause," we take no issue. The law should never permit one to have the

power, and therefore should never impose upon one the duty, of determining an issue wherein he is materially interested. Judges are but human, and, like their fellow mortals, possessed of human frailties; like others, their judgments are liable to be warped and twisted, either consciously or unconsciously, through the influence of self-interest. Certainly no self-respecting jurist, unless duty demands it, will ever consent to sit in judgment upon a matter in issue, in the determination of which he may have any material interest. In fact, no self-respecting jurist would, of his own choice, sit in judgment upon any issue concerning which there might be any well-grounded suspicion of personal interest on his part. We quote with approval the following from the decision in *State ex rel. Barnard v. Board of Education*, 19 Wash. 8, 40 L.R.A. 317, 67 Am. St. Rep. 706, 52 Pac. 317: "The learned and observant Lord Bacon well said that the virtue of a judge is seen in making inequality equal, that he may plant his judgment as upon even ground. Caesar demanded that his wife should not only be virtuous, but beyond suspicion; and the state should not be any less exacting with its judicial officers, in whose keeping are placed, not only the financial interests, but the honor, the liberty, and the lives of its citizens, and it should see to it that the scales in which the rights of the citizen are weighed should be nicely balanced, for, as was well said by Judge Bronson in *People ex rel. Roe v. Suffolk Common Pleas*, 18 Wend. 550: 'Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge.'"

But one of the maxims of jurisprudence is: "For every wrong there is a remedy." Section 2422, Civ. Code. It would bring small comfort to any person to quote him this maxim, and yet advise him that, for reasons peculiar to his particular claim of wrong, there was no tribunal wherein he could seek the remedy the law has guaranteed him. The right, inherent in every member of organized society, to a court wherein he may seek a remedy for every wrong, be it real or imaginary, is a right second and inferior to none other, and is a right which organized society is bound to guarantee by providing some tribunal into which everyone may go and obtain legal redress for any wrong suffered. This right is guaranteed by §§ 2 and 20 of the Bill of Rights found in our Constitution, which sections read as follows:

"Sec. 2. No person shall be deprived of life, liberty or property without due process of law."

"Sec. 20. All courts shall be open, and

every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay."

Under such a Constitution, can anyone, simply because he chanced to be the judge of a court, or because of any other situation in which he may be placed, be deprived of his property "without due process of law?" Can the doors of justice be closed or their opening even delayed to his appeal, and he be deprived or delayed of a remedy "by due course of law," and thus denied "right and justice," simply because the only court in which a remedy can be sought is presided over by judges having an interest either like or adverse to that of the one seeking such remedy? The Constitution, the supreme law of this state, answers this question in the negative. The courts provided by such Constitution must open their doors to the call of all, and no court can refuse to hear a cause simply because its judges are interested and the law has made no provision for anyone to take their places.

In some states there are statutes declaring null and void any judgment rendered by a disqualified judge; and yet the inherent right of every member of organized society to have his rights determined in a court of justice (which right is guaranteed in such states under provisions such as are found in our Bill of Rights) is recognized as a right before which statutes must fall, and the courts of such states uniformly hold that a judgment, rendered by a legally disqualified judge in a case where, if such judge had not acted, the door of justice would have been closed, is valid. We can do no better than to quote the words of Justice Strong of the supreme court of New York in the case of *People ex rel. Morris v. Edmonds*, 15 Barb. 529. In that case, as in this, a justice of the court wherein the action was brought was seeking by mandamus to compel the payment to him of an allowance other than his salary, as fixed by law. The judge presiding was not financially interested, but he took occasion to review the previous cases arising in that state, wherein judges, having personal financial interest in a question before them, had, owing to the fact that there was no other judge having authority to sit, presided and rendered judgments. After quoting with approval the decision in *Re Lee*, 2 Barb. Ch. 39, he said; the italicizing in this and all the following quotations being ours: "I know of no instance in which official association, or a possible interest in some question involved in the controversy, has prevented judicial action. If there had been any,—indeed, if there had been a positive statutory prohibi-

tion,—a judge of this court, upon whom general and unrestricted jurisdiction in law and equity has been conferred by the Constitution, would nevertheless have been bound to hear and decide a cause, when the only objections to his acting would, if they could prevail, effectually bar the door of justice, which should be open to all, against one of the parties."

In the *Lee* case, supra, an appeal had been taken from the decision of the vice chancellor to the chancellor, and the question arose as to whether the chancellor was disqualified to sit, owing to relationship to a party to such appeal. The Constitution of the state gave this right of appeal, "and the legislature had made no provision authorizing any other person to sit for him in a case where that officer (the chancellor) is related to one of the parties." The chancellor said: "The statute, it is true, prohibits any judge from sitting, where he is related to either of the parties within the ninth degree of affinity or consanguinity; but it has not provided for any other person or tribunal, to exercise the appellate power which is given to the chancellor, by the Constitution, in such cases. The Constitution must, therefore, control, as that is the paramount law."

Having our attention called, by the case of *State ex rel. Null v. Polley*, — S. D. —, 42 L.R.A. (N.S.) 788, 138 N. W. 300, to the fact that there was no law under which a proper person could be appointed to take the place of a member of this court when such member should not sit, the then members of this court, through one of its members who chanced to be the chairman of the committee on legal reform of the state bar association, called the attention of such association to the need of an amendment to the Constitution of this state, authorizing the enactment of such a law. Such association recommended to the legislature that it submit such an amendment to the people for their adoption, and the legislature, by chapter 135, Laws 1913, submitted an amendment, which provided: "Whenever, in the opinion of the supreme court, one or more of its judges shall be disqualified, by reason of interest or other cause, from taking part in the decision of any particular action or proceeding, and the court shall deem it necessary, a person, or persons, shall be selected, in such manner as the legislature shall provide, to serve in place of such disqualified judge or judges, only for the purpose of deciding such particular action or proceeding."

This amendment was rejected by the people in November, 1914. One can explain this action of the voters upon one ground only,—that they did not understand the

purpose and importance of the proposed amendment. We trust that one result of the present action will be the awakening of the people of this state to the importance of enacting such an amendment, and by so doing prevent the judges of this state being placed in the embarrassing position in which the members of this court now find themselves,—forbidden by the Constitution from closing the doors of this court to any person entitled to admission therein, and yet knowing that, when we do the duty thus imposed upon us, we must suffer unjust criticism from the thoughtless and from those whose criticism may be inspired by unworthy motives.

Certainly the members of this court, and, we firmly believe, all the people of this state, would to-day be thankful if the proposed amendment to our Constitution had been adopted and the last legislature had authorized the appointment of qualified persons to sit as a court to determine the matter now before us, so that we could, as did the members of the supreme court of Arkansas, in *Ferrell v. Keel*, 103 Ark. 96, 146 S. W. 494, in a case involving the validity of the general appropriation bill under which, as in this state, the salaries of judges of the supreme court are paid, simply say: "An order will therefore be entered announcing the disqualification of the judges, and the clerk is directed to certify the same to the governor, to the end that special judges may be appointed to sit in the case."

It certainly is pertinent to ask: If counsel's contention is correct, what would become of the government of this great state (of its executive and judicial departments, its educational and other public institutions), provided the defendant, or some one of his successors, should, upon a claim that he believed the then current general appropriation bill to be invalid, refuse to issue any warrants thereunder? The doors of every court in this state would be closed to those who might seek to have the validity of such appropriation bill determined. It is no answer to say that defendant has not questioned the validity of such appropriation bill, and that neither he nor his successor ever will. Who is there that can say that circumstances may not arise making it the bounden duty of some future auditor to question such a bill? The true test of the correctness of a legal proposition is not to be found merely in its application to certain present facts, but more often it is to be found in its application to supposed facts and circumstances.

Defendant's counsel, in his brief, asserts that the holding in the case of *Dimes v. Grand Junction Canal*, 3 H. L. Cas. 759 L.R.A.1915E.

(which case was cited by this court as sustaining its decision in *State ex rel. Null v. Polley*, supra), does not sustain such decision; he even asserts that it is absolutely contrary to such decision; and he purports to quote therefrom in support of such assertion. This certainly would be surprising, if true, in view of the fact that this English case is almost universally cited, both in reports and text books, as supporting the proposition announced in *State ex rel. Null v. Polley*, supra. The learned counsel is in error. Charity would require us to conclude that he failed to carefully read the decision in such case, as otherwise we can find no possible explanation of what, if it be intentional, is a most serious breach of professional duty (a breach of professional duty of which we would be loth to believe counsel would be guilty,—the quoting, as the decision of a court, the mere argument of counsel submitted to such court.) But we cannot understand how a lawyer of the experience of the learned counsel for defendant could fail to discover the *Dimes Case* time and again quoted in support of the proposition announced in *State ex rel. Null v. Polley*, supra. Such a discovery should have called him to a second and more careful reading of the decision in that case, if his sole desire were to aid this court in a correct solution of the questions presented to it. After stating the nature of the matter before the House of Lords in the *Dimes Case*, counsel, in his brief, purports to quote some four pages from the opinion in that case. An examination of such case, as reported, discloses the fact that the matter quoted is taken wholly from the argument of counsel for appellant therein, and does not contain a single word from the opinions rendered therein. Counsel has failed to quote from the argument of respondent's counsel in the *Dimes Case*, which argument follows immediately after the quotation found in his brief, in which argument the respondent's counsel say, in relation to the authorities mentioned in the quotation presented to this court: "*All the cases quoted are those of inferior jurisdictions whence there was an appeal, or of courts where there were many members composing them, so that it was not a matter of necessity to resort to the decision of the individual who might happen to have an interest in the question discussed.*"

It was not the argument of counsel upon either side, but the opinions in the *Dimes Case*, that this court had in mind when it cited such case as an authority supporting our decision in *State ex rel. Null v. Polley*, supra. Two questions were presented for the determination of the House of Lords in relation to the validity of the acts of

the lord chancellor, who, it appeared, had an interest in a judgment, which judgment he had affirmed upon appeal from the vice chancellor, who had rendered same. One of these was the validity of his judgment of affirmance; the other, the validity of the proceedings by which the case was brought to the House of Lords,—such proceedings resting upon an enrolment signed by the lord chancellor, and it being contended that the lord chancellor, if disqualified from rendering judgment upon appeal, was also disqualified from signing such enrolment, and that therefore the cause was not properly before the House of Lords. Certain questions were referred to the judges for their answer. In answering such questions, Baron Parke announced the unanimous decision of the judges, wherein, after discussing the validity of the judgment of affirmance, and holding that such judgment was not void, but voidable, and upon appeal should be avoided, the judges took up the question of the jurisdiction of the House of Lords dependent upon the enrolment signed by the lord chancellor, and said: "But, in order to appeal against them to the House of Lords, *they must be enrolled; and enrolment cannot be made without the lord chancellor's signature.* In giving that signature the chancellor has a discretion which he may exercise. But he may be applied to for that purpose, and, if he gives his signature, his interest affords no objection to its validity. *For this is a case of necessity, and, where that occurs, the objection of interest cannot prevail.* Of this the case in the Year Book (Y. B. 8 Hen. vi, 19; 2 Rolle, Abr. 93) is an instance, where it was held that *it was no objection to the jurisdiction of the common pleas that an action was brought against all the judges of the common pleas, in a case in doubt which could only be brought in that court.*"

It will be seen from the above that the judges recognized clearly this rule of necessity before which all other rules of law must fall. Following the opinion of the judges, the then lord chancellor, who had succeeded the lord chancellor whose action was under review, announced his opinion, which opinion was concurred in by Lords Brougham and Campbell. The lord chancellor said: "Now, as the suitor *has a right to come directly from the vice chancellor to your Lordship's House*, the appeal here would stand correctly before the House as an appeal, not only against the affirmance, which may be considered, for the purpose of observation, as void, on account of the lord chancellor's interest, but as an appeal on the merits against the decision of the vice chancellor, and, as such, proper to be heard

at your Lordships' bar. I understand the opinion of the judges to be that the interest of the lord chancellor was such as disqualified him from judging in the cause; and I must therefore infer that, *in their opinion, there was no such absolute necessity for his adjudication as, upon the ground set forth in some of the cases, might be deemed to render his decision effectual.*"

Why was there no such "absolute necessity" as "might be deemed to render his decision effectual?" Simply because there was another tribunal to which the appeal from the vice chancellor could be taken, as the appellant "*had a right to come directly from the vice chancellor to your Lordships' House.*" It will thus be seen that twice, once in the decision of the judges and again in that of the lord chancellor, it was recognized that the rule forbidding a judge to act in a matter wherein he was interested must give way to necessity, and that, where it is necessary for him to act, his act will be valid and effectual, regardless of any interest. It is therefore clear that counsel was absolutely in error when he stated that this English authority did not support the holding of this court in *State ex rel. Null v. Polley*, — S. D. —, 42 L.R.A. (N.S.) 788, 138 N. W. 300.

Defendant's counsel quotes the following from the decision in *State ex rel. Null v. Polley*, supra: "It is elementary that no man may sit in judgment upon his own cause, and no citation of authorities is necessary to demonstrate the law. *It is, however, almost universally held that the rule is one which must yield to necessity;*" and then contends that the italicized words were not required in determining the matter then before us, "and must be treated as *obiter*." It being absolutely necessary, to the determination of the matter then before us, that we should hold that this court was bound to sit and determine the cause regardless of the interest of the majority of the court, it is apparent that the words italicized by counsel were an essential part of the court's decision and in no sense "*obiter*." We fully agree with Chief Justice Marshall's statement in relation to any "*obiter*" statement or *dictum*. In *Cohen v. Virginia*, 6 Wheat. 264, 399, 5 L. ed. 257, 290, he said: "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. *If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.* The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent.

Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Counsel for defendant is certainly familiar with such maxim, and yet he has cited but two cases, other than the Dimes Case above referred to, in which he claims the courts have held contrary to our views in *State ex rel. Null v. Polley*, supra. These cases are *Washington Ins. Co. v. Price*, 1 *Hopk. Ch. 1* (1823), and *Oakley v. Aspinwall*, 3 *N. Y. 547* (1850). A reading of these cases reveals the fact that, while the court, in each case, made statements, quoted by counsel in his brief, which statements, if they were not *obiter*, would be authority for counsel's contention, yet it clearly appears, in each case, *from the holding of the court itself*, that it was unnecessary for the disqualified judge to act in order that the parties be not denied a court. In one case, an appeal was taken to a disqualified chancellor, and he held that there were other courts open to the parties. In the other case, there was a quorum of the judges of the court qualified to sit, and thus there existed no necessity requiring a disqualified one to sit in order that there might be a court. It thus appears that all that was said by the chancellor and the judge upon the question now before this court was unnecessary to the decisions rendered, and therefore "*obiter*" to the real questions decided by such courts. Counsel has apparently failed to read carefully the opinion in *Oakley v. Aspinwall*, as he has failed to discover that the court fully recognized the proposition announced by us in *State ex rel. Null v. Polley*, supra. This he should have discovered, because the *Oakley Case* has been frequently cited by courts and text writers as an authority in support of such proposition. Judge Hurlbut said: "But it may be said that this court consists of eight judges; that a less number cannot constitute it; and therefore from necessity its members must sit in all cases. . . . It being provided by law that six members of the court shall constitute a quorum, a judge, who is interested or related to a party to a suit, cannot be required to act from necessity, unless when at least three of the judges may be so circumstanced,—a case not likely to occur."

We are therefore confronted with this unusual situation—counsel denouncing as unsound a former holding of this court, and yet failing to cite anything, entitled to recognition as authority, in support of his contention, while two of the three cases cited by him are absolutely opposed to such contention.

L.R.A.1915E.

Let us see what other courts, besides those hereinbefore referred to, have said upon this question, and in many cases when their statements were an essential part of their decisions. Referring to other decisions rendered by the courts of New York (those being the courts rendering the decisions heretofore referred to as cited by defendant), we find the following:

In *Paddock v. Wells*, 2 *Barb. Ch. 331*, the vice chancellor, in refusing to sit in a case when he was related to one of the parties thereto, said of the rule forbidding a judge to sit in a cause where he is disqualified: "The only exception to this principle is where the Constitution has conferred the jurisdiction upon a particular judge, or tribunal, and no provision is made by law for hearing and deciding the matter in controversy, when the judge is related to either of the parties in the suit. There, the Constitution being the paramount law, the judge, or tribunal, to whom the Constitution has conferred the decision of the matter, must, from the necessity of the case, hear and decide it, to prevent a failure of justice."

The exception to the general rule was again recognized in *Converse v. McArthur*, 17 *Barb. 410*, decided in 1854, being subsequent to the decisions cited by defendant: the court saying: "A judge, it is said, may sit, where jurisdiction is conferred by the Constitution [the fact in the case at bar], and upon no other tribunal, for otherwise there will be a failure of justice."

In 1896, in the case of *People ex rel. Pond v. Saratoga Springs*, 4 *App. Div. 399*, 39 *N. Y. Supp. 607*, the court recognized this exception in the following language: "Cases are to be found where judicial officers, or officials acting in a judicial capacity, have been permitted to act, notwithstanding the disqualification of interest, but I think, without exception, they have all been cases where, unless such officer was permitted to act, there would have been a failure of justice, for the reason that there was no other person who could act."

Again, in the year 1900, in *People ex rel. Shannon v. Magee*, 55 *App. Div. 195*, 66 *N. Y. Supp. 849*, the court, in a most extreme case, said: "By the statute the police commissioner was the only tribunal authorized to try charges against the relator. Whatever may be his prejudice, therefore, his jurisdiction is undoubted, for otherwise the relator could not be tried or removed, however flagrant his offenses. If this proposition need authority, it is abundant. See *People ex rel. Deal v. Williams*, 51 *App. Div. 102*, 64 *N. Y. Supp. 457*; *People ex rel. Burby v. Auburn*, 85 *Hun, 602*, 33 *N. Y.*

Supp. 165; *Re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88."

And again, as late as the year 1910, in *Wilcox v. Supreme Council*, R. A. 66 Misc. 253, 123 N. Y. Supp. 83, we find the exception fully recognized. In *Bliss v. Caille Bros. Co.* 149 Mich. 601, 113 N. W. 317, 12 Ann. Cas. 513, the court said: "It is well established that the rule of disqualification of judges must yield to the demands of necessity; as, for example, in cases where applied it would destroy the only tribunal in which relief could be had."

In *Galey v. Montgomery County*, 174 Ind. 181, 91 N. E. 593, Ann. Cas. 1912C, 1090, the court said: "The maxim that one shall not be a judge in his own case is a sound and salutary one, and should not be relaxed, except when necessity requires."

In *Pearce v. Atwood*, 13 Mass. 324, the court said: "Any interest, therefore, however small, has been held sufficient to render a judge incompetent. The only exception known, to this broad and general rule, exists where there may be a necessity that the person so interested should act, in order to prevent a failure in the administration of justice."

In *Jefferson County v. Milwaukee County*, 20 Wis. 139, in supporting the action of the judges of such court in deciding causes wherein they were interested, the court said: "And it is obvious that from necessity they must have acted in such causes, to prevent a failure of justice."

We cannot better close this part of our decision than by quoting the following from the great case of *State ex rel. Cook v. Houser*, 122 Wis. 534, 100 N. W. 964, decided in the year 1904. That court said: "But, going further, and conceding for the moment that the proposition last discussed could, in any event, be resolved in favor of the position of counsel for the plaintiff, we meet at once the stern rule of necessity, which puts aside all the grounds for judicial disqualification, when otherwise there would be no tribunal whatever to administer any remedy for the grievance waiting for redress. The courts, in treating that rule, will be found generally to have restricted it to the precise case in hand, and yet viewed it broadly enough to fully suffice therefor. . . . This court has recognized the rule of necessity, where otherwise the one empowered to apply his judgment to the matter would have been disqualified, in *Jefferson County v. Milwaukee County*, supra. The same rule justified Chancellor Kent in *Stuart v. Mechanics' & F. Bank*, 19 Johns. 496, to keep his place upon the bench, though pecuniarily interested in the trial before him. In *Re Leefe*, 2 Barb. Ch. 39, Chancellor Walworth L.R.A.1915E.

deemed himself justified by it in presiding, though one of his relatives was a party, and by express statutory provision he was disqualified. In *Mooers v. White*, 6 Johns. Ch. 360, Chancellor Kent again leaned on that rule in presiding, though by the literal sense of the statute disqualified, as in the case aforesaid. In the Year Book, 8 Hen. vi., 19, 2 Rolle, Abr. 93, the judges who presided relied upon the same rule in performing their duties, though all were defendants in the action. That is referred to as a very apt illustration of the extent to which the rule has been applied in London v. Markwick, 11 Mod. 164. Further to the same effect are *Re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88; *Thellusson v. Rendlesham*, 7 H. L. Cas. 428, 28 L. J. Ch. N. S. 948, 5 Jur. N. S. 1031, 7 Week. Rep. 563; *Com. v. McLane*, 4 Gray, 427; *Ten Eick v. Simpson*, 11 Paige, 177-179; *People ex rel. Morris v. Edmonds*, 15 Barb. 529-531. It should be noted that in the authorities, to which plaintiff's counsel can best turn to sustain their contention on this, the rule we are discussing is fully recognized. *Stockwell v. White Lake*, 22 Mich. 341; *State, Winans, Prosecutor, v. Crane*, 36 N. J. L. 394; *State ex rel. Barnard v. Board of Education*, 19 Wash. 8, 40 L.R.A. 317, 67 Am. St. Rep. 706, 52 Pac. 317. In addition to the foregoing on the same subject, the following are peculiarly in point: *People ex rel. Burby v. Auburn*, 85 Hun, 601, 33 N. Y. Supp. 165; *People ex rel. Doherty v. New York Police Comrs.* 84 Hun, 64, 32 N. Y. Supp. 18; *People ex rel. Pond v. Saratoga Springs*, 4 App. Div. 399, 39 N. Y. Supp. 607; *People ex rel. Shannon v. Magee*, 55 App. Div. 195, 66 N. Y. Supp. 849; *People ex rel. Jones v. Sherman*, 66 App. Div. 231, 72 N. Y. Supp. 718, affirmed in 171 N. Y. 684, 64 N. E. 1124; *People ex rel. Miller v. Elmendorf*, 51 App. Div. 173, 64 N. Y. Supp. 775."

It is therefore clear that, under both reason and authority, the law is as announced in 23 Cyc. 581: "The rule as to the disqualification of judges must yield to the demands of necessity. Where disqualification, if permitted to prevail, destroys the only tribunal in which relief may be sought, and thus effectually bars the door of justice, the disqualified judge is bound to hear and decide the cause. But, to justify a disqualified judge in sitting in a cause in which he is directly interested, the necessity must be imperative, in the determination of which the greatest care should be exercised."

Plaintiff, believing himself entitled to the expense warrant demanded, had the same right that every other citizen of this state has—to go into court and seek "right and justice, administered without denial or delay." There was only one court to which

he could go for relief. He could not be asked to wait until the people had provided another tribunal, because: (1) To do so would, at best, deprive him of a constitutional right (speedy justice); (2) there was nothing to encourage him in the belief that any such tribunal would ever be created; (3) to so wait would be misconstrued by many as a confession that he had knowingly taken money under an invalid law. Defendant left to plaintiff but one course to pursue,—to go at once before the only court having authority to determine the validity of his claim and to grant him adequate relief, and there demand his legal rights. We refer to this court as “the only court having authority to determine the validity of his claim and to grant him adequate relief,” because, while the circuit court has jurisdiction to issue writs of mandamus and might have been applied to for a writ herein, it is customary, whenever, through such a writ, it is sought to require a public officer to perform some ministerial act, which, to be of any effect whatsoever, must be performed within a very limited period, to seek such writ of this court because, from any decision of the circuit court, there is a right of appeal to this court, and a considerable time must necessarily elapse before such an appeal can be taken and brought on for hearing in this court. This is but another application of the rule of necessity. Thus, if this proceeding had been started in the circuit court, before an appeal could be brought to and determined by this court, June 30, 1915, the date when the current appropriation to meet the provisions of chapter 239, Laws 1911, *supra*, lapses, would have passed and the appropriation have lapsed, rendering absolutely ineffective the writ sought for. Furthermore, it is clear that the circuit judges of this state are equally disqualified to determine the rights of plaintiff to the relief sought as are the members of this court. Two questions are presented in considering the provisions of chapter 239, Laws 1911: (1) Is the allowance therein provided for an allowance for expenses? (2) If it is an allowance for expenses, is such statute constitutional? Chapter 49, Laws 1907, provides that the circuit judges shall be reimbursed for certain “expenses” incurred in the discharge of their duties. There can be no question but that the allowance to the circuit judges is one for expenses. It is therefore apparent that, if this proceeding had been brought before a circuit judge, he would have had a direct financial interest in the determination of these questions, as upon the answer he gave to the same might rest his right to receive the benefits of said chapter 49, Laws 1907. He would have a direct interest in

the answer to the first question, as thereon would depend the necessity of his answering the second question, the answer to which is as vital to his rights as it may be to those of Judge McCoy. It was undoubtedly a consideration of all these matters (the equal disqualification of the circuit judges; the fact that the writ, to be effective, must be given in such a short time; and the further fact that this matter could not reach a final determination within such brief period, if commenced in the circuit court) which led counsel for defendant to state in his brief: “It is true that, if this court does not act, there is probably no other tribunal that can try Judge McCoy’s case.”

Has plaintiff sought the proper remedy? This proceeding was instituted under the provisions of § 764, Code Civ. Proc., but it is contended by defendant in his return, though not even suggested in his brief, that plaintiff’s remedy is by action at law in this court under the provisions of § 25, Code Civ. Proc., and succeeding sections. Through such failure to present this matter in his brief, we might deem this contention abandoned by defendant and not refer to it further, but we prefer not to so dispose of it. The remedies provided by §§ 25 and 764 are radically different, and there is a well-defined line of demarcation between the classes of cases that come within the provisions of these two sections. Section 764 authorizes the supreme and circuit courts to issue the writ of mandamus to any person or officer, “to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station;” and § 765 provides that the writ “must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.” It will be noted that the writ will issue to compel the performance of an act that the law specifically enjoins as a duty, and this means that it can issue to compel the performance of such act *only* as the law specifically enjoins as a duty. If the duty to perform the act depends upon the judgment of the officer charged therewith, or if, under the facts presented, he is vested with any discretion in the matter of performance, mandamus is not the proper remedy.

By the provisions of § 25, any person deeming himself aggrieved by the refusal of the state auditor to allow any just claim against the state may commence an action at law against the state in the supreme court. If he recovers judgment, the clerk of the supreme court shall furnish a certified transcript of the judgment to the state auditor, who shall audit the amount of the judgment, and the same shall be paid out of the

state treasury. These provisions of the law have reference to, and apply only to, cases where the auditor is vested by law with some judgment or discretion as to the amount, if any, that shall be allowed on a particular claim against the state. If the claim is rejected, or if allowed in part, and the claimant is dissatisfied with the allowance, then his remedy is by an action at law in this court, as provided by § 25 and succeeding sections; but, when a claim, based upon a valid law, has once been audited and allowed by the auditor himself or by some other duly authorized person, board, or tribunal, or the amount thereof is fixed by law, so that there is no dispute as to the amount of the claim, it then becomes the duty of the auditor to allow it and to issue a warrant upon the state treasurer therefor; provided, of course, that money has been appropriated for the payment thereof. In such cases, the auditor is vested with no discretion, and the issuance of the warrant is a pure ministerial act, the performance of which, in case of refusal, will be compelled by mandamus. The distinction may be made clearer by illustration. If a bill for labor or supplies furnished to the state is presented to the auditor for allowance, it is his duty to audit it. If he allows it in part or in whole, and the claimant accepts such allowance, it is then the duty of the auditor to issue a warrant in payment thereof; and, if he refuse, mandamus will lie to compel him to issue it. But the auditor cannot be compelled by mandamus to allow the claim at any particular amount, and, if the claimant is dissatisfied with the allowance as made, his remedy is by action at law, under the provisions of § 25. On the other hand, where the amount claimed is fixed by law (as, for instance, an officer's salary), the auditor is vested with no discretion whatever. If he is satisfied as to the identity of the officer claiming the salary, it is his duty to issue his warrant for the amount so fixed. In that case, there is nothing to be determined by an action at law, and, if the auditor refuse to issue the warrant, mandamus is the proper remedy to compel him to issue the same.

The above principles are recognized by the courts of this country generally. 20 Cyc. 235. In *Black v. Auditor*, 26 Ark. 237, that court, after quoting the section of their statute allowing suits to be brought against the state, and which, in all material matters, is similar to our § 25, said: "The salaries of the circuit judges are fixed by law. An appropriation has been made to pay these salaries. The ministerial duty of auditing the accounts and issuing his warrant, for the amount, is all that remains to be done. If suit were brought against the state, un-

der the sections above quoted, and an appropriation made by the legislature, the same ministerial duty would remain to be performed."

This has special application to the present case, because the only fact to be determined at a trial is already determined, to wit, the amount due to plaintiff; and, even after a judgment in an action at law, it would still be necessary to issue the warrant. In *Rice v. State*, 95 Ind. 33, that court said: "Whenever the money necessary to pay a particular claim against the state has been appropriated by the legislature, and the amount of the claim has been definitely ascertained in a manner prescribed by law, a refusal by the auditor of state to draw his warrant upon the treasurer of state for the payment of the claim will authorize the interposition of the courts by appropriate mandatory proceedings. In such a case it is not a sufficient objection that such proceedings afford an indirect method of suing the state."

In *Bryan v. Cattell*, 15 Iowa, 538, the supreme court of that state said: "All the cases, as well as the statute, recognize a distinction between those acts resting in discretion and such as are plainly, clearly, definitely prescribed by law. Thus the auditor is required to settle all claims against the treasury. . . . Now, his judgment or discretion as to the amount he should allow on such settlement could not be controlled by *mandamus*, but he could be compelled to act, or, after he had thus settled the amount due the claimant, he could be compelled to grant the required certificate. . . . And whether there is a discretion is, of course, to be determined by the courts, in each case, where the process of *mandamus* is invoked. If there is, then, though ever so unwisely exercised, there can be no interference. If not, then the omission or performance of an act, specially enjoined by law, as resulting from the office, may be compelled."

A few others of the many cases to the same effect are *White v. Ayer*, 126 N. C. 570, 36 S. E. 132; *State ex rel. Bache v. Richards*, 15 Utah, 477, 49 Pac. 532; *State ex rel. Maddox v. Kenney*, 10 Mont. 533, 26 Pac. 999; *Swann v. Buck*, 40 Miss. 268; *Gilbert v. Moody*, 3 Idaho, 3, 25 Pac. 1092; *Page v. Hardin*, 8 B. Mon. 648. The right to the writ, under the circumstances shown in this case, has been recognized in this state. *Howard v. Burns*, 14 S. D. 383, 85 N. W. 920.

Chapter 239, Laws of 1911, allows to each supreme court judge, who removes to the capital for the performance of his official duties, the fixed expense allowance of \$50 per month, payable upon the certified vouch-

ers of such judge. It is alleged by plaintiff and admitted by defendant that plaintiff has complied with all the requirements of this law. It is further alleged and admitted that the legislature of 1913 made an appropriation of funds with which to pay this specific amount, and that this fund is now on hand in the state treasury and available for this very purpose. The claim is audited at a fixed amount by the law itself. The defendant is vested with no discretion whatever in the matter of allowing the said sum of money. Mandamus is the proper mode of compelling him to perform the purely ministerial act of issuing the warrant. *Evans v. Bradley*, 4 S. D. 83, 55 N. W. 721. The contention of defendant that plaintiff's remedy is by action under § 25, Code Civ. Proc., and not by mandamus, can scarcely be taken seriously, and it apparently was not so taken by defendant himself, or he would have discussed the same in his brief.

Defendant, in his return, contends that plaintiff has a plain, speedy, and adequate remedy at law. Inasmuch as this contention is not referred to in his brief, and the return does not suggest any other remedy at law, except that under § 25, Code Civ. Proc., we need only suggest, in addition to what we have said above in regard to an action at law, that, in the ordinary course of law, an action commenced under § 25, after plaintiff's cause of action had accrued, could never be prosecuted to final judgment prior to the 1st day of July, 1915, and defendant admits that unless the money, appropriated for the payment of plaintiff's claim, is paid prior to that date, said appropriation will lapse. In that case, plaintiff could not be paid in any event until the money for that purpose had been appropriated by some future legislature. In the second place, it requires more than a right of recovery in the future to constitute adequate relief and to justify a refusal of relief by mandamus. "The 'other remedy,' the existence of which will oust, or, rather, prevent the invocation of, jurisdiction by mandamus, must be equally convenient, beneficial, and effective as mandamus. . . . It must be a remedy which will place the relator *in statu quo*; that is, in the same position he would have been had the duty been performed. *Etheridge v. Hall*, 7 Port. (Ala.) 47. Indeed, it must be more than this. It must be a remedy which itself enforces in some way the performance of the particular duty, and not merely a remedy which in the end saves the party, to whom the duty is owed, unharmed by its nonperformance. *Sessions v. Boykin*, 78 Ala. 328; 2 *Spelling, Extr. Relief*, § 1375; *Merrill, Mandamus*, § 53. Hence, L.R.A.1915E.

it is that, while mandamus will not lie to enforce a duty which may be coerced by the ordinary civil actions at law, as where the duty is merely to pay money or to deliver property, it does lie whenever such actions cannot be availed of to the specific performance of the official act which the relator is entitled to have performed, as where a disbursing officer refuses to draw a warrant it is his duty to draw, in which case an action for damages, while it would eventually save the relator harmless, would not coerce the discharge of the specific duty." *State ex rel. Brickman v. Wilson*, 123 Ala. 259, 45 L.R.A. 772, 26 So. 482.

The above language is especially appropriate when applied to the facts in this case. Conceding that plaintiff has a cause of action against the state that could be maintained under the provisions of § 25, Code Civ. Proc., and that the money now due could eventually be recovered, this would by no means afford plaintiff the specific and adequate remedy to which he is entitled. Under the provisions of chapter 239, Laws 1911, plaintiff is entitled to a warrant on the state treasurer for \$50, and no substitute for such warrant, or means, however certain, of collecting said sum of money in the future, can afford him adequate relief.

This brings us to a consideration of the one ground assigned by defendant for refusing to issue the warrant demanded, to wit, the claim that said chapter 239, Laws 1911, is unconstitutional because in conflict with § 2, art. 21, and § 30, art. 5, of the Constitution of this state.

Section 2, art. 21, after fixing the salaries of the governor, supreme and circuit court judges, secretary of state, the state treasurer, state auditor, and commissioner of school and public lands, the superintendent of public instruction, the attorney general, and the lieutenant governor, provides: "They shall receive no fees or perquisites whatever for the performance of any duties connected with their offices. It shall not be competent for the legislature to increase the salaries of the officers named in this article except as herein provided."

Section 30, art. 5, provides: "The judges of the supreme court, circuit courts and county courts shall each receive such salary as may be provided by law, consistent with this Constitution, and no such judge shall receive any compensation, perquisite or emoluments for or on account of his office in any form whatever, except such salary: Provided, that county judges may accept and receive such fees as may be allowed under the land laws of the United States."

The argument presented by defendant's

counsel in his printed brief is certainly unusual, and we believe counsel himself, upon mature reflection, will feel that much that he has said was wholly uncalled for and highly improper, not an aid to the court in arriving at the proper legal conclusion, for which every brief should be designed. Counsel says: "It would take only a child, simply, were he not biased, to see that the donation offered you under § 239 is nothing but graft. The reason it is given is on account of the pitiable salary which is attached to your office. . . . If they (the legislature) possessed this power, then the amount they may give, or you may take, is limited only by their judgment, or your avarice."

He also says: "Could I stand before you, convinced clearly, as I am, that the act of the legislature attempting to give you \$50 per month in addition to your salary clearly violates the Constitution, and ask you to hold yourselves guilty? Could you admit your guilt? And still I am a lawyer as well as yourself. Probably my knowledge, based on a long period of study, would not differ much from the average of the bench."

The only thing to be found in counsel's brief which could in any manner throw light upon the question now under consideration, is the definition of the word "perquisite," as found in Webster's New International Dictionary, and another definition found in Bouvier's Dictionary, which latter definition is approved in the case of *Wren v. Luzerne County*, 9 Pa. Co. Ct. 22, a decision of a county court cited by defendant. With these definitions we fully agree. The only other authority cited is a decision by the supreme court of Maryland (*Vansant v. State*, 96 Md. 110, 53 Atl. 711), holding that an officer is not entitled to retain interest on public funds held by him in his official capacity,—a question entirely foreign to the one before us. Counsel for defendant has misquoted § 30, art. 5, of the Constitution, making what we deem a material change. Instead of quoting it as providing that the officers therein named shall receive no "compensation, perquisite or emoluments for or on account of his office, in any form whatever, except such salary," he has inserted, in place of the italicized words, the words "on any account." We trust this error, as well as that in quoting from the English decision, is the result of inadvertence, and not prompted by any desire to mislead the court or others who may read defendant's brief.

From the fact that defendant's counsel has cited no authorities throwing any real light upon the constitutionality of the law in question, we are led to conclude that he fully realizes the weakness of the conten-

tion that chapter 239, Laws 1911, is unconstitutional, and therefore bases his real defense, not upon the ground that the action of defendant in refusing to issue the warrant was justified, but that such action, right or wrong, is final, and cannot be reviewed by this court, owing to the interest of the judges thereof. Having held, however, that such action of defendant is not final, and that it is both our right and duty to act in this matter, we shall proceed to consider and determine the ultimate question before us,—the constitutionality of such law. We do this in the full faith that the people of this state will believe that the conclusion at which we arrive will be the honest view of those whom they have placed in a position of great trust; and we believe that they, who have so honored us, will commend us for meeting squarely the issue thus presented, while they would justly condemn us, if, moved by the insinuations and veiled threats contained in defendant's brief, we should refuse to uphold the dignity of this court, and wrongfully surrender to an inferior executive officer the judicial function of interpreting the laws of this state.

It being a fundamental proposition that the state Constitutions do not *grant* powers to the representatives of the people, but that such representatives *have* every power of a sovereign people, except such as may be taken from them by the state Constitution or given to the Federal government by the Federal Constitution, it follows that the universal rule for construing the enactments of such representatives is: An act of a state legislature will not be held unconstitutional unless it unconstitutionality appears practically beyond a reasonable doubt. This rule has frequently been announced by this court. We are, however, not content to base our decision herein upon such rule, but, owing to our direct interest therein, we believe that we should refuse to issue the writ prayed for, unless it appear clear that, under both reason and authority, the law in question is constitutional.

It must be conceded by all that our Constitution forbids any increase in the salary of any officer named in the sections quoted, through the granting to him of "any compensation, perquisite or emoluments for or on account of his office;" but it must be presumed that our Constitution was drafted with the utmost care and precision in the use of language, and with a full understanding of the accepted meaning of every word used therein. With this thought in mind it might be sufficient, for the purposes of this decision, to note that an allowance for "expenses" is not forbidden by any section of the Constitution. The distinction between the term "expenses" and the phrases

"compensation, perquisite or emoluments for or on account of an office," or, "for the performance of duties connected with an office," is so broad and clear that it cannot be presumed that the framers of the Constitution overlooked the same. The Constitution nowhere forbids the allowance, to any public officer, of expenses incident to the performance of his official duties. The convention which framed the Constitution of this state had before it all of the Constitutions that had theretofore been adopted by the several states as well as the Constitution of the United States; and such convention had among its members many of the most prominent lawyers of the territory,—men who must be presumed to have been familiar with the decisions of the various courts interpreting the language of such Constitutions and the constructions placed upon the legislative enactments of the various states. These men must have known that § 1, art. 2, of the Federal Constitution, declared that the *President* should receive for his services a compensation "which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive within that period any other *emolument* from the United States or any of them." These men must have known that the word "emolument" was, as recognized by every authority, a term broad and comprehensive, one which includes within it "perquisites," "salary," "compensation," "pay," "wages," and "fees." These men must have known that, with the above provisions of the Federal Constitution in force, the Congress of the United States, a body of men which at all times during the history of this government has had among its members many of the greatest constitutional lawyers of the day, had enacted legislation under which the President, *for nearly a century prior to the framing of our Constitution*, had been furnished a home, horses, carriages, servants, household equipment, and many other things incidental to and appropriate to his high office. These men must have known that such Federal legislation had never been questioned either as regards its propriety or its constitutionality. These men must have known that in practically every state in the Union (in many of which there were constitutional provisions similar to the one above referred to in the Federal Constitution and to the ones relied upon by defendant in this case) there had been legislative enactments making provisions for the several governors similar to those made by the Federal Congress for the President, as well as innumerable measures appropriating money to be paid other officers to recompense them for expenses incurred in the discharge of their L.R.A.1915E.

official duties. Is it possible for anyone to presume that these men, with all these facts in mind, intended, by the words used in our Constitution, to prohibit allowances for expenses incident to the discharge of public duties? Further light has since been thrown upon the construction given to the provision of the Federal Constitution above referred to by the act of June 23, 1906 (34 Stat. at L. 454, chap. 3523, Comp. Stat. 1913, § 225), which provides: That "hereafter there may be expended for or on account of the *traveling expenses* of the President of the United States such sum as Congress may from time to time appropriate, not exceeding \$25,000 per annum, such sum when appropriated to be expended in the discretion of the President and accounted for on his certificate solely."

Under appropriations thereafter made by Congress, Presidents Roosevelt and Taft received, and to-day President Wilson is receiving, thousands of dollars each year. So far as we know, it has never been suggested that the money so allowed was an "emolument," and therefore unconstitutional. No one has ever seen fit to accuse these Presidents of being grafters. The judges of the Federal courts, whose salaries are fixed by a law declaring that such salaries shall be the "compensation for their official services," draw from the United States Treasury a sum not exceeding \$10 per day when absent from the places of their residence. Act March 3, 1911, chap. 231, § 259, 36 Stat. at L. 1161, Comp. Stat. 1913, § 1236. This allowance is not given as an increase of *salary*, but to cover the expenses incident to their being away from home in the discharge of their duties.

Certainly, from the above, it should be clear that it is universally held that an allowance for expenses incident to the discharge of the duties of office is not an increase of salary, a perquisite, nor an emolument of office. Counsel for defendant practically concedes as much, because in his brief he says: "If the act of the legislature had merely provided that you should be reimbursed on account of actual traveling fees or other money which you expend for the state, other than your actual living, this would probably be valid; but such is not the case."

This brings us to a discussion of what we deem the only question upon the real merits of this case,—the allowance of a lump sum instead of an appropriation to reimburse for actual moneys expended and itemized. The Constitution of this state, as well as the Constitutions of nearly all the other states, contains no provision requiring the judges of the appellate court to reside at the capital. In many states the judges do not reside at

the capital; in one, at least, they are required to reside in the district from which elected. The territorial supreme court of Dakota territory was composed of the several district judges who held stated terms of appellate court at the capital, and were engaged at other times in the trial of cases in the several districts. The framers of our Constitution knew of these facts and undoubtedly intentionally so worded the Constitution as to allow the judges of this court to retain their actual, as they expressly allowed them to retain their legal, residences at their former homes. The Constitution merely requires that they hold two terms of court at the capital. It would therefore be entirely proper and legal for plaintiff to have retained his actual residence at Aberdeen, the place of his legal residence, just as many of the judges in other states live away from the capital. If the judges of this court continued to reside at the places of their legal residence, no question, under any authority, could be raised as to the constitutionality of a law which appropriated money to reimburse them for their actual expenses incident to their travel to and from, and for their hotel bills while at, the capital. Such an allowance would leave to the judges clear, as compensation for their official services, the salary provided by law, and no one could, and we apprehend no one would, say that they received perquisites or emoluments. In view of the number of trips that would have to be made to the capital and the number of days that would have to be spent there, it is clear that the aggregate of such expenses would be in excess of \$600 per year for each judge so living away from the capital. Let us suppose that the several judges of this court were living at the places of their legal residence, and the legislature were asked to enact legislation to reimburse them for their actual expenses incurred in going to and remaining at the capital, which expenses could, from their nature, be itemized. Is it possible that such legislature could not say to the judges of this court: "We believe that, owing to the fact that the duties of your office require your presence at the capital a considerable portion of the time, you can better discharge the duties of such office if you will reside at the capital; hence, in the furtherance of a sound public policy, we ask you to make your actual residence at the capital, and, in order that you may do so without financial loss to you, we will, in place of paying your expenses of traveling to and boarding at the capital, while living at your places of legal residence, allow you such a sum as will cover the extra expense incident to your moving to and living at the capital."

L.R.A.1915E.

Would not the allowance in the one case be as much an allowance for expenses, and in no sense a perquisite or emolument, as in the other? Certainly it would; the only difference being that in the one case the law could provide for the expenses to be itemized and the exact amount paid, while in the other, from the very nature of things, it would be necessary for the legislature to estimate the reasonable and probable amount of such expenses and appropriate a lump sum therefor. If the legislature could pass such a law to encourage the judges to move to the capital, for the same reasons it certainly could pass one where, prior thereto, the judges had voluntarily moved to the capital. This they did, and no one has ever claimed that the allowance made was greater than the amount of such expenses, or that it is greater than would be the expense incident to the judges coming to and remaining at the capital in the discharge of official duties if they lived at the places of their legal residences. The one allowance is just as clearly for expenses as would be the other, and is therefore as clearly permissible under the Constitution as the other. The legislature had the right, if deemed best as a matter of public policy, to enact the law which it did enact, provided it did not make the allowance greater than the expenses it was designed to cover; and it was for such legislature to determine a reasonable and proper amount. It is clear that the legislature did not intend, in the enactment of such legislation, to *increase the salaries* of the judges, or to grant them any *perquisites or emoluments* for the discharge of their duties, but only intended to assure them, in so far as possible, that for the performance of their official duties alone, and not for the performance of such duties and the payment of the expenses incident thereto, they should receive the salaries provided by law for the performance of such duties. The legislature had a right, in determining the advisability of this legislation, to take into account what would have been the probable allowance necessary to meet the expenses for which the judges would have been justly entitled to be reimbursed, if they had remained at their legal residences, and also to take into account the estimated amount of additional expense incident to moving to and living at the capital; so long as it has not exceeded either of these sums, there is left no ground to claim that it has increased their salaries. The mere fact that the legislature, in the exercise of its discretion, has seen fit to estimate, in advance, the amount of such expenses, and to limit the same to the sum of \$50 per month, does not transform the expense allowance into an increase of sal-

ary. The only purpose of the act was to enable the judges to retain for their own proper use, and for the support of their families, the salaries allowed them for their official services, instead of paying out such salaries for expenses that should properly be paid by the state.

A careful and, we believe, exhaustive examination of the decisions fails to disclose a single case in which it has ever been held that a legislative act, providing for an allowance, for expenses incurred in the discharge of official duties, to a public officer whose salary or compensation was fixed at a stated sum, was in violation of provisions such as are found in many state Constitutions, forbidding an increase of salary during official terms, or forbidding the granting of "fees," "perquisites," or "emoluments" to such officer. Legislative acts which directly in terms, or as construed, attempted to increase such salaries, have been held invalid. But no decision has been found, or, as we believe, can be found, which holds a legislative act to be unconstitutional which merely relieves an officer, who received a fixed salary or compensation, from expending such salary for expenses incident to the performance of his official duties. One question will be found running through all the decisions wherein courts have passed upon the validity of statutes providing allowances to public officers, to wit: Was the purpose of the legislature to increase the salary, or was its purpose merely to save such salary, so that the officer would, in fact, receive the whole thereof, for the performance of his official duties? Defendant's counsel, in his printed brief, says of the expense allowance given by the legislature to the members of this court: "The reason it is given is on account of the pitiable salary which is attached to your office. It is because members of the legislature realized this that they attempted to give you this."

Undoubtedly the legislature intended to permit the members of this court to retain and use, for the support of themselves and their families, the meager salaries attached to such office, instead of requiring them to expend it in traveling and other expenses. Not even the defendant claims that the legislature has done more than this.

The following cases illustrate the rule applicable to legislative acts relating to expense allowances:

The Constitution of the state of Wisconsin declared that the compensation of a public officer should not be increased or diminished during his term of office. Section 26, art. 4, Wis. Const. An act of the legislature of that state fixed the salary of circuit court judges, and provided that: "The L.R.A.1915E.

judges of the circuit courts [shall receive] \$3,000 each, and in addition thereto each judge shall receive the sum of \$400 per annum as and for his necessary expenses while in the discharge of his duties, such amount to be paid quarterly." Stat. 1898, § 170.

The supreme court held that this expense allowance was not a part of the salary or compensation of the judges, within the provision of their Constitution forbidding an increase of the compensation of a public officer during his term of office. *Milwaukee County v. Halsey*, 149 Wis. 82, 136 N. W. 139.

The Constitution of California (§ 9, art. 11) forbade an increase of the salary or compensation of any officer during his term of office. The supreme court of that state, in *Kirkwood v. Soto*, 87 Cal. 394, 25 Pac. 488, held that the constitutional inhibition applied only to the salary, and not to incidental expenses of the office. The court, in its opinion, says: "The words 'compensation' and 'salary' were evidently used synonymously in the Constitution and in the county government act;" and referred to the fact that the Constitution forbade an increase of the compensation of state or constitutional officers equally with county officers. The action before the court was to recover expenses of a county superintendent. The court said: "Since the adoption of the present Constitution, many acts have been passed by the legislature, after the commencement of terms of office, providing for the payment of necessary expenses incident to the offices."

The legislature of that state had passed an act making an allowance to the justices of the supreme court and the judges of the superior courts, for expenses incurred in going to and from their respective places of residence, upon the business of the court, or to attend its sessions. Referring to this act, the court says: "The constitutionality of these provisions has never been questioned, so far as we are advised, in any court, or elsewhere, and yet, if the theory of the appellant be true, they would seem to have been subject to the same objections raised here, during the terms of the justices and judges who were in office at the time the act was passed. The question now presented for decision does not appear to have been ever passed upon by the supreme court of this state, but a similar question was before the supreme court of Illinois in *Briscoe v. Clark County*, 95 Ill. 309. The Constitution of that state provided that the county board should fix the compensation of all county officers, with the amount of their necessary expenses, 'provided that the compensation of no officer shall be increased or diminished during his term of office.' The supreme court.

held that it was the salary of the county officer (*the compensation for the personal discharge of official duty*), which the board was forbidden to change, . . . " and not the expense allowance, saying: "In our opinion, it was the compensation for services to be rendered, and not the incidental expenses of the office, that the legislature was forbidden by § 9, art. 11, of the Constitution, to raise."

A review of decisions founded upon particular statutory provisions would extend this opinion to no useful purpose. It is sufficient to say that we have no doubt or hesitation as to our conclusions: (1) That it is not only the right, but the duty, of the judges of this court, not only under the rule of necessity, recognized by all the courts, but especially under the express provisions of our state Constitution, to take jurisdiction of and to decide this case regardless of any personal interest in the result thereof. (2) That chapter 239, Laws 1911, being what it clearly purports to be, a law providing for the expenses incident to the office of supreme judge, and therefore one which was intended to save to the judges their salaries, and not to increase such salaries, is constitutional. (3) That the voucher presented to and filed with the defendant on May 4, 1915, and upon which plaintiff based his demand for the expense warrant claimed, was and is in due and proper form. (4) That it was the clear and plain duty of the defendant to issue the warrant demanded by the plaintiff. (5) That the proper and only adequate remedy to enforce the performance of this ministerial act is the writ demanded by plaintiff.

Let judgment be entered accordingly.

McCoy, P. J., taking no part herein.

ARKANSAS SUPREME COURT.

B. S. PHILLIPS, Appt.,

v.

J. C. COLVIN.

(— Ark. —, 169 S. W. 316.)

Homestead — exemption — money loaned to retire purchase money notes.

1. Money loaned to retire purchase money

Note. — Homestead exemption as against claim for money loaned by third person to pay off existing purchase money obligations.

I. Scope, 875.

II. General rule, 876.

III. Rule that money borrowed to pay debt is not purchase money, 881.

IV. Miscellaneous, 882.

L.R.A.1915E.

notes of a homestead is not within the operation of a constitutional provision excepting purchase money from the homestead exemption.

Judgment — denying lien — conclusive against right of subrogation.

2. A judgment denying a lien upon land for money advanced to retire purchase money notes is conclusive against the right to claim subrogation to the lien of the vendor in a subsequent proceeding to establish an exemption for the land from an execution levied thereon.

(July 6, 1914.)

A PPEAL by plaintiff from an order of the Circuit Court for Columbia County denying a motion to quash the supersedeas obtained by defendant after judgment in plaintiff's favor, and the levying of an execution on certain land, in an action on a debt. Affirmed.

Statement by Hart, J.:

B. S. Phillips obtained judgment against J. C. Colvin in the circuit court in an action on debt for the sum of \$253.18. Subsequently an execution was issued upon the judgment and levied upon 47 acres of land belonging to Colvin. The latter, after giving due notice of his intention to do so, filed his schedule claiming said land as his homestead, thereby being exempt from execution. Upon the hearing the circuit clerk sustained the schedule and issued a supersedeas. Subsequently Phillips filed a motion in the circuit court to quash the supersedeas on the ground that the judgment upon which the execution was issued was for money loaned by Phillips to Colvin for the express purpose of paying the purchase price of the land levied upon, and that on that account the land was not exempt from execution as his homestead.

Colvin filed a plea of *res judicata*, in which he stated that Phillips had instituted an action against him in the chancery court to recover an amount of money which he alleged he had loaned Colvin for the purpose of paying the balance of the purchase money due on his homestead, and in his complaint asked that he be given a lien on the land comprising the homestead of Colvin for the amount sued for. The court sustained a demurrer to the complaint and

I. Scope.

This note excludes cases where the money was loaned at the time of the purchase, and it is not intended in general to include cases where the seller's deed was not delivered till the time of the loan, but a few of these latter cases may be cited. Cases of assignments or renewals of vendors' liens are not included.

dismissed it for want of equity. No appeal was taken from the decree rendered. The present case was submitted to the circuit court on an agreed statement of facts as follows:

The defendant, J. C. Colvin, purchased from H. A. Bryant, 47 acres of land situated in Columbia county, Arkansas, and Bryant executed to him a warranty deed therefor. The consideration recited in the deed was \$200, evidenced by two notes for \$100 each, due and payable some time thereafter, with interest at the rate of 10 per cent per annum. Colvin was unable to pay the purchase money when the notes became due, and he and Bryant and the plaintiff met together and Phillips loaned to Colvin the sum of \$213 for the purpose

of paying the purchase price of the land. Colvin at the same time paid the money to Bryant, and executed to Phillips his note for \$213, bearing interest at the rate of 10 per cent per annum. At the same time the note from Colvin to Bryant was destroyed. Colvin lived upon the land at the time he borrowed the money from Phillips, and claimed it as his homestead.

The court overruled the motion of Phillips to quash the supersedeas, and from the judgment rendered Phillips has appealed.

Messrs. W. H. Askew and George M. LeCroy, for appellant:

Money loaned by a third person to the original vendee purchaser, for the purpose of paying off the balance due on the pur-

Generally, as to the right of one advancing money for purchase price of property to be subrogated to vendor's lien, see the note to *Bell v. Bell*, 37 L.R.A. (N.S.) 1203.

As to whether money loaned to improve land is part of the purchase price within the rule that a purchase money lien takes priority over homestead rights, see the note to *City Sav. Bank v. Thompson*, 41 L.R.A. (N.S.) 89.

For right of one advancing money to pay off a lien for encumbrance upon security which proves defective, to be subrogated to such lien or encumbrance, see the notes to *Capen v. Garrison*, 5 L.R.A. (N.S.) 838; *Southern Cotton Oil Co. v. Napoleon Hill Cotton Co.* 46 L.R.A. (N.S.) 1049; and *Berry v. Stigall*, 50 L.R.A. (N.S.) 489.

For mortgage to secure money advanced to purchase property as a purchase money mortgage, see the note to *Marin v. Knox*, 40 L.R.A. (N.S.) 272.

It is usual, if not universal, either by Constitution or statute, to except, from homestead exemptions, the unpaid purchase money of the homestead, and, generally speaking, there seems no doubt that this exception extends to the original debt in the hands of an assignee.

The reader is referred to the above mentioned note to *Bell v. Bell*, 37 L.R.A. (N.S.) 1203, for the subject of subrogation to vendors' liens.

II. General rule.

Contrary to *PHILLIPS v. COLVIN*, it is the general rule that money lent to pay off debts incurred for purchase money may be considered as purchase money, and so superior to a homestead claim, provided the circumstances are sufficient. *Scott v. Land, Mortg. Invest. & Agency Co.* 127 Ala. 161, 28 So. 709; *Carr v. Caldwell*, 10 Cal. 380, 70 Am. Dec. 740; *Middlebrooks v. Warren*, 59 Ga. 230; *White v. Wheelan*, 71 Ga. 533; *McWilliams v. Bones*, 84 Ga. 203, 10 S. E. 724; *Moseley v. Bevins*, 91 Ky. 260, 15 S. W. 527, overruling *Griffin v. Proctor*, 14 Bush, 571; *Riley v. Filmore*, 4 Ky. L. Rep. 347; *Harrod v. Johnson*, 5 Ky. L. Rep. 247; L.R.A.1915E.

Andrews v. Kentucky Citizens' Bldg. & Loan Assn. 23 Ky. L. Rep. 2418, 67 S. W. 826; *Western Mortg. & Invest. Co. v. Ganzer*, 11 C. C. A. 371, 23 U. S. App. 608, 63 Fed. 647; *Hicks v. Morris*, 57 Tex. 658; *Texas Land & Loan Co. v. Blalock*, 76 Tex. 85, 13 S. W. 12; *Pridgen v. Warn*, 79 Tex. 588, 15 S. W. 559; *Mustain v. Stokes*, 90 Tex. 358, 38 S. W. 758; *Flynt v. Taylor*, 100 Tex. 60, 93 S. W. 423; *Wingate v. People's Bldg. & L. Sav. Assn.* 15 Tex. Civ. App. 416, 39 S. W. 999; *Dixon v. National Loan & Invest. Co.* — Tex. Civ. App. —, 40 S. W. 541; *Mergerle v. Felix*, 45 Tex. Civ. App. 55, 99 S. W. 709.

The circumstances have been held sufficient to prefer the lender to the homestead,—

—where the holders of land executed a mortgage to a lender who, at their request, paid the money to a third party who held a vendor's lien on the land and who released the lien, and it was claimed that the mortgage was improperly acknowledged and invalid, the land being homestead, *Scott v. Land, Mortg. Invest. & Agency Co.* 127 Ala. 161, 28 So. 709 (the court did not discuss the homestead statute);

—where money borrowed was to be applied to the payment of a decree of foreclosure of a mortgage for purchase money, and was to be secured by mortgage, and was so applied, and the same day a mortgage was given for the money borrowed, which was not joined in by the wife of the borrower, *Carr v. Caldwell*, 10 Cal. 380, 70 Am. Dec. 740;

—where money was borrowed and used to pay off a purchase money mortgage, the mortgage having reached a judgment before the payment was made, and a new mortgage being given to the lender specifying that it was given to remove the encumbrances of the judgment, *Middlebrooks v. Warren*, 59 Ga. 230;

—where money was borrowed for the purpose of paying off an obligation for purchase money of a homestead, and was so paid, and a note given for the money so borrowed, *White v. Wheelan*, 71 Ga. 533;

—where some of the money borrowed was

chase price of a homestead, and used for that purpose, is purchase money within the exception to § 3 of art. 9 of the Constitution.

Acruman v. Barnes, 66 Ark. 442, 74 Am. St. Rep. 104, 51 S. W. 319; *Allen v. Hawley*, 66 Ill. 164; *Hemrick v. People's Bank*, 54 Ga. 502; *Carr v. Caldwell*, 10 Cal. 385, 70 Am. Dec. 740; *Nichols v. Overacker*, 16 Kan. 54; *Waples, Homestead & Exemption*, 911; *Houlehan v. Ressler*, 73 Wis. 557, 41 N. W. 720; *White v. Wheelan*, 71 Ga. 533; *Middlebrooks v. Warren*, 59 Ga. 230; *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571; *Pratt v. Topeka Bank*, 12 Kan. 570; *Greeno v. Barnard*, 18 Kan. 521; *Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254; *Kelly v. Stephens*, 39 Ga. 466; *Pinchain v. Col-*

lard, 13 Tex. 333; *Hawks v. Hawks*, 46 Ga. 204; *Carey v. Boyle*, 53 Wis. 574, 11 N. W. 47.

Messrs. *Stevens & Stevens*, for appellee:

The money for which judgment was recovered was a loan. Being a loan there can be no lien.

Hardin v. Hooks, 72 Ark. 433, 81 S. W. 386; *Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254; *Carr v. Caldwell*, 10 Cal. 385, 70 Am. Dec. 740; *Carey v. Boyle*, 53 Wis. 581, 11 N. W. 47; *Acruman v. Barnes*, 66 Ark. 422, 74 Am. St. Rep. 104, 51 S. W. 319.

Hart, J., delivered the opinion of the court:

Counsel for the plaintiff, *Phillips*, in his

to pay outstanding obligations given for purchase money, and a mortgage was given stating that it was given for the purpose of paying off encumbrances, etc., some of such encumbrances being for purchase money, *McWilliams v. Bones*, 84 Ga. 203, 10 S. E. 724 (as to the amount of the obligations for the purchase money);

—where the debt is created by the owner of the land in order to pay off the purchase money by an agreement, the purpose and agreement being evidenced by the recitals of a mortgage executed at the same time, *Riley v. Filmore*, 4 Ky. L. Rep. 347, reported on abstract;

—where a mortgage is given for money, part of which was advanced to pay a note to the mortgagor's vendor, *Andrews v. Kentucky Citizens' Bldg. & Loan Asso.* 23 Ky. L. Rep. 2418, 67 S. W. 826 (to the extent of the note);

—where one pays off vendor's lien notes upon a homestead, upon an express written agreement of subrogation in the trust deed, *Western Mortg. & Invest. Co. v. Ganzler*, 11 C. C. A. 371, 23 U. S. App. 608, 63 Fed. 647 (Tex.);

—where, at the time money was borrowed on notes and a deed of trust, there was an outstanding vendor's lien for a smaller amount, which the lender saw was discharged before paying the balance of the money to the borrower, *Texas Land & Loan Co. v. Blalock*, 76 Tex. 85, 13 S. W. 12 (to extent of vendor's lien); see also to the same substantial effect *Pridgen v. Warn*, 79 Tex. 588, 15 S. W. 559;

—where the lender paid the amount of the loan to the holder of vendor's lien notes, at the instance and request of the landholder, in order to take up the vendor's lien notes, and it was understood at the time between the landholder and the lender that the lender should be secured by the same security held by the holder of the vendor's lien notes, *Mergele v. Felix*, 45 Tex. Civ. App. 55, 99 S. W. 709.

In *Lawson v. Pringle*, 98 N. C. 450, 4 S. E. 188, where an administrator sold land to a distributee of the estate, and there was a balance due from such distributee, and L.R.A.1915E.

at his request and promise to pay, the administrator made him a deed for the property and made out his administration account as if he had received the full purchase money of the land, it was held that the claim of the administrator, who thus became liable for the balance, was virtually that of an assignee, and was ahead of the purchaser's claim for homestead. The court said: "Most unquestionably the provision in the Constitution that 'no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises' (art. 10, § 2), does not relieve the land from liability to sale under execution for the residue of purchase money still owing by the debtor, and simply passing from the plaintiff in his capacity as administrator to himself personally."

It is difficult to reconcile with the foregoing case of *Carr v. Caldwell*, 10 Cal. 380, 70 Am. Dec. 740, the decision in *Perry v. Ross*, 104 Cal. 15, 43 Am. St. Rep. 66, 37 Pac. 757, where one entered upon land and filed a claim to homestead, and thereafter made a contract to buy it, and, being indebted for part of the purchase money, borrowed it from a third party and gave him a note and assigned the contract as security, and it was held that the third party had no lien against the homestead right in view of the statutory inhibition.

Other illustrations—Kentucky.

In *Moseley v. Bevins*, 91 Ky. 260, 15 S. W. 527, where the facts are not reported, the court answers in the affirmative the question "whether land occupied and claimed as a homestead, but bought on credit, can be made subject to payment of a debt not existing at the time, to the extent of purchase money paid after it was created," the statute providing that the homestead exemption "shall not apply to sales under execution, attachment, or judgment at the suit of creditors, if the debt or liability existed prior to the purchase of the land, or erection of improvements thereon." And the court overrules or disapproves the case of *Griffin v. Proctor*, 14 Bush, 571, as en-

brief, says that the sole question raised by this appeal is whether or not money loaned by a third person to the purchaser for the purpose of paying off the balance due on the purchase price of his homestead, and used for that purpose, is "purchase money" to such an extent as to come within the exception of § 3, art. 9, of our Constitution? The section of the Constitution in question provides that "the homestead of any resident of this state who is married or the head of a family shall not be subject to the lien of any judgment, or decree of any court or to sale under execution or other process thereon, except such as may be rendered for the purchase money or for specific liens."

In the case of *Acruman v. Barnes*, 66

Ark. 442, 74 Am. St. Rep. 104, 51 S. W. 319, Barnes borrowed from Acruman \$1,000 for the purpose of purchasing a homestead, and used it for that purpose, and the court held that money borrowed for the purpose of buying a home and so used is "purchase money" within the exception to article 9, § 3, of our Constitution.

In the present case the facts are essentially different. Colvin executed his notes to Bryant for the purchase money of the land which subsequently became his homestead. When the notes became due he was unable to pay them, and borrowed the money from Phillips for that purpose. This was a debt for borrowed money, loaned, it is true, to pay for the land, but it is still a debt for borrowed money. The money

abling the buyer to get a preference over money used to pay for the homestead.

In *Griffin v. Proctor*, supra, it was held that one in possession of property under a title bond, who made a mortgage to a person who lent him money wherewith he paid part of the purchase price of the property, his wife not joining, did not give a lien superior to the homestead, as this debt did not exist prior to the purchase of the land within the meaning of the statute.

It was held in *Harrod v. Johnson*, 5 Ky. L. Rep. 247, reported on abstract, that one who has paid off for another the notes executed by him for the purchase money of land is entitled to a lien on the land, which is not waived by taking a mortgage upon the land to further secure himself, unless such was the intention of the parties; nor can the vendee claim homestead as against such demand.

Where A sold land to B, giving him a bond for title and taking promissory notes from him which he assigned to C, who after a time accepted new notes with A thereon as surety for B, and took a mortgage from A and B on the land, and on the other land belonging to A, to secure their payment, in which B's wife did not join, the mortgage stating that the right to the land under the homestead law was waived and conveyed to C, and that the sum for which the notes were given was "the purchase money of the land that is set forth in this article," it was held that the debt existed prior to the purchase within the spirit of the statute, and that there was no waiver of the lien. *Bradley v. Curtis*, 79 Ky. 327.

In view of the other Kentucky cases, it is not easy to understand the decision (which cites no authority on the question) in *Kiesewetter v. Kress*, 24 Ky. L. Rep. 1239, 70 S. W. 1065, where a lender lent the owner of land money with which to finish paying for it, and the borrower executed a deed to the lender as security, and afterward the lender reconveyed the land to the borrower and received from him a note and mortgage, and it was held that the borrower's title, which he acquired long before the loan, was older than the debt, L.R.A.1915E.

and that the homestead right was superior to such debt.

—Texas.

In *Hicks v. Morris*, 57 Tex. 658, where land was about to be sold to satisfy a part of the purchase money thereon, the owner borrowed of a third party money to pay for the land upon the sale, and gave a note to the lender which recited that the note was executed for the purchase money, and executed a mortgage to secure the note. While it seems that the parties were not all present at the same time, the court considered that the transaction was an agreement, as was testified, to give a mortgage binding the land, and that the whole transaction would be construed as if done at the same time, and the lender was held to be superior to the homestead. The court disapproved *Malone v. Kaufman*, 38 Tex. 454, where, at the request of the purchaser, the lender advanced the money to take up purchase money notes, which were accordingly taken up and canceled, together with the deed of trust, and the borrower executed new notes to the lender, and he and his wife executed a deed of trust to secure him. It was held that the contract was not one for purchase money within the constitutional prohibition of a forced sale of a homestead except for purchase money, although the parties did intend to invest the new contract with the superior force of a vendor's lien.

Where the lender procures the money to pay off vendor's lien notes, and with it pays them off, the lender will be protected as against the homestead, and if the borrower claims that the balance of a mortgage given to secure the money was invalid, or that it was all invalid, he must first tender or pay the amount of the vendor's lien so repaid before he can recover the property or restrain the foreclosure. *Dixon v. National Loan & Invest. Co.* — Tex. Civ. App. —, 40 S. W. 541.

In *Wingate v. People's Bldg. & L. Sav. Asso.* 15 Tex. Civ. App. 416, 39 S. W. 999, it was held that deeds of trust, so far as

was loaned by Phillips to Colvin to pay a pre-existing debt created for the purpose of purchasing a homestead, and it was therefore a general loan. Phillips was not a party to the original transaction. This is the distinction made in the following cases: *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571; *Carey v. Boyle*, 53 Wis. 574, 11 N. W. 47; *Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254; *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537. In the latter case the court said: "It was insisted that the money to secure which this deed of trust was given was purchase money, and the premises, in any event, are liable to be sold for its satisfaction. If it were established that the money borrowed by appellant from appellee was paid to Redick

for the land, still it does not follow that it was purchase money. It appears that the premises were purchased of Redick, and the money for which this debt was incurred was paid on the last instalment due on the purchase. The statute, in declaring that the homestead right should not be claimed against a debt due for the purchase money, obviously used the language in its ordinary and popular signification. All persons understand the term 'purchase money' to mean the price agreed to be paid for the land, or the debt created by the purchase. It is not understood to mean a debt due another person than the vendor. In this case the debt was created for money loaned, and not for land purchased. Appellee sold no land to appellant, but he

they secured money borrowed and used in paying off a vendor's lien, protected the lender against the homestead to that extent.

In *Flynt v. Taylor*, 100 Tex. 60, 93 S. W. 423, it was held that a lender would be protected as against the homestead to the extent of vendors' liens for purchase money paid off by the lender, where land was encumbered with vendors' liens, and the owner, desiring to borrow enough money to pay them off, and considerably more on the land, entered into an arrangement whereby he conveyed the land to a relative, who made a note for the total amount of the loan to the lender, with a deed of trust upon the land, and afterward reconveyed the premises to his grantor, who assumed the payment of the note, the lender having, out of the money of the loan, paid off the vendors' liens.

In *McCarty v. Brackenridge*, 1 Tex. Civ. App. 170, 20 S. W. 997, it was held that A was entitled to be protected against the homestead, where it was agreed between A and B that B should buy certain premises which he desired, that he should temporarily pay for the same with money withdrawn from his business, that the deed should be made by his instructions to A, who, within thirty days thereafter, would hand B the amount of the purchase money in order that B might replace it in his business, and that he would hold a lien upon the land and reconvey to B when the money was repaid. In carrying out the transaction, however, the original grantor made a deed to B, who returned it, and then a new deed was made to A.

In *Mustain v. Stokes*, 90 Tex. 358, 38 S. W. 758, it was held that the lender was entitled to be preferred to the homestead, where the homestead was in the first place encumbered by a debt secured by a valid lien for purchase money, and the money was loaned to the defendants for the purpose of discharging that debt, which was in fact discharged with the moneys so loaned to the defendants,—who conveyed the land to the lender, who reconveyed it for the consideration of notes, the deed stating that a vendor's lien was retained. L.R.A.1915E.

One who pays off a vendor's lien note at the request of the debtor, and takes from the debtor a deed of the land, and then deeds back the land to the debtor, taking a new note from the debtor for an amount greater than the amount of the vendor's lien, is protected against the homestead as to the amount of the lien note which he had paid off, the deeds back and forth being simply a mortgage to secure him on the transaction for such vendor's lien and other matters. *Lennox v. Sanders*,—Tex. Civ. App.—, 54 S. W. 1076.

In *Clements v. Lacy*, 51 Tex. 150, it was held that if the purchase money for land had been advanced by a third party a deed by the purchaser to such third party, followed by a deed from such third party to the purchaser of a one-half interest, would leave the other half interest valid in the third party's hands as against the homestead.

Where the borrower applied part of the loan to the payment of a vendor's lien, his note and mortgage to the lender is to this extent superior to the homestead. *Pioneer Sav. & L. Co. v. Paschall*, 12 Tex. Civ. App. 613, 34 S. W. 1001, where the facts do not all appear, the court referring to *Hensel v. International Bldg. & L. Asso.* 85 Tex. 215, 20 S. W. 116, where substantially the same was held in a case where the deed to the borrower was not made until the lender paid the vendor the amount of his lien.

In *Eylar v. Eylar*, 60 Tex. 315, it was held that if land was conveyed to secure the grantee for money to be advanced by him to those who had liens on the homestead prior to the adoption of the Constitution of Texas then in force, the grantee would be subrogated to such sums as he had paid on account of these liens.

Circumstances held insufficient—money not used to pay off lien.

It has been held that where the money is not actually used to pay off the vendor's lien, the homestead is superior to the lender's right. Thus it was held that the lender had no lien against the homestead

loaned him money. It could not matter, in this indebtedness, whether the money was subsequently paid for the same or other property. There is nothing in the case which shows the relation of vendor and vendee between these parties, and this provision of the statute only applies to parties occupying that relation, or those representing them, and for a debt created by the purchase of the homestead."

It is not contended by counsel for the plaintiff that he is entitled to be subrogated to the rights of Bryant under the principles of law decided in the case of *Rodman v. Sanders*, 44 Ark. 504, or *Carr v. Caldwell*, 10 Cal. 385, 70 Am. Dec. 740, cited

in their brief. Even if this were a suit in equity and they made this contention, they could not successfully maintain it, for the reason that it was within the issue involved in the chancery suit instituted by the plaintiff against the defendant to have a lien declared on the land in question for the money loaned the defendant by the plaintiff. No appeal was taken from the judgment in that case, and the plea of *res judicata* of the defendant would be a bar to the right of the plaintiff for subrogation.

It follows that the judgment must be affirmed.

where, at the request of the landholder, he lent him money to pay off a vendor's lien upon his promise that he would pay it off with the money, and the landholder did not carry out the promise, but used the money for other purposes, and later paid off the vendor's lien. A note taken by the lender was later renewed and was sold to the plaintiff. The court said there could be no subrogation unless the money lent had been actually applied to the payment of the vendor's lien. *Kallman v. Ludeneker*, 9 Tex. Civ. App. 182, 28 S. W. 579.

—relying on other security than the land.

Where the lender takes and relies on other security than the land, he is not superior to the homestead. *Wilhelm v. Locklar*, 46 Fla. 575, 110 Am. St. Rep. 111, 35 So. 6; *Johnson County Sav. Bank v. Carroll*, 109 Iowa, 564, 78 N. W. 247, 80 N. W. 683, *infra*, III.; *Pridgen v. Warn*, 79 Tex. 588, 15 S. W. 559.

In *Wilhelm v. Locklar*, 46 Fla. 575, 110 Am. St. Rep. 111, 35 So. 6, where the owner of land borrowed money and with it paid off a purchase money note, the lender relying not on the security of the land, but on the indorsement of another party on the note, it was held that there was no lien on the homestead in favor of the lender under the provision of the Constitution that no property shall be exempt from the payment of obligations contracted for the purchase of said premises.

—no agreement for subrogation.

It has been held in some cases that the loan will not be superior to the homestead where no agreement for subrogation is shown. *Davis v. Davis*, 81 Vt. 259, 130 Am. St. Rep. 1035, 69 Atl. 876, where, at the request of the husband, a man paid off a purchase money mortgage on a homestead, taking a note and mortgage signed by the husband alone, it not being shown that there was any agreement to subrogate him. The statute provided that if the wife did not join in the execution of the conveyance, it should be inoperative to convey any right, title, or interest in such homestead, and the rights of the parties, and of all persons L.R.A.1915L.

claiming under them, or either of them, shall be and remain the same as if no deed had been executed.

See also *Johnson County Sav. Bank v. Carroll*, 109 Iowa, 564, 78 N. W. 247, 80 N. W. 683, *infra*, III.

But see generally cases cited *supra* in the early part of this section.

—miscellaneous.

Money borrowed to pay off part of the purchase price of property will not be superior to a homestead, in the absence of an agreement that the money would be so used. *Dreese v. Myers*, 52 Kan. 126, 39 Am. St. Rep. 336, 34 Pac. 349.

In *Burnap v. Cook*, 16 Iowa, 149, 85 Am. Dec. 507, it was held that the right of homestead was superior to a mortgage given as follows: The purchaser of land, having given notes for part of the purchase money, afterward became surety for a third party for a certain sum, and asking security, such third party procured such purchaser to be credited on the purchase notes the amount for which he was surety, and the purchaser gave a mortgage to the person indemnified for part of such indemnity, and it was held that the mortgage so given was not superior to the homestead right. (The indemnifying purchaser first joined the principal debtor in notes, and upon his asking for security, and it being arranged as aforesaid, these notes were given up and he paid part cash to the party indemnified, and gave that party a note and a mortgage for the balance.)

In *Howell v. Bush*, 54 Miss. 437, B bought land of A, giving cash and a trust deed and note to secure the balance, and B sold the property to C for the same amount, who gave him cash and a trust deed to secure notes, and D, at C's request, paid the first seller the amount unpaid, took up that note, and had the two trust deeds canceled (really being an agent for C in the transaction), and D, as was agreed, took a new note secured by a new deed of trust, in which C's wife did not join, and it was held that, as there was no intent to keep alive the old security, the homestead was ahead of the new mortgage, notwithstanding the stat-

ute provided that no property should be exempt from execution on a judgment for the purchase money. Distinguished as to a fraudulent act by an agent in *Dorrah v. Hill*, 73 Miss. 787, 32 L.R.A. 631, 19 So. 961, *infra*, IV.

In *Farmer v. Word*, 72 Ga. 16, it was held that there was no claim against the homestead within the provisions of the Constitution of 1877 and statutes, providing that the homestead set apart was, among other things, subject to levy and sale for the purchase money of the same, and likewise "for the removal of all encumbrances thereon," under the following circumstances: A, having sold the land to B, gave him a bond for title and took his note; B sold the land to C, gave him a new bond for title and took his notes, and assigned one of them to D. Thereafter, B canceled his contract with A, gave up his bond and took back his own note, and thereafter A and C entered into a contract for the land, A giving C a bond for title and taking C's note; meantime, the outstanding note of C, which had been assigned to D, was put in judgment, and it was held that this judgment was no claim against the homestead, which had been laid out by C after he had paid A something upon the purchase, as B never had any lien.

III. Rule that money borrowed to pay debt is not purchase money.

It will be observed that in *PHILLIPS v. COLVIN*, the subrogation was denied on the ground that the money borrowed to pay purchase money was not purchase money, and not on the ground that no specific lien was given to the lender.

In some jurisdictions it is held that money borrowed to pay off a debt for purchase money is not purchase money, and therefore is not as such superior to homestead. *PHILLIPS v. COLVIN*; *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537 (probably not necessary to decision); *Winslow v. Noble*, 101 Ill. 194 (*obiter*); *Lear v. Hefner*, 28 La. Ann. 829; *Loftis v. Loftis*, 94 Tenn. 232, 28 S. W. 1091; *Bradshaw v. Van Valkenburg*, 97 Tenn. 316, 37 S. W. 88.

In *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537, the court observed, the matter not being necessary to the decision, if indeed it was in point, that money borrowed to pay the last instalment of the purchase price was not purchase money under the statute declaring that the homestead right should not be claimed against a debt due for the purchase money, as the statute obviously used the language in its ordinary and proper signification. It may be noted that it does not appear whether this loan was made at the time of the purchase or afterward.

In *Lear v. Hefner*, 28 La. Ann. 829, it was held that one who had advanced money from time to time by which the cash and deferred payments on property were paid, and who was secured by special mortgage, was not to be preferred to the homestead L.R.A.1915E.

right, as such lender was not a vendor nor did she acquire her rights from the vendor, the statute providing that "no property shall, by virtue of this act, be exempt . . . for debt contracted for the purchase price of said exempted property."

In *Bradshaw v. Van Valkenburg*, 97 Tenn. 316, 37 S. W. 88, it was held that one paying off purchase money is not subrogated to the rights of vendor, and that, if he secure himself by mortgage, his rights will depend on the mortgage, and not on the original transaction.

In *Loftis v. Loftis*, 94 Tenn. 232, 28 S. W. 1091, it was held that money borrowed from a third person and secured by mortgage in which the wife did not join was not a debt for purchase money, so as to be superior to the homestead. It does not seem clear whether the money borrowed was used at the time of the original purchase, or later to pay off a part of the purchase money debt. The court overruled *Guinn v. Spurgin*, 1 Lea, 228.

In the *Guinn* Case the original deed was not executed until the money borrowed had been paid to the seller, that is to say, it seems that the money was paid at two different times, and that on the second occasion the parties all met together and the papers were signed, the buyer then giving a deed of trust to the lender; and it was held that the money lent was a debt contracted for the purchase money within the Constitution.

Reference should be made in this connection to *Johnson County Sav. Bank v. Carroll*, 109 Iowa, 564, 78 N. W. 247, 80 N. W. 683, where the purchaser of property entered under a contract, and the court held that his homestead right had attached before he borrowed money with which he paid the balance of the purchase price, for which he gave other security as well as his note. It was held that the homestead was superior to the lender's claim, first, because it was not shown that it was any part of the arrangement or agreement that the money should be used for the purchase, and because there was other security for the loan; second, because the statute provided that the homestead was exempt from judicial sale "when there is no special declaration of statute to the contrary," and the only statutory provisions were that a homestead should be liable to mechanics' liens, and that it might be sold for debts created by written contract executed by those persons invested with power to convey, when the contract expressly stipulates that it is liable, as well as for debts antedating its purchase.

It has been held, however, in some cases that where the seller's deed is given at the time of the loan, the rule is otherwise. *Farnsworth v. Hoover*, 66 Ark. 367, 50 S. W. 865; *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571; see also *Guinn v. Spurgin*, *supra*, now it seems overruled; see *Loftis v. Loftis*, *supra*.

In *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571, where the purchaser, being to-

tally unable to complete his purchase of property on which he had a bond for title, induced a third party to pay the money due on the purchase to the seller, and promised him that when he got a deed he would give him a mortgage to secure him, and the money was so paid, but the purchaser declined to give the mortgage, it was held that the lender's right was superior to the purchaser's right of homestead, as this was not the payment of a pre-existing debt, but was actually payment for the land. It incidentally appears that some of the purchase money must have been paid beforehand. The court distinguishes the *Eyster Case*, 50 Ill. 521, 99 Am. Dec. 537.

Where those in possession of land held it under a contract of title, and before they could get a deed it was necessary that mortgages be paid off, and a third party advanced the money so that the deed could be made and the mortgages paid off, he buying one of them, and the landholders made a new mortgage to the lender in which the wife did not join, it was held that the lender was entitled to the lien of the earlier mortgages as against the homestead, as the matter was simultaneous, and the advance was for the purchase money, the statute providing that "no conveyance, mortgage or other instrument affecting the homestead of any married man shall be of any validity, except for taxes, laborers' and mechanics' liens, and the purchase money, unless his wife joins in the execution of such instrument and acknowledges the same." *Farnsworth v. Hoover*, 66 Ark. 367, 50 S. W. 865.

The owner of the homestead was required to do equity in *Winslow v. Noble*, 101 Ill. 194, where a landowner induced a third party to lend the money to pay off a purchase money mortgage, and take a new mortgage, which he did, the new mortgage being defective in acknowledgment; and while it was held that the homestead was ahead of the new mortgage as the money advanced was a mere loan, and not purchase money, it was also held that where the new mortgagee had foreclosed his mortgage and bid off the property, and the original purchaser induced another party to take an assignment of the certificate of purchase and to pay the assignor substantially the amount due upon it, and also to pay some \$400 balance to the original purchaser, the latter would not be permitted to come into equity and set the transaction aside without repaying to the party that he had induced to take the certificate the amount received by him from such party and also the amount which such party had paid at his inducement to the holder of the certificate, particularly where he had knowledge of the ownership of such assignee by taking a lease from him, as it would be considered that he had abandoned his right to homestead.

IV. Miscellaneous.

In *Dorrah v. Hill*, 73 Miss. 787, 32 L.R.A. L.R.A.1915E.

631, 19 So. 961, an agent made a loan for his principal, taking a deed of trust in which the wife of the debtor did not join, but instead of paying the money over to the debtor, he applied it partly on a debt due to the principal and partly on a debt due to himself, secured by a valid deed of trust which he had canceled. It was held that the court would restore such canceled deed of trust and subrogate his principal to rights under it, as against the homestead, it having been given apparently for the original purchase price of land sold by him individually. The court considered that *Howell v. Bush*, 54 Miss. 437, supra II., did not apply to a case where the agent had acted as he had in this case without the knowledge of the principal, and that such act amounted to a fraud upon his principal.

In *Berry v. Bullock*, 81 Miss. 463, 33 So. 410, it was held that a mere volunteer lending money knowing that it was to be paid to the holder of a trust deed on land, but with the sole and verbal agreement that the owner was to give the lender a new trust deed on the same land to secure it, which new trust deed was never given, cannot be subrogated to the rights under the old trust deed as against the homestead in the land. It does not appear what the original mortgage was given for.

In *Calmes v. McCracken*, 8 S. C. 87, where money was borrowed to pay off a purchase money mortgage, and a note and mortgage were given for the loan, the note expressing the consideration to be an amount of money received as a loan "which was applied to the payment of the purchase money on lands purchased by me," it was held that this loan and mortgage, while not superior to the wife's dower, were superior to her claim of homestead, upon the theory that the husband had a right to mortgage a homestead, at least one that had not been set apart.

It is not intended to include cases where deeds were made direct from seller to lender. See *Hamrick v. People's Bank*, 54 Ga. 502; *Clark v. Burke*, — Tex. Civ. App. —, 39 S. W. 306; *Investors' Mortg. Security Co. v. Loyd*, 11 Tex. Civ. App. 449, 33 S. W. 750; *Parker v. Bushong*, — Tex. Civ. App. —, 143 S. W. 281.

It may be noted that in *Amick v. Amick*, 59 S. C. 70, 37 S. E. 39, it does not appear that the money was lent subsequently to the original purchase. B. B. B.

KANSAS SUPREME COURT.

HUGH A. LEMMON

v.

W. EUGENE KING, Appt.

(95 Kan. 524, 148 Pac. 750.)

False imprisonment — Liability of informer.

One who in good faith reports to a po-

Headnote by MASON, J.

lice officer the violation of a city ordinance, and at the same time asks that the violator be arrested, but does not assume to say what steps shall be taken to that end, is not thereby rendered liable for damages because the arrest is made without the issuance of a warrant.

(May 8, 1915.)

APPEAL by defendant from a judgment of the District Court for Wyandotte County, in plaintiff's favor, in an action brought to recover damages for an alleged assault and battery and for false imprisonment. Reversed.

The facts are stated in the opinion.

Note. — *False imprisonment: liability of private complainant or informer for an arrest by an officer without a warrant.*

As to liability of an officer for making an arrest without a warrant, see notes to Leger v. Warren, 51 L.R.A. 193; Lawton v. Harkins, 42 L.R.A.(N.S.) 71; and Brown v. Hadwin, L.R.A.1915B, 505.

As to lack of jurisdiction or of legal grounds of criminal prosecution as affecting the liability for false imprisonment of a complainant who acts in good faith, see note to Gifford v. Wiggins, 18 L.R.A. 356.

As to liability of carrier for wrongful arrest of passenger, caused by servant, see notes to Schmidt v. New Orleans R. Co. 7 L.R.A.(N.S.) 162, and Moore v. Louisiana & A. R. Co. 34 L.R.A.(N.S.) 299.

For burden of proof as to authority for arrest in action for false imprisonment, see note to McAleer v. Good, 10 L.R.A.(N.S.) 303.

There seem to be three alternative lines of defense to a complainant or informer sued for false imprisonment where the arrest was made by an officer without a warrant. He may, as in *LEMMON v. KING*, avoid liability notwithstanding that the act of the officer in making the arrest without a warrant was illegal, if in the circumstances he cannot be deemed to have directed or requested an arrest without a warrant. If, however, in view of the circumstances, he must be deemed to have contemplated an arrest without a warrant, it would seem, in case of an arrest for a felony, that he might avoid liability if the officer who made the arrest had reasonable grounds to believe that a felony had been committed, and that the person arrested was guilty thereof, since in that case the arrest by the officer without a warrant would be justified. Probably, however, that defense would not be available if the defendant was aware of facts which, if known to the officer, would have destroyed his justification for the arrest without a warrant. A third line of defense in the case of an arrest without a warrant for a felony would be the actual guilt of the person arrested, if that L.R.A.1915E.

Messrs. T. A. Witten and Junius W. Jenkins, for appellant:

Under the facts, defendant could not be liable for false imprisonment, and the court should not have submitted that issue to the jury.

12 Am. & Eng. Enc. Law, 757, 758; Benham v. Vernon, 5 Mackey, 18; Burns v. Erben, 1 Robt. 555; Rich v. McInerny, 103 Ala. 345, 49 Am. St. Rep. 32, 15 So. 603; Lark v. Bande, 4 Mo. App. 186; White v. Shradski, 36 Mo. App. 640; Bierwith v. Pieronnet, 65 Mo. App. 431.

The instruction in regard to the arrest and imprisonment was inapplicable, misleading, and prejudicial to defendant, and therefore erroneous.

could be established, or possibly reasonable grounds for believing him guilty.

Generally a private person who causes or directs the arrest of another by an officer without a warrant may be held liable for false imprisonment, in the absence of justification. Park v. Taylor, 55 C. C. A. 56, 118 Fed. 34; Pearce v. Needham, 37 Ill. App. 90; Veneman v. Jones, 118 Ind. 41, 10 Am. St. Rep. 100, 20 N. E. 644; Benham v. Vernon, 5 Mackey, 18; Palmer v. Maine C. R. Co. 92 Me. 399, 44 L.R.A. 673, 69 Am. St. Rep. 513, 42 Atl. 800; Wehmeyer v. Mulvihill, 150 Mo. App. 197, 130 S. W. 681; Taafe v. Slevin, 11 Mo. App. 507; Pandjiris v. Hartman, 196 Mo. 539, 94 S. W. 270; Ball v. Horrigan, 65 Hun, 621, 47 N. Y. S. R. 384, 19 N. Y. Supp. 913; Parke v. Fellman, 145 App. Div. 836, 130 N. Y. Supp. 361; Burns v. Erben, 40 N. Y. 463; Thompson v. Fisk, 50 App. Div. 71, 63 N. Y. Supp. 352; Grinnell v. Weston, 95 App. Div. 454, 88 N. Y. Supp. 781; Farnam v. Feeley, 56 N. Y. 451; Thorne v. Turck, 94 N. Y. 90, 46 Am. Rep. 126; Carson v. Dessau, 142 N. Y. 445, 37 N. E. 493; McGarrahan v. Lavers, 15 R. I. 302, 3 Atl. 592.

So, where a private person causes the arrest of an innocent person without a warrant, he is liable in damages, notwithstanding he had reasonable cause to believe such person guilty, acted without malice, and took the advice of counsel; the court stating that the only plea of justification or excuse is that plaintiff was guilty of the crime for which he was arrested. Pandjiris v. Hartman, 196 Mo. 539, 94 S. W. 270.

So, a private individual who has procured the arrest of an innocent person for a misdemeanor by an officer without a warrant cannot justify by showing that he acted in good faith, without malice, and upon a belief of guilt founded upon reasonable grounds. Palmer v. Maine C. R. Co. 92 Me. 399, 44 L.R.A. 673, 69 Am. St. Rep. 513, 42 Atl. 800.

So, where an officer makes an arrest at the direction of another without either a warrant or reasonable grounds of suspicion, for an offense not committed in his presence, the only matter of justification which may be shown in defense of an action

Missouri P. R. Co. v. Pierce, 33 Kan. 61, 5 Pac. 378; State Sav. Asso. v. Hunt, 17 Kan. 532; Hazeltine v. Edgmand, 35 Kan. 202, 57 Am. Rep. 157, 10 Pac. 544.

Mr. A. J. Herrod, for appellee:

Where defendant, by his acts and language, encouraged and promoted the unlawful arrest of plaintiff, he was responsible for the consequences thereof, as though made at his instance.

Joske v. Irvine, — Tex. Civ. App. —, 43 S. W. 278.

One may be liable for an arrest if it is made at his instance and with his knowledge and consent, although he does not expressly direct the officers to make it.

McAleer v. Good, 216 Pa. 473, 10 L.R.A.

(N.S.) 303, 116 Am. St. Rep. 782, 65 Atl. 934.

One who directs officers to make an arrest when no crime has been committed renders himself liable therefor.

McMorris v. Howell, 89 App. Div. 272, 85 N. Y. Supp. 1018; Burk v. Howley, 179 Pa. 539, 57 Am. St. Rep. 607, 36 Atl. 327.

One who causes an unlawful detention through another is as responsible in law to the person injured as though he personally committed the wrong.

19 Cyc. 327; Hynes v. Jungren, 8 Kan. 391.

The instruction showing that plaintiff suffered injury, both mental and physical, suffered many indignities, and experienced

for the arrest and false imprisonment is that the person arrested was actually guilty of an offense. Wehmeyer v. Mulvihill, 150 Mo. App. 197, 130 S. W. 681.

The fact that plaintiff was about to leave the state with a check, in violation of a contract, and that the arrest without a warrant was made for the purpose of securing the check, was in Park v. Taylor, 55 C. C. A. 56, 118 Fed. 34, held no defense to an action for false imprisonment.

It is stated in Grinnell v. Weston, 95 App. Div. 454, 88 N. Y. Supp. 781, that if a private individual identifies a person as one who has been guilty of a crime, and requires a police officer to arrest him without a warrant, the arrest is the joint act of the private individual and the police officer, and if the arrest is unwarranted and illegal, both the police officer and the private individual are joint tortfeasors, and both are liable for the wrong. The fact that the officer, acting under the information given to him by the individual, is the one that takes the physical possession of the person arrested, does not relieve the private individual from responsibility. Both the individual and the officer united in the act, and are both responsible for the arrest if unlawful. While the officer may prove a justification by showing that a felony had been committed, and that he acted upon the statement made to him by the instigator, and had reasonable cause to believe that the person arrested was guilty of the felony, the person instigating the arrest and who was jointly responsible with the police officer for it, to justify himself must show that a felony had been committed, and that the person arrested was connected with it, or at least that he acted upon grounds which would justify a prudent person in believing that the person arrested was guilty.

In Grimes v. Greenblatt, 47 Colo. 495, 107 Pac. 1111, 19 Ann. Cas. 608, defendant lost certain copper wire by theft. He visited a junk shop with officers and found wire that had been purchased which he claims was his. The plaintiff (dealer) objected to the officers taking the wire, claiming that he did not know that the wire belonged to defendant, and that he would hold the wire until its identity was established. Thereupon L.R.A.1915E.

on the officers arrested him without a warrant. It was held that, under the circumstances of the case, the defendant and officers who personally arrested and placed plaintiff in jail were to be treated as joint wrongdoers, and the plaintiff was at liberty to look to either or all for indemnity.

In McGarrahan v. Lavers, 15 R. I. 302, 3 Atl. 592, plaintiff ordered a rare steak at a restaurant. The waiter brought him one which was well done, which the plaintiff refused to take. He repeated his order, and the waiter brought him another steak, which was rare, and which he accepted and offered to pay for, but refused to pay for the one which was well done. The defendant, a clerk having charge of the restaurant, directed an officer to take the plaintiff into custody. The officer obeyed, and took the plaintiff to the police station, from which he was removed to the jail. On trial for the offense he was acquitted. The defendant was held responsible for the wrongful imprisonment directed or authorized by him.

Where a debtor at the instance of his creditor was arrested without legal process of any kind and held in restraint by an officer until he made a payment on the debt, he had a right of action against the creditor for the false arrest. Foor v. Coombs, 15 Ky. L. Rep. 845 (abstract).

Generally, where a private person induces an officer to arrest another without a warrant, and without an offense having been committed in the view of the officer, he will be liable for false imprisonment unless he justifies by showing that the charge was well founded.

Thus, no arrest can be made in the state of Michigan unless by warrant upon complaint duly made, or by an officer or bystander who actually sees the offense which constitutes the misdemeanor. Consequently where one not an eyewitness causes an officer to arrest a person for committing a misdemeanor, namely, damaging a guy post erected in front of his premises, the person causing such arrest is liable in damages. Ross v. Leggett, 61 Mich. 445, 1 Am. St. Rep. 608, 28 N. W. 695.

Where defendant procured plaintiff's arrest without a warrant, for a misdemeanor,

considerable sense of shame and humiliation, was proper.

Zimmerman v. Knox, 34 Kan. 252, 8 Pac. 104; 2 Enc. Pl. & Pr. 164; *Mercer v. Morrison*, 83 Kan. 489, 112 Pac. 106; *Seidler v. Burns*, 84 Conn. 111, 33 L.R.A. (N.S.) 291, 79 Atl. 53.

Mason, J., delivered the opinion of the court:

Hugh A. Lemmon brought an action against W. Eugene King for damages resulting from an assault and battery and false imprisonment. He recovered a judgment for \$500, and the defendant appeals.

The defendant was the president of a lumber company. According to his story, he

visited the yard office one Sunday afternoon and found his son and the plaintiff there, both of whom were employees of the company. The plaintiff was drinking liquor out of a quart bottle, which he immediately hid. The defendant asked what he was doing there, and on receiving an insulting reply said he didn't want him drinking and carousing there, and ordered him from the place. The plaintiff left, but, meeting the defendant on the sidewalk, threatened to shoot him, using abusive language, accompanied by obscenity and profanity. The defendant drove to the police station in his automobile and reported the occurrence. An officer accompanied him back to the office, and, finding the plaintiff drunk and abusive,

it was stated in *Taaffe v. Slevin*, 11 Mo. App. 507, that, in the absence of evidence of a misdemeanor committed in the presence of the officer, defendant, to justify himself, was bound to show that the charge which led to the arrest was well founded; that if he failed to do this, he was liable for an action in the nature of trespass for false imprisonment. The court, citing *Griffin v. Coleman*, 4 Hurlst. & N. 265, 28 L. J. Exch. N. S. 134, further stated that a constable cannot arrest merely because he is told that a misdemeanor has been committed; and everyone who takes part in an unlawful imprisonment acts at his peril. If the arrest in this case had been made by the officer, of his own motion, then the case would have been within the ruling of this court in *Lark v. Bande*, 4 Mo. App. 186. The court also said that if the plaintiff had, in the presence of the officer, committed a breach of the peace or other misdemeanor, and the officer had arrested her for that offense, it would have been a matter of indifference that defendant directed the officer to do what it was his duty to do without any such direction.

A charge that the defendant incited or induced an officer to arrest plaintiff by representing that he was violating a city ordinance, and by demanding of the officer that he arrest plaintiff, is fully justified by answering that the plaintiff was, at the time of his arrest, actually violating a city ordinance in the view and presence of the officer who made the arrest without a warrant. *Veneman v. Jones*, 118 Ind. 41, 10 Am. St. Rep. 100, 20 N. E. 644.

Where one procured the arrest of a servant without a warrant on a charge of having stolen certain jewelry, it was held in *Thompson v. Fisk*, 50 App. Div. 71, 63 N. Y. Supp. 352, that since the felony had in fact been committed, plaintiff's arrest was lawful under statute, provided the detective, who apparently was a peace officer, had reasonable ground to believe that the plaintiff had committed the felony; and whether he had reasonable ground for that belief was a question of fact for the determination of the jury.

L.R.A.1915E.

But one who merely states to an officer what he knows of a supposed offense, even though he expresses the opinion that there is ground for an arrest, but without making any charge or requesting an arrest, does not thereby make himself liable for false imprisonment.

Thus, as stated in *LEMMON v. KING*, where a citizen makes a truthful statement to an officer of facts justifying an arrest, the mere fact that he asks that the law be enforced, without assuming to declare the precise procedure, should not make him liable in damages because the formality of procuring a warrant is not observed.

So, where one goes before a magistrate to make a complaint, accompanied by counsel, expecting to make complaint in writing, and that a warrant will issue in the usual way, and is in no manner at fault that it does not issue, he cannot be held liable for the act of the magistrate in directing the arrest of the plaintiff without a warrant. *Poupard v. Dumas*, 105 Mich. 326, 63 N. W. 301.

So, one is not responsible for false imprisonment where he did not counsel or direct the arrest, but the officer acted upon his own responsibility, defendant doing nothing beyond answering an inquiry made of him when plaintiff and the officer came to his store. *Farnam v. Feeley*, 56 N. Y. 451; *Limbeck v. Gerry*, 15 Misc. 663, 39 N. Y. Supp. 95; *Hopkins v. Crowe*, 7 Car. & P. 373.

So, one cannot be held liable for false imprisonment where he merely told an officer of his suspicion that certain servants had stolen jewelry, and the officer, acting on his own initiative, made an arrest. *Scheurmann v. Vaccaro*, 118 La. 67, 42 So. 648.

So, one who charges another with crime is not liable for false imprisonment on account of an arrest made by an officer without any request from him, and when the person arrested sent for the officer for the express purpose of having the accusation repeated in his presence. *Shinglemeyer v. Wright*, 50 L.R.A. 129.

J. D. C.

arrested him and took him to the station. This version of the affair was in part corroborated by the defendant's wife, by the officer making the arrest, and by other witnesses, one of whom testified that the plaintiff had quit work that morning because he was intoxicated. The sergeant of police in charge of the station testified that when Lemmon was brought in he was drunk and very boisterous and abusive; that he was booked as drunk and disturbing the peace; that he was not locked up, but held until he gave a bond of \$10 for his appearance the next morning.

The plaintiff testified that he had taken one drink of whisky on the morning of the day on which he was arrested, from a quart bottle belonging to himself and the defendant's son; that they also had a beer bottle containing diluted Jamaica ginger, from which they had been drinking; that his conduct toward the defendant had been inoffensive; but that the defendant had forcibly ejected him from the office and caused his arrest. The arrest was made without a warrant. Lemmon was detained at the station from half to three quarters of an hour. He appeared the next morning, and the case was dismissed. The city ordinances provide a fine for disturbance of the peace by the use of profane or obscene language, and authorize the arrest of anyone found so intoxicated "as not to be able to take care of himself, or annoying or endangering the safety of others."

The jury found for the plaintiff on both counts, but fixed the recovery at a lump sum; the items of damage, or the amount allowed on each count, not being shown. The verdict necessarily implies findings that the defendant assaulted the plaintiff, either directly, or by using more force than was necessary in putting him out of the office; that the plaintiff at the time he was arrested was not drunk, and was not disturbing the peace.

A reversal is asked on the ground that the defendant could not be liable for the arrest, conceding it to have been wrongful, unless he requested or directed it, and that there was no evidence at all to that effect. The contention fails because, while there was much testimony that the defendant merely reported the facts, and that the officer acted only on his own initiative, or by the direction of his superior, there was some to the contrary. The plaintiff testified: "That he waited there till the officer came with defendant in defendant's automobile, and the defendant said: 'There is the son of a bitch; go get him.'"

Another witness returned an affirmative answer to the question: "Before he arrested him or at any time, didn't Dr. King [the

defendant] say: 'Take him down to the station?'"

And the evidence as to what took place on the defendant's visit to the police station might possibly be regarded as showing what was, in effect, a request for the arrest.

In an instruction, after stating that the plaintiff claimed that the defendant had caused his wrongful arrest, the court added: "The defendant in his answer alleges that the plaintiff was drunk and disturbing the peace at the time he was arrested."

The defendant maintains that this statement was prejudicial to him, because it led the jury to suppose that his defense was based wholly on an attempt to justify the arrest, whereas his answer included a general denial, and he at all times contended that he was not responsible for the officer's act; this being made clear in the preliminary statement made to the jury in his behalf. The instruction in question concluded with these words: "If you find from the evidence that the plaintiff at the time he was arrested by Officer Ryan was not drunk, and was not disturbing the peace, and that he was arrested at the solicitation and request of the defendant by said officer, without a warrant, then you are instructed that the plaintiff would be entitled to recover upon his second cause of action."

This accords with the statement sometimes made that, inasmuch as an arrest made by an officer without a warrant, for an offense less than a felony, not committed in his presence, is illegal, one who requests it is liable as a participant in the wrongful act. However true that may be as a general rule, the instruction quoted was not sufficient to give full protection to the defendant in the present instance, for these reasons: The jury may have found that the defendant's assault upon him was hardly more than nominal, involving the use of no more force than necessary in doing a lawful act; that the plaintiff was guilty of disturbing the peace by violent and indecent abuse of the defendant in the presence of his wife and daughter-in-law; that the defendant reported the fact to the police, and asked that the plaintiff be arrested, meaning that this should be done in accordance with whatever formality the law might require; that the public officers, acting upon their own judgment, upon the real facts in the case as accurately reported to them, made the arrest without a warrant, or that an officer sent to investigate the matter arrested the plaintiff on his own judgment, for what had been done in his presence, although, in fact, the plaintiff was not then disturbing the peace, and was not then so intoxicated, according to the legal standard, as to jus-

tify his arrest on that account, and that he was detained at the station because his condition then exceeded the legal limit; and yet, acting upon this instruction, the jury, notwithstanding these findings, may have awarded \$500 damages to the plaintiff because the defendant requested the arrest, and it was made without a warrant, and without a public offense having been committed in the presence of the officer. A judgment which may rest on such foundation ought not to stand.

Assuming that no offense was committed in the presence of the officer, the instruction referred to makes the case turn on whether the arrest was made "at the solicitation and request" of the defendant. The phrase quoted would doubtless ordinarily be regarded as the equivalent of "because of the solicitation and request." But, in view of the fact that the defendant's position had just been stated as being that the arrest was justifiable, there is room to suppose the jury may have understood the court to mean that, if the defendant requested the arrest, and it was wrongfully made, the plaintiff was entitled to recover. In such circumstances as those here presented it may well be said that "the fact that the defendant commanded the police officers to arrest the plaintiff cannot entitle the latter to recover of the former, unless the arrest was in consequence of such command." *Rich v. McNerny*, 103 Ala. 345, 15 So. 663, 49 Am. St. Rep. 32, headnote.

The general verdict, in view of the instruction quoted, implies a finding that the defendant requested the arrest of the plaintiff, but it does not necessarily imply that the request was made just before the plaintiff was taken into custody. The plaintiff testified that such was the case, but the defendant denied this. The jury may have found that what the defendant said on his visit to the police station amounted to a request for the plaintiff's arrest. It is said that "in order to avoid liability, the person so causing an arrest [unauthorized by law] must, before he puts the law into motion, see that the process is properly procured." 19 Cyc. 332.

But most of the cases in which this rule has been applied involve either arrests upon civil process or the use of criminal process to enforce the payment of a debt or for some similar purpose. Obviously, one who in good faith invokes the action of public officers on account of a violation of the criminal law to which he calls their attention is entitled to more liberal treatment in this regard than is one who seeks to bring about an arrest for his private advantage.

It is said that "the person making the complaint upon which the warrant issues L.R.A.1915F.

is not liable if he states the facts to the magistrate, even though such facts do not authorize the issuance of a warrant." Note in 67 Am. St. Rep. 411.

By analogy it would seem that, where a citizen makes a truthful statement to an officer of facts justifying an arrest, the mere fact that he asks that the law be enforced, without assuming to declare the precise procedure, should not make him liable in damages because the formality of procuring a warrant is not observed. In *Taaffe v. Slevin*, 11 Mo. App. 507, 514, an action for false imprisonment, it was said that "in the absence of evidence of a misdemeanor committed in the presence of the officer, defendant, to justify himself, was bound to show that the charge which led to the arrest was well founded," implying that proof of the plaintiff's guilt would constitute a defense. Substantially this language was repeated in *Veneman v. Jones*, 118 Ind. 41, 10 Am. St. Rep. 100, 20 N. E. 644, where the court explicitly held that, in an action against a private person for causing the arrest of the plaintiff without a warrant, for the violation of a city ordinance, not committed in view of an officer, an allegation that the charge was well founded stated a good defense.

If the plaintiff was, in fact, guilty of the gross misconduct originally charged against him, even although it was not repeated in the presence of the officer, the invasion of his rights by arresting him without a warrant was rather technical than substantial, and not such as to justify the allowance of any very considerable sum as damages. From what has already been said it is clear that a miscarriage of justice may have occurred, through some misconception by the jury, which might have been prevented by a fuller statement of the conditions under which a verdict for the defendant would be justified.

The defendant complains of the giving of an instruction that, if the jury found for the plaintiff upon the count relating to his arrest, they should award him as actual damages such sum as they found from the evidence would compensate him from any injuries or indignities sustained, adding (the italics being those used in the brief):

"In awarding such damages you may consider the *character of his injuries*, what *physical injury*, if any, he sustained, also the *mental suffering*, if any, also any *sense of shame or humiliation* suffered on account of his imprisonment, if any, and award him such damages as will be fair compensation in the premises."

The argument is made that the instruction was improper because there was no evidence on which to base it. The plaintiff testified that it hurt when defendant kicked

him, and that he was afterwards joked about being a jailbird, but said nothing about suffering mental anguish or humiliation; however, the fact that he was taken to the police station in charge of an officer, and was restrained of his liberty for some time, justified the giving of the instruction. Damages on account of the matters referred to, being general, are not required to be proved by specific evidence. 1 Bouvier's Law Dict., Rawle's 3d Rev. 751.

Because of the defects pointed out in the instruction which stated the conditions under which the defendant might be held liable for false imprisonment, the judgment is reversed, and a new trial ordered.

All the Justices concur.

Petition for rehearing denied.

COLORADO SUPREME COURT.

MANLEY LOVEJOY, Plff. in Err.,

v.

DENVER & RIO GRANDE RAILROAD
COMPANY.

(— Colo. —, 146 Pac. 263.)

Master and servant — competency of engineer — permitting children to ride on engine.

1. An engineer is not shown to be incom-

Liability of master where servant invites or permits children to ride on engine or cars.

The question of contributory negligence is not within the scope of the note. The question as to the liability of the defendant for the act of its employee in compelling the child to jump from the engine or car while in motion is also beyond the scope of the note, although occasionally alluded to for the purpose of contrast with the question of liability for the act of the employee in inviting or permitting the child to ride.

As to liability of owner of vehicle for injury to child invited to ride by driver, see note to *Dover v. Mayes Mfg. Co.* 46 L.R.A. (N.S.) 199.

There is considerable conflict upon this subject even after allowing for differences of fact between the cases. This conflict seems to be due in a large measure to the different points of view from which the subject is regarded. If an employee, for a purpose of his own, or to indulge a child's whim, permits the latter to ride on an engine or car, and the question as to the company's liability for an injury to the child is approached from the standpoint of the scope of the employee's authority or duty, the decision is apt to be in favor of the defendant. But a different result may be

petent so as to render his employer liable for his act by the fact that, without authority, he permits children to ride on the engine.

Negligence — attractive nuisance — locomotive.

2. The doctrine of attractive nuisance is not applicable to a locomotive engine in charge of an engineer so as to render the railroad company liable for injuries to a child whom the engineer permits to ride upon the engine.

Same — contributory — child on engine.

3. A five-year-old child is not guilty of contributory negligence in accepting an invitation to ride on a locomotive engine.

Master and servant — scope of employment — duty to remove child from engine.

4. A railroad company is liable for injury to a child by falling from an engine on which the engineer has invited him to ride, although the invitation was beyond the scope of the engineer's employment, if it was his duty to remove the child from the engine, or refrain from starting it while he was in a place of danger.

(March 1, 1915.)

ERROR to the District Court for the City and County of Denver to review a judgment sustaining a demurrer to the complaint filed to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

reached if the question is approached from the standpoint of the defendant's duty to keep the child out of a place of danger, or to exercise ordinary care to that end. Obviously, if a duty in that respect does rest upon the defendant, and therefore upon employees through whom it must act, it cannot escape the responsibility for the breach of that duty upon the ground that it was one of such employees who invited the child to ride, and in so doing he acted beyond the scope of his duty. The rule that the master is not responsible for the act or conduct of a servant beyond his duty has no application where the act done or induced by the employee is one which it was the duty of the master, and so the employee's own duty, to prevent. Assuming the existence of the duty on the part of the railroad company, through its employees, to keep children off its engines or cars, or to exercise reasonable care to that end, if the action of an employee in inviting the child to ride on the engine or car may be regarded as beyond the scope of his duty and authority, yet his failure to prevent the child from boarding the engine or car falls within the scope of his authority and duty so as to render the master responsible. Assuming the existence of such a duty, the case seems to fall within the same principle that renders a carrier responsible for an assault committed

Mr. John A. Rush, for plaintiff in error:

Defendant was liable.

Pueblo Electric Street R. Co. v. Sherman, 25 Colo. 121, 71 Am. St. Rep. 116, 53 Pac. 322; Bittle v. Camden & A. R. Co. 55 N. J. L. 615, 23 L.R.A. 283, 28 Atl. 305; Alsever v. Minneapolis & St. L. R. Co. 115 Iowa, 338, 56 L.R.A. 748, 88 N. W. 841; Galveston, H. & S. A. R. Co. v. Zantzing, 92 Tex. 365, 44 L.R.A. 553, 71 Am. St. Rep. 859, 48 S. W. 563, 5 Am. Neg. Rep. 477; Toledo, W. & W. R. Co. v. Harmon, 47 Ill. 298, 95 Am. Dec. 489; Texas & P. R. Co. v. Scoville, 27 L.R.A. 179, 10 C. C. A. 479, 23 U. S. App. 506, 62 Fed. 730; Pittsburgh, C. & St. L. R. Co. v. Shields, 47 Ohio St. 387, 8 L.R.A. 464, 21 Am. St. Rep. 840, 24 N. E. 658; Euting v. Chicago & N. W. R. Co. 116 Wis. 13, 60 L.R.A. 158, 96 Am. St. Rep. 936, 92 N. W. 358, 13 Am. Neg. Rep. 234; Higgins v. Watervliet Turnp. & R. Co. 46 N. Y. 27, 7 Am. Rep. 299; Rounds v. Delaware, L. & W. R. Co. 64 N. Y. 133, 21 Am. Rep. 597, 8 Am. Neg. Cas. 536; Pittsburg, A. & M. Pass. R. Co. v. Donahue, 70 Pa. 119.

It was the duty of the engineer while the child was on the engine to guard him against any injury befalling him while in that place of danger; and failure so to do constitutes actionable negligence against the railroad company.

Ekman v. Minneapolis Street R. Co. 34 Minn. 24, 24 N. W. 291; Pettit v. Great Northern R. Co. 62 Minn. 530, 64 N. W.

1019; Pittsburg, A. & M. Pass. R. Co. v. Caldwell, 74 Pa. 421; De Palacios v. Rio Grande & E. P. R. Co. — Tex. Civ. App. —, 45 S. W. 612; Metropolitan Street R. Co. v. Moore, 83 Ga. 453, 10 S. E. 730; East Saginaw City R. Co. v. Bohn, 27 Mich. 504; Denver & B. P. Rapid Transit Co. v. Dwyer, 3 Colo. App. 408, 33 Pac. 815; Whitehead v. St. Louis, I. M. & S. R. Co. 99 Mo. 263, 6 L.R.A. 409, 11 S. W. 751; Danbeck v. New Jersey Traction Co. 57 N. J. L. 463, 31 Atl. 1038, 5 Am. Neg. Cas. 41; Wilton v. Middlesex R. Co. 107 Mass. 108, 9 Am. Rep. 11; Buck v. People's Street R. & Electric Light & P. Co. 108 Mo. 179, 18 S. W. 1090, 4 Am. Neg. Cas. 691; Muehlhausen v. St. Louis R. Co. 91 Mo. 332, 2 S. W. 315; Hector Min. Co. v. Robertson, 22 Colo. 491, 45 Pac. 406; Meeks v. Southern P. R. Co. 56 Cal. 513, 38 Am. Rep. 67; Brennan v. Fair Haven & W. R. Co. 45 Conn. 284, 29 Am. Rep. 679, 2 Am. Neg. Cas. 277; East St. Louis Connecting R. Co. v. Jenks, 54 Ill. App. 96; 23 Am. & Eng. Enc. Law, 748.

It was the duty of the engineer to put the child off the engine so as to avoid the possibility of injury.

Benton v. Chicago, R. I. & P. R. Co. 55 Iowa, 496, 8 N. W. 330, 3 Am. Neg. Cas. 349; Chicago, M. & St. P. R. Co. v. West, 125 Ill. 320, 8 Am. St. Rep. 380, 17 N. E. 788, 2 Am. Neg. Cas. 672; Louisville & N. R. Co. v. Hunt, 11 Ky. L. Rep. 825, 13 S. W. 275; Kansas City, Ft. S. & G. R. Co. v. Kelly, 36 Kan. 655, 59 Am.

upon a passenger by an employee acting out of personal malice and spite, and for no reason connected with his duty toward the carrier. (See note in 40 L.R.A.(N.S.) 1059 et seq.)

As the carrier owes a duty to protect a passenger from assault, or at least to exercise proper care to that end, it is obvious that the fact that the assault happens to be made by one of its own employees, out of his personal malice, instead of by another passenger or some other third person, does not relieve the carrier. Of course, the passenger cases differ from those now under consideration in that in the former there is a contractual relation between the parties from which the precedent duty springs, while in the latter there is no such contractual relation. But that difference bears upon the preliminary question as to the duty of protection, and, assuming that duty, there appears to be no more reason why the rule that a master is not responsible for the act of his servant beyond the scope of his authority should be effectual to relieve the defendant from the consequence of a breach of that duty than to relieve a carrier of the responsibility for a breach of its duty to protect its passengers from assault.

As already suggested, however, there is a tendency upon the part of the cases which L.R.A.1915E.

approach the question under annotation from one point of view to overlook or ignore the other point of view. That, however, is not true of the case of Danbeck v. New Jersey Traction Co. 57 N. J. L. 463, 31 Atl. 1038, 5 Am. Neg. Cas. 41, which is especially valuable on this subject, because, instead of dealing directly with the contention that the conductor acted beyond the scope of his duty and authority in inviting the boy to ride, it went directly to the question whether there was a duty on the part of the defendant to keep children off its cars and engines. In that case, a boy under ten, having been invited by the conductor in charge thereof to board the car, it was held that the company was liable for injuries sustained as the result of carelessness of the driver. It was contended that the act of the conductor in inviting the boy to get on the car was not in any sense the act of the company, and the latter consequently did not thereby assume any duty with respect to him; also that the duty of the conductor was well understood to be to let passengers in and out of the cars and to collect their fares, and that he had no authority to ask persons to come upon the cars except as passengers. But the court stated that "the question is not as to the duty of a defendant towards a person of mature years, but what is that duty in re-

Rep. 596, 14 Pac. 172, 3 Am. Neg. Cas. 437; Brill v. Eddy, 115 Mo. 596, 22 S. W. 488, 8 Am. Neg. Cas. 471; Bucci v. Waterman, 25 R. I. 125, 54 Atl. 1059, 14 Am. Neg. Rep. 215; Biddle v. Westonville, M. & F. Pass. R. Co. 112 Pa. 551, 4 Atl. 485; Lake Erie & W. R. Co. v. Matthews, 13 Ind. App. 355, 41 N. E. 842; Stone v. Chicago, St. P. M. & O. R. Co. 88 Wis. 98, 50 N. W. 457.

Messrs. E. N. Clark and R. G. Lucas, for defendant in error:

The fact that the engineer, Jacobs, had previously permitted children to ride on the engine, is utterly immaterial.

Louisville & N. R. Co. v. Webb, 99 Ky. 332, 35 S. E. 1117; Wilson v. Atchison, T. & S. F. R. Co. 66 Kan. 183, 71 Pac. 282;

Catlett v. St. Louis, I. M. & S. R. Co. 57 Ark. 461, 38 Am. St. Rep. 254, 21 S. E. 1062; Underwood v. Western & A. R. Co. 105 Ga. 50, 13 S. E. 123; Little Rock Traction & Electric Co. v. Nelson, 66 Ark. 494, 52 S. W. 7; Louisville & N. R. Co. v. Hunt, 11 Ky. L. Rep. 825, 13 S. W. 275; Friess v. New York C. & H. R. R. Co. 67 Hun, 205, 22 N. Y. Supp. 104; Files v. Boston & A. R. Co. 149 Mass. 204, 14 Am. St. Rep. 411, 21 N. E. 311, 3 Am. Neg. Cas. 856; Barney v. Hannibal & St. J. R. Co. 126 Mo. 372, 26 L.R.A. 847, 28 S. W. 1069; Hoskins v. Louisville & N. R. Co. 17 Ky. L. Rep. 78, 30 S. W. 643; Mason v. Missouri P. R. Co. 27 Kan. 83, 41 Am. Rep. 405; Swartwood v. Louisville & N. R. Co. 129 Ky. 247, 19 L.R.A.(N.S.) 1112, 130 Am. St. Rep. 464, 111 S. W. 305;

spect to children? It might be quite reasonable to declare as a rule of law that a grown person has no right to enter a car except as a passenger, and if he does so, as a friend of the conductor, that such a situation creates no relationship between such person and the car company, and that the latter is under no obligations to see to his safety, while it might be unreasonable in the extreme to apply the same rule to a child under similar circumstances. Very few of the rules that regulate the conduct of a man with his fellow could be applied with the least show of reason to his intercourse with children. It is the legal duty of everyone dealing with a child to protect it against its own indiscretion." The court said further: "The defendant has introduced and is in the habit of using in the public streets of a city a machine of a highly dangerous character, and as children have the right to frequent such streets, it is the duty of the company to provide in all reasonable ways for their safety so far as the same is imperiled by the business it thus transacts. It cannot be reasonably contended that if the master be liable for the carelessness of his servant for leaving a dangerous machine in the street where it is likely to be meddled with by children, he will not be liable if his servant permits children to meddle with such machine. In such transactions the knowledge of the servant of the situation aggravates his negligence. It is the plain duty of these street railroad companies to prevent children, except under proper safeguard, from entering their cars, and if this duty be neglected, they become responsible for the consequences."

So, where a number of children ranging in age from six to fifteen years are, with knowledge and without the disapproval of the employees of a railroad company in charge of its train, permitted to board and ride upon the train while they are passing over a side track through a playground of the children to a point beyond, and while they are returning from such point to the main line of the road, the children alighting from the train at the limit of the playground, both

coming and returning; and this custom is a continuous one,—it is the duty of the employees of the train, who are aware of this custom, to anticipate that when the train enters the playground the children will attempt to ride upon it and alight from it at the point where they have been accustomed to do so; and they are under a further duty, consequent upon the first, to take proper measures to prevent injury to such children. Ashworth v. Southern R. Co. 116 Ga. 635, 59 L.R.A. 592, 42 S. E. 36.

And in Lawhorn v. Denver & R. G. R. Co. 42 Utah, 244, 130 Pac. 470, it was held that a railroad company will be liable for failure to use due care not to injure a young boy who is attempting to board a freight train with the consent of the engineer, while it is moving, it having long been the custom and practice for boys to board freight trains at such place with the knowledge and permission of the company's employees. The court said that a boy boarding a freight train under such circumstances is not to be treated as a trespasser to whom only is due the duty not to wantonly and wilfully inflict injury.

A street car company is liable for the negligence of its driver in permitting little children to ride on the platform of a moving car. Pittsburgh, A. & M. Pass. R. Co. v. Caldwell, 74 Pa. 421. It should be stated, perhaps, that although these children were permitted to ride free, that fact did not enter into the decision, but the decision turned on the fact that they were permitted to be in a place of danger.

And it is negligence *per se* for employees of a railroad company to permit a boy of seven to climb upon and ride on a car filled with loose dirt, so as to make the receiver of a railroad company liable where, by reason of the dirt slipping, the boy is thrown off and injured. Burke v. Ellis, 105 Tenn. 702, 58 S. W. 855. The court stated that an open car loaded with earth is such an inducement as would naturally lead children into danger, and it was negligence not to keep them away from the car under such circumstances, and added that there was proof tending to show that the child

Barkley v. Chicago, M. & St. P. R. Co. 37 Ill. App. 293; Memphis & C. R. Co. v. Womack, 84 Ala. 149, 4 So. 618.

Even if a defendant owes a duty to someone else, but does not owe it to the person injured, no action will lie.

Wickenburg v. Minneapolis, St. P. & S. Ste. M. R. Co. 94 Minn. 276, 102 N. W. 913; Akers v. Chicago, St. P. M. & O. R. Co. 58 Minn. 540, 60 N. W. 609; Shearm. & Redf. Neg. 5th ed. § 8; Wencker v. Missouri, K. & T. R. Co. 169 Mo. 592, 70 S. W. 145; 1 Thomp. Neg. § 3; Feedback v. Missouri P. R. Co. 167 Mo. 206, 66 S. W. 965; Emry v. Roanoke Nav. & Water Power Co. 111 N. C. 94, 17 L.R.A. 699, 16 S. E. 18.

A child of tender years may be a trespasser so as to preclude a recovery; and

was not only permitted, but invited, to ride by the railroad employees, and with the knowledge of the superintendent.

A small boy who, by the consent of the driver of a street car in charge, is riding free, is a passenger, and the company is liable for injuries sustained by the boy while alighting, due to the negligence of the driver in permitting the car to start prematurely. Buck v. People's Street R. & Electric Light & P. Co. 108 Mo. 179, 18 S. W. 1090, 4 Am. Neg. Cas. 691.

In Biddle v. Hestonville, M. & F. Pass. R. Co. 112 Pa. 551, 4 Atl. 485, same case on later appeal, 1 Monaghan (Pa.) 16 Atl. 488, while the driver of a bob-tail car was inside the car, collecting fares, a boy who was driving invited other boys to ride, one of whom was later shoved off the car while it was in motion, by the driver, and killed, and the company was held liable for his death even though he was a trespasser, the court stating that it was the driver's duty to stop the car for the purpose of putting the boy off.

And in Harris v. Southern R. Co. 25 Ky. L. Rep. 559, 76 S. W. 151, action for injury to a boy of thirteen, run over while alighting from a moving train, the court said that if he was directed or invited by the engineer and fireman, or either of them, to go upon the tender and shovel coal for their convenience, and they started the train, and after it was moving they directed him to get off the train while it was in motion, and under such circumstances he attempted to alight from the train, and as a result thereof he received his injury, the company was responsible unless, at the time he attempted to alight, the speed of the train made the danger to him so imminent and obvious that an ordinarily prudent person of his age and discretion would not have incurred the risk.

But in Duff v. Alleghany Valley R. Co. 91 Pa. 458, 36 Am. Rep. 675, where a newsboy permitted by the conductor, against the rules, to ride free on the train, was injured through the alleged negligence of the railroad company, it was held that he was a mere trespasser, and so there could be no L.R.A.1915E.

this is so, even though he is too young to be guilty of contributory negligence.

29 Cyc. 541, 542.

The fact that a trespasser is an infant cannot have the effect to raise a duty where none existed. Mental inability may excuse contributory negligence, but does not alone create an obligation.

2 Thomas, Neg. 2d ed. p. 2110; Mayfield Water & Light Co. v. Webb, 129 Ky. 395, 18 L.R.A.(N.S.) 179, 130 Am. St. Rep. 469, 111 S. W. 712; Casista v. Boston & M. R. Co. 69 N. H. 649, 45 Atl. 712; Nolan v. New York, N. H. & H. R. Co. 53 Conn. 461, 4 Atl. 106; Delaware, L. & W. R. Co. v. Reich, 61 N. J. L. 635, 41 L.R.A. 831, 68 Am. St. Rep. 727, 40 Atl. 682, 4 Am. Neg. Rep. 522; Savannah, F. & W. R. Co. v. Beavers, 113

recovery. The court stated that the boy was on the train from day to day, not as a passenger or employee of the company, but by the connivance of the conductor in order to sell newspapers, and so was not like a person allowed by the conductor to ride in a car as a passenger without paying fare.

So, also, in Fleming v. Brooklyn City R. Co. 1 Abb. N. C. 433, 6 Am. Neg. Cas. 69, where a boy permitted to get on and off cars to sell newspapers was injured, the court denied the contention that, by permitting newsboys to traffic with the passengers on the cars, the defendant became charged with the duty of looking after their safety, of seeing that they do not run into danger, and of stopping or slackening the speed of a car for them to leave, whether requested to do so or not, and so there could be no recovery. The court stated that they did not understand that the company was in any sense a guardian for the time being even of children of tender years who are permitted by their parents or guardians to go upon the cars for the purpose of selling papers, nor that it was bound to restrain them from exposing themselves to danger. That it employed agents for the purpose of carefully and properly conducting the business of carrying passengers, but such business did not embrace within its scope the obligation sought to be charged upon it in this action. The court further said that the boy was not expected to pay fare, nor did he go on board for the purpose of being transported from one place to another; but he simply had a license to pass on and off the car for the purpose of selling newspapers to the passengers.

In Wencker v. Missouri, K. & T. R. Co. 169 Mo. 592, 70 S. W. 145, the railroad company was held not to be liable for the death of a boy of eleven, caused by being thrown from the car as the result of the running out of the slack in the train, he having boarded the car for the purpose of placing therein the conductor's lunch, at the latter's direction. The court stated that the boy's business being with the conductor, and not with the railroad company, the facts failed

Ga. 398, 54 L.R.A. 314, 39 S. E. 82, 10 Am. Neg. Rep. 8; *O'Bannion v. Southern R. Co.* 33 Ky. L. Rep. 315, 110 S. W. 331; 33 Cyc. 816, 817; *Felton v. Aubrey*, 20 C. C. A. 436, 43 U. S. App. 278, 74 Fed. 350, 7 Am. Neg. Cas. 405; *Wencker v. Missouri, K. & T. R. Co.* 169 Mo. 592, 70 S. W. 145; *Hoberg v. Collins*, 80 N. J. L. 425, 31 L.R.A.(N.S.) 1064, 78 Atl. 166, 1 N. C. C. A. 792; *Hendryx v. Kansas City, Ft. S. & G. R. Co.* 45 Kan. 377, 25 Pac. 893; *Chicago, B. & Q. R. Co. v. Casey*, 9 Ill. App. 632; *Flower v. Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251, 12 Am. Neg. Cas. 524; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258, 47 Am. Rep. 706.

The turntable doctrine has no application to the facts of this case. Defendant

is not a public guardian of children. A railroad company is under no duty to maintain a lookout to keep children off its trains.

Elkins v. South Carolina & G. R. Co. 64 S. C. 553, 43 S. E. 19; *Lynch v. Nurdin*, 1 Q. B. 29, 4 Perry & D. 672, 10 L. J. Q. B. N. S. 73, 5 Jur. 797; *Walker v. Potomac, F. & P. R. Co.* (*Pannill v. Potomac, F. & P. R. Co.*) 105 Va. 226, 4 L.R.A.(N.S.) 80. 115 Am. St. Rep. 871, 53 S. E. 113, 8 Ann. Cas. 862, 20 Am. Neg. Rep. 221; *Tureas v. New York, S. & W. R. Co.* 61 N. J. L. 314, 40 Atl. 614, 4 Am. Neg. Rep. 520; *Briscoe v. Henderson Lighting & P. Co.* 148 N. C. 396, 19 L.R.A.(N.S.) 1116, 62 S. E. 600; *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 13 L.R.A. 248, 26 Am. St. Rep. 253, 28 N. E. 283; *Walsh v. Fitchburg R. Co.* 145 N. Y.

to show that the company owed him any other duty than not to negligently or wantonly injure him, and was under no obligation to notify him as he approached the car of the danger to be apprehended by him by the running out of the slack in the train; but that if any such duty was imposed by law upon anyone, it was upon the conductor for whose benefit and with whose knowledge he was on his way to the car with the lunch, when he met him on the platform of the depot. This being the case, the fact that the deceased was only about eleven years of age at the time of his unfortunate death was held by the court to be of no significance.

Scope of employment.

As already suggested, when the question is approached solely from the point of view of the scope of the employee's duty or authority, the decisions generally, except in cases involving street railways, favor the defendant, unless the employee was chargeable with subsequent misconduct; *e. g.*, requiring the child to jump from a moving engine or car, which would constitute a breach of duty toward the child, even regarded as a trespasser.

—steam cars.

An engineer of a freight train was held in *Chicago, B. & Q. R. Co. v. Casey*, 9 Ill. App. 632, not to be acting within the scope of his employment in giving permission to boys to ride, and so the railroad company could not be held responsible for the death of one of the boys as a result of coming in contact with the platform. Stress was laid on the fact that the rules of the company forbade passengers riding on freight trains, and also that the duties of the engineer were limited to running the engine.

And in *Burns v. Southern R. Co.* 63 S. C. 46, 40 S. E. 1018, it was held that the invitation of the conductor and engineer to a small boy who brought them lunches, to ride in the engine cab, was without the scope of their employment, and so the boy was a mere trespasser to whom the company was L.R.A.1915E.

not liable for injuries sustained by reason of a collision, there being no evidence that the injury was wantonly or wilfully inflicted.

So, also, in *Flower v. Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251, 12 Am. Neg. Cas. 524, it was held that there was no actual or presumptive authority on the part of a locomotive fireman whose duty it was to supply the engine with water, to invite a ten-year-old boy to climb up on the side of the tender, put in the hose, and turn on the water at a water tank, and so the boy's father could not recover from the railroad company for his death, caused by his being knocked from the tender by a collision.

A brakeman of a freight train was held in *Sherman v. Hannibal & St. J. R. Co.* 72 Mo. 62, 37 Am. Rep. 423, to be without authority to give a boy of thirteen a free ride in return for services he rendered, so as to make the railroad company liable for injuries sustained by such boy while performing such service under the direction of the brakeman. As to the effect of youth on liability, the court stated that while it may excuse him from concurring negligence, yet it cannot supply the place of negligence on the part of the company, or confer authority on one who has none.

Also in *Whitehead v. St. Louis, I. M. & S. R. Co.* 22 Mo. App. 60, a brakeman of an extra freight train was held to be without authority to invite a boy to ride in the caboose as his guest, so as to make the railroad company liable for injuries sustained as the result of a collision.

And the act of a baggage master on a train in permitting children ranging from eight to thirteen years of age, to ride in a coach while it was being switched in the yards, was held in *Reary v. Louisville, N. O. & T. R. Co.* 40 La. Ann. 32, 8 Am. St. Rep. 497, 3 So. 390, not to have been within the scope of his employment, so as to make the company liable for injuries to one of the children, caused by jumping from a moving car, in the fear that the train was running out of the city, at least, in the absence of a showing that such fear was caused by any word or act of the company's employees.

301, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068; Frost v. Eastern R. Co. 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790; Hebard v. Mabie, 98 Ill. App. 543; Dover v. Mayes Mfg. Co. 157 N. C. 324, 46 L.R.A. (N.S.) 199, 72 S. E. 1067; Foster-Herbert Cut Stone Co. v. Pugh, 115 Tenn. 688, 4 L.R.A. (N.S.) 804, 112 Am. St. Rep. 881, 91 S. W. 199, 19 Am. Neg. Rep. 553; Scott v. Peabody Coal Co. 153 Ill. App. 103; Hoberg v. Collins, 80 N. J. L. 425, 31 L.R.A. (N.S.) 1064, 78 Atl. 166; 1 N. C. C. A. 792; Pokras v. Pennsylvania Salt Mfg. Co. 234 Pa. 595, 83 Atl. 430; Conlon v. Bailey, 58 Ill. App. 261; Little Rock Traction & Electric Co. v. Nelson, 66 Ark. 494, 52 S. W. 7; Lebov v. Consolidated R. Co. 203 Mass. 380, 26 L.R.A. (N.S.) 265, 89 N. E. 546; Bishop

v. Union R. Co. 14 R. I. 314, 51 Am. Rep. 386, 6 Am. Neg. Cas. 394; Chicago West Div. R. Co. v. Hair, 57 Ill. App. 587; Barlow v. Jersey City, H. & P. R. Co. 67 N. J. L. 364, 51 Atl. 463, 11 Am. Neg. Rep. 469; Wrasse v. Citizens' Traction Co. 146 Pa. 417, 23 Atl. 345; Rushenberg v. St. Louis, I. M. & S. R. Co. 109 Mo. 112, 19 S. W. 216; Barney v. Hannibal & St. J. R. Co. 126 Mo. 372, 26 L.R.A. 847, 28 S. W. 1069; Underwood v. Western & A. R. Co. 105 Ga. 50, 31 S. E. 123; Wilson v. Atchison, T. & S. F. R. Co. 66 Kan. 183, 71 Pac. 282; Catlett v. St. Louis, I. M. & S. R. Co. 57 Ark. 461, 38 Am. St. Rep. 254, 21 S. W. 1062; St. Louis Southwestern R. Co. v. Davis, — Tex. Civ. App. —, 110 S. W. 939; Swartwood v. Louisville & N. R. Co. 129 Ky. 247,

In Snyder v. Hannibal & St. J. R. Co. 60 Mo. 413, the railroad company was held not liable for the negligence of its servants engaged in moving cars and inviting children to get upon them for the purpose of having a free ride. The court stated that the act of the defendant's servants "in inducing, encouraging, and permitting the plaintiff's son and others to ride upon the cars operated by them cannot be viewed as having been done by them in the course of their employment. It does not appear that they were engaged in carrying passengers, or had any authority to permit persons to ride on said cars with or without compensation, or that the invitation or permission alleged were in furtherance of the master's interest, or directly or indirectly connected with the service which they had engaged to render to it. The mere fact that a tortious act is committed by its servant while he is actually engaged in the performance of the service he has been employed to render cannot make the master liable. Something more is required: it must not only be done while so employed, but it must pertain to the particular duties of that employment."

But in Chicago, M. & St. P. R. Co. v. West, 125 Ill. 320, 8 Am. St. Rep. 380, 17 N. E. 788, 2 Am. Neg. Cas. 672, it was held that although the act of an engineer in inviting a seven-year-old boy to ride upon his engine was without the scope of his employment, the company was liable for injury sustained by the boy as the result of jumping from the engine while in motion, at the direction of the engineer, upon the engineer's fear of the discovery of the boy's presence by the yard master, the court stating that, conceding that he was wrongfully on the engine, yet it was negligent conduct in the engineer to direct a child seven years old to get off the engine while in motion, and a violation of the duty to use reasonable care in removing one wrongfully on the train.

And in Missouri, K. & T. R. Co. v. Tona-hill, 16 Tex. Civ. App. 625, 41 S. W. 875, 3 Am. Neg. Rep. 287, an action for injury to a boy eleven years old, received while attempting to board a freight train which did L.R.A.1915E.

not carry passengers, at the invitation of one of the company's employees, the court held that the following instructions should have been given to the jury: "If the jury should find from the evidence that plaintiff, at the time of the accident, had such a degree of intelligence that he could and should have appreciated the danger of his act, then the burden would be on plaintiff to show that the person who invited him to get on the train, if there was such invitation, had authority to do so; and, in the absence of such authority, under the circumstances, the jury should find for the defendant."

Also, that "although the jury may believe from the evidence that an invitation was extended to the plaintiff, and that it was negligence of the person to so invite him, yet if it appears from the testimony that he had no authority to do so, and that plaintiff possessed such a degree of intelligence as to appreciate the danger of his act, then plaintiff cannot recover, and the jury should find for the defendant."

—hand cars.

A railroad company is not liable for an injury to a child riding on a hand car on the invitation of its employees, contrary to the rules, and not in accordance with any custom acquiesced in by the officers of the company. Houston, C. A. & N. R. Co. v. Bolling, 59 Ark. 395, 27 L.R.A. 190, 43 Am. St. Rep. 38, 27 S. W. 492.

In Chrisco v. St. Louis & S. F. R. Co. 163 Mo. App. 540, 146 S. W. 1180, the railroad company was held not liable for injuries sustained by a boy nine years old in jumping from a hand car while in motion, upon which he was riding by permission of the section men, the act of the section men in permitting the boy to ride not being within the scope of their employment.

A railroad company is not liable for the unauthorized act of a section foreman and other employees in permitting a seven-year-old boy to ride with them in a dangerous position on a hand car, from which he is negligently allowed to fall and is hurt. Dougherty v. Chicago, M. & St. P. R. Co. 137 Iowa,

19 L.R.A.(N.S.) 1112, 130 Am. St. Rep. 464, 111 S. W. 305; Felton v. Aubrey, 20 C. C. A. 436, 43 U. S. App. 278, 74 Fed. 350, 7 Am. Neg. Cas. 405; Chicago, B. & Q. R. Co. v. Stumps, 69 Ill. 409; Central Branch Union P. R. Co. v. Henigh, 23 Kan. 357, 33 Am. Rep. 167; Smalley v. Rio Grande Western R. Co. 34 Utah, 423, 96 Pac. 311; Clark v. Northern P. R. Co. 29 Wash. 139, 59 L.R.A. 508, 69 Pac. 636; Rodgers v. Lees, 140 Pa. 475, 12 L.R.A. 216, 23 Am. St. Rep. 250, 21 Atl. 399; Chicago & W. I. R. Co. v. Roath, 35 Ill. App. 349; Emerson v. Peteler, 35 Minn. 481, 59 Am. Rep. 337, 29 N. W. 311; Horn v. Chicago, M. & St. P. R. Co. 124 Iowa, 281, 99 N. W. 1068; Jefferson v.

Birmingham R. & Electric Co. 116 Ala. 294, 38 L.R.A. 458, 67 Am. St. Rep. 116, 22 So. 546; Western R. Co. v. Mutch, 97 Ala. 194, 21 L.R.A. 316, 38 Am. St. Rep. 179, 11 So. 894; Chicago & A. R. Co. v. McLaughlin, 47 Ill. 265; Heasley v. Winona & St. P. R. Co. 46 Minn. 233, 24 Am. St. Rep. 220, 48 N. W. 1023; Louisville & N. R. Co. v. Ray, 124 Tenn. 16, 134 S. W. 858, Ann. Cas. 1912D, 910; Paquin v. Wisconsin C. R. Co. 99 Minn. 170, 108 N. W. 882, 20 Am. Neg. Rep. 607; McEachern v. Boston & M. R. Co. 150 Mass. 515, 23 N. E. 231; George v. Los Angeles R. Co. 126 Cal. 357, 46 L.R.A. 829, 77 Am. St. Rep. 184, 58 Pac. 819, 6 Am. Neg. Cas. 420; 3 Elliott, Railroads, § 1260; Kaumeier v.

257, 14 L.R.A.(N.S.) 590, 126 Am. St. Rep. 282, 114 N. W. 902. The court stated that the only possible theory upon which there could be a recovery was that the boy was either a licensee or a trespasser, and that the company was charged with the duty of not wantonly or purposely injuring him; but added that there were several answers to this proposition: First, that the original wrong, for which the company was in no way responsible, was the proximate cause of injury to the boy; second, that there was no evidence of any such wanton or malicious conduct on the part of the company's agents as would justify a recovery; and third, that as to the employees who injured the boy, he was not a trespasser, for they invited him upon the car. Nor, the court stated, could there be any application of the rule that the car was a dangerous agency, and so the company was responsible for the act of its agent in charge thereof, as the injury to the plaintiff was due not to the dangerous character of the car, but to the negligence of those having it in charge, and it was not such negligence as to render the defendant responsible.

In *Lake Shore & M. S. R. Co. v. Duer*, 21 Ohio C. C. 512, 11 Ohio C. D. 761, where a boy, fifteen years of age, was permitted by the section foreman to ride on a hand car and was injured while assisting in propelling it, it was held that the permission to ride having been granted without authority, and the injury not having been inflicted wilfully and intentionally, there could be no recovery.

And it was further held in this case that the fact that boys had been accustomed to ride on the hand car with the permission of the section foreman could not be construed as a license to so ride where such permission was in violation of the rules of the company, and the violation was unknown to the officers.

The act of a section foreman in loaning a hand car to a number of boys is entirely outside of and exceeds the scope of the employment, and so the railroad company will not be liable for injury to a boy falling off the car so used. *Robinson v. McNeill*, 18 Wash. 163, 51 Pac. 355.

So, in *St. Louis, I. M. & S. R. Co. v. Robinson*, 95 Ark. 39, 128 S. W. 60, a railroad company was held not liable for injury to a child riding on a hand car by permission of the section foreman, who, on Sunday, when he was not working for the company, sent with the hand car men who were not in the railroad company's employ, on an errand solely his own and exclusively for his own benefit, the sending of the men on such an errand and the permission to ride being outside the scope of his employment and authority.

In *Missouri, K. & T. R. Co. v. Rodgers*, 89 Tex. 675, 36 S. W. 243, a twelve-year-old boy was injured while riding upon a hand car upon the alleged invitation of the employee in charge thereof, and the court laid down the following rules: "If the jury should find that the plaintiff, by reason of his age and want of intelligence, was not capable of appreciating the danger of getting upon the car, and that the employees of the railway company invited or permitted him to get upon it; and if it should appear that to ride upon such a car was dangerous for a child of his age; and further, that the act of getting upon the same under the circumstances was such as might have been done by a child of his age and intelligence,—the defendant would be liable to him for the injuries inflicted, although its employees may have been forbidden to permit anyone to ride upon said car. Disobedience of orders by its servants in such a case would not be available to the defendant as a defense to the action . . . If, however, the jury should find that the plaintiff had such a degree of intelligence that he could and should have appreciated the danger of his act, then the burden would be upon him to prove that the person or persons who invited or permitted him to ride upon the car had authority so to do; and the rules of the company forbidding employees to permit persons to ride upon such cars would be admissible upon this issue, whether the plaintiff knew of their existence or not. If the proof should show that the employees had such authority, this would only affect the degree of care due to plaintiff under the circumstances, but would not relieve him of the consequences of his own negligence, if any, in boarding the car. If the

City Electric R. Co. 116 Mich. 306, 40 L.R.A. 385, 72 Am. St. Rep. 525, 74 N. W. 481; Chicago, R. I. & P. R. Co. v. Eininger, 114 Ill. 79, 29 N. E. 196; Hubener v. New Orleans & C. R. Co. 23 La. Ann. 492, 3 Am. Neg. Cas. 514; Vertrees v. Newport News & M. Valley R. Co. 95 Ky. 314, 25 S. W. 1; Taylor v. South Covington & C. Street R. Co. 14 Ky. L. Rep. 355, 20 S. W. 275; Union Stock Yard & Transit Co. v. Butler, 92 Ill. App. 166; Haberlau v. Lake Shore & M. S. R. Co. 73 Ill. App. 261; Crawleigh v. Galveston, H. & S. A. R. Co. 28 Tex. Civ. App. 260, 67 S. W. 140; East St. Louis Connecting R. Co. v. Jenks, 54 Ill. App. 91; Atchison, T. & S. F. R. Co. v. Plaskett, 47 Kan.

107, 26 Pac. 401, 3 Am. Neg. Cas. 454; Arkansas & L. R. Co. v. Sain, 90 Ark. 278, 22 L.R.A. (N.S.) 910, 119 S. W. 659; Chicago & A. R. Co. v. Graham, 84 Ill. App. 480; St. Louis, A. & T. H. R. Co. v. Daley, 53 Ill. App. 614; Chicago & A. R. Co. v. Lammert, 12 Ill. App. 408; Woodbridge v. Delaware, L. & W. R. Co. 105 Pa. 460; Louisville & N. R. Co. v. Webb, 99 Ky. 332, 35 S. W. 1117; Udell v. Citizens' Street R. Co. 152 Ind. 507, 71 Am. St. Rep. 336, 52 N. E. 799, 5 Am. Neg. Rep. 562; Louisville & N. R. Co. v. Hunt, 11 Ky. L. Rep. 825, 13 S. W. 275; Chicago & N. W. R. Co. v. Smith, 46 Mich. 504, 41 Am. Rep. 177, 9 N. W. 830, 4 Am. Neg. Cas. 24; Hastings v. Southern

employees had no such authority, then the defendant cannot be held liable for the injuries received by the plaintiff, although such employees may have been guilty of negligence."

And in an action by the father of the boy for the loss of services growing out of the same injury, the court held that if the boy was without mental capacity to understand the danger of riding on the hand car, and he was invited or permitted by the employees of the railroad company to ride on the car, and was thereby injured, it would be liable for the damages whether the employees knew of the incapacity of the boy or not. Missouri, K. & T. R. Co. v. Rodgers, — Tex. Civ. App. —, 39 S. W. 383, 1 Am. Neg. Rep. 708.

—street cars.

The act of a driver of a street car in inviting a nine-year-old child to ride on the front platform without payment of fare is an act within the general scope of his employment, so as to make the company responsible for injuries sustained by such child by reason of losing her balance as the result of the sudden starting of the car before she had boarded it, there being no lack of due care on the part of the child at the time of the injury. Wilton v. Middlesex R. Co. 107 Mass. 108, 9 Am. Rep. 11, Wilton v. Middlesex R. Co. 125 Mass. 130.

A boy ten years of age, riding upon a street car without paying fare, by invitation of a motorman in charge of the same, who has authority to receive and let off passengers, is not a trespasser. The invitation of the motorman is an act within the general scope of his employment, for which he is responsible to his master. If the boy accepted it innocently, he is no trespasser, and it is the duty of the company to extend to him the diligence due to passengers of his age and discretion. Little Rock Traction & Electric Co. v. Nelson, 66 Ark. 494, 52 S. W. 7.

In Brennan v. Fair Haven & W. R. Co. 45 Conn. 284, 29 Am. Rep. 679, 2 Am. Neg. Cas. 277, a street railroad company was held liable where a child permitted by the L.R.A.1915E.

driver and conductor to ride free on the front platform was injured in jumping from the moving car at his destination, which was known to the driver, the court stating that it was within the scope of the authority of the driver and conductor to receive and let off passengers, and the boy's status as a passenger was not affected by the fact that the conductor omitted to collect fare.

But a gripman on a cable car is not in charge of the car and has no authority to permit boys to ride free, and so such a boy, twelve years old, riding by permission or invitation of the gripman, is not a passenger, and the company will be liable for injury sustained as the result of the conductor endeavoring to scare him off the car, while it is moving rapidly, only where the act of the conductor is characterized by wilfulness or wantonness. Drogmund v. Metropolitan Street R. Co. 122 Mo. App. 154, 98 S. W. 1091.

In this case, however, the court said in effect that the defendant would be liable upon the humanitarian doctrine, if, considering the youth of the boy, his want of discretion, and the probability of his obeying the command, the conductor ordered him to get off while the car was moving at a dangerous speed, and at the same time seized a broom and advanced towards him.

In Finley v. Hudson Electric R. Co. 64 Hun, 373, 19 N. Y. Supp. 621, 6 Am. Neg. Cas. 29, where the motorman of the car, who was also the conductor, contrary to the express rules of the company, invited a boy to ride in pay for services rendered in operating a switch, it was held that the company was not liable to the boy for injuries sustained. The court stated that the company's liability could not be predicated upon any neglect of duty that it owed to the boy as a passenger or one seeking to become a passenger; nor was the company under any obligation of duty to him as a guest, as it was not within the scope of the motorman's duties to invite him upon the car as a guest; nor was the invitation for the benefit of the company or in the furtherance of its interest, so that assent thereto could be implied.

J. H. B.

R. Co. 5 L.R.A.(N.S.) 775, 74 C. C. A. 398, 143 Fed. 260; Harris v. Southern R. Co. 25 Ky. L. Rep. 559, 76 S. W. 151; Mehalek v. Minneapolis, St. P. & S. Ste. M. R. Co. 105 Minn. 128, 117 N. W. 250; Richardson v. Missouri P. R. Co. 90 Kan. 292, 133 Pac. 535; Green v. Maysville & B. S. R. Co. 25 Ky. L. Rep. 1623, 78 S. W. 439; Curley v. Missouri P. R. Co. 98 Mo. 13, 10 S. W. 593; Monehan v. South Covington & C. Street R. Co. 117 Ky. 771, 78 S. W. 1106; Johnson v. Great Northern R. Co. 49 Wash. 98, 94 Pac. 895; Brown v. Rockwell City Canning Co. 132 Iowa, 634, 110 N. W. 12; Le Beau v. Pittsburg, C. C. & St. L. R. Co. 69 Ill. App. 557, 2 Am. Neg. Rep. 501; Harris v. Cowles, 38 Wash. 331, 107 Am. St. Rep. 847, 80 Pac. 537.

The invitation extended to plaintiff by the engineer was beyond the scope of his employment and unauthorized. It gave plaintiff no right to be upon that train. Defendant is not liable for plaintiff's injuries received in consequence of the engineer's unauthorized act.

Atchison, T. & S. F. R. Co. v. Headland, 18 Colo. 477, 20 L.R.A. 822, 33 Pac. 185; Eaton v. Delaware, L. & W. R. Co. 57 N. Y. 382, 15 Am. Rep. 513; Skirvin v. Louisville & N. R. Co. 30 Ky. L. Rep. 1208, 100 S. W. 308; Chicago, B. & Q. R. Co. v. Casey, 9 Ill. App. 632; Burns v. Southern R. Co. 63 S. C. 46, 140 S. E. 1018; Robertson v. New York & E. R. Co. 22 Barb. 91; Elkins v. Boston & M. R. Co. 23 N. H. 275; White v. Illinois C. R. Co. 97 Miss. 91, 55 So. 593; 6 Labatt, Mast. & S. pp. 2610, 7610; Keating v. Michigan C. R. Co. 97 Mich. 154, 37 Am. St. Rep. 328, 56 N. W. 346; Smith v. Louisville, E. & St. L. R. Co. 124 Ind. 394, 24 N. E. 753; Clark v. Colorado & N. W. R. Co. 19 L.R.A.(N.S.) 988, 91 C. C. A. 358, 165 Fed. 408; Files v. Boston & A. R. Co. 149 Mass. 204, 14 Am. St. Rep. 411, 21 N. E. 311, 3 Am. Neg. Cas. 856; Virginia Midland R. Co. v. Roach, 83 Va. 375, 5 S. E. 175; Radley v. Columbia Southern R. Co. 44 Or. 332, 75 Pac. 212, 1 Ann. Cas. 447, 15 Am. Neg. Rep. 659; Baltimore & O. S. W. R. Co. v. Cox, 66 Ohio St. 276, 90 Am. St. Rep. 583, 64 N. E. 119, 12 Am. Neg. Rep. 544; 3 Thomp. Neg. 12th ed. § 2668; Chicago, M. & St. P. R. Co. v. West, 125 Ill. 320, 8 Am. St. Rep. 380, 17 N. E. 788, 2 Am. Neg. Cas. 672; Flower v. Pennsylvania R. Co. 69 Pa. 210, 8 Am. Rep. 251, 12 Am. Neg. Cas. 524.

Defendant is not liable for the failure of the engineer to put plaintiff off the engine. The doctrine of discovered peril or last-clear-chance rule has no application to this case.

Dover v. Mayes Mfg. Co. 157 N. C. 324, 46 L.R.A.(N.S.) 199, 72 S. E. 1067; Driscoll v. Scanlon, 165 Mass. 348, 52 Am. St. Rep. L.R.A.1915E.

523, 43 N. E. 100; Kiernan v. New Jersey Ice Co. 74 N. J. L. 175, 63 Atl. 998, 20 Am. Neg. Cas. 431; Dougherty v. Chicago, M. & St. P. R. Co. 137 Iowa, 257, 14 L.R.A.(N.S.) 590, 126 Am. St. Rep. 282, 114 N. W. 902; Burns v. Southern R. Co. 63 S. C. 46, 40 S. E. 1018; Robertson v. New York & E. R. Co. 22 Barb. 91; Clark v. Colorado & N. W. R. Co. 19 L.R.A.(N.S.) 988, 91 C. C. A. 358, 165 Fed. 408; Keating v. Michigan C. R. Co. 97 Mich. 154, 37 Am. St. Rep. 328, 56 N. W. 346.

Even if the engineer's act in regard to the child should be considered as a wilful, wanton one, nevertheless the master is not responsible for the wanton, wilful, malicious, or criminal act of the servant, unless the act, from its very nature, is within the scope of the servant's employment.

Jones v. St. Louis, N. & P. Packet Co. 43 Mo. App. 407, Marion v. Chicago, R. I. & P. R. Co. 59 Iowa, 428, 44 Am. Rep. 687, 13 N. W. 415; Holler v. Ross, 68 N. J. L. 324, 59 L.R.A. 943, 96 Am. St. Rep. 546, 53 Atl. 472; Sagers v. Nuckolls, 3 Colo. App. 95, 32 Pac. 187.

Scott, J., delivered the opinion of the court:

The complaint in this case alleged, in substance, that the defendant operates a spur or branch railroad track running from its main line near the city of Leadville, to the Ibex mining property; that on the day of the accident complained of, the engineer of defendant company was in full charge of the conduct and operation of the defendant's engine and train operated on said branch or spur of its road; that there was no conductor for the train, but that the engineer was in full charge thereof; that the engine was coupled to and engaged in pushing a string of freight cars, had a tender attached behind, and was then so being operated by the said engineer in the line of his employment; that the latter stopped the engine and cars where the said branch line crossed the public highway, which likewise runs between the city and the Ibex mining property. It is then alleged that the plaintiff, a boy of five years, with a little brother and sister, approached the engine, when the engineer got down from his cab, and called to the plaintiff, saying he had a present for him; that the said engineer had taken the plaintiff and his brother and sister on the engine and given them a ride a few days prior; that the engineer asked plaintiff if he wanted to ride on the engine, and thereupon lifted him up into the cab, and then started his engine forward in pursuance of his employment, leaving the plaintiff unguarded and uncared for, and that in some manner the plaintiff fell off the engine,

and the wheels of the tender ran over and crushed one of his legs, so that it became necessary to have it amputated. The court sustained a demurrer to the complaint upon the ground that it did not state facts sufficient in law to constitute a cause of action. The plaintiff elected to stand upon his complaint, and brings the case here for review.

The acts of the engineer alleged to constitute negligence are: (a) That there was a duty resting upon the engineer in this case to prevent the child from being placed on the engine; (b) that there was a duty resting on the engineer to safely remove the boy from the engine before starting to operate it; (c) that there was a duty resting on the engineer, after having placed the plaintiff on the engine, and not having caused him to be removed therefrom, to have safely guarded him while the engine was in motion; that the engineer by his neglect and failure to perform all or any of these duties was guilty of such negligence as will make the defendant liable for the injury. Other acts of negligence alleged are: (1) That there was a duty resting on the company to use great caution in the selection of an engineer who is careful and competent, and that the defendant did not exercise proper care in selecting the said engineer, and for such reason the defendant is guilty of negligence in this case; (2) that the said engine was a powerful and dangerous instrument, especially attractive to children, and therefore the failure to select a competent engineer was equivalent to negligently leaving such dangerous instrument without guard and in an unsafe condition.

Admitting the duty of the defendant to employ competent and skilled engineers, there is no sufficient allegation in the complaint of the nonobservance of such duty, nor is there any allegation at all that the engineer here was not competent or skilled as such. That he may have been unduly kind-hearted and devoted to children, to the possible neglect of a duty as charged here, is not such a matter as may reasonably be foreseen in his employment, conceding his qualifications otherwise.

Neither are we able to see how the turntable doctrine is applicable to the facts in this case. This doctrine is well stated in the brief of defendant in error to be: "The leaving or maintaining of a dangerous and attractive machine, or other instrument or agency upon one's premises, under circumstances which naturally tend to attract or allure young children of immature judgment, and to induce them to believe that they are at liberty to enter and handle or play with it, is tantamount to an implied invitation to enter. Hence a correspond-

ing duty is imposed upon the owner or occupant of the premises to prevent the intrusion, or to protect from personal injury such children as may be so attracted and thus induced to enter, and who are incapable of appreciating the attending dangers. The doctrine is founded upon the principle that when one sets a temptation before young children under circumstances which in law is equivalent to holding out of an inducement to enter, he must use ordinary care to protect them from harm. It is but applying the general rule that when one induces or invites another upon his premises, he must use ordinary care to avoid injuring him."

The leading, if not the first, American case upon this subject, is that of *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, which involved an injury to a child by leaving a railroad turntable unlocked, and therefore in an unsafe condition for children who might naturally be attracted thereto. The reason for the rule was stated in that case to be: "As it was in fact, on this occasion, so it was to be expected that the amusement of the boys would have been found in turning this table while they were on it or about it. This could certainly have been prevented by locking the turntable when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of the broken latch. This was a heavy catch, which, by dropping it into a socket, prevented the revolution of the table. There had been one on this table weighing some 8 or 10 pounds, but it had been broken off and had not been replaced. It was proved to have been usual with railroad companies to have upon their turntables a latch or bolt, or some similar instrument. The jury may well have believed that if the defendant had incurred the trifling expense of replacing this latch, and had taken the slight trouble of putting it in its place, these very small boys would not have taken the pains to lift it out, and thus the whole difficulty have been avoided. Thus reasoning, the jury would have reached the conclusion that the defendant had omitted the care and attention that it ought to have given, that it was negligent, and that its negligence caused the injury to the plaintiff."

This cannot be well said to apply to the instant case of an engine being then operated and in direct charge and control of defendant's engineer. So that, if the defendant is to be held liable, it must be by reason of the acts and conduct of the engineer so alleged to constitute negligence.

It will be observed that under the allegations of the complaint the engineer was in sole charge and control of the engine and train, and for such reason there can be in this case none of those distinctions sometimes indulged in, arising in cases where the train was in charge of a conductor or other train-managing official, and where the injury occurred through the alleged negligence of the engineer alone.

The plaintiff was of that age when he must be presumed not to be conscious of the danger incurred in being placed on the engine, or to be possessed of a judgment to resist the temptation to his childish curiosity and pleasure offered by the invitation and act of the engineer. Hence there can be no contributory negligence, and we have only to determine the question of negligence for which the defendant company may or may not be held.

That the injury occurred by reason of, and was due to the alleged acts of, the engineer, is not disputed, but it is argued that in so doing, he was not acting within the actual or apparent scope of his authority, and for such reason the defendant is not responsible. The doctrine in this regard may be said to be as in substance stated by our text writers:

"In order to make a master liable in tort for an injury caused by the wrongful or negligent act of his servant, it must appear that the act was within the actual or apparent scope of the servant's authority; for if the servant was not acting in the due course of his employment for his master, but in contravention of his duty to him and against his interest, the master is not liable." Addison, *Torts*, § 1809.

"The liability of the master for intentional acts, which constitute legal wrongs, can only arise when that which is done is within the real or apparent scope of the master's business. It does not arise where the servant has stepped aside from his employment to commit a tort, which the master neither directed in fact nor could be supposed, from the nature of his employment, to have authorized or expected the servant to do." Cooley, *Torts*, 535.

"The master is liable for the acts of his servant, not only when they are directed by him, but also when the scope of his employment or trust is such that he has been left at liberty to do, while pursuing or attempting to discharge it, the injurious act complained of. It is not merely for the wrongful acts he was directed to do, but the wrongful acts he was suffered to do, that the master must respond." Cooley, *Torts*, 534.

But where there is a clear duty of the servant and where he fails or neglects to L.R.A.1915E.

perform such duty, and such failure results in and is the proximate cause of an injury, then the master is liable for the negligent acts of his servant.

In the case of *Euting v. Chicago & N. W. R. Co.* 116 Wis. 13, 80 L.R.A. 158, 96 Am. St. Rep. 936, 92 N. W. 358, 13 Am. Neg. Rep. 234, the principle that a master is not responsible for the torts of a servant when the servant has departed from his employment, as distinguished from the question as to whether he had departed from or neglected his duty in the line of employment, is so clearly stated as to justify the insertion of that portion of the opinion here. In that case the court stated: "So the situation to be considered upon the motion is this: The defendant placed these dangerous explosives in the custody of its servant, to be placed on the track in certain contingencies as a warning to approaching trains. The servant, however, placed one on the track when not contemplated by the employer, evidently for his own amusement, and in dangerous proximity to third persons, and moved the engine over it, causing it to explode and inflict injury on one of such persons; and the question is whether a verdict for the injured person against the principal can be sustained under such circumstances. We think this question must be answered in the affirmative. The principle that a master is not responsible for the torts of his servant when the servant has departed from his employment is well understood. If this principle were as easy of application as it is of statement, we should have little difficulty; but, like many another simple and plain principle, its application to concrete facts is sometimes very difficult. The question generally is whether the servant has departed from his employment, or whether he has departed from or neglected a duty in the line of that employment. In the first case the principal is not responsible for his acts, and in the second case he is. Applying the principle to the present case, supposing that the jury had found that the engineer placed the torpedo on the track, it seems quite plain that a verdict for the plaintiff might be sustained. The engineer's duty was to operate the engine; to take care of the torpedoes, and see that they were used only at proper times and places. The company had placed in his charge these dangerous agencies, and authorized him to use them at proper times. In placing one of them upon the track as he did, he was doing what the company had directly authorized him to do; but he was not doing it at the time or place authorized by the master. He was not beyond the scope of his employment, but he was wilfully or wantonly violating a duty

resulting from his employment; namely, his duty to safely keep and properly use the torpedoes. There have been many cases involving the application of this principle, and they cannot be said to be entirely harmonious; but the principle above stated is believed to be substantiated by the great weight of authority. The doctrine is quite well stated in *Pittsburgh, C. & St. L. R. Co. v. Shields*, 47 Ohio St. 387, 8 L.R.A. 464, 21 Am. St. Rep. 840, 24 N. E. 658, as follows: 'A servant may depart from his employment without making his master liable for his negligence when outside of the employment of his master, and he so departs whenever he goes beyond the scope of his employment and engages in affairs of his own; but he cannot depart from the duty intrusted to him when that duty regards the rights of others in respect to the employment of dangerous instruments by the master in the prosecution of his business, without making the master liable for the consequences; for the first step in that direction is a breach of the duty intrusted to him by the master, and his negligence in this regard becomes the negligence of the master.'

That a railroad engine, being operated as was the one in question, was an unsafe and dangerous place for a child of tender years, is not only alleged in the complaint, but must be assumed as a matter of common knowledge.

Counsel contends that the act of the engineer in placing the child upon the engine alone was the proximate cause of the injury, and that such act was without the scope of his authority; therefore no liability attached. Even if we concede for the moment that there was no liability upon the part of the defendant for the mere act of placing the child on the engine, yet, even under the authority of cases so holding, the child was on the engine, in a concededly dangerous position, with the positive knowledge of the engineer, who then placed his engine in motion. Under such circumstances it was his duty to put the boy safely off the engine, which, if he had done, the accident would in all human probability have been avoided. This is nothing more than the application of the doctrine of the duty to exercise reasonable care. The reason for the rule and the distinction made in this class of cases is well stated in the case of *Chicago, M. & St. P. R. Co. v. West*, 125 Ill. 320, 8 Am. St. Rep. 380, 17 N. E. 788, 2 Am. Neg. Cas. 672, as follows: "Conceding, as must be done, the engineer invited plaintiff to ride with him on his engine, he was acting without the scope of any duty he owed to his employer, and had any injury come to plaintiff on account of L.R.A.1915E.

that act of the engineer itself, whether negligently done or not, the master would not be liable. If that were all there is of this case, it is plain the judgment would be contrary to law, and should be set aside. The action is not based on any such ground. It is sought to recover for a very different reason. It is because when plaintiff was on the engine, no matter how he got there, it was the duty of the engineer to put him off, and in doing so he was obliged to observe reasonable care. The rules of the company, in evidence, show it was unlawful for anyone, other than certain employees, to ride upon the engine. Should any stranger get upon the engine, it would clearly be the duty of the engineer to put him off, and in doing so he would be acting within the general scope of his employment, and if, in the discharge of that duty, he negligently or wantonly injured such person, the master would be liable. In this case it may be conceded plaintiff was wrongfully on the engine, whether he was there by the invitation of the engineer or by his own wrongful conduct, and it was the duty of the engineer to cause him to get off. At the time of the accident plaintiff was about seven years old, and, of course, was too young to observe much, if any, care for his personal safety. It was the duty of the engineer to observe care, even if plaintiff was in the wrong in getting upon the engine. It was admitted by counsel at the trial, 'the engineer has no right to throw a boy off or to kick him off.' That concession is in harmony with the law that makes it his duty to observe reasonable care, under the circumstances, in putting a person off the engine, even when wrongfully there."

This is but to apply the same reasoning upon which is based the rule of last clear chance, though not to the same extent as in the uniform cases in this court, for the peril of the plaintiff here was within the actual knowledge and presence of the engineer, with the undisputed opportunity and power to have avoided the accident. The present case can be no different in principle than if the plaintiff had been between the rails in front of the engine, and plainly visible to the engineer when he put the engine in motion. There may be a difference in degree of danger, or in the certainty of injury, but there is obvious peril in either case.

The right to recovery will scarcely be questioned under the circumstances stated. *Alabama G. S. R. Co. v. Burgess*, 119 Ala. 555, 72 Am. St. Rep. 943, 25 So. 251; *Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680.

In *Missouri, K. & T. R. Co. v. Tonahill*,

— Tex. Civ. App. —, 54 S. W. 419, a boy eleven or twelve years old and of immature judgment and discretion, in an attempt to board a train while moving out of a depot, fell and was injured. It was held to be the duty of the employees of the company to use ordinary care to prevent the attempt, and that the company was liable.

So, where a boy ten years old and of ordinary intelligence was injured while riding on the pilot of the engine of a work train, it was held that the employees had no right to permit anyone to ride on the train, and that they were guilty of negligence in failing to use care to prevent children from riding thereon. St. Louis Southwestern R. Co. v. Abernathy, 28 Tex. Civ. App. 613, 68 S. W. 539.

In the case of an injury to a boy six or seven years of age, it was held in *Burke v. Ellis*, 105 Tenn. 702, 58 S. W. 855, that "it is negligence *per se* to permit a child of such tender years to climb on and ride upon a car loaded with loose earth that is liable to slip and throw the child off at any time. In such case the statement of the facts makes out a case of negligence, and the opinion of witnesses is not needed to show that such an act is negligence. An open car loaded with earth is such an inducement as would naturally lead children into danger, and it was negligence not to keep them away from the cars under such circumstances."

In *Harris v. Southern R. Co.* 25 Ky. L. Rep. 559, 76 S. W. 151, in the case of a boy thirteen years of age, it was said: "If appellant was directed or invited by the engineer and fireman, or either of them, to go upon the tender and shovel coal for their convenience, and they started the train to Louisville, and after it was moving they directed him to get off the train while it was in motion, and under such circumstances he attempted to alight from the train, and as a result thereof he received his injury, the appellee was responsible, unless at the time he attempted to alight the speed of the train made the danger to him so imminent and obvious that an ordinarily prudent person of his age and discretion would not have incurred the risk."

In the case of a child four years of age being permitted to ride in an exposed and dangerous place upon a street car (*East Saginaw City R. Co. v. Bohn*, 27 Mich. 503), Judge Cooley writing the opinion, it was said of the duty of a railroad company: "That the duty of the railway company not to permit persons to ride in unsafe places on their cars is the same, and rests upon the same reasons, with their duty not to make use of vehicles wholly unsafe, appears to me entirely clear."

L.R.A.1915E.

It was further said in that case: "If, however, it was dangerous for passengers to stand or sit on the front platform, where the driver himself would be, it would not only be his right and duty to notify any who might occupy it of the danger, but if they were of an age not to be likely to understand the risk, or able to judge for themselves, or if he knew them to be insane or otherwise unable to exercise discretion, the duty would not be fully performed without an enforcement of proper regulations to compel their occupying positions less exposed."

And, again, the court said: "The action is for negligence in carrying him in an exposed and dangerous place on the car, and the negligence was the same whether he was compelled, or only permitted, to ride there."

The principle upon which these cases rest has been fully upheld by this court in the case of *Pueblo Electric Street R. Co. v. Sherman*, 25 Colo. 114, 71 Am. St. Rep. 116, 53 Pac. 322, wherein it was held to be negligence for the motorman of a street car to permit a boy thirteen years old, who is not a passenger, to ride upon the car for amusement, and to alight while the car is in motion, for the purpose of turning the trolley, and that the company is liable for such negligence. It was there said of the duty of the motorman in charge of the car to exercise reasonable care, regardless of instructions, and regardless of the fact that, generally speaking, the acts of the motorman were not within the scope of his actual or apparent authority: "The motorman was charged with the management and control of the car; it was his special duty, regardless of instructions, to exercise reasonable care and diligence in operating it so as to prevent injury to those with whom the relation of carrier and passenger did not exist. The evidence discloses that appellee was permitted to ride upon the car for a period of something over two hours; allowed to alight while the car was still in motion, for the purpose of turning the trolley; he was not upon the car as a passenger, but there because the permission granted to ride and turn the trolley afforded him amusement, which would be naturally attractive to one of his years. To allow children to make a playground of a moving street car, or convert that vehicle when so moving into an article of amusement, is certainly exposing them to serious, if not fatal, injuries, and it is as much the duty of the employees of a street car company to exercise reasonable care and diligence in preventing those not capable of appreciating the danger to which they would be exposed on account of their childish proclivities to amuse themselves in the

manner appellee did, as it is their duty to prevent injury to persons of like age, exposed to injuries in other ways from the same source. Had the motorman not permitted appellee to ride upon the car merely for amusement, alight therefrom recklessly while in motion, but, on the contrary, had exercised a reasonable degree of care in preventing him from so doing, the injury might not have occurred."

Whatever may be said of the act of the engineer in the instant case, as it relates to the invitation to the plaintiff to come upon the engine, the fact remains that such engineer, under the allegations of the complaint, permitted him to remain in that dangerous position, and proceeded to put his engine and train in motion without effort to protect him from danger, which it was his clear duty to do.

In the well-considered case of *Whitehead v. St. Louis, I. M. & S. R. Co.* 99 Mo. 263, 6 L.R.A. 409, 11 S. W. 751, where a boy of fourteen years of age was injured through the negligence of the trainmen, and while the boy was riding in the caboose of a freight train, forbidden to carry passengers, but with the acquiescence of the conductor, though the lad was not a passenger for pay, the court said: "Now, in this case the conductor had entire charge of the train. In its management he acted for and represented the defendant. It was a part of his duties to see that persons did not ride upon it either with or without the payment of fare. How, therefore, can it be said his act in allowing the boy to ride upon the train was beyond or outside the scope of his employment? It was an act directly within the line of his duty. He made breach of his duty towards his master, but that is a matter of no consequence here. To all outward appearance, as well as in point of fact, he was master of the train. The defendant, therefore, cannot escape liability in this case on the ground that the conductor had no authority to permit the boy to ride on the train. It also follows from what has been said, as well as from the authorities cited, that the defendant did owe a duty to the boy. It owed a duty to him even on the theory that he was not, in the full sense of the term, a passenger."

As supporting the rule as to duty, and in holding the defendant company to the exercise of reasonable care, in similar cases, the following authorities may be cited: 23 Am. & Eng. Enc. Law, 748; *Galveston, H. & S. A. R. Co. v. Zantlinger*, 93 Tex. 64, 47 L.R.A. 282, 77 Am. St. Rep. 829, 53 S. W. 379; *Pittsburg, A. & M. Pass. R. Co. v. Caldwell*, 74 Pa. 421; *Kansas City, Ft. S. & G. R. Co. v. Kelly*, 36 Kan. 655, 59 Am. Rep. 596, 14 Pac. 172, 3 Am. Neg. Cas. L.R.A.1915E.

437; *Wilton v. Middlesex R. Co.* 107 Mass. 108, 9 Am. Rep. 11; *Brennan v. Fair Haven & W. R. Co.* 45 Conn. 284, 29 Am. Rep. 679, 2 Am. Neg. Cas. 277; *Buck v. People's Street R. & Electric Light & P. Co.* 108 Mo. 179, 18 S. W. 1090, 4 Am. Neg. Cas. 691; *Danbeck v. New Jersey Traction Co.* 57 N. J. L. 463, 31 Atl. 1038, 5 Am. Neg. Cas. 41; *Metropolitan Street R. Co. v. Moore*, 83 Ga. 453, 10 S. E. 730; *Chicago, M. & St. P. R. Co. v. West*, 125 Ill. 320, 8 Am. St. Rep. 380, 17 N. E. 788, 2 Am. Neg. Cas. 672; *Brill v. Eddy*, 115 Mo. 596, 22 S. W. 488, 8 Am. Neg. Cas. 471; *Bucci v. Waterman*, 25 R. I. 125, 54 Atl. 1059, 14 Am. Neg. Rep. 215; *Biddle v. Hestonville, M. & F. Pass. R. Co.* 112 Pa. 551, 4 Atl. 485; *Stone v. Chicago, St. P. M. & O. R. Co.* 88 Wis. 98, 59 N. W. 457.

It is urged by the defendant company that a railroad company has the right to carry passengers and freight on different trains, and when such provision is made, the conductor and brakemen have no implied authority to receive passengers upon freight trains. The rule must be conceded, but it can have no application here. It is not claimed or pretended that the plaintiff was a passenger. The same duty is upon the engineer whether of a passenger train, freight train, or where, under any circumstances, the engine is being operated, to keep persons without right, off his engine, and to safely put them off if he in time, discovers them there, and particularly so if such persons are children not of the age of discretion.

Counsel for defendant cite many cases wherein railroad companies have been held not liable in cases of injury to boys by climbing on moving trains, without the permission or knowledge of the employees of the company. But the reason assigned for this rule, in substantially all these cases, is clearly stated in the case of *Wilson v. Atchison, T. & S. F. R. Co.* 66 Kan. 183, 71 Pac. 282, to be: "They [trains] pass and re-pass through every community with such frequency, the peril of jumping upon and from moving trains is so well understood, and the task of keeping boys from stealing rides and hopping upon cars of trains slowly moving through towns or railroad yards is so impracticable and burdensome, as to make the rule invoked inapplicable. So to guard trains as to keep boys entirely away from them would require a host of employees, and fix a standard of responsibility which has never received countenance in this state. Such a standard of duty and responsibility cannot be invented and applied by the court without legislation."

No such reason exists in this case. No extra employee was required, but, on the

contrary, the engineer, who was the master of the train and in personal charge of the engine, with his own hands placed the boy on the engine, and knowingly left him to shift for himself while the engine was put in motion.

It will be observed that in the Kansas cases, as in many such cases, the boy was found to be an intelligent boy, twelve years of age, who was familiar with the running of trains, and who knew and appreciated the danger of getting on and off a moving train, and that he was a conscious trespasser and responsible for his own negligence and injury.

It is true that cases are cited which apparently hold to a contrary doctrine from that here announced, but we must decline to follow them. They are not founded in either sound reason or justice. It is the universal rule that railroad corporations are held to the exercise of due care upon the part of their servants, and they should not be permitted to palpably violate this duty, and then hide behind the too often misconstrued and misapplied rule as to scope of authority.

The acts of the engineer as alleged in this case constitute but one continuous transaction. He got down off his engine, induced the boy, unconscious of his danger, to permit him to place him on the engine, left him unguarded thereon, and proceeded to put the engine in motion in the regular course of his employment, with the resulting accident. This was inexcusable negligence upon the part of the servant while engaged in the performance of his duties, however kindly may have been his purpose to please and amuse the child.

The judgment is reversed, with instruction to overrule the demurrer, and to proceed with the trial of the case in accordance with the views herein expressed.

Gabbert, Ch. J., and Garrigues, J., concur.

GEORGIA SUPREME COURT.

RAILROAD COMMISSION OF GEORGIA
et al., Plffs. in Err.,
v.
LOUISVILLE & NASHVILLE RAILROAD
COMPANY.

(140 Ga. 817, 80 S. E. 327.)

Carrier — use of mileage books — authority of Commission.

1. Under the provisions of the Code of this state, the Railroad Commission had

Headnotes by FISH, Ch. J.
L.R.A.1915E.

statutory authority to pass an order providing that "all railroads selling mileage or penny scrip books are hereby required on and after February 1, 1913, to pull the same on the trains of the company selling the same, when presented by the holders for transportation between points wholly within the state of Georgia, except where passengers board trains in cities of 10,000 population or more according to the United States census of 1910, in which places mileage or penny scrip shall be exchanged for tickets."

Same — constitutionality of regulation — due process — contract rights.

2. The statute and the order of the Railroad Commission passed thereunder were not in violation of the 14th Amendment of the Constitution of the United States, as being an unlawful interference with the liberty of contract, or the taking of property without due process of law.

(a) They do not violate the due process clause of the state Constitution.

(b) That a state, through its legislature or its Railroad Commission, cannot fix a reasonable maximum rate for the carriage of passengers by railroads, and then compel them to issue certain tickets to certain persons at a less rate, does not negative the power to regulate carriers of passengers who voluntarily adopt such practice.

(c) As to mileage and penny scrip books issued or to be issued since the date of the order, this is clear.

Constitutional law — contract rights — government interference.

3. In regard to such mileage and penny scrip books as were issued before the passage of the rule or order of the Railroad Commission, they were issued subject to the statutory power of the Railroad Commission to make regulations in regard to such railroads as carriers of passengers; and

Note. — Carriers: validity of regulations by public concerning the manner of using tickets or mileage books.

As to validity of statute requiring issuance of mileage book at reduced rates, see note to Com. ex rel. Anderson v. Atlantic Coast Line R. Co. 7 L.R.A.(N.S.) 1086.

Generally as to delegation to Railroad Commission of the power to regulate carriers, see note to State v. Atlantic Coast Line R. Co. 32 L.R.A.(N.S.) 639.

A careful search has failed to disclose any other cases passing upon the precise question decided in RAILROAD COMMISSION v. LOUISVILLE & N. R. Co. However, in St. Louis & S. F. R. Co. v. Travelers' Corp. — Okla. —, 148 Pac. 166, it was decided that the order of the Corporation Commission directing that railroad companies desist from requiring passengers to show their tickets before entering cars, and which penalize all passengers that do not procure tickets, where sufficient opportunity is afforded, is not in conflict with § 812, Rev. Laws 1910, authorizing a common carrier to demand passenger fare either at starting or at any subsequent time. W. W. A.

such regulatory order as to operation was not violative of the provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts.

Carrier — regulations — power of state.

4. The fact that railroads, like common carriers at common law, could make reasonable rules and regulations in regard to their own operation, in the absence of any statute or valid rule of a Railroad Commission, does not negative the power of the state, directly by legislative act, or through a Railroad Commission, duly authorized, to regulate such carriers.

Public Service Commission — regulations — validity.

5. Where, under statutory authority, a Railroad Commission of a state, after full hearing as to facts, passes a regulatory order of the character of that stated in the first headnote, it will not be declared void by the court merely because, in the absence thereof, a different regulation or agreement made by the railroad companies might have been held valid.

Same — force of ruling — respect in court.

6. Where such a regulatory order has been made by the state Railroad Commission, within its statutory authority, after a full hearing from the parties concerned, including the carriers, the courts will not regard as of no effect the determination of the Commission as to the reasonableness and propriety of such order, or deal with those questions as if the body charged with the duty of considering them had not acted upon them.

(a) The public power to regulate railroads and the private right of ownership of such property coexists, and the one does not destroy the other. Where the power to regulate is so arbitrarily exercised as to infringe the rights of ownership, the exertion is void as being repugnant to the 14th Amendment of the Constitution of the United States, and to the due process clause of the state Constitution.

Evidence — sufficiency.

7. The evidence in this case was conflicting, but it did not show that the Railroad Commission acted so unreasonably or arbitrarily as to authorize an injunction to be granted.

Public Service Commission — effect of dissent.

8. Where an order is promulgated by the Railroad Commission, although a minority of the members thereof may dissent, the order passed by the majority stands as the official action of the body, and is to be dealt with as such.

Commerce — interference — use of mileage books.

9. The order above mentioned is not invalid on the ground that it directly affects and trammels interstate commerce.
L.R.A.1915F.

Constitutional law — discriminatory order.

10. Nor is it invalid on the ground that it is discriminatory.

(Beck, J., dissents.)

(November 18, 1913.)

ERROR to the Superior Court for Fulton County to review a judgment enjoining an order passed by defendant, regulating the sale of mileage books by railroads. Reversed.

Statement by Fish, Ch. J.:

On November 8, 1912, the Railroad Commission of Georgia passed the following order: "Resolved, by the Commission, that all railroads selling mileage or penny scrip books are hereby required, on and after February 1, 1913, to pull the same on the trains of the company selling the same, when presented by the holders for transportation between points wholly within the state of Georgia, except where passengers board trains in cities of 10,000 population or more according to the United States census of 1910, in which places mileage or penny scrip shall be exchanged for tickets."

The Louisville & Nashville Railroad Company filed its petition to enjoin the order on the following grounds, among others: The issuance and sale of mileage scrip books below the maximum rates of passenger fare could not be compelled by the legislature, or by the Railroad Commission under the powers delegated to it, but the issuance and sale of the same was voluntary; that petitioner and other interested carriers have the right to attach to them the condition requiring the exchange of coupons for tickets, as an incident to the checking of baggage and travel thereon, and have the right to make with the purchasers of said books contracts embodying such conditions; that the Railroad Commission of Georgia has no jurisdiction and authority over the subject which would justify it in passing said order; and that in passing said order the Commission exceeded its powers and functions. The order invades the right of petitioner to attach any condition which it sees fit to a privilege which it voluntarily gives, and which it could not be compelled to give, and unwarrantably interferes with its right to make a contract with the purchaser of such books embodying the conditions upon which the same shall be used. Said order is an unlawful invasion and denial by the Railroad Commission of the property right of petitioner of proper and reasonable management and conduct of its affairs, in that it deprives petitioner of the opportunity of protecting its revenue by

proper and reasonable checks, and of the reasonable opportunity to safeguard the proper checking of baggage. Petitioner avers that the right of such reasonable management is a property right which cannot be denied it by the state or the Commission, and that said order is in conflict with the due process clause of the state Constitution. Said order deprives petitioner of the right of making a legal contract with the purchasers of said books, which right of contract is a property right, and in this respect violates said provision of the state Constitution. Said order deprives petitioner of the right to make a contract with other carriers as to the terms and conditions under which interchangeable mileage or penny scrip shall be issued and used, and therefore violates said provision of the state Constitution. The order of the Railroad Commission is violative of the clause of the Constitution of the United States which prohibits a state from passing any law impairing the obligation of contracts. Said order operates as a regulation of interstate commerce, and will result in unduly and illegally burdening and interfering with the same. Said order is unreasonable; and it is discriminatory, as excepting cities of 10,000 or more population.

The defendants demurred to the petition on various grounds, which were urged as reasons why the injunction should not be granted. After hearing evidence and argument, the trial judge granted the injunction as prayed, and the defendants excepted.

Mr. James K. Hines, for plaintiffs in error:

The Commission had the power and authority to pass the order.

State v. Atlantic Coast Line R. Co. 56 Fla. 617, 32 L.R.A.(N.S.) 639, 47 So. 969; *State ex rel. Railroad Comrs. v. Atlantic Coast Line R. Co.* 61 Fla. 799, 54 So. 900; *Wadley Southern R. Co. v. State*, 137 Ga. 507, 73 S. E. 741.

All such contracts as those under which this company sells these forms of transportation are made subject to change, modification, or amendment.

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 263, 46 L. ed. 1156, 22 Sup. Ct. Rep. 900; *Dawson v. Dawson Teleph. Co.* 137 Ga. 62, 72 S. E. 508; *State v. Western & A. R. Co.* 138 Ga. 835, 76 S. E. 577; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259.

The order, although it may indirectly affect interstate commerce, does not unrea-

sonably and unduly burden such commerce, and is not void because it conflicts with the commerce clause of the Federal Constitution.

Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Hennington v. Georgia*, 163 U. S. 299, 317, 41 L. ed. 166, 173, 16 Sup. Ct. Rep. 1086; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; *Grossman v. Lurman*, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 203 U. S. 38, 50, 51 L. ed. 78, 86, 27 Sup. Ct. Rep. 1; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *Asbell v. Kansas*, 209 U. S. 251, 254, 256, 52 L. ed. 778, 780, 781, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; *Chicago, R. I. & P. R. Co. v. Arkansas*, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; *Savage v. Jones*, 225 U. S. 525, 56 L. ed. 1191, 32 Sup. Ct. Rep. 715; *Atlantic Coast Line R. Co. v. State*, 135 Ga. 545, 32 L.R.A.(N.S.) 20, 69 S. E. 725; *Munn v. Illinois*, 94 U. S. 115, 24 L. ed. 77; *Dow v. Beidelman*, 125 U. S. 680, 686, 31 L. ed. 841, 842, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 179, 32 L. ed. 377, 380, 9 Sup. Ct. Rep. 47; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 337, 29 L. ed. 646, 6 Sup. Ct. Rep. 334, 388, 1191; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; *Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts)*, 94 U. S. 155, 24 L. ed. 94; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; *Gladson v. Minnesota*, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45

L. ed. 194, 21 Sup. Ct. Rep. 115; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722.

Railroad companies, from the public nature of their business and the interest which the public have in their operation, are subject as to their state business to state regulation, which may be exerted directly by the legislative authority or by administrative bodies endowed with power to that end.

Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Stone v. Wisconsin, 94 U. S. 181, 24 L. ed. 102; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Perry v. Atlantic Coast Line R. Co. 9 Ga. App. 260, 70 S. E. 1122.

The order is not void for undue discrimination.

Bone v. State, 86 Ga. 108, 12 S. E. 205; Maysville v. Smith, 132 Ga. 316, 64 S. E. 131; McGinnis v. Ragsdale, 116 Ga. 245, 42 S. E. 492.

Messrs. Walter McElreath and Mason & Johnson, also for plaintiffs in error.

Messrs. Tye, Peeples, & Jordan, for defendant in error:

The railroad commission has no authority to require the carriers to sell mileage books.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Mason v. Seaboard Air Line R. Co. 159 N. C. 183, 75 S. E. 25, Ann. Cas. 1914B, 911; Com. v. Atlantic Coast Line R. Co. 106 Va. 61, 7 L.R.A.(N.S.) 1086, 117 Am. St. Rep. 983, 55 S. E. 572, 9 Ann. Cas. 1124; State ex rel. McCue v. Great Northern R. Co. 17 N. D. 370, 116 N. W. 89; Beardsley v. New York, L. E. & W. R. Co. 162 N. Y. 230, 56 N. E. 488; State v. Bonneval, 128 La. 902, 55 So. 569, Ann. Cas. 1912C, 837; Re Gardner, 84 Kan. 264, 33 L.R.A.(N.S.) 956, 113 Pac. 1054.

Not even the legislature can require railroad companies to sell mileage books at a rate less than the maximum rate fixed by law for transportation of passengers, generally; and they cannot be compelled to sell mileage books at all.

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Grand Trunk Western R. Co. v. South L.R.A.1915E.

Bend, 227 U. S. 544, 57 L. ed. 633, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303; Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191.

The order of the Commission is invalid because it directly affects and trammels interstate commerce.

Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; State v. Western & A. R. Co. 138 Ga. 835, 76 S. E. 577; St. Louis Southwestern R. Co. v. Arkansas, 217 U. S. 136, 147, 54 L. ed. 698, 704, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476.

Messrs. McDaniel & Black also for defendant in error.

Fish, Ch. J., delivered the opinion of the court:

The controlling questions involved may be considered under three general heads:

(1) Did the State Railroad Commission have statutory power to make the regulation under consideration? (2) If so, does such statute conflict with the 14th Amendment of the Federal Constitution, or the clause of the state Constitution forbidding the depriving of any person of life, liberty, or property without due process of law? (3) If the Commission has power to make regulations of this character, has it exercised the power so arbitrarily and unreasonably in the particular case before us as to authorize the courts to declare such action illegal?

Did the State Railroad Commission have statutory authority to make a regulation of this character? By § 2638 of the Code of 1910 it is declared that "all contracts and agreements between railroad companies doing business in this state, as to rates of freight and passenger tariffs, shall be submitted to said commissioners for inspection and correction, that it may be seen whether or not they are a violation of the law or of the provisions of the Constitution, or of this article, or of the rules and regulations of said commissioners; . . . and said commissioners may make such rules and regulations as to such contracts and agreements as may be then deemed necessary and proper." The plaintiff alleges that it issues interchangeable mileage books by agreement with other railroads. In § 2663, among other things, it is declared that the Commission is authorized "to require all common carriers and other public service companies under their supervision to establish and maintain such public service and facilities as may be reasonable and just." Large powers of regulation as to freight and passenger carriage are also declared to exist in the Commission by § 2630. In Wadley Southern R. Co. v. State, 137 Ga.

497, at page 505, 73 S. E. 741, Mr. Justice Evans, delivering the opinion, said: "The power of the legislature to create a commission to regulate public service corporations, and to prevent unjust discriminations by them, is too well established in the jurisprudence of this state to be contested at this late day." Again he said (at page 509 of 137 Ga.): "It is contended that § 2657 [which prohibits discrimination against any connecting line and requires the furnishing of the usual and customary facilities for the interchange of freights to the patrons of all lines] does not require the affording of facilities of the character required by this order of the Commission, but that its requirement is only applicable to physical connections and physical appliances. We do not think the section should be so restricted in its application. It applies to every facility necessary for the safety and convenience of passengers and for the prompt transportation of freight. Besides, the more recent act of 1907 (Civil Code, § 2630) confers on the Railroad Commission the power to require all railroads to maintain such public service and facilities as may be reasonable and just. . . . At common law common carriers were allowed to discriminate in favor of some of their patrons, so long as the bestowal of favors did not violate their duty to the public. *Ocean S. S. Co. v. Savannah Locomotive Works & Supply Co.* 131 Ga. 834, 20 L.R.A.(N.S.) 867, 127 Am. St. Rep. 265, 63 S. E. 577, 15 Ann. Cas. 1044. But railroad companies of the present day are not only common carriers charged with the performance of their common-law duties as such, but they are also quasi public institutions, and in this relation owe additional duties to the public and are subject to governmental regulation."

In *Perry v. Atlantic Coast Line R. Co.* 9 Ga. App. 260, 70 S. E. 1122, the case arose before the Railroad Commission passed the order now attacked. A person with a mileage book presented it to a conductor, who declined to accept the coupons in payment of fare. The passenger refused to pay his fare otherwise, and was ejected, whereupon he brought an action for damages. The court of appeals held: "There is no law or regulation of the Railroad Commission in this state which prevents a common carrier from making with members of the general public a contract by which the carrier sells to a member of the public at a reduced rate a mileage book, which shall not be good for passage on trains except from non-agency stations, or from agency stations not kept open for the sale of tickets, unless it is first exchanged for a ticket." In the opinion Powell, J., said, p. 264: "With the L.R.A.1915E.

inconvenience which results from passengers being required to exchange mileage coupons for tickets, we, as judges, have no right to concern ourselves. That is a matter which addresses itself initially to the transportation companies, and finally to the legislature or to the Railroad Commission. So long as the law and the railroad commissioners' rules remain as they are, it is our duty to enforce these contracts as they are made; and decisions from other states, where they have different laws or different regulations adopted by the Railroad Commission, are neither persuasive nor controlling." This clearly recognized the fact that the Railroad Commission had legislative authority to make a regulation on the subject, and while it is not binding authority upon this court, it is persuasive, and, we think, correct. In *State ex rel. Railroad Comrs. v. Atlantic Coast Line R. Co.* 61 Fla. 799, 54 So. 900, it was declared: "The difficulty of making a specific enumeration of all such powers as the legislature may intend to confer upon railroad commissioners for the regulation of common carriers in the interest of the public welfare renders it necessary to confer some power in general terms; and general powers given are intended to confer other powers than those specifically enumerated."

In the case before us the legislature conferred upon the Railroad Commission authority to make rules and regulations in regard to such carriers. The order of the Railroad Commission under consideration provides that all railroads selling mileage or penny scrip books shall "pull the same on the trains of the company selling the same, when presented by the holders for transportation between points wholly within the state of Georgia, except where passengers board trains in cities of 10,000 population or more according to the United States census of 1910, in which places mileage or penny scrip shall be exchanged for tickets." This was a regulation, and clearly fell within the power of regulation conferred by the statute on the Commission.

The next question is whether the statute, in so far as it confers such power, and the order in pursuance thereof, are unconstitutional. Is this order in violation of the 14th Amendment of the Constitution of the United States, in that it interferes with the freedom of contract, which is a part of "the liberty" guaranteed thereby? In support of this theory several cases are cited, but they are not sufficient to establish the contention. It is settled by the decision in *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565, that, where a state had fixed a reasonable maximum rate, it could not compel

railroad companies to sell 1,000-mile tickets at a less rate, and require them to issue such tickets in the name of the purchaser and his wife and children, upon application, and declare that each ticket of that character should be valid for two years after its issuance. It was said that after the state had formally declared a reasonable maximum rate which railroad companies might charge within its boundaries, to then declare that they must sell tickets of certain kinds to certain persons for less than the amount which had been fixed as reasonable was, in effect, an effort by legislation to discriminate in favor of certain purchasers of railroad tickets, and to compel the carriers to take less than the state itself had declared they might reasonably charge. The court was careful not to limit the power of the state to regulate common carriers, and the syllabus contains the following statement, which is supported by the opinion: "In so holding, the court is not thereby interfering with the power of the legislature over railroads, as corporations or common carriers, to so legislate as to fix maximum rates, to prevent extortion or undue charges, and to promote the safety, health, convenience, or proper protection of the public; but it only says that the particular legislation in review in this case does not partake of the character of legislation fairly or reasonably necessary to attain any of those objects, and that it does violate the Federal Constitution, as above stated." This case has been followed by a number of others.

But a moment's thought will show that there is a wide difference between holding that a state cannot first fix a reasonable maximum rate and then compel the sale of tickets of a certain character to certain parties at a less rate, and the question whether, if railroads voluntarily issue tickets of a certain character, the state, through the legislature or a Railroad Commission, may regulate the manner of operation or dealing with passengers using such tickets. In the case now before us there is no effort to compel the issuing of mileage tickets, but a regulation if they are voluntarily issued. The case last cited is typical of one class of cases relied on. Another class comprises decisions holding that, in the absence of statute or lawful regulation by a Railroad Commission, railroad companies may make reasonable regulations, and that certain agreements in regard to the manner of using mileage books were valid and binding. To this class belong the cases of *Mason v. Seaboard Air Line R. Co.* 159 N. C. 183, 75 S. E. 25, Ann. Cas. 1914B, 911, and that of *Perry v. Atlantic Coast Line R. Co.* 9 Ga. App. 260, 70 S. E. 1122, L.R.A.1915E.

supra. But these cases do not decide that a legislature or Railroad Commission cannot make a regulation on the subject. In addition to what has just been said, it may be remarked of the case of *Eschner v. Pennsylvania R. Co.* 18 Inters. Com. Rep. 60, that it was dealing with the act regulating interstate commerce, in which occurs a clause "that nothing in this act shall prevent . . . the issuance of mileage, excursion, or commutation passenger tickets," and that there was no denial of the power of Congress to deal with the subject. It arose, not under any requirement of an act of Congress, or rule of the Commission in pursuance of power so conferred, but, in the absence of both, a complaint was made in a special case that the practice of the railroads was unreasonable and discriminatory against the complainant. What was said must be construed in the light of the question before the Commission. It in no way affects the act of the legislature of this state or the rule of the State Railroad Commission passed under its authority.

This asserted right of liberty to contract has been again and again put forward in opposition to regulation by legislatures and Railroad Commissions. In *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900, it was held that "the act of the legislature of Minnesota, creating a railroad commission, is not unconstitutional in assuming to establish joint through rates or tariffs over the lines of independent connecting railroads, and apportioning and dividing the joint earnings. Such a commission has a clear right to pass upon the reasonableness of contracts in which the public is interested, whether such contracts be made directly with the patrons of the road or for a joint action between railroads in the transportation of persons and property in which the public is indirectly concerned. Without deciding whether or not connecting roads may be compelled to enter into contracts as between themselves, and establish joint rates, it is none the less true that where a joint tariff between two or more roads has been agreed upon, such tariff is as much within the control of the legislature as if it related to transportation over a single line." In delivering the opinion Mr. Justice Brown said: "It is insisted that it is beyond the constitutional power of the legislature to compel companies to enter into involuntary, unreasonable, and unprofitable contracts with other companies at the instance of third parties, or to fix terms and conditions upon which such contracts shall be performed. This argument in its various applications is one which has been addressed to and considered by this

court in nearly every case in which the power of the state to regulate railway charges has been called in question, and the answer made to it in those cases is equally pertinent here. Indeed, it is impossible for the state to exercise this power of regulation without interfering to some extent with the power of a railway to contract either with its customers or connecting lines. The power is one which was said in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, to have been customarily exercised in England from time immemorial, and in this country from its first colonization, for the regulation of ferries, common carriers, hackmen, bakers, millers, wharfingers, and innkeepers; and the whole object of this class of legislation is to curtail the power to contract by limiting the exactions of those engaged in these occupations, and providing that the rendition of such services shall not raise an implied promise to pay more than a certain fixed sum."

The idea that the regulation of common carriers is altogether new is erroneous. In England in the third year of the reign of William and Mary (A. D. 1691) a statute was enacted which declared that "and whereas divers waggoners and other carriers, by combinations amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of trade; be it therefore enacted," etc. 3 Wm. & Mary, chap. 12, § 24. This remained in force until 1827. Regulating rates is only the exercise of one branch of the power of regulation.

In the celebrated and often cited case of *Munn v. Illinois*, supra, the subject of control and regulation, where an owner of property devotes it to a use in which the public has an interest, was thoroughly considered. In the opinion Chief Justice Waite said (pp. 125, 126): "This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what is without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Hargrave's Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants L.R.A.1915E.

to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." Again (p. 130): "Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 382, 12 L. ed. 465, 482. Their business is, therefore, 'affected with a public interest,' within the meaning of the doctrine which Lord Hale has so forcibly stated."

Referring to the common-law rule that in matters affecting the public interest, if there were no statutory regulations, the owner of the property could make his rates, subject to judicial inquiry as to whether they were reasonable, but that the legislature might fix a rate, he said (p. 134): "But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one." The modification of the ruling in that case, as to the limitation upon the legislative power, and the extent to which the courts will inquire into whether a particular regulation amounts to a taking of property without due process of law, will be mentioned presently.

In the absence of regulation by the state, the whole subject of the making of rules and regulations is left to the common carrier, subject only to control by the courts of their reasonableness, or discriminatory character. By way of illustration, the location of depots, whether a railroad will make physical connections between its road and others, how long it will keep open its stations before the arrival of trains, whether it will stop trains at certain points, whether it will discontinue trains without notice, and many other like subjects, might be mentioned. But when the legislature by

itself, or through the medium of a commission, has investigated these matters and made regulations in regard to them, it will hardly be now contended that the act or rule does not supersede the power of the railroad company to make such determination, unless the act or rule itself is invalid. If what a railroad company may do in the absence of any legislative act or rule of a Railroad Commission is to be taken as a limitation upon the power of the legislature or the Commission, then governmental power to regulate such carriers is a name only. Our Code recognizes the common-law rule as it exists in the absence of regulation by the legislature or the Railroad Commission. Civil Code 1910, §§ 2729, 2750. It also provides for such regulation by the Commission. Sections 2630 et seq., 2662 et seq., in which a later act is codified. Construing these sections in harmony, it is evident that the power of a common carrier to make reasonable regulations must yield, where regulations have been made by authority of the state, unless they are invalid.

Pursuing further the subject of liberty to contract, and the power of state regulation to affect the carrying out of contracts and the right to make them, in *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259, it was held that the state had power to prohibit contracts limiting liability for injuries by railroads, made in advance of the injury received, and to provide that the subsequent acceptance of benefits under such a contract should not constitute satisfaction of the claim for the injuries received after the contract. It was said: "Freedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to contract as one chooses. Liberty implies the absence of arbitrary restraint,—not immunity from reasonable regulations. Where police legislation has a reasonable relation to an object within governmental authority, the legislative discretion is not subject to judicial review." In *Schmidinger v. Chicago*, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284, it was declared that there is no absolute liberty of contract, and limitations thereon by police regulations of the state are frequently necessary in the interest of public welfare, and do not violate the freedom of contract guaranteed by the 14th Amendment. That case involved an ordinance of the city of Chicago, enacted under the legislative authority, fixing standard sizes of bread loaves, and prohibiting the sale of other sizes.

The power of a legislature or of Congress to regulate common carriers, within their respective jurisdictions, and the fact that L.R.A.1915E.

this is not destroyed because such regulations may to some extent affect the power to contract, or even contracts already made, have recently been considered by this court. *Atlantic Coast Line R. Co. v. State*, 135 Ga. 545, 32 L.R.A.(N.S.) 20, 69 S. E. 725; *Washington v. Atlantic Coast Line R. Co.* 136 Ga. 638, 38 L.R.A.(N.S.) 867, 71 S. E. 1066; *State v. Western & A. R. Co.* 138 Ga. 835, 76 S. E. 577; *Stephens v. Central of Georgia R. Co.* 138 Ga. 625, 42 L.R.A.(N.S.) 541, 75 S. E. 1041, Ann. Cas. 1913E, 609. See also *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265. In the cases last cited the Supreme Court of the United States held that contracts already made (in the one case as to rates, in the other as to free transportation) must yield to lawful regulation as to interstate commerce. In the *Armour Case* Mr. Justice Day said (p. 82): "If the shipper sees fit to make a contract covering a definite period for a rate in force at the time, he must be taken to have done so subject to the possible change of the published rate in the manner fixed by statute, to which he must conform or suffer the penalty fixed by law." In *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 102, 112, 2 I. C. C. Rep. 162, 189, 34 Am. & Eng. R. Cas. 630, 653, Judge Cooley said: "If the legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose. No doctrine to that effect would be even plausible, much less sound and tenable."

Under the *Dartmouth College Case* charters were held to be contracts. Thereupon in various states constitutional or statutory provisions were made, to the effect that all charters thereafter granted should be subject to modification or change. It has been held that all charters thereafter granted were subject to such reservation. *Central R. & Bkg. Co. v. State*, 54 Ga. 401; *Macon & B. R. Co. v. Gibson*, 85 Ga. 12, 21 Am. St. Rep. 135, 11 S. E. 442. See also *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115. As has already been shown, the Supreme Court of the United States has declared more than once that the police power of the state extends to regulating railroads as common carriers, as to intrastate business.

It may be remarked that, under the allegations of the plaintiff's petition, mileage and penny scrip books are only issued for

one year at a time. As more than a year has elapsed since the order of the Commission was passed, the question of prior contracts is of little practical application.

So far as the argument relates to checking baggage, nothing is said in the order on that subject, and we need not deal with such suggestion.

We now come to consider the limitation upon the power of the legislature to regulate common carriers, so far as it may be necessary for the determination of the present case. If the rule of the Railroad Commission under consideration violates a provision of the Constitution of the United States, it would be equally void whether it was passed by the Commission under legislative authority or enacted by the legislature itself. The trial judge apparently entertained too contracted a view of the power of a sovereign state to legislate for the welfare of its people, which frequently goes under the name of the police power, and too broad a view of the absolute right to contract.

In the case of *Thurlow v. Massachusetts*, 5 How. 504, 12 L. ed. 256, and other cases, known as the License Cases, Chief Justice Taney said (p. 582): "But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits,—in every case it exercises the same powers; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States." This is recognized as a part of the police power in *Lake Shore & M. S. R. Co. v. Smith*, supra, 173 U. S. 684, 689, 43 L. ed. 858, 861, 19 Sup. Ct. Rep. 565, and *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 297, 43 L. ed. 702, 706, 19 Sup. Ct. Rep. 465.

In *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633, the court had under consideration an ordinance of the city of Chicago (authorized by the state) providing for the issuing of a license to persons to sell cigarettes upon payment of \$100, and forbidding their sale without a license. It also provided that a license should be issued if the mayor was satisfied that the person applying was of good character and reputation and a suitable person L.R.A.1915E.

to be intrusted with the sale of cigarettes, and required the applicant to file a bond to faithfully observe and obey the laws in regard to cigarettes. In discussing the police power of the state in respect to the regulation of businesses, Mr. Justice Peckham said (p. 188): "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be, and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizens are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference." In *Schmidinger v. Chicago*, 226 U. S. 578, 587, 57 L. ed. 364, 367, 33 Sup. Ct. Rep. 182, 184, Ann. Cas. 1914B, 284, supra, this language was approvingly quoted by Mr. Justice Day, who also said: "This court has frequently affirmed that the local authorities intrusted with the regulation of such matters, and not the courts, are primarily the judges of the necessities of local situations calling for such legislation, and the courts may only interfere with laws or ordinances passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred." See also *Frisbie v. United States*, 157 U. S. 160, 165, 166, 39 L. ed. 657-659, 15 Sup. Ct. Rep. 586.

The decision in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, substantially laid down three propositions: (1) That the legislature had power to regulate common carriers, and as a part of such power to establish rates of charges by them. (2) That the fixing of such rates was a matter for the legislative discretion. (3) That when this discretion had been exercised by the legislature, it could not be overthrown by the courts. In the opinion Chief Justice Waite used this very strong language (p. 134): "We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts." See also *Chicago, B. & Q. R. Co. v. Iowa* (*Chicago, B. & Q. R. Co. v. Cutts*), 94 U. S. 155, 24 L. ed. 94; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 529, 24 L. ed.

734, 737; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180, 24 L. ed. 99. Of the three propositions above stated the first remains undisputed. The third has been considerably modified or changed, and this modification necessarily affects to some extent the second proposition.

In the *Railroad Commission Cases*, 116 U. S. 307, 331, 29 L. ed. 636, 644, 6 Sup. Ct. Rep. 334, 345, 388, 1191, Chief Justice Waite said (p. 331): "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." In *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702, it was held that an act which provided that rates of charges for the transportation of property recommended and published by a Railroad Commission should be final and conclusive as to what were equal and reasonable charges, and that there could be no judicial inquiry as to the reasonableness of such rates, was unconstitutional. In the opinion Mr. Justice Blatchford used some broad language as to the question of reasonableness being a proper one for judicial investigation. Three justices dissented, on the ground that the decision was in conflict with that in the *Munn Case*.

Without discussing the various decisions of the Supreme Court of the United States in which the subject has been under consideration, it may be stated that sometimes the word "reasonable" has been used, and sometimes the expression "reasonable in a legal sense," and sometimes other expressions; but, when the decisions are considered as a whole, they do not mean either that the legislature is deprived of all discretion in the exercise of this branch of the police power of the state, or that the discretion of the courts is substituted entirely for that of the legislature. To hold that the legislature of a state has the power to regulate rates, but no discretion as to what regulations are proper and reasonable, and that the whole subject of reasonableness is to be determined by the courts as a primary question, would be substantially to strip the lawmaking power of the state of its sovereignty, and would not comport with the theory of our state and national gov-

ernments of the existence of three co-ordinate departments. If the discretion of the legislature and its power to decide what is a reasonable regulation is to be measured by the "chancellor's foot," it is but an impotent and puling thing. Moreover, if the subject of reasonableness is to be treated as one of the primary discretions in the courts, unaffected by the legislative opinion on that subject, the courts may expect to be overwhelmed with questions of rate making and railroad regulation. The legislature may enact laws directly on the subject of regulation, or they may establish railroad commissions. Such commissions are selected on the idea that their members are peculiarly qualified to deal with such questions, and they are required to devote their time and attention to the study and solution of these problems. Often the chancellor, however learned in law, has little training in rate making. The general rule is that legislative acts are presumed to be constitutional, and will only be declared unconstitutional when they plainly violate the fundamental law. When the legislature empowers a railroad commission to make regulations for common carriers, surely some presumption of correctness is to be indulged in favor of their rulings, especially after due hearing has been had, as in the present case.

In *Gladson v. Minnesota*, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627, it was held that a statute of a state, which required every railroad company to stop all regular passenger trains, running wholly within the state, at its stations at all county seats long enough to take on and discharge passengers with safety, was a legitimate exercise of the police powers of the state, and did not take property of the company without due process of law. In *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398, it was held that railroad companies "from the public nature of the business by them carried on, and the interest which the public have in their operation, are subject as to their state business to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end. The public power to regulate railroads and the private right of ownership of such property coexist and do not the one destroy the other; and where the power to regulate is so arbitrarily exercised as to infringe the rights of ownership, the exertion is void, because repugnant to the due process and equal protection clauses of the 14th Amendment." Under this rule it was held that it was within the power of a state railroad com-

mission to compel a railroad company to make reasonable connections with other roads so as to promote the convenience of the traveling public, and that an order requiring the running of an additional train for that purpose, if otherwise just and reasonable, was not inherently unjust and unreasonable because the running of such train would impose some pecuniary loss on the company. It was further declared: "While the enforcement by a state of a general scheme of maximum rates so unreasonably low as to be unjust and unreasonable may be confiscation, and amount to taking property without due process of law, the state has power to compel a railroad company to perform a particular and specified duty necessary for the convenience of the public even though it may entail some pecuniary loss."

In *Interstate Commerce Commission v. Illinois C. R. Co.* 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155, referring to the Interstate Commerce Commission it was held: "in determining whether an order of the Interstate Commerce Commission shall be suspended or set aside, power to make—and not the wisdom of—the order is the test, and this court must consider all relevant questions of constitutional power or right, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to be made, and also whether, even if in form it is within such delegated authority, it is not so in substance, because so arbitrary and unreasonable as to render it invalid." Shall not the courts of the state give as much consideration to the State Railroad Commission in dealing with intrastate business?

In *Interstate Commerce Commission v. Louisville & N. R. Co.* 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185, is contained a very recent utterance on the subject of the weight to be given to the determination of the Interstate Commerce Commission in passing on evidence, upon a hearing before that body. It was said: "The value of evidence in rate proceedings varies, and the weight to be given to it is peculiarly for the body experienced in regard to rates and familiar with the intricacies of rate making. . . . In this case the order of the Commission restoring local rates that had been in force many years between New Orleans and neighboring cities, and making a corresponding reduction in through rates, was not arbitrary, but was sustained by substantial, although conflicting, evidence, and the courts cannot settle such a controversy, or put their judgment against that of the Commission, which is the ratemaking body." These excerpts from the syllabi are

sustained by the opinion rendered by Mr. Justice Lamar.

The case of *Platt v. Lecoq*, 15 L.R.A. (N.S.) 588, 85 C. C. A. 621, 158 Fed. 723, was cited by counsel for the defendant in error. It was a decision of the circuit court of appeals the eighth circuit, in which the opinion was prepared by Sanborn, J. That case did not involve a general rule regulating common carriers for the convenience of the public, but arose on the application of a bank to compel an express company to receive specie and currency after the departure of trains during the morning, and store them until the departure of trains on the next day. In the present case the evidence discloses that there are about 7,000 persons who travel as salesmen to a greater or less extent in Georgia, and who, as well as others using 1,000-mile tickets, are affected by the practice of the railroad company concerning which a regulation was made by the State Railroad Commission after a hearing. In the opinion in the case cited Judge Sanborn indulged in some broad expressions; but it should be noted that Mr. Justice Van Devanter, then circuit judge, declined to concur generally in the opinion of Judge Sanborn, and concurred only in the result.

In the year 1912 the South Carolina legislature passed an act (27 Stat. at L. p. 778), which provided that any railroad company selling mileage books for transportation should receive coupons from books sold by such road on its trains for transportation within the state, and should check baggage for passengers upon presentation of such mileage books. A railroad operating in South Carolina caused to be stamped upon all interchangeable mileage books thereafter sold a statement that coupons therefrom would not be accepted in exchange for tickets for a journey wholly within that state. A new form of mileage books was provided for intrastate travel in South Carolina. It was noninterchangeable, that is, good only upon the line of the road issuing it, and it was receivable only for transportation wholly within the state, as to which the coupons were made receivable, and no exchange for tickets was required. A complaint was made to the Interstate Commerce Commission by the Railroad Commission of South Carolina, touching interstate business, and directed against the practice of the carriers which required that mileage should be exchanged for tickets instead of being used directly for checking baggage, or for transportation upon trains. The Interstate Commerce Commission thereupon instituted an investigation. On October 14, 1913, a decision was rendered. The Commission referred to § 22 of the act

to regulate interstate commerce, act Feb. 4, 1887, chap. 104, 24 Stat. at L. 387 (Comp. Stat. 1913, § 8595), which declared "that nothing in this act shall prevent . . . the issuance of mileage, excursion, or commutation passenger tickets." It was said that this language had been construed as a permission to carriers in relation to interstate commerce, and not as a grant of authority to the Interstate Commission to compel the carriers to furnish passenger transportation at less than a reasonable rate.

The next question which arose was whether, under the evidence introduced on that hearing, the regulation or practice of the carriers in South Carolina operated to make discriminations or work other positive wrongs forbidden by the act of Congress in relation to interstate commerce. It was held that the practice above described did not operate to make a discrimination as to interstate commerce, and as to it was not unreasonable. This in no way affected the power of the state legislature to enact the law in regard to intrastate business; nor in the case before us does it affect the power of the State Railroad Commission, in view of the evidence before it, to make a regulation in regard to passenger transportation wholly within the state, so as to require a railroad company issuing a mileage book or penny scrip book to accept the coupons on the trains of the selling company. Judging from the statement of the evidence before the Interstate Commerce Commission, it was quite different from that in the present record. The opinion of the Interstate Commission controls as to interstate business. It does not control the judgment of the State Commission, on evidence before it, in regard to intrastate business. The right of local regulation in regard to intrastate business is recognized in the opinion of the Interstate Commission in that case, where it is said: "The Commission [i. e., the Interstate Commission] clearly has no power to require the carriers to receive the interchangeable mileage coupons upon trains for journeys wholly within that state. The regulation of transportation wholly within South Carolina is still with the state authorities and beyond the control of the Commission. Neither has this Commission power to direct that the mileage sold in South Carolina, by its terms good only for transportation wholly within that state, shall be receivable for interstate journeys."

When the matter now under consideration was before the State Railroad Commission, after a full hearing, it passed the order which is attacked. It is true that

two members of the Commission dissented; but the majority of the Commission passed the regulation, and that becomes the official action of the body, and must be so treated by this court, and given force accordingly. The evidence before the Commission was doubtless conflicting. But they solved the conflict. It is not shown that the Commission acted arbitrarily under the evidence before them. In the record brought to this court there is no lack of evidence as to the large number of people affected and the extent of the inconvenience imposed upon them. The courts ought not to interfere. The issuance of mileage books is not attacked. What is said in regard to the Federal Constitution applies also to a large extent to the due process clause of the state Constitution *mutatis mutandis*.

In view of the decision of the Supreme Court of the United States that railroads cannot be compelled to issue mileage books at a rate below the general maximum rate established according to law, and in view of the ruling of the Interstate Commerce Commission in the South Carolina case, it may be questioned whether the regulation of the Railroad Commission of this state now under consideration will have as extensive an effect as may have been anticipated by its advocates. But that is not a question for this court, in determining the power of the Commission to make the regulation.

As to the contention that this order of the State Railroad Commission is invalid as being an interference with interstate commerce, it will appear from some of the decisions cited above that such contention is not well founded. See also *Southern R. Co. v. Melton*, 133 Ga. 277, 298, 65 S. E. 665, and cases cited; *Southern R. Co. v. Atlanta Sand & Supply Co.* 135 Ga. 35, 68 S. E. 807.

The order was not void as being unduly discriminatory in excepting certain larger cities. The evidence tended to show greater inconvenience in small towns. There was no discrimination injurious to the railroads, and no one else is complaining. This objection is not the same as the constitutional point sometimes raised that special or local acts cannot be passed by the legislature in cases already provided for by a general law. No such constitutional point was raised, nor does it seem applicable to such an order of the Railroad Commission. Nor, indeed, was the objection as to discrimination because of a difference in regard to the larger cities urged in the brief.

We have not discussed in detail all the questions raised by the defendant in error; but none of their contentions authorize the

grant of an injunction, under the facts of the case.

Judgment reversed.

All the Justices concur, except

Beck, J., dissenting:

Upon the back of the mileage books and the penny scrip books which are dealt with by the rule of the Railroad Commission (hereinafter referred to as the Commission) are certain conditions and stipulations. These are signed by the purchaser at the time of the purchase, and thus between him and the railroad company selling the tickets, whether for scrip or interchangeable mileage, is created an express contract. Under that contract and by virtue of it the purchaser obtains certain advantages which are not enjoyed by one who, about to become a passenger, buys the ordinary ticket to be used for his passage and taken up on the train. The advantages secured by the purchaser of the books of coupons in question constitutes a valuable consideration. The purchaser of the coupon books (and in the use of the expression "coupon books" I include both the interchangeable mileage books and the penny scrip) obtains his transportation at a rate that is considerably less than that paid by the purchaser of the ordinary ticket; the reduction amounting in some cases to 20 per cent of the cost of transportation at the rates fixed by the Railroad Commission. The Commission had, previously to the passage of the order in question, fixed the maximum rates for carriage between points in this state over the various lines of railroad therein; and the order which they have passed is not in the nature of one rearranging or creating a passenger tariff, but it affixes certain new and material conditions to the terms of the contract between the railroad company selling the coupon tickets and the purchaser thereof. This contract entered into by the carrier and its patron is one voluntarily entered into by both parties thereto; by the carrier, no doubt, because it tends to increase the volume of its business, and by the purchaser for a valuable consideration.

It is not contended, nor even suggested in argument, that the contract violates the policy of the law. The regulations as to the manner of the use of the coupon tickets were held by the trial court to be reasonable, and in view of the evidence submitted at the trial tending to show the reasonableness of all the regulations in the regard just referred to, it can scarcely be denied that this holding was clearly authorized, so far as relates to the regulations themselves without reference to the effect which other

regulations sought to be imposed by the action of the Commission had upon them. They are not violative of any public policy of the state; they do not adversely affect the safety of the passenger; nor do they diminish in any way the care due nor the diligence owing him by the carrier. The passenger's rights to safe transportation, to every comfort and facility guaranteed by the law, or voluntarily provided for other passengers, are as complete as if he were traveling on a full-fare ticket. Consequently the carrier had the right, in order to facilitate the transaction of its business and to safeguard its income, to make these regulations, if, in its opinion, they were such as to accomplish the ends proposed, whether others agreed with it as to the necessity and effectiveness of these regulations in this regard or not. In *Perry v. Atlantic Coast Line R. Co.* 9 Ga. App. 260, 70 S. E. 1122, the court of appeals says: "There is no law or regulation of the Railroad Commission . . . which prevents a carrier from making with the members of the general public a contract by which the carrier sells to a member of the public at a reduced rate a mileage book, which shall not be good for passage on trains except from nonagency stations, or from agency stations not kept open for the sale of tickets, unless it is first exchanged for a ticket." In *Mason v. Seaboard Air Line R. Co.* 159 N. C. 183, 75 S. E. 25, the supreme court of North Carolina said: "The consensus of all the authorities, without a single exception so far as we have been able to find, is that by accepting such a contract at a reduced rate, when he has the opportunity to purchase the usual and ordinary ticket, the passenger enters into a contract with the carrier different from that implied by law upon the purchaser of an ordinary ticket at full rate of fare. The purchaser is bound in such cases by the terms of the contract, and is entitled to its advantages of reduced fare." In *Eschner v. Pennsylvania R. Co.* 18 Inters. Com. Rep. 60, the Interstate Commerce Commission held: "If a carrier may extend or withhold the privilege of mileage, excursion, and commutation tickets, it would seem to follow that it may attach to them, as an integral part of the contract, conditions of the kind involved in this proceeding; and since we cannot compel carriers to issue such tickets, we see no grounds upon which we may compel them to modify the conditions which they attach to them, so long, at least, as these conditions result, as heretofore stated, in no discrimination, nor in the violation of any other provision of the act. . . . In a word, the right to use exchange orders and mileage books is in the nature of a privi-

lege voluntarily accorded by carriers under their tariffs, and must be accepted by those who use such special fares with all lawful and nondiscriminatory limitations that may be attached to them." And supporting this view there is abundant authority to be found in the decisions of many courts, which have been collated in the opinion of the chairman of the Commission (concurring in by another member of the Commission) dissenting from the action of the majority in passing the order in controversy.

I have referred to the contract between the carrier and the purchaser of the coupon books as voluntary, and it is purely so. It may be further said that the placing of the coupon books upon sale by the carrier is also voluntary, in that neither the legislature nor the Commission has passed any act, nor adopted any order, requiring the issuance and sale of such coupon books, and it may well be doubted whether the Commission could compel the issuance of such mileage tickets while the order already passed by the Commission fixing maximum rates remains of force and unchanged. In the case of *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565, the Supreme Court of the United States had before it the question of the compulsory issuance of mileage tickets like those in question here, and the question of the constitutionality of an act of the legislature of the state of Michigan, which provided that 1,000-mile tickets shall be kept for sale at the principal ticket office of all railroads in the state, or carrying on business partly within and partly without the state, at a price not exceeding \$20 in one part and \$25 in another part of the state; that such tickets should be made nontransferable, "but whenever required by the purchaser they shall be issued in the names of the purchaser, his wife and children, designating the name of each on such ticket," and that such tickets shall be made valid for two years from the date of purchase. The court sustained the contention of the railroad company to the effect that the act was unconstitutional, because violative of that part of the Constitution of the United States which forbids the taking of property without due process of law and requires the equal protection of the laws. This case has been followed by the courts of last resort in a number of the states—reluctantly by some, and without question or hesitation in others. *State v. Bonneval*, 128 La. 902, 55 So. 569, Ann. Cas. 1912C, 837.

It appearing, then, that the sale of the mileage tickets and the assent of the purchaser to the conditions and stipulations L.R.A.1915E.

entered thereon and evidenced by his signature attached thereto constitute a contract voluntarily entered into by both parties, and that the contract was not violative of the public policy of the state, how could the Commission attach new terms or conditions to the contract, which in substance would have the effect of making a different contract from that into which the parties had entered? It is not necessary to consider here whether the Commission could prohibit entirely the issuance of the mileage books, on the ground that it would be discriminatory in favor of a certain class of the public; but the question is whether, without attempting to abolish the use of the mileage books, they could change the contract which was entered into in connection with the sale and purchase thereof. We recognize the principle that the right to contract is not absolute and universal. It was well said by the Supreme Court of the United States in *Frisbie v. United States*, 157 U. S. 160, 165, 166, 39 L. ed. 657-659, 15 Sup. Ct. Rep. 586, 588, that "it is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property." The same principle is stated in the case of *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259, and in numerous cases there cited.

But it is equally true, as was said by the same court in the case of *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427, 431, that "the liberty mentioned in that Amendment [14th] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to

a successful conclusion the purposes above mentioned." It can certainly be said that freedom in the exercise of the right to contract is the general rule, subject always to interference therewith by the state in the exercise of its police power, where it can be properly invoked to preserve or safeguard the health, safety, or welfare of the public. But before an interference with the freedom of contract can be justified upon the ground that it is resorted to in the exercise of the police power by the state, it must appear that the exercise of this power has a clear relation to the purpose in view and was necessary to the accomplishment of the ends for which that power can be exercised. In the use of the mileage tickets under the conditions which form a part of the stipulations assented to by the purchaser, there is, as we have said before, the same care for the welfare, the comfort, and the protection of the user thereof as if he had bought the usual and ordinary ticket good for passage at the rates prescribed by the Railroad Commission. Consequently, the exercise of the police power in case of the purchase and use by passengers of the mileage books cannot be justified on the ground that it was necessary to safeguard or to insure the health, comfort, or welfare of the passenger.

Now, if it be insisted that in addition to the exercise of the police power for the purpose of securing and protecting the health, comfort, and welfare of the members of the public, it may be invoked also to afford him greater convenience and to diminish inconvenience incurred in traveling, that contention can well be met in the present case by calling attention to the fact that the inconvenience to which the holder of one of these mileage tickets is subjected can be only slightly greater than the inconvenience every traveler by railway, who seeks to buy the usual and ordinary ticket, is subjected to, when in a limited time the traveler seeks to purchase a ticket at stations where one agent must wait upon a considerable number of customers. But whether the inconvenience of the user of the mileage ticket is only slightly greater than that of the purchaser of the ordinary ticket, this inconvenience is one of the things which he contracted, for a valuable consideration, to undergo, and it is optional on his part whether the advantage to him secured in the decrease of the amount to be paid for his transportation is compensation to him for the inconvenience which he contracts to undergo. The holder of the coupon book buys his transportation, it might be said, at a bargain. Has he not, and should he not have, the right to bargain that he will exercise some degree of pa-

L.R.A.1915E.

tience and undergo some degree of inconvenience for the advantage and profit which he secures from the bargain? In consideration, also, of the greater trouble, inconvenience, and labor incurred by the railway selling the mileage ticket, has it not the right to adopt the method of handling and keeping accounts with respect thereto which the court below found, under the evidence, to be reasonable in view of its being a check against loss of revenue derived from the sale of this class of tickets? If the holders of the coupon tickets were entitled to have the coupons taken up just as tickets are taken up, and the coupons by the order of the Commission be thus converted into an ordinary ticket, then the railroad loses part of the consideration which was the inducement for the issuance of such coupon books at a reduced rate, and the purchaser of a mileage ticket good for 1,000 miles would secure for \$20 that for which other members of the public would have to pay \$25. To hold that a ticket voluntarily sold at a reduced price by the railroad, and purchased by a prospective passenger in consideration of the reduction, can by the order of the Railroad Commission be stripped of the reasonable conditions which were attached to the sale thereof at such reduced price, and be made to serve all of the purposes of a regular passage ticket, without having been exchanged for a passage ticket, would be to give to the purchasers of the coupon books an advantage merely because they bought transportation in larger quantities than did the purchaser of the usual ticket. I do not think the Commission can confer upon a purchaser of transportation in large quantities such an advantage over the purchaser in less quantities, especially while the order fixing maximum rates remains of force.

It will be observed that I have several times spoken of the exercise of the police power. In doing so I have, for the sake of the argument, treated the order of the Railroad Commission under consideration as upon the same plane, and as having the same effect and authority, as a legislative enactment; but I do not intend for it to be inferred that I am of the opinion that the Railroad Commission could exercise that great power, reserved to the state, as completely as the legislature may do in proper cases.

The authority to adopt and to put into effect the order of the Commission is sought to be upheld under the provisions of civil Code, § 2638. That section provides that all contracts and agreements between railroad companies doing business in this state, as to rates of freight and passenger tariffs, shall be submitted to the Railroad Commis-

sion for inspection and correction, that it may be seen whether or not they are a violation of the law or of the provisions of the Constitution, or of article 6 of chapter 2 of the Civil Code, or of the rules or regulations of the Railroad Commission; and said commissioners may make such rules and regulations as to said contracts and agreements as may be deemed necessary and proper. It may well be doubted whether or not contracts such as are to be affected by the order of the Commission under consideration—that is, terms and stipulations annexed to the sale of these mileage books, which become a contract between the railroad company and the purchaser of the book, upon the written agreement of the purchaser thereof and the payment of the purchase price—fall within the provisions of this section; but, even if they did, it is clear, if I am right in the conclusion which I have announced above, that the order amounted to an unlawful interference with the right to contract, and that any such regulation as that embodied in this order of the Commission would not be embraced within the authority to make necessary and proper rules and regulations; for, as I have pointed out, it could only be justified as a proper exercise of the police power, and that power could not be exercised for the purpose sought to be accomplished by this order, in view of the object with respect to which it is invoked. And this is said without reference to the power of the Commission—an administrative body—to exercise the police power.

For these reasons, I am of the opinion that the order of the Commission under attack should have been adjudged illegal and void, and that the judgment granting the injunction should be affirmed.

IDAHO SUPREME COURT.

BOISE ASSOCIATION OF CREDIT MEN,
Limited, Appt.,

v.
T. R. ELLIS et al., Respts.

(26 Idaho, 438, 144 Pac. 6.)

Bulk sales law — validity.

1. Forbidding a merchant to dispose of

Note. — Constitutionality of bulk sale legislation.

The earlier cases on this subject are discussed in the notes to *Everett Produce Co. v. Smith*, 2 L.R.A.(N.S.) 331, and *Young v. Lemieux*, 20 L.R.A.(N.S.) 160.

Form of statutes.

While the attention of the courts has not as yet been directed to the various require-
L.R.A.1915E.

his stock in bulk without giving notice to creditors does not deprive him of his property without due process of law, nor is it invalid as class legislation.

Same — effect on disposition of fixtures.

2. Fixtures used in connection with a business are not within the operation of a statute forbidding a merchant to dispose of his goods, wares, and merchandise in bulk without giving notice to creditors.

(October 29, 1914.)

A PPEAL by plaintiff from a judgment of the District Court for Washington County dismissing an action brought to recover an amount alleged to be due for goods sold and delivered by plaintiff's assignor to defendant Ellis. Affirmed.

The facts are stated in the opinion.

Messrs. **Raymond L. Givens** and **Charles E. Winstead**, for appellant:

The bulk sales law is valid.

John P. Squire & Co. v. Tellier, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; *Walp v. Mooar*, 76 Conn. 515, 57 Atl. 277; *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; *McDaniels v. J. J. Connelly Shoe Co.* 30 Wash. 549, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37; *Fisher v. Herrmann*, 118 Wis. 424, 95 N. W. 392; *Hart v. Roney*, 93 Md. 432, 49 Atl. 661; *Wright v. Hart*, 182 N. Y. 330, 2 L.R.A. (N.S.) 338, 75 N. E. 404, 3 Ann. Caa. 263; *Jaques & T. Co. v. Carstarphen Warehouse Co.* 131 Ga. 1, 62 S. E. 82; *Kidd, D. & P. Co. v. Musselman Grocer Co.* 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606; *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; *Thorpe v. Pennock Mercantile Co.* 99 Minn. 22, 108 N. W. 940, 9 Ann. Cas. 229; *Lemieux v. Young*, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174, affirming 79 Conn. 434, 20 L.R.A.(N.S.) 160, 129 Am. St. Rep. 193, 65 Atl. 436, 600, 8 Ann. Cas. 452.

A sale of the fixtures necessary for the conducting of the business made such sale fraudulent and void as to the creditors unless the notices provided in the statute had been given in the manner prescribed by law.

Parham v. Potts-Thompson Liquor Co.

ments of the statutes except in a general way, it seems evident that these requirements are of sufficient interest to warrant a statement of the most general.

The most common form of statute requires a list of the vendor's creditors to be furnished the purchaser, and the amount of indebtedness owing each.

Fla.—*Goldstein v. Maloney*, 62 Fla. 198, 57 So. 342.

Ill.—*G. S. Johnson Co. v. Belosky*, 263

127 Ga. 303, 56 S. E. 400; Knapp, S. & Co. Co. v. McCaffrey, 178 Ill. 107, 69 Am. St. Rep. 290, 52 N. E. 898; Fitz Henry v. Munter, 33 Wash. 629, 74 Pac. 1003; Holford v. Trewella, 36 Wash. 654, 79 Pac. 308; Olwell v. Gordon, 40 Wash. 185, 82 Pac. 180; Plass v. Morgan, 36 Wash. 160, 78 Pac. 784; Everett Produce Co. v. Smith Bros. 40 Wash. 566, 2 L.R.A.(N.S.) 331, 111 Am. St. Rep. 979, 82 Pac. 905, 5 Ann. Cas. 798; Whitehouse v. Nelson, 43 Wash. 174, 86 Pac. 174; Bigelow, Fraud. Conv. p. 525; Kohn v. Fishbach, 36 Wash. 69, 104 Am. St. Rep. 941, 78 Pac. 190.

Messrs. Varian & Norris, for respondents:

The bulk sales law is unconstitutional and violates the provisions of § 1, article 1,

and § 13 of article 1, of the Constitution of this state.

Charles J. Off & Co. v. Morehead, 235 Ill. 40, 20 L.R.A.(N.S.) 167, 126 Am. St. Rep. 184, 85 N. E. 264, 14 Ann. Cas. 434; Pogue v. Rowe, 236 Ill. 157, 86 N. E. 207; Wright v. Hart, 182 N. Y. 330, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263; Miller v. Crawford, 70 Ohio St. 207, 71 N. E. 631, 1 Ann. Cas. 558; McKinster v. Sager, 163 Ind. 671, 68 L.R.A. 273, 106 Am. St. Rep. 268, 72 N. E. 855; Block v. Schwartz, 27 Utah, 387, 65 L.R.A. 308, 101 Am. St. Rep. 971, 76 Pac. 22, 1 Ann. Cas. 551.

The law does not include fixtures.

Gallus v. Elmer, 193 Mass. 106, 78 N. E. 772, 8 Ann. Cas. 1067; Lee v. Gillen, 90 Neb. 730, 134 N. W. 278; Albrecht v. Cudi-

Ill. 363, 105 N. E. 287, Ann. Cas. 1915C, 411.

Ind.—Hirth-Krause Co. v. Cohen, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708.

Miss.—Moore Dry Goods Co. v. Rowe, 97 Miss. 775, 53 So. 626.

Mont.—Wheeler & M. Mercantile Co. v. Moon, 49 Mont. 307, 141 Pac. 665.

Neb.—Appel Mercantile Co. v. Barker, 92 Neb. 669, 138 N. W. 1133.

Okla.—Noble v. Ft. Smith Wholesale Grocery Co. 34 Okla. 662, 46 L.R.A.(N.S.) 455, 127 Pac. 14.

Or.—Coach v. Gage, 70 Or. 182, 138 Pac. 847.

Tenn.—Cantrell v. Ring, 125 Tenn. 472, 145 S. W. 166.

Tex.—Nash Hardware Co. v. Morris, 105 Tex. 217, 146 S. W. 874.

And the Michigan statute construed in Kidd, D. & P. Co. v. Musselman Grocer Co. 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606.

Under the most common form of statute, it is then made the duty of the purchaser to notify these creditors, either personally or by registered mail.

Fla.—Goldstein v. Maloney, 62 Fla. 198, 57 So. 342.

Ill.—G. S. Johnson Co. v. Belosky, 263 Ill. 363, 105 N. E. 287, Ann. Cas. 1915C, 411.

Ind.—Hirth-Krause Co. v. Cohen, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708.

Neb.—Appel Mercantile Co. v. Barker, 92 Neb. 669, 138 N. W. 1133.

Okla.—Noble v. Ft. Smith Wholesale Grocery Co. 34 Okla. 662, 46 L.R.A.(N.S.) 455, 127 Pac. 14.

Tenn.—Cantrell v. Ring, 125 Tenn. 472, 145 S. W. 166.

Tex.—Nash Hardware Co. v. Morris, 105 Tex. 217, 146 S. W. 874.

And the Michigan statute construed in Kidd, D. & P. Co. v. Musselman Grocer Co. 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606.

The Mississippi statute provides for notice personally or by mail, registered mail not being required (Moore Dry Goods Co. v. Rowe, 97 Miss. 775, 53 So. 626), while the L.R.A.1915E.

Oregon statute provides for notice personally or by wire or by registered mail. (Coach v. Gage, 70 Or. 182, 138 Pac. 847.)

The Arizona statute requires notice of intention to sell to be filed with the county recorder. Nolte v. Winstanley, — Ariz. —, 145 Pac. 246. And see as to dispensing with notice as provided in Nebraska statute, Appel Mercantile Co. v. Barker, *infra*.

A statute which was declared unconstitutional in Williams & T. Co. v. Preslo, 84 Ohio St. 328, 95 N. E. 900, Ann. Cas. 1912C, 704, merely required a notice in writing describing in general terms the property to be sold and all conditions of such sale and the parties thereto, and of the intention to make such sale, to be filed with an officer in the county in which the goods were located.

The Montana statute sustained in Wheeler & M. Mercantile Co. v. Moon, 49 Mont. 307, 141 Pac. 665, imposes a very heavy burden upon the purchaser. It provides that if the purchaser at a bulk sale shall pay for the goods without having demanded and received the statement mentioned in a preceding section of the statute, "and without paying or seeing to it that the purchase money of the said property is applied to the payment of the bona fide claim of the creditors of the vendor, as shown upon such verified statement, share and share alike, such sale or transfer shall be fraudulent and void."

Some statutes require an inventory of the goods in the stock.

Ind.—Hirth-Krause Co. v. Cohen, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708.

Neb.—Appel Mercantile Co. v. Barker, 92 Neb. 669, 138 N. W. 1133.

Miss.—Moore Dry Goods Co. v. Rowe, 97 Miss. 775, 53 So. 626.

Tenn.—Cantrell v. Ring, 125 Tenn. 472, 145 S. W. 166.

And the Michigan statute sustained in Kidd, P. & D. Co. v. Musselman Grocer Co. 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606.

It is provided in some statutes that the inventory and notice may be dispensed with by filing with some officer an agreement with all the creditors of the seller, waiving

hee, 37 Wash. 206, 79 Pac. 628; Wilson v. Edwards, 32 Pa. Super. Ct. 295; Bowen v. Quigley, 165 Mich. 337, 34 L.R.A.(N.S.) 218, 130 N. W. 690; People's Sav. Bank v. Van Allsburg, 165 Mich. 524, 131 N. W. 101; Everett Produce Co. v. Smith Bros. 40 Wash. 566, 82 Pac. 905, 2 L.R.A.(N.S.) 331, 111 Am. St. Rep. 979, 5 Ann. Cas. 798; Charles J. Off & Co. v. Morehead, 235 Ill. 40, 20 L.R.A.(N.S.) 167, 126 Am. St. Rep. 184, 85 N. E. 264, 14 Ann. Cas. 436; Curtis v. Phillips, 5 Mich. 112; Kolander v. Dunn, 95 Minn. 422, 104 N. W. 371, rehearing denied in 95 Minn. 424, 104 N. W. 483.

Truitt, J., delivered the opinion of the court:

This action was commenced by the ap-

the inventory and notice. Appel Mercantile Co. v. Barker, 92 Neb. 669, 138 N. W. 1133.

The Florida, Illinois, and Oregon statutes impose a penalty upon the vendor for making a false statement of the matters prescribed by statute. Goldstein v. Maloney, 62 Fla. 198, 57 So. 342; G. S. Johnson Co. v. Beloosky, 263 Ill. 363, 105 N. E. 287, Ann. Cas. 1915C, 411; Coach v. Gage, 70 Or. 182, 138 Pac. 847.

Constitutionality—In general.

The great weight of authority passing upon the validity of such statutes since the date of the last of the above notes is to the effect that such legislation is valid.

Having decided that the transaction involved was not within the meaning of the bulk sales law, the court in *Fairfield Shoe Co. v. Olds*, 176 Ind. 526, 96 N. E. 592, refused to pass upon the constitutionality of that act.

As is pointed out in the note in 20 L.R.A.(N.S.) 160, a distinction has been made between statutes which declare such transfers void and those which merely prescribe a rule of evidence that such transfers are presumptively void.

Such legislation has been held valid without reference to this distinction and without the form of statute appearing. *Boise Asso. v. Ellis*; *McGray v. Woodbury*, 110 Me. 163, 85 Ath. 491; *Kett v. Masker*, 86 N. J. L. 97, 90 Atl. 243.

That such legislation is valid is held also in *Nolte v. Winstanley*, supra, under a statute making a sale without complying with the provisions of the law void as to all creditors.

A similar statutory provision making the transfer void was sustained in *Hirth-Krause Co. v. Cohen*, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708; *Wheeler & M. Mercantile Co. v. Moon*, 49 Mont. 307, 141 Pac. 665; *Nash Hardware Co. v. Morris*, 105 Tex. 217, 146 S. W. 874; *Appel Mercantile Co. v. Barker*, supra.

As pointed out in the report of *Young v. Lemieux*, 20 L.R.A.(N.S.) 160, that case L.R.A.1915E.

pellant corporation, as assignee of two different mercantile companies, against said T. R. Ellis, to collect certain accounts against him for goods, wares, and merchandise sold and delivered to him by said companies at his place of business in Cambridge, Idaho. The complaint alleges that these accounts were duly assigned by said companies to appellant, who was the owner and holder of them at the time of commencing this action, and that the aggregate sum of said accounts, amounting to \$285.46, was due and owing from Ellis to appellant, and judgment was demanded for said sum against him. In said complaint the respondent Thomas Buhl is connected with the transaction which is the basis of the action against him as follows: "That on or about Decem-

was affirmed by the Supreme Court of the United States. The United States Supreme Court again committed itself to the doctrine that statutes making void sales of stocks of merchandise without complying with the provisions of the act are valid. *Kidd, D. & P. Co. v. Musselman Grocer Co.* 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606, affirming 151 Mich. 478, 115 N. W. 409.

That the validity of acts making such transfers void is established in Michigan is recognized in *Coffey v. McGahey*, 181 Mich. 225, 148 N. W. 356.

An act which was construed to apply to all sales of goods and chattels, and not merely to sales of stocks of merchandise, and which made such a sale without complying with the provisions of the act void, was sustained in *G. S. Johnson Co. v. Beloosky*, 263 Ill. 363, 105 N. E. 287, Ann. Cas. 1915C, 411.

A statute which provided such sales "shall be presumed to be fraudulent and void as against the creditors of the seller" unless the provisions of the statute are complied with was construed as rendering such sales absolutely void as to creditors, and not merely as creating a prima facie presumption. As thus construed the validity of the statute was sustained. *Moore Dry Goods Co. v. Rowe*, 97 Miss. 775, 53 So. 626, approved on rehearing in 99 Miss. 30, 54 So. 659, Ann. Cas. 1913C, 1213.

The Oklahoma act makes the transfer of a stock of goods in bulk presumptively fraudulent, and then provides that this presumption may be rebutted only by showing a compliance with the provisions of the statute. This act was sustained in *Noble v. Ft. Smith Wholesale Grocery Co.* 34 Okla. 662, 46 L.R.A.(N.S.) 455, 127 Pac. 14; and also in *Humphrey v. Coquillard Wagon Works*, 37 Okla. 714, 49 L.R.A.(N.S.) 600, 132 Pac. 899.

The statute sustained in *Coach v. Gage*, 70 Or. 182, 138 Pac. 847, made the presumption of fraud conclusive.

The statute involved in *Cantrell v. Ring*, 125 Tenn. 472, 145 S. W. 166, made such transfers without compliance with the provision of the statute presumptively fraud-

ber 11, 1912, the said T. R. Ellis sold and transferred all his said stock of goods, wares, and merchandise, including fixtures, out of the usual and ordinary course of business and trade, and did thereby substantially sell and convey the entire business and trade thereof conducted by the said T. R. Ellis; said fixtures consisting of counters, scales, shelving, tables, and store fixtures in general. That the said T. R. Ellis particularly sold the said fixtures to the defendant Thomas Buhl for the sum of \$150."

It will be seen from the complaint that Buhl did not buy or receive any of the merchandise. The respondent Buhl, as defendant therein, interposed a general demurrer to said complaint, and after consideration

of the same by the trial court it was sustained, and the action dismissed. From the order dismissing said action, and the judgment entered against appellant, this appeal is taken. The defendant Ellis did not appear in the court below, and the record is silent as to whether or not he was served with process.

The appellant in his brief presents an argument and cites authorities to show that the claims in this case were assignable, and were properly assigned to the plaintiff, and it could therefore legally maintain an action upon them. As to the defendant Ellis, counsel for the respondent Buhl do not dispute the validity of the assignment of these claims, nor the right of appellant to maintain an action to collect the debt which

ulent. Nothing is said as to whether the presumption is *prima facie* or conclusive. It does not appear, however, that the unconstitutionality of the act was urged upon the court; it is merely stated that the act has been sustained as a valid and constitutional police regulation of trade, to prevent fraudulent sales by merchants, to the injury of their creditors, and *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50, is relied upon. The *Neas* case is discussed in the note in 2 L.R.A.(N.S.) 331.

In other cases the validity of such legislation is sustained after it is construed to create only a *prima facie* presumption. *Goldstein v. Maloney*, 62 Fla. 198, 57 So. 342.

Sprintz v. Saxton, 126 App. Div. 421, 110 N. Y. Supp. 585, discussed in the note in 20 L.R.A.(N.S.) 160, is followed in *Seeman v. Levine*, 67 Misc. 74, 121 N. Y. Supp. 645, in sustaining the constitutionality of a statute construed to create a rebuttable presumption that transfers in violation of the act are void. *Seeman v. Levine* is reversed on other grounds in 140 App. Div. 272, 125 N. Y. Supp. 184.

The only dissent from this array of authorities is that of the Ohio supreme court, in *Williams & T. Co. v. Preslo*, 84 Ohio St. 328, 95 N. E. 900, Ann. Cas. 1912C, 704, where a statute construed to create a *prima facie* presumption, merely, is held unconstitutional, the reason being that it imposes a burden upon those to whom it relates, of which all others are relieved. This court adheres to a distinction that is made in Illinois, as appears from the case of *Charles J. Off & Co. v. Morehead*, 20 L.R.A.(N.S.) 167. The subsequent Illinois statute sustained in *G. S. Johnson Co. v. Belosky*, *supra*, obviated this objection by covering all sales of goods and chattels.

Specific constitutional objections.

The constitutional objection most frequently urged against such legislation is that it is a violation of due process of law and that it is class legislation.

L.R.A.1915E.

It is well settled that such legislation is not a violation of due process of law. *Boise Assn. v. Ellis*; *Hirth-Krause Co. v. Cohen*, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708 (statute made sale void); *Appel Mercantile Co. v. Barker*, 92 Neb. 669, 138 N. W. 1133; *Nash Hardware Co. v. Morris*, 105 Tex. 217, 146 S. W. 874.

Nor is it a violation of the due process clause of the Federal Constitution. *Moore Dry Goods Co. v. Rowe*, 97 Miss. 775, 53 So. 626, approved on rehearing in 99 Miss. 30, 54 So. 659, Ann. Cas. 1913C, 1213; *Kidd, D. & P. Co. v. Musselman Grocer Co.* 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606.

And it has been held generally that it is no violation of the 14th Amendment of the Federal Constitution. *Kett v. Masker*, 86 N. J. L. 97, 90 Atl. 243.

In sustaining an act rendering a sale void unless made in conformity with the provisions of the act, the court in *Hirth-Krause Co. v. Cohen*, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708, cites with approval from *Kidd, D. & P. Co. v. Musselman Grocer Co.* *supra*, to the effect that such a statute does not violate the 14th Amendment of the Federal Constitution, providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law. This holding was approved in *Rich v. C. Callahan Co.* 179 Ind. 509, 101 N. E. 810, and also in *Beard v. Indianapolis Fancy Grocery Co.* 180 Ind. 536, 103 N. E. 404.

The court in *Noble v. Ft. Smith Wholesale Grocery Co.* 34 Okla. 662, 46 L.R.A.(N.S.) 455, 127 Pac. 14, cites with approval cases holding that such statutes are no violation of the due process clause of the Federal Constitution. Followed in *Humphrey v. Coquillard Wagon Works*, 37 Okla. 714, 49 L.R.A.(N.S.) 600, 132 Pac. 899.

The validity of a bulk sales law was sustained in *McGray v. Woodbury*, 110 Me. 163, 85 Atl. 491, against the objection that it unconstitutionally deprived "persons of

they constitute as to the defendant Ellis, but do question the manner of the proceeding in said action for the purpose of holding defendant Buhl liable for this debt. But as this only relates to the manner of procedure, and not to the real points presented by the appeal, we do not think proper to pass upon it.

The two important points presented by this appeal are: (1) Whether the law under consideration imposes such restrictions on sales of goods, wares, and merchandise in bulk by persons engaged in that business as to deprive them of their property without due process of law, and also whether it is class legislation within the inhibition of the Constitution on that subject; and (2) that, if the law is constitutional, whether

fixtures used in connection with the mercantile business are by implication included within its purview and meaning.

This act, though passed by the legislature in 1903, has never before come before this court for interpretation, and for that reason we have examined a number of the decisions of other courts that have passed upon and construed similar laws with much interest. It must be conceded that this law does restrict and put some burdens on the sale of the kind of property to which it relates, but it is claimed in its favor that its object is to prevent an abuse of credit extended to debtors engaged in the mercantile business, and thus prevent fraudulent sales that would otherwise deprive their creditors of their honest debts. In John P.

their right, privileges, and liberty to control their property."

It is not a violation of due process of law where it merely creates a prima facie presumption. *Goldstein v. Maloney*, 62 Fla. 198, 57 So. 342.

Likewise it is settled by the weight of authority that such statutes are not unconstitutional as being class legislation. *Boise Asso. v. Ellis*; *Nolte v. Winstanley*, — Ariz. —, 145 Pac. 246; *Goldstein v. Maloney*, supra; also *Appel Mercantile Co. v. Barker*, 92 Neb. 669, 138 N. W. 1133.

The specific provision which the bulk sales law was alleged to violate in *Hirth-Krause Co. v. Cohen*, supra, was that the general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens. It was held, however, that the statute did not violate this clause of the Constitution, but was a proper exercise of the police power of the state. See also discussion of this case under due process clause, supra.

An earlier Indiana act which excluded from the benefit from the bulk sales law all creditors of the merchant, except merchandise ones, has been held unconstitutional, because the classification was too narrow. The statute involved in *Hirth-Krause Co. v. Cohen* obviated this objection and embraced all creditors of the merchant. A bulk sales law is not in violation of a constitutional provision requiring laws to be of general and uniform operation throughout the state. *Ibid*.

The fact that such a statute applies to solvent merchants in the same way as to insolvent ones does not render it unconstitutional. *Ibid*.

It is not a denial of the equal protection of the law guaranty of the Federal Constitution. *Moore Dry Goods Co. v. Rowe* and *Kidd, D. & P. Co. v. Musselman Grocer Co.* supra.

See *Kett v. Masker*, supra.

The court in *Noble v. Ft. Smith Wholesale Grocery Co.* supra, cites with approval cases holding that such statutes relating to L.R.A.1915E.

merchants only are not a violation of the equal protection of the law guaranty of the Federal Constitution. Followed in *Humphrey v. Coquillard Wagon Works*, supra.

In *Goldstein v. Maloney*, supra, it is stated that a classification covering "every person who shall bargain for or purchase any stock of goods, wares, or merchandise in bulk," apparently has a reasonable basis in practical differences in the conditions affecting those engaged in trade, and such classification is not merely arbitrary nor patently an unjust discrimination among those who sell and buy.

The statute here involved provided that a sale in violation of the act shall, "as to any and all creditors of the vendor, be presumed to be fraudulent." It is stated by the court that it is competent for the legislature to create by law prima facie presumption of evidence without denying due process of law, where such presumption may be a natural or reasonable inference from the facts or circumstances from which the presumptions are raised by the statute, and the opposite party is not deprived of the right to rebut the presumptions in some fair manner, duly provided or accorded by the rules of law or procedure. *Ibid*.

The court in *Nash Hardware Co. v. Morris*, 105 Tex. 217, 146 S. W. 874, states: "We take judicial knowledge of the fact that there have been frequent cases of litigation over such sales, and our reports testify that the protection afforded to creditors and buyers under the former laws was quite unreliable; therefore, we conclude that there were sound reasons why the legislature should adopt some regulation by which the frauds charged and frequently proved might be prevented."

The decision of the supreme court of Michigan in *Spurr v. Travis*, 145 Mich. 721, 116 Am. St. Rep. 330, 108 N. W. 1090, 9 Ann. Cas. 250, set forth in the note in 20 L.R.A.(N.S.) 160, sustaining such a statute against the objection that it limited its operation to merchants, and did not include farmers, manufacturers, etc., and that it did not relate to merchants who owed no debt, is cited with approval in *Hirth-Krause Co.*

Squire & Co. v. Tellier, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312, a case decided by the supreme judicial court of Massachusetts, it is said: "The statute deals only with sales in bulk of a part or the whole of a stock of merchandise, which are not made in the ordinary course of trade and in the regular and usual prosecution of the seller's business. It does not interfere with the transaction of ordinary business, but relates to unusual and extraordinary transfers. In substance it declares that a sale of this kind shall not be made without first giving to creditors an opportunity to collect their debts, so far as the property to be sold might enable them to collect, or subsequently making satisfactory provision for the payment of these debts. A sale made in violation of the statute is void only as against creditors, and, if the

vendor's debts are paid, the sale cannot be interfered with. A purchaser, to be safe, has only to see that the vendor's creditors are provided for. The vendor may sell freely, without regard to the statute, if he pays his debts."

The purpose of this law is quite similar to that of § 3163, Rev. Codes, against transfers of property with intent to defraud or delay creditors; and under the statute relating to sales in bulk, the object is to prevent a retail merchant from disposing of his stock of goods without notice to his creditors, with the intention of doing the same thing, and it is the intention and purpose of this law to prevent that. It is true that in doing this it may work a hardship on honest tradesmen, but many other laws do the same thing as to honest men

v. Cohen, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708.

The court in *Hirth-Krause Co. v. Cohen*, further cites with approval from the opinion in *Young v. Lemieux*, 20 L.R.A.(N.S.) 160, to the effect that such statutes make a classification based upon a reasonable distinction, and one which has been generally applied in the exertion of the police power over the subject, and there is no foundation for the proposition that the result of the enforcement of the statute will be to deny the equal protection of the laws.

In *McGray v. Woodbury*, 110 Me. 163, 85 Atl. 491, the case of *John P. Squire & Co. v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312, is cited with approval to the effect that the statute deals only with sales in bulk of a part or the whole of a stock of merchandise, which are not made in the ordinary course of trade and in the regular and usual prosecution of the seller's business, thus confining the operation of such statute to sales of merchandise.

The supreme court of Illinois, however, holds to the theory that a statute which relates merely to sales of stocks of merchandise is unconstitutional. In *G. S. Johnson Co. v. Belosky*, 263 Ill. 363, 105 N. E. 287, Ann. Cas. 1915C, 411, this court sustained an act which included within its terms the sale, transfer, or assignment of a stock of merchandise, or merchandise and fixtures, or "other goods and chattels of the vendor's business," on the express ground that, as thus drawn, it applied generally to the sale of any goods and chattels in the prohibited manner, and not merely to sales of stocks of merchandise, as did the statute which was declared unconstitutional by this court in *Charles J. Off & Co. v. Morehead*, 235 Ill. 40, 20 L.R.A.(N.S.) 167, 126 Am. St. Rep. 184, 85 N. E. 264, 14 Ann. Cas. 434.

The distinction made by the Illinois court is adhered to by the Ohio supreme court. It is because the statute involved L.R.A.1915E.

in *Williams & T. Co. v. Preslo*, 84 Ohio St. 328, 95 N. E. 900, Ann. Cas. 1912C, 704, was confined to merchants, that it was declared unconstitutional, the court stating that "careful attention to what has been said upon this point has failed to develop in our minds the perception of any difference in this respect between sales where the subject, upon one hand, is merchandise, and, on the other, flocks, herds, or machinery, or the capital stock of corporations, or any others of the large list of the subjects of property."

An objection to a bulk sales law on the ground that it violated a constitutional provision that "the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability," was overruled, it being stated that the act in question evinces no legislative intent to affect any debtor exemption law, and if it were otherwise, the contention of the merchant could not prevail, because the provision of the Constitution was not self-executing, but required legislative enactment to make it effective. *Beard v. Indianapolis Fancy Grocery Co.* 180 Ind. 530, 103 N. E. 404.

Bulk sales statutes are frequently attributed to the exercise of the police power, and are held a valid exercise of that power. *Boise Asso. v. Ellis*; *Nolte v. Winstanley*, — Ariz. —, 145 Pac. 246; *Goldstein v. Maloney*, 62 Fla. 198, 57 So. 342; *Hirth-Krause Co. v. Cohen*, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708; *Wheeler & M. Mercantile Co. v. Moon*, 49 Mont. 307, 141 Pac. 665; *Noble v. Ft. Smith Wholesale Grocery Co.* 34 Okla. 662, 46 L.R.A.(N.S.) 455, 127 Pac. 14, approved in *Humphrey v. Coquillard Wagon Works*, 37 Okla. 714, 49 L.R.A.(N.S.) 600, 132 Pac. 899; *Kidd, D. & P. Co. v. Musselman Grocer Co.* 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606.

W. A. E.

that the designs of the dishonest may be defeated.

Some of the early acts passed upon this subject were held unconstitutional and void by the supreme courts of the respective states in which they were passed; but the objections pointed out by the courts in those acts have been corrected in the later laws enacted on this subject, and have now been held constitutional by the courts of the same states that had declared the earlier acts unconstitutional.

Block v. Schwartz, 27 Utah, 387, 65 L.R.A. 308, 101 Am. St. Rep. 971, 76 Pac. 22, 1 Ann. Cas. 550, is relied on by respondent to support his contention that the law in question in the case at bar is unconstitutional and void. In that case the statute on this subject in the state of Utah was held unconstitutional, but that statute had two objectionable provisions in it, which are pointed out by Mr. Justice Bartch in his opinion as follows: "Under the provisions of this act a sale of any portion or all of a stock of merchandise, made out of the ordinary course of trade, by any merchant who has creditors, without a detailed inventory made at least five days before the sale, showing the cost price of each article, and notice of the proposed sale, the cost price, and selling price, given at least five days before the sale to each creditor, is not only fraudulent and void, but also renders both the seller and purchaser guilty of a misdemeanor, and subjects them to the penalty provided in the act for that crime."

And in the opinion a further objection is stated as follows: "Now, it will be noticed that nowhere in its provisions is there any exemption of any sale by administrators, executors, trustees, assignees for the benefit of creditors, trustees in bankruptcy, or public officers, acting under judicial process. There being no such exemption, it would seem that such sales of merchandise owned by debtors, made by persons acting in a fiduciary capacity or under judicial process, must also be made in accordance with the provisions of the act, in order that the seller and purchaser may avoid the penalties provided. It is evident that such a law would not only deprive property of one of its chief attributes, but would greatly hamper the administration of estates and retard the enforcing of judicial process."

It is not probable that a law with such drastic and unreasonable provisions as the Utah statute had would ever be sustained by any court. It is generally conceded that state legislatures have the right to enact reasonable laws to prevent fraudulent sales of property and to protect creditors, and that this right falls within the general scope of police power will not be denied. But the L.R.A.1915E.

police power must stop where it comes against the provisions of the Constitution. It must be exercised for a reasonable and beneficial purpose to the general public or to a special class of business.

In the syllabus of *Hirth-Krause Co. v. Cohen*, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708, which is a case decided in 1912 by the supreme court of Indiana, it is stated: "Acts 1909, chap. 49, § 1, making a sale of goods or merchandise in bulk void, unless in the ordinary course of trade, and unless an inventory be made before the sale, showing the quantity of the goods, and the cost of each article, and unless the purchaser demand and receive from the seller a written list of names and addresses of the seller's creditors, with the amount of indebtedness, and unless the purchaser before taking possession shall notify personally the creditors named in the list, or known to him, of the proposed sale, and the price and conditions thereof, is a proper exercise of the state's police power."

In *Spurr v. Travis*, 145 Mich. 721, 116 Am. St. Rep. 330, 108 N. W. 1090, 9 Ann. Cas. 250, which is a leading case, the supreme court of Michigan held that the "sales in bulk" statute of that state did not violate the Constitution, and in discussing that point the opinion says: "Does the act conflict with § 32 of article 6 of the Constitution? It may be conceded that an act which should prohibit the sale of property of any character, either generally or for a stated time, without any adequate purpose or object, would constitute such an interference with the property and liberty of the individual as is inhibited by this section. The courts have, however, never treated this or similar provisions as prohibitive of legislation in the exercise of police power which regulates the manner of the use or disposition of property, even though a temporary inconvenience may be suffered by the owner."

And in the case of *Musselman Grocer Co. v. Kidd, D. & P. Co.* 151 Mich. 478, 115 N. W. 409, the same court held that the act was not in conflict with any of the provisions of the Michigan Constitution, or of § 1 of the 14th Amendment of the Constitution of the United States. The plaintiff in error, being dissatisfied with the decision, carried the case to the Supreme Court of the United States, which in 1910 held that the Michigan law was based on a proper and reasonable classification of business and did not violate the 14th Amendment to the Federal Constitution. *Kidd, D. & P. Co. v. Musselman Grocer Co.* 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606. In this holding, the court followed its previous ruling, made in the case of *Lemieux v. Young*, 211 U. S.

489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174, which involved the same question with reference to a similar statute of Connecticut. In delivering the opinion in *Lemieux v. Young*, supra, Mr. Justice White said: "The supreme court of errors, in upholding the validity of the statute, decided that the subject with which it dealt was within the police power of the state, as the statute alone sought to regulate the manner of disposing of a stock in trade outside of the regular course of business, by methods which, if uncontrolled, were often resorted to for the consummation of fraud to the injury of innocent creditors. In considering whether the requirements of the statute were so onerous and restrictive as to be repugnant to the 14th Amendment, the court said: 'It does not seem to us, either from a consideration of the requirements themselves of the act, or of the facts of the case before us, that the restrictions placed by the legislature upon sales of the kind in question are such as will cause such serious inconvenience to those affected by them as will amount to an unconstitutional deprivation of property. A retail dealer who owes no debts may lawfully sell his entire stock without giving the required notice. One who is indebted may make a valid sale without such notice, by paying his debts, even after the sale is made. Insolvent and fraudulent vendors are those who will be chiefly affected by the act, and it is for the protection of creditors against sales by them of their entire stock at a single transaction, and not in the regular course of business, that its provisions are aimed.'"

And Mr. Justice White further said: "That the court below was right in holding that the subject with which the statute dealt was within the lawful scope of the police authority of the state, we think, is too clear to require discussion."

We think the foregoing authorities are decisive as to the first point submitted by appellant, but will say that as the state of Washington has a law substantially like ours on this subject, and as the same question was presented to the supreme court of that state as is here presented in the case at bar, we refer to the case of *McDaniels v. J. J. Connelly Shoe Co.* 30 Wash. 549, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37, as being directly in point in this case. In meeting the objections there urged to the Washington law, the court said: "The first objection to the constitutionality of the act is that it deprives persons of their property without due process of law. As we understand the argument, the contention is not that the act deprives an owner of property of his day in court, where his property rights are judicially called in L.R.A.1915E.

question, or that it in any manner authorizes the actual physical taking by one of the property of another, but it is that as the term, 'property,' in legal signification, includes in its meaning the right of any person to possess, use, enjoy, or dispose of a thing, the act violates the Constitution, inasmuch as it restricts the right of an owner to dispose of his property. The act, it is true, does prohibit owners of certain kinds of property from disposing of it in a particular way, without complying with certain conditions, but it is not for that reason necessarily unconstitutional. While the legislature may not constitutionally declare that void which in its nature is, and under all circumstances must be, entirely honest and harmless, yet it may, under its police powers, place such reasonable restrictions on the right of an owner in relation to his property as it finds necessary to protect the interests of the public, or to prevent frauds among individuals. If this were not so, it would be easy to find many unconstitutional acts on the statute books. . . . It is next said that the act violates that provision of the Constitution which prohibits the legislature from granting to a class of citizens privileges and immunities which upon the same terms shall not equally belong to all citizens; in other words, it is class legislation. In *Redford v. Spokane Street R. Co.* 15 Wash. 419, 46 Pac. 650, we held that, where a law is uniform so far as it operates, its constitutionality is not affected by the number of persons within the scope of its operation; and, applying this principle, we held in *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147, that a law giving laborers in certain enumerated industries liens upon the general property of their employers was constitutional. The same principle is applicable to the case in hand."

In deciding the question as to the constitutionality of the law of this state regulating the purchase, sale, and transfer of stocks of goods, wares, and merchandise in bulk, and prescribing penalties for the violation thereof, we hold both by weight of authority and on principle that said law is constitutional and valid, that it is not repugnant to the Constitution as class legislation, and that it is a proper exercise of the police power of the state.

Coming, now, to the other point presented by the appellant to reverse the judgment of the lower court, viz., that the fixtures of a merchant are in effect a part of his goods, wares, and merchandise, or stock in trade, and that said statute relating to sales in bulk of such merchandise should be construed to include the word "fixtures" by implication: This statute is clearly in derogation of the common-law rule, in that it

prescribes conditions and restrictions regarding the sale of such property, for under the common law a person could sell any of his property at such time and in such manner he might choose, without notice of the sale to his creditors or any other person, and without doing the things prescribed by said statute. Statutes of this kind should not be extended by implication to supply words that would bring subjects into the purview of the statute not specifically found there and not within its spirit or intention. Can the word "fixtures" be supplied to this statute? Is it germane to the scope, meaning, and purpose of the statute?

We think not. The Standard Dictionary defines "fixture" as: "An article of a personal or chattel nature affixed to the freehold by a tenant, and removable by him, if it can be taken away without material injury to the realty, as gas fixtures in a residence, counters, shelving, and store fixtures in a mercantile house, or machinery or apparatus in trade and manufactures."

And Bouvier's Law Dictionary defines "fixture" as: "Anything fixed or attached to a building, and used in connection with it, movable or immovable. Whenever the appendage is of such a nature that it is not part and parcel of the building, but may be removed without injury to the building, then it is a movable fixture, and does not pass with conveyance of the freehold."

Now, we think that under these definitions it would do violence to the clear meaning and intent of this statute to read the word "fixtures" into it. "Merchandise" is defined by Webster as: "Objects of commerce; whatever is usually bought and sold in trade or market by merchants."

We think that merchandise, as used in this statute, must be construed to mean such things as are usually bought and sold by merchants. Merchandise means something that is sold every day, and is constantly going out of the store and being replaced by other goods; but the fixtures are not a part of the trade or business. They are not sold in the ordinary trade as goods. They remain from year to year. The merchant could not dispose of them as long as he remains in business. It is true that shelving, counters, drawers, tables, and many other things are necessary in order to conduct the business of the retail merchant, and so are delivery wagons in the larger towns to deliver goods, and clerks to sell the goods, and so is a house or room in which to keep them; but the clerks are not part of the goods, wares, or merchandise, and, though the business cannot be

conducted without a house or place to keep and display the goods, the house or the room where they are sold is not a part of the goods, wares, and merchandise.

In *Kolander v. Dunn*, 95 Minn. 422, 104 N. W. 371, it was held that "under chapter 291, p. 357, Laws 1899, the sale of the stock of merchandise was presumed to be fraudulent and void, but that act has no application to the sale of fixtures."

In *Gallus v. Elmer*, 193 Mass. 106, 78 N. E. 772, 8 Ann. Cas. 1067, it is held that "as used in the Massachusetts statute prohibiting sales in bulk, except when made in the ordinary course of trade, the phrase 'stock of merchandise' is applicable only to the articles which the seller keeps for sale in the ordinary course of his business, and is not applicable to a storekeeper's fixtures."

In *Lee v. Gillen*, 90 Neb. 730, 134 N. W. 278, it was held that: "Section 6048, Anno. Stat. 1909, commonly called the 'bulk sales law,' relates only to merchandise kept for sale 'in the ordinary course of trade and in the regular and usual prosecution of' business, and does not apply to fixtures or a manufacturer's stock of raw materials used by himself, and not kept or offered for sale in the ordinary course of trade."

It is suggested that to make the law apply to fixtures as well as to the goods would strengthen the retail merchant's credit. Perhaps it would, and it might also strengthen his credit to make it include all his other personal property, or his store building if he owned it, or his farm; but that is beyond the scope and reasonable purpose of the law, which is not primarily to strengthen the retailer's credit, but to make him pay his honest debts.

A very peculiar feature of this case is that the complaint does not charge that the goods, wares, or merchandise were sold to respondent Buhl, but in effect claims that he should pay for them because he bought the fixtures, and this theory of the case would make the goods, wares, and merchandise a part of the fixtures, instead of the fixtures being a part of the goods. We hardly think this is permissible.

Having thus decided that the points relied on by appellant to reverse the judgment against it are not well taken, we hold, therefore, with the lower court, that said complaint does not state a cause of action against respondent Buhl.

The judgment must be affirmed, with costs in favor of respondent.

Sullivan, Ch. J., concurs.

MISSOURI SUPREME COURT.
(Division No. 1.)

WILLIAM EDWARD SWENTZEL
v.
WALTON H. HOLMES.

(— Mo. —, 175 S. W. 871.)

Party wall — fire — voluntary propping — liability.

1. That one of the owners of a party wall whose building is destroyed by fire undertakes to prop the wall, which is weakened by the fire, does not render him liable for injury to the property of the other owner because of insufficiency of the props.

Same — failure to obey order to remove wall — liability.

2. Failure of the part owner of a party

Note. — Party wall: liability of part owner to other owner for damages from fall of, or injury to, party wall.

The scope of this note limits it to cases of falling, or of injury to the wall, although one or two other cases have been cited.

The question of one owner's right to tear down and rebuild a wall, using due care, is not included.

For right of one party to raise height of party wall, see the note to *Bright v. Bacon*, 20 L.R.A.(N.S.) 386.

Negligence.

Where a landowner by his negligence injures a party wall or causes it to fall, he is liable for the damage to his co-owner of the wall. *Moody v. McClelland*, 39 Ala. 45, 84 Am. Dec. 770 (excavation causing settlement); *Brown v. Werner*, 40 Md. 15 (excavation causing fall of parts of the wall; owner and contractor both held liable); *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224 (see *infra*, "Independent contractors"); *Lancaster v. Connecticut Mut. L. Ins. Co.* 92 Mo. 460, 1 Am. St. Rep. 739, 5 S. W. 23 (resting new cross wall upon the party wall without proper support, whereby it fell); *Hammond v. Schiff*, 100 N. C. 161, 6 S. E. 753 (excavation causing fall of wall, defendant being in possession under bond for title); *Hughes v. Percival*, L. R. 8 App. Cas. 443, 52 L. J. Q. B. N. S. 719, 49 L. T. N. S. 189, 31 Week. Rep. 725, 47 J. P. 772 (fall of wall in building operations); *Bradbee v. Christ's Hospital*, 4 Mann. & G. 714, 2 Dowl. N. S. 164, 5 Scott. N. R. 79, 11 L. J. C. P. N. S. 209 (injury to wall from deficient underpinning); *Brown v. Windsor*, 1 Crompt. & J. 20 (excavation causing sinking of wall).

In *Bradbee v. Christ's Hospital*, *supra*, where it was found that the plaintiff's messuage was ancient and was entitled to be supported by a party wall, and that the wall was sound and of proper thickness, and was injured by the defendant's lack of proper underpinning in building opera-

wall, whose building is destroyed by fire, to obey the orders of the municipal authorities to remove the dangerous portion of the standing wall, gives the other owner no right of action for injury to his property by fall of the wall upon it, since it was equally his duty to remove the wall.

Same — possession by one part owner — effect.

3. That when one of two owners of a party wall discovers that the building of the other owner has been destroyed by fire, and the wall weakened, such other has attempted to prop the wall, does not entitle him to hold such other liable for injury to his property by the fall of the wall, on the theory that the wall was in the other's possession, so that he was prevented from taking steps to protect his own property.

(March 2, 1915.)

tions, and "the carelessness, negligence, and unskilfulness of the defendants and their agents and workmen, in and about the underpinning of the said party wall, consisted in their underpinning the said party wall, partially, and not underpinning the whole of said wall, whereby the plaintiff's messuage sank and sustained damages,"—it was held that an action on the case was maintainable against the defendants in respect to the injury which resulted from their mode of dealing with the wall. The court was of the opinion "that the defendants had no right to underpin the party wall either partially or wholly, unless that could be done without injuring the plaintiff's house."

The question of absolute liability.

The question whether a landowner is liable for injuries to a party wall irrespective of his negligence is not free from difficulty.

In *Dowling v. Hennings*, 20 Md. 179, 83 Am. Dec. 545, where houses were built with a narrow alley between them, which was built over, and the partition wall of the houses was above the alley, the owner of one house, taking it down to build an improved building, took down the alley wall on his side, causing the partition wall to fall, and it was held he was liable absolutely for the damages sustained by his neighbor, although he had notified such neighbor of his intentions.

So in *Eno v. Del Vecchio*, 4 Duer, 53, and in *Eno v. Del Vecchio*, 6 Duer, 17, it was held that one adjoining occupant cannot interfere in any manner with a party wall without the consent of his neighbor unless he can do so without injury to the adjoining building, and the fact that the work was done by a contractor is immaterial.

In *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545, an action to remove the part added to the height of a party wall, the court said: "We think that the right of either of the adjacent owners to increase the height of a party wall, when it can be done without injury to the adjoining building,

APPEAL by plaintiff from and writ of error to the Circuit Court for Jackson County to review a judgment in defendant's favor, in an action brought to recover damages for injury to property by the fall of a party wall. Affirmed.

Statement by **Railey, C.**

The demurrer of defendant to second amended petition was sustained in the trial court. Plaintiff refused to plead further, and final judgment was rendered on behalf of defendant on said demurrer.

The case stands for review here upon the sufficiency of said second amended petition, upon either or both counts, to state a cause of action, without any reference to the exhibit attached thereto.

and the wall is clearly of sufficient strength to safely bear the addition, is necessarily included in the easement. No adjudication adverse to that right has been referred to by counsel or found by us. The party making the addition does it at his peril; and if injury results he is liable for all damages. He must insure the safety of the operation. But when safe, it should be allowed. The wall is devoted to the purpose of being used for the common benefit of both tenements."

In *Briggs v. Klosse*, 5 Ind. App. 129, 51 Am. St. Rep. 238, 31 N. E. 208, it is possibly intended to be held that an owner digging a trench in his cellar, causing the settling of the party wall, was liable absolutely; but it does not seem clear that it was necessary so to hold.

In *Payne v. Moore*, 31 Ind. App. 360, 66 N. E. 483, 67 N. E. 1005, it was held that one of the proprietors of a party wall must insure the safety of building operations, and was responsible to the lessees of the adjoining building for losses due to the fall of the wall into the building occupied by them and which it had supported, due to excavations of the defendants destroying its support, but a judgment for the plaintiffs was reversed on another ground.

In *Pierce v. Musson*, 17 La. 389, it was held under the Louisiana statutes that an owner who, in rebuilding, cut away part of a common wall or built against it a new wall carrying a heavier building, the result being that the old wall cracked and settled, is liable to his neighbor where the statute provided that "neither of the two neighbors can make any cavity within the body of the wall held by them in common, nor can he affix to it any work without the consent of the other, or without having, on his refusal, caused the necessary precaution to be used, so that the new work would be not an injury to the rights of the other, to be ascertained by persons skilled in building," and also provided that "although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it which may deprive his neighbor of the L.R.A.1915E.

Second Amended Petition.

Comes now William Edward Swentzel, plaintiff in the above entitled cause, and for cause of action states that he is now and for many years last past has been a citizen and resident of the city of Kansas City, Jackson county, Missouri; that the defendant, Walton H. Holmes, is now and for many years last past has been a citizen and resident of Kansas City, Jackson county, Missouri.

Plaintiff states that at all times herein mentioned plaintiff was the owner of lot 115 in block 8, McGee's addition to Kansas City, Missouri, and that all of the times herein mentioned the defendant, Walton H. Holmes, was the owner of lot 116 in block 8, McGee's addition to Kansas City, Mis-

liberty of enjoying his own, or which may be the cause of any damages to him."

See also the opinion of the court quoted in *Bradbee v. Christ's Hospital*, supra.

In *Miller v. Brown*, 33 Ohio St. 547, the defendant was held liable for cutting away a projection of a wall extending upon his own land, causing his neighbor's building to settle and crack, where the wall was built with his consent for a joint wall; but the only point considered was whether the plaintiff had the right to cut off the projection.

But it has been held that a defendant is not liable for the fall of a party wall where it was caused by his independent contractor in taking down the defendant's house, where there was no proof that the probable consequences of taking down the defendant's building would be injurious to the wall. *Earl v. Beadleston*, 10 Jones & S. 294.

See also *Keller v. Abrahams*, 13 Daly, 188, infra, under "Independent contractors" and the *dictum* in *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224, infra, under "Independent contractors."

And it has been held in one case that one owner may pull down half the wall to build an improved building. Thus, in *Hieatt v. Morris*, 10 Ohio St. 523, 78 Am. Dec. 280, it was held that where the land had increased in value, one owner desiring to improve his property might, after notice and request to his neighbor to join him, take down his own half of the wall, and if this was done with due care, he would not be liable to his neighbor for the fall of the remaining part of the wall.

And it has also been held that if injury results to a party wall from its legitimate use and employment as such without negligence, the party so using it is not liable for the damage.

Thus, when a party wall had been erected for a two-story building by the plaintiff under a contract between the neighbors that it should be "of suitable size and dimensions to support a three-story brick building," and the other party had paid one-half therefor and later conveyed his lot to the defendants, who employed a contractor

souri, upon which said lot 116 the defendant, long prior to the times therein mentioned, erected a five-story brick building covering the entire lot, and which said building was thereafter used continuously by the defendant or his tenants.

Plaintiff avers that in the construction of the said building upon lot 116, the north wall thereof was located one half upon said lot 116, belonging to defendant, and one half upon said lot 115, belonging to the plaintiff, and which said wall was, at the times herein mentioned, owned by the parties respectively, under and by virtue of a certain party-wall agreement whereby each of the parties hereto had a half ownership therein, a copy of which said party-wall agreement is hereto attached, marked "Ex-

hibit A," and made a part of this petition; that said party-wall agreement provided, among other things, as follows: "That each of said walls shall be a party wall and as such be kept and fairly treated; that either party shall have the right to run up or build said walls higher than they are now, or either of them, provided such running up or building higher be not of a character to endanger the stability of such wall or walls. . . . That upon the total destruction of either of said walls by fire or accident, or upon either or both of said walls being thereby rendered so unsafe as to require that it or they be taken entirely down, this contract shall terminate as to the wall so destroyed or taken down, and be and remain in force as to the other wall; such

to build a building of three stories, and during the building of it that part of the wall which was being carried up fell over upon the plaintiff's building, a complaint not alleging negligence on the part of the defendants or the contractor states no cause of action. *Negus v. Becker*, 143 N. Y. 303, 25 L.R.A. 667, 42 Am. St. Rep. 724, 38 N. E. 290. The court distinguished the statement noted above in *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545, and held that there was here a right to go up to three stories, that there could be no recovery except for negligence, and that if there was negligence, it was that of the contractor.

In *McMinn v. Karter*, 116 Ala. 390, 22 So. 517, an action for an injunction, where the contract provided "that the said wall shall be kept in repair by the said parties equally, that each of said parties have a right to use the same and join thereto, that nothing shall be done by either party to weaken or in any manner impair the strength of said wall as a party wall, and that said wall shall be and remain a solid wall," the court said: "Under the law apart from the contract, and under the contract itself, Parker had the right not only to use the face or side of the wall next his lot, but also to such further use of it as was necessary to form a complete and perfect junction in an ordinarily good mechanical manner between it and any building he desired to erect on his lot, and an injury to or weakening of the wall merely incident to the joining thereto of such building in the customary and proper manner would not be within the inhibition of the contract nor violative of legal duty."

In *Hart v. Baldwin*, 1 N. Y. Leg. Obs. 139, an action was brought for injuries to the plaintiff's house in that his front wall inclined to the street in consequence, as he claimed, of the digging of a cellar by the defendant; but it does not seem clear that there was any injury to the party wall. It was held that if the defendant proceeded with due care, he was not liable, nor if the injury was due to the insufficiency of the party wall, as the co-owners were not the original builders, and were not shown to L.R.A.1915E.

have had any knowledge of the actual state of the wall.

In *Bicak v. Runde*, 78 Misc. 358, 138 N. Y. Supp. 413, where it affirmatively appeared that the defendant had not weakened, but strengthened, the party wall, the plaintiff was denied damages claimed to be due to the sagging of the wall, caused by the pounding of the defendant's workmen on the beams of his house, it not being claimed that they proceeded negligently, for the defendant was not liable for incidental damages (citing *Negus v. Becker*, supra).

Liability where wall is used and paid for only by defendant.

It has been held that where a wall has been built and paid for by one party under an agreement that it is to be a party wall, and that the other party may use it on paying his share, such wall before it is used by the second party is the wall of the builder, and he must see that it does not fall upon his neighbor from his neglect. Thus, in *Glover v. Mersman*, 4 Mo. App. 90, where by agreement the defendant built a wall on the line between his lot and that of the plaintiff, who might use it on contributing thereto, and before he had done so it was made dangerous by fire, and the defendant negligently omitted to support it, so that it fell, injuring property on the plaintiff's lot, it was held that the defendant was liable for the damage.

So, where a party wall is built by an owner partly on his land and partly on the land of an adjoining proprietor under an agreement that the latter, before using the wall, shall pay for one half of it, and before it is so used by the adjoining proprietor, it becomes ruinous from fire, and the builder neglects to repair it after notice from the city and his neighbor, he is liable to the latter for damages for failing to maintain it in a safe condition notwithstanding a provision in the said agreement that "said parties further agree and covenant that if it shall hereafter become necessary to repair or rebuild the whole or any portion of the said party wall or walls, the

repairs as are necessary shall be done in a good, workmanlike manner by either party, and one half of the cost thereof shall be paid by one side and the other half by the other side."

Plaintiff further states that early in the year 1902 he constructed a certain two-story building on his said lot 115, and in the erection of said building used as a wall two stories of the five-story party wall herein referred to, joining his building to the two first stories of the party wall, but plaintiff did not use any part of the upper three stories of said party wall; that the plaintiff leased the building so constructed upon his lot 115 for the term of five years from July 1, 1902, to one Alfred Holtman, and that said Holtman took

possession of the said building at about the time of the commencement of the lease, and, by himself or others by subtenants, continued to occupy, and did occupy, the same, and was in possession thereof until the falling of the party wall as hereinafter recited.

Further stating his cause of action, plaintiff alleges: That on or about August 2, 1905, the building of the defendant, Walton H. Holmes, so located as aforesaid on his said lot 116 and immediately adjoining the building of this plaintiff, was greatly damaged by fire, in that the interior of the said building was almost completely destroyed, leaving the outer walls of said building standing, including the five-story party wall herein mentioned. That by reason of the fire the said party wall was greatly dam-

expense of such repairing or rebuilding shall be borne equally by them, their respective heirs and assigns, as to so much of said walls as the said parties, their heirs and assigns, shall or may use jointly." *Mickel v. York*, 175 Ill. 62, 51 N. E. 848.

In *Beidler v. King*, 209 Ill. 302, 101 Am. St. Rep. 246, 70 N. E. 763, where B built a party wall, his neighbor K to have the use of it on paying one half of the value of the part used, and after K had used and paid for a part of the wall in length and for about $\frac{1}{2}$ of it in height, a fire weakened the top portions of the wall, and K and the city notified B's heirs to protect the wall, and they were slow and negligent in doing it, so that it fell and destroyed K's building, it was held that B's heirs were liable therefor, the damage being due to the injury to the top portion of the wall not used by K, that she had no right to repair or deal with the part of the wall not used by her, and was not guilty of any contributory negligence; and that she was not liable for repairs to any portion of the wall not used by her, the contract providing: "That if it shall become necessary to repair or rebuild any portion of said party wall or walls before said party of the second part shall use or pay for her portion of the same, the expense or cost of such repairing or rebuilding shall be borne by the said first party; and further, if it shall become necessary to so repair or rebuild after the said party of the second part shall have used or paid for her portion of said wall, then and in that event the cost of such repairing or rebuilding shall be borne equally by the parties hereto, to the extent that they are each using said wall."

This case was approved in somewhat similar circumstances in *McKnight v. Strasburger Building Co.* 96 Kan. 118, 150 Pac. 542, where the defendant was held liable for negligence where a part of the party wall above part of the building of the plaintiff's lessor, and which had not been used or paid for by such lessor under an existing party-wall agreement, was injured by a fire destroying the defendant's building, and was left unsupported for some eleven days, when L.R.A.1915E.

a severe wind blew it over on the building occupied by the plaintiff, injuring (it and) his goods.

The distinction between these cases and that where the wall was used by both owners is shown by the decision in *SWENTZEL v. HOLMES*.

But an action of this kind will not, it seems, lie in contract. Thus, in *Gorham v. Gross*, 117 Mass. 442, 28 Am. Rep. 224, it was held that no cause of action was stated on contract for injuries to property on the plaintiff's lot, caused by the fall of a wall built by the defendant on the boundary line between the lots of the plaintiff and himself, under an agreement that either party might build the wall of a certain size and materials, the other to contribute on using it, the declaration setting up the contract and alleging that the defendant erected the wall negligently, improperly, and without due care, but not alleging that the plaintiff had used the wall. The court said: "The duty of the party who avails himself of the right to build the wall, to exercise due care in building it, so as not to injure the buildings and property already upon his neighbor's estate, is not regulated by the agreement, and does not rest in contract; it is governed by the common law, and redress for any injury suffered by a failure in the performance of this duty must be sought by action of tort."

Independent contractors.

Generally as to liability for acts of independent contractor, see Index to L.R.A. Notes under the title, "Master and Servant," IV. b, "for acts of independent contractors," and see especially note in 65 L.R.A. 849, "where work is dangerous to adjoining landowners."

Where the injury is due to the nature of the work, the owner is not relieved because the work was done by an independent contractor. *Briggs v. Klosse*, 5 Ind. App. 120, 51 Am. St. Rep. 238, 31 N. E. 208, where the injury to the wall was caused by digging a trench in the defendant's cellar.

In *Gorham v. Gross*, 125 Mass. 232, 28

aged and weakened. On the day following the fire the defendant, Holmes, made an examination of the damaged building and of the party wall aforesaid, and took possession of the said building and party wall for the purpose of repairing and bracing the same, and employed labor for the erection of props to support the said party wall, placing the said props against the roof of plaintiff's building and running the same up against said party wall, with the intent and purpose of bracing the same. That the defendant then and there entered upon possession as aforesaid, and undertook to do all things necessary to repair and protect the said party wall and prevent the same from falling. Plaintiff avers that the props so erected and constructed as aforesaid were wholly insufficient for the purposes intended, and that defendant was negligent in the care, protection, and repair of said party wall, in that the said props were merely put up and notched against the

brick wall, and that only a corner of the beams or props assisted in supporting the said party wall, and in failing to do anything otherwise or further to protect and support said wall and prevent the same from falling; that the defendant knew, or with reasonable care could have known, that the said props were wholly inadequate and insufficient.

Plaintiff avers that no other or further steps were taken by the defendant in caring for or protecting said party wall, but that on September 7, 1905, the defendant, Walton H. Holmes, and while said wall was in the possession of the defendant, was notified by the building department of the city of Kansas City, Missouri, that said party wall was unsafe and in great danger of falling, and was notified to tear down immediately the two upper stories of the said party wall; that said defendant, upon receipt of said notice, on the 7th day of September, 1905, then and there agreed

Am. Rep. 224, an action in tort, between the same parties as *Gorham v. Gross*, 117 Mass. 442, *supra*, preceding subdivision, it was held that an instruction was sufficiently favorable to the defendants which stated that if the fall of the wall was caused by negligence in building it without sufficient stays of supports, or in building it in too cold weather, that the defendants would be liable although it was the negligence of the defendants' masons in executing their contract. The court said: "Assuming that the relation of the masons to the defendants was that of contractors, the former alone would be responsible to a third person for any injury caused by their negligence in a matter collateral to the contract; as, for instance, in depositing materials, handling tools, or constructing temporary safeguards, while doing the work; but where the very thing contracted to be done is improperly done, and causes the mischief upon the land of another, the employer is responsible for it; at least, when it occurs after the structure has been completed to his acceptance. . . . For the injury caused to property on the adjoining land by the falling of this wall, by reason of its defective and unsafe condition, whether owing to their own negligence or to that of the masons who had built it, the defendants are responsible."

One negligently resting a new cross wall upon the party wall without proper support, whereby the party wall was pulled down, is liable to his adjoining owner for the damage although the work was done by independent contractors, where the negligence was in the plans and specifications. *Lancaster v. Connecticut Mut. L. Ins. Co.* 92 Mo. 460, 1 Am. St. Rep. 739, 5 S. W. 23.

But it has been held that if the work itself has no tendency to injure the wall, the defendant is not liable for the negligence L.R.A.1915E.

of an independent contractor. Thus, where an owner caused alterations to be made in his house, necessitating lowering beams and cutting into the foundation of a party wall, and the work in itself had no tendency to injure the wall, and was done by an independent contractor, any damage is due to the negligence of such contractor, and the owner is not liable therefor. *Keller v. Abrahams*, 13 Daly, 188.

See also *Earl v. Beadleston*, 10 Jones & S. 294, *supra*; *dictum* in *Gorham v. Gross*. 125 Mass. 232, 28 Am. Rep. 224, *supra*; and *Negus v. Becker*, 143 N. Y. 303, 25 L.R.A. 667, 42 Am. St. Rep. 724, 38 N. E. 290, *supra*, under "The question of absolute liability."

"But, on the other hand, where a party wall was pulled down by the rebuilding operations of one owner, caused by the negligence of his contractor's workmen, who proceeded in a manner not authorized by the contract, such owner was held liable as not using due care in the supervision of the work. *Hughes v. Percival*, L. R. 8 App. Cas. 443, 52 L. J. Q. B. N. S. 719, 49 L. T. N. S. 189, 31 Week. Rep. 725, 47 J. P. 772, affirming L. R. 9 Q. B. Div. 441.

Miscellaneous.

It may be noted that the damage may include that from water used to put out a fire started by the falling of the wall. *Hammond v. Schiff*, 100 N. C. 161, 6 S. E. 753.

It may be observed that in *Bower v. Peate*, L. R. 1 Q. B. Div. 321, 46 L. J. Q. B. N. S. 446, 35 L. T. N. S. 321, while the wall is stated in the declaration to be a party wall, the case apparently proceeded as if it was an independent wall; and that *Dorsey v. Habersack*, 84 Md. 117, 35 Atl. 96, rested upon an express covenant for damages, and the plaintiff's judgment was reversed on another ground. B. B. B.

with the city building inspector of the city of Kansas City, Missouri, that he would immediately tear down said two upper stories and take such other precautions as were necessary in supporting and protecting the said party wall; that said defendant employed labor for that purpose, but instead of beginning the tearing down of the party wall in question, the defendant, through his servants and employees, engaged upon the work of tearing down the west wall of said building, and utterly failed and neglected to comply with the order of the city building inspector and to comply with his undertaking and agreement, although defendant was warned of the danger, and had ample time to tear down the party wall; that at the time of the fire this plaintiff was absent from the city of Kansas City, and this plaintiff was ignorant of the said fire and of the condition of the party wall until more than three weeks thereafter. Plaintiff returned to the city of Kansas City in the latter part of August, 1905, and, being notified of the occurrence of the said fire, made an examination of the premises and of the party wall in question, and found the said premises in the possession of the defendant, and found that the defendant had erected and constructed props, and ascertained that defendant had undertaken to care for, protect, and repair said party wall.

Plaintiff avers that he relied upon the acts of the said defendant in taking possession of the said party wall, and acquiesced therein, and relied upon the defendant's assumption of the duty of caring for and protecting said wall, and the steps taken by the defendant for the bracing and protection of the same; that by reason of the reliance of this plaintiff upon the possession by the defendant of the premises in question and of the party wall, and of his assumption of the duty to repair and protect the same, this plaintiff was prevented from making a further examination of the said premises and from doing anything other or further in connection with the care and protection of said wall. Plaintiff avers that the defendant was negligent, in this: That said props were wholly insufficient for the purposes intended, and was negligent in that, after knowledge of the unsafe condition of said wall, and after his taking possession of the said wall, he failed to take any steps for the tearing down of the two upper stories of said wall, and failed to repair and make the same safe, and failed to perform his undertaking in connection therewith. That by reason of the defendant's negligence, as herein recited, and while said wall was in the possession and control of the defendant for the purposes stated, the two upper stories of said

party wall did, on the night of the 16th day of September, 1905, fall upon the building of plaintiff, greatly damaging and injuring the same. A large portion of the two upper stories of said party wall fell through the roof of plaintiff's building, tearing out the roof and the stories below and completely wrecking the interior of said building. That the defendant knew, or by the exercise of reasonable care could have known, of the condition of said party wall in time to have taken down same, or the two upper stories thereof, or to have repaired same, or made the same secure and safe.

Plaintiff avers that by reason of the falling of the party wall upon plaintiff's building, as herein recited, the plaintiff was compelled to expend large sums of money in rebuilding the said building, to wit, the sum of \$3,560, all of which damage was by reason of the negligence of the defendant, and without any negligence upon the part of this plaintiff.

Plaintiff further avers that, immediately after the falling of the said party wall and before September 20, 1905, this plaintiff notified defendant of his claim for damages by reason of the negligent acts aforesaid of the defendant, and demanded of the defendant payment for the damages so sustained, and rendered to the defendant a statement of the amount of the said damages and the items thereof, and made demand therefor, but that defendant has failed and refused to pay to this plaintiff any part thereof.

Wherefore, plaintiff demands judgment against the defendant in the sum of \$3,560, together with interest from September 30, 1905, and for the costs of this action.

Second count.

The plaintiff herein, William Edward Swentzel, complains of the defendant herein, Walton H. Holmes, and adopts each and all of the allegations contained and stated in the first cause of action herein as fully as if herein repeated, and further alleges: That at the time of the falling of said party wall upon the building of the plaintiff the said building was occupied by the firm of Reinhardt Brothers, composed of John J. Reinhardt, Philip W. Reinhardt, and Frank J. Reinhardt, and was used by said firm as a store in which said firm had a stock of goods and was engaged as retail merchants. That the said firm of Reinhardt Brothers were the subtenants of plaintiff's tenant, Alfred Holtman; that the said firm of Reinhardt Brothers made claim for a large sum as damages to their stock of merchandise and on account of the falling

of said party wall, and thereafter began and prosecuted in this court an action for damages against the defendant, Walton H. Holmes, and this plaintiff, and alleged and stated in said action that, as between the plaintiffs therein and the defendants therein, the said defendants in said action were liable for all damages to the said firm because of the falling of said wall, and in said action, upon trial thereof, the plaintiff recovered a judgment on the 20th day of June, 1908, in the sum of \$5,000 against the plaintiff and the defendant herein, and from said judgment the plaintiff herein and the defendant herein each prosecuted separate appeals to the Kansas City court of appeals of the state of Missouri. That the damages, if any, occasioned to the said plaintiffs, Reinhardt Brothers, or to their stock of goods or business, by the falling of said wall, were wholly occasioned and caused by the negligent acts, as hereinbefore alleged, of the said defendant, and that, as between this plaintiff and the defendant herein, all damages occasioned to said stock of goods of the Reinhardt Brothers, or to their business, constitute a claim and demand against the defendant herein, and in no wise a claim or demand against this plaintiff. The said case on appeal was decided in favor of the plaintiffs, Reinhardt Brothers, by the affirmance of the judgment of the trial court, and by reason thereof this plaintiff was compelled to pay, and did pay, in satisfaction of his proportion of the said judgment, the sum of \$3,000. That in addition thereto the costs of the said action in favor of Reinhardt Brothers, were also adjudged against this plaintiff, and the defendant, Walton H. Holmes, and this plaintiff was compelled to pay in the defense of said action large sums of money for attorney's fees and other expenses incident to the defense of said case, aggregating the total sum of \$1,000.

Wherefore this plaintiff avers that he has been damaged, by reason of the negligent acts aforesaid, by which the said damages covered by the judgment in said action were occasioned, and by reason of the costs and expenses therein, in the sum of \$4,000.

Wherefore, this plaintiff prays judgment herein accordingly, and for the sum of \$6,500, together with interest thereon from June 20, 1908, or such portion thereof as this plaintiff may be finally adjudged to pay in the action aforesaid for all of which, with costs of suit, plaintiff prays judgment.

John A. Eaton,

E. H. McVey,

Attorneys for Plaintiff.

L.R.A.1915E.

Demurrer to second amended petition.

Now comes the defendant in the above-entitled action and demurs to the second amended petition of the plaintiff herein for the reason that said second amended petition does not state facts sufficient to constitute a cause of action against him.

Holmes, Holmes, & Page,

Attorneys for Defendant.

Final judgment on said demurrer.

And on this day, said demurrer coming on for hearing and consideration, and the court, being fully advised in the premises, doth sustain the defendant's demurrer to plaintiff's second amended petition, plaintiff excepting to said action of the court, it is therefore ordered, considered, and adjudged by the court that the plaintiff take nothing by this action, but that the defendant have and recover of and from the plaintiff the costs of this suit, and that execution issue therefor.

Messrs. John A. Eaton, Dudley W. Eaton and Hyden J. Eaton, for appellant:

Defendant, having undertaken to remove or repair the wall, is liable to the plaintiff for damages to his building, caused by the negligence of the defendant in doing the work.

Lexington Lodge v. Beal, 94 Miss. 521, 49 So. 833; Commercial Nat. Bank v. Eccles, 43 Utah, 91, 46 L.R.A.(N.S.) 1021, 134 Pac. 614; Beidler v. King, 209 Ill. 302, 101 Am. St. Rep. 246, 70 N. E. 763; Fleming v. Cohen, 186 Mass. 323, 104 Am. St. Rep. 572, 71 N. E. 563; Eno v. Del Vecchio, 6 Duer, 53; 30 Cyc. 790; Crawshaw v. Sumner, 56 Mo. 517; Bright v. Bacon, 131 Ky. 848, 20 L.R.A.(N.S.) 386, 116 S. W. 268.

Defendant, because of his overt acts of negligence alleged in the petition, was morally liable, and he is bound to indemnify plaintiff for the part of the Reinhardt judgment paid by him and his costs and expenses.

Bowling Green v. Bowling Green Gas-light Co. — Ky. —, 112 S. W. 917; 9 Cyc. 807; Eaton & P. Co. v. Mississippi Valley Trust Co. 123 Mo. App. 117, 100 S. W. 551.

Mr. Massey Holmes, with Messrs. Holmes, Holmes, & Page, for respondent:

The petition states no facts from which the law raises a duty on the part of defendant to prevent the wall from falling. It is not charged that he did any act which caused the wall to fall.

Shearm. & Redf. Neg. 5th ed. § 8; Lucas v. St. Louis & Suburban R. Co. 174 Mo. 277, 61 L.R.A. 452, 73 S. W. 589; Glover v. Mersman, 4 Mo. App. 90; Mickel v. York, 175 Ill. 62, 51 N. E. 848; 22 Am. & Eng.

Enc. Law, 249; Reinhardt v. Holmes, 143 Mo. App. 212, 127 S. W. 611; Whitten v. Nevada Power, Light & Water Co. 132 Fed. 782; 14 Enc. Pl. & Pr. 332; Evansville & T. H. R. Co. v. Yeager, 170 Ind. 139, 83 N. E. 742; Chicago & E. R. Co. v. Lain, 170 Ind. 84, 83 N. E. 632; State ex rel. McCaffery v. Aloe, 152 Mo. 466, 47 L.R.A. 393, 54 S. W. 494; Montgomery County v. Auchley, 92 Mo. 126, 4 S. W. 425.

The petition alleges no facts justifying an award of indemnity to plaintiff. The most that he could ask is that defendant contribute one half of the Reinhardt judgment, and this he has already done.

Boston & M. R. Co. v. Sargent, 72 N. H. 455, 57 Atl. 688; Beck v. Ferd Heim Brewing Co. 167 Mo. 195, 66 S. W. 928; Baustian v. Young, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921; Eaton & P. Co. v. Mississippi Valley Trust Co. 123 Mo. App. 117, 100 S. W. 551.

Railey, C., filed the following opinion:

It appears from the record before us that plaintiff and defendant, on August 2, 1905, were the equal owners of a party wall built upon parts of lots 115 and 116, in block 8 of McGee's addition to Kansas City, Missouri. Defendant owned lot 116, and plaintiff lot 115. The party wall was a part of defendant's five-story brick building, and a part of plaintiff's two-story building adjoining same. On the 2d of August aforesaid, a fire occurred in the Holmes Building, which almost completely destroyed the interior of that building, but left the outer walls thereof, including said party wall, standing, but greatly damaged and weakened. On September 16, 1905, the two upper stories of the said party wall fell northward onto the roof of plaintiff's said building and caused the damages sued for in this action. It is alleged that on the day following the fire, defendant made an examination of his building and said party wall, and thereafter employed a contractor, who, under direction of defendant, placed certain props and supports against said party wall for the purpose of bracing same. It is further averred that defendant employed labor for the purpose of removing the upper stories of his building, but instead of first tearing down the upper portion of said party wall adjoining plaintiff's building, which he had previously attempted to brace against falling, he engaged the labor so employed in tearing down the other walls of his building. It is neither charged nor claimed in the petition that the props placed by defendant the next day after the fire against the party wall caused the latter to fall, or even contributed to the falling of same. In appellant's statement L.R.A.1915E.

and brief it is said: "While one party did not owe the other party any duty to undertake such care, protection, and repair of the wall, either party had the right to assume the task, the exercise of which right by 'either party' precluded the other party from any interference."

It is alleged in the petition that plaintiff was absent from Kansas City when the fire occurred, and did not return until more than three weeks thereafter. The record discloses that said party wall fell on September 16, 1905. It is undisputed that on August 3, 1905, defendant put up the props referred to, while plaintiff was absent from Kansas City. It is not asserted that these props were improperly placed, or that they had anything whatever to do with the falling of the wall. On the contrary, it is claimed that these props were insufficient to support the wall, and that defendant was negligent in failing to furnish those which were sufficient for that purpose. What the defendant did, in respect to the props aforesaid, was a gratuity pure and simple. It is conceded that, as between himself and plaintiff, he was under no legal obligation or duty to do so.

In Barney v. Hannibal & St. J. R. Co. 126 Mo. loc. cit. 392, 26 L.R.A. 847, 28 S. W. 1069, this court, in discussing the question under consideration, said: "But plaintiff's counsel says that defendant assumed the duty of keeping its yards clear of boys, by giving instructions to its yard hands, etc., but that this duty was neglected, and therefore a cause of action arises alone from this neglect. But if the prior duty did not exist to keep the boys out of the yards, then the mere assumption of a nonexistent duty would be but a gratuity, with no precedent or concurrent consideration on which to base it, and therefore no liability would follow such assumed and pretermitted duty. Mere pretermission of a self-imposed precaution does not constitute actionable negligence. Skelton v. London & N. W. R. Co. L. R. 2 C. P. 636, 38 L. J. C. P. N. S. 249, 18 L. T. N. S. 563, 15 Week. Rep. 925, Campbell, Neg. 2d ed. § 41."

In Young v. Missouri P. R. Co. 93 Mo. App. loc. cit. 274, Judge Smith, speaking for the Kansas City court of appeals, said: "We know of no law, nor has our attention been called to any, which required the defendant to furnish portable steps for the use of its passengers in entering or leaving any of its cars. If it did furnish such steps, it was but a self-imposed duty for the violation of which there could, of course, be no liability. Barney v. Hannibal & St. J. R. Co. supra."

In Schumacher v. Kansas City Breweries Co. 247 Mo. loc. cit. 161, 162 S. W. 13,

Judge Woodson, speaking for this court, in which all concurred, quoted with approval the above excerpt from the Barney Case, *supra*.

The defendant having violated no legal duty which he owed plaintiff in putting up the props which were used, and in failing to furnish those which were sufficient to sustain said wall, the petition is insufficient to sustain a recovery in respect to these matters.

2. It is charged in the complaint that defendant, after the 3d day of August, 1905, took no other or further steps to protect said party wall, and that on September 7, 1905, Kansas City, Missouri, through one of its offices, notified defendant that said wall was unsafe, dangerous, and that he must tear down the two upper stories of said party wall. It is alleged that defendant, pursuant to said notice, agreed with said city that he would immediately tear down said two upper stories and take such other precautions as were necessary in supporting and protecting the said party wall. The violation of the city's order could furnish no right of action in behalf of plaintiff as a joint tortfeasor. He was under just as great obligation to the public to abate the nuisance complained of as was the defendant. His duty, as well as that of defendant, required him to remove this wall. He owed this duty to the public without any notice from the city, for the obvious reason that both he and the defendant were maintaining a public nuisance, and both would have been liable to third parties who had suffered damage or injury on account of the falling of said wall. As to third persons, both plaintiff and defendant would be liable, in case of injury, for maintaining a dangerous party wall from August 2, 1905, to September 16, 1905, when it fell. The municipality under such circumstances would also be liable to third persons on account of its passive negligence, in failing to abate the nuisance, with the right of contribution against both wrongdoers for the amount paid by it on account of their negligent acts.

In *Reinhardt v. Holmes*, 143 Mo. App. loc. cit. 224, 225, 127 S. W. 611, the Kansas City court of appeals had before it the case of a tenant of this plaintiff, who sustained damages on account of the falling of said wall. He sued both plaintiff and defendant herein for the damages he sustained by reason of their negligence in maintaining said nuisance. On page 224 of 143 Mo. App., Judge Johnson said: "The defendant Holmes did omit to perform a duty imposed on him by law. When voluntarily and with

the tacit consent, at least, of his tenant he entered into possession of the demised premises and assumed charge of the dangerous wall, he became charged with the performance of the duty owed by the owner and occupier of the premises to third persons, and, being negligent in the discharge of that duty, he will not be heard to repudiate his own acts and deny responsibility for them."

On page 225 of 143 Mo. App., Judge Johnson said: "Swentzel succeeded to all the rights and interest of Mrs. Evans, his grantor, and also took his title subject to all the burdens and obligations of the party-wall agreement. When, on account of the fire, the wall became dangerous, it was as much his duty (unless he demised the whole wall to plaintiffs) to remove the danger as it was the duty of Holmes, the co-owner of the wall, to remove it."

On page 226 of 143 Mo. App., Judge Johnson concludes his very able opinion as follows: "As to that part of the wall, the relation of plaintiffs [*Reinhardt et al.*] to each of the defendants was that of third persons. Both defendants negligently suffered a nuisance to be created on their premises and negligently maintained it. Plaintiffs, the innocent victims of this tort, have a cause of action against both wrongdoers."

We therefore rule that the action of Kansas City is serving upon defendant the notice to remove said wall, and the failure of defendant to comply with his alleged agreement with the city in regard to removal of same, did not confer upon this plaintiff any right of action as against defendant.

3. The petition alleges that plaintiff returned to Kansas City, Missouri, the latter part of August, 1905, and learned of the fire; that he examined the premises and party wall, and found them in defendant's possession. He alleges that he found defendant had erected and constructed props, and that he ascertained defendant had undertaken to care for, protect, and repair said party wall. He further charges that he relied upon and acquiesced in the above acts of defendant; that by reason of foregoing matters, he was prevented from making a further examination of said premises or from doing anything further toward protecting or removing said party wall. It was the primary duty, as held by the court of appeals, *supra*, of both plaintiff and defendant to make this party wall secure or to remove the same. Aside from the props placed by defendant to brace the wall on August 3, 1905, nothing further

was done, by either plaintiff or defendant, up to the 16th of September, 1905, to secure the safety of said wall or to remove same. Plaintiff had ample time, after he found that defendant had done nothing further to protect the wall, to have made it safe or to have torn it down himself. From the time plaintiff returned, to the falling of said wall on September 16th, both plaintiff and defendant continued to maintain this nuisance. The petition signally fails to set out any facts which are sufficient in law to release plaintiff from the imputation of a wrongdoer, and to saddle the responsibility of their concurring negligence upon defendant. The allegation of a conclusion of law raises no issue, need not be denied, and its truth is not admitted by a demurrer to the complaint containing it. *Sidway v. Missouri Land & Livestock Co.* 163 Mo. loc. cit. 374, 375, 63 S. W. 705; *Mallinckrodt v. Hemmich*, 169 Mo. loc. cit. 397, 69 S. W. 355; *Gibson v. Chicago, G. W. R. Co.* 225 Mo. loc. cit. 482, 125 S. W. 453; *State ex rel. Major v. Missouri P. R. Co.* 240 Mo. loc. cit. 50, 144 S. W. 1088. The petition fails to allege that defendant, at any time or place, contracted with plaintiff to protect or remove said party wall. It fails to allege that he ever had any conversation or correspondence with defendant upon the subject. It is not averred that defendant was to receive any compensation for protecting said wall, or for removing same. The complaint fails to allege any facts from which it could be inferred that defendant obligated himself to secure or remove the wall, and to relieve the plaintiff from his joint obligation to look after and protect the same. There was nothing in defendant's conduct to induce plaintiff to abandon that duty which the law imposed upon him. He knew that defendant, on the 3d of August, after putting up the props, had neither removed the wall, nor furnished additional props. He alleges in petition: "That the defendant knew, or with reasonable care could have known, that the said props were wholly inadequate and insufficient;" and: "Plaintiff avers that he relied upon the acts of the said defendant in taking possession of the said party wall and acquiesced therein, and relied upon defendant's assumption of the duty of caring for and protecting said wall, and the steps taken by the defendant for the bracing and protection of the same."

It is conceded in appellant's brief that "while one party did not owe the other party any duty to undertake such care, protection, and repair of the wall, either party had the right to assume the task, the ex-

cise of which right by 'either party' precluded the other party from any interference.

In other words, the petition charges that the props were insufficient; that defendant knew it or ought to have known it; that in the latter part of August plaintiff examined the party wall and acquiesced in what defendant had done. He concedes that defendant was under no greater obligation than he was to protect or remove the wall. He had neither contract, conversation, nor correspondence with defendant on the subject, and had no right to stand silently by and rely upon the self-imposed act of defendant, under such circumstances, to relieve him from the performance of his legal duty. "The law is well settled that if the master was under no legal obligation to furnish a watchman to warn persons of danger, the mere fact that he voluntarily assumes that duty would not, of itself, render him liable for failure to so do." *Schumacher v. Kansas City Brewers Co.* 247 Mo. loc. cit. 160, 152 S. W. 13.

We have carefully examined all the authorities cited in the respective briefs on file, and find nothing therein which we deem sufficient to overturn the conclusions heretofore reached. The demurrer to first count was therefore properly sustained.

4. What we have said heretofore applies with equal force to the second count of petition. In addition to foregoing, the Kansas City court of appeals, in *Reinhardt v. Holmes*, 143 Mo. App. 212, 127 S. W. 611, and following, held that both plaintiff and defendant were wrongdoers, and were guilty of negligence in regard to the subject-matter of this litigation.

It appears from the record that each of the parties hereto paid one half of the judgment and costs rendered in said cause, and hence the law of contribution, under such circumstances, has been fully satisfied.

The petition as to both counts fails to state a cause of action, and the demurrer thereto was properly sustained.

Judgment affirmed.

Brown, C., concurs.

Per Curiam:

The foregoing opinion of *Railley, C.*, is adopted as the opinion of the court.

All the Judges concur, *Bond, J.*, in the result.

Petition for rehearing denied April 1, 1915.

NEBRASKA SUPREME COURT.

STATE OF NEBRASKA EX REL. MIL-
DRED PARMENTER

v.

A. C. TROUP, Judge of the District Court
of Douglas County.

(— Neb. —, 152 N. W. 748.)

Prohibition — when lies.

1. Although the common-law writ of prohibition has been abolished in this state, the duty is still imposed upon this court to prevent violation of law by inferior tribunals, and when there is no adequate remedy in the ordinary course of the law, mandamus is the appropriate remedy.

Evidence — compulsory examination of person.

2. In an action for damages caused by injuries to the person, the trial courts have power to order an expert examination of

Headnotes by SEDGWICK, J.

Note. — Power to compel plaintiff to submit to a physical examination.

This note is supplemental to notes covering the same question attached to McQuigan v. Delaware, L. & W. R. Co. 14 L.R.A. 466, and Larson v. Salt Lake City, 23 L.R.A. (N.S.) 462. An examination of the cases shows that the same conflict of opinion disclosed by the earlier cases, as to the authority of the court, in absence of statute, to require a plaintiff to submit to a physical examination, still prevails, the courts apparently being reluctant to overrule their earlier decisions in deciding for or against the existence of such power. The decisions in the cases herein generally make no point as to the time the application for physical examination is made, whether before or at the time of trial; where the time was referred to, that fact has been set out. As to cross-examination of plaintiff in action for personal injuries, as to his willingness to submit to physical examination, see note to Chicago, R. I. & P. R. Co. v. Hill, 43 L.R.A. (N.S.) 622.

The power of the court to grant an order requiring an examination of plaintiff in an action for personal injuries is based on the supposition that without its exercise injustice may be done the defendant. Kokomo, M. & W. Traction Co. v. Walsh, — Ind. App. —, 108 N. E. 19.

And in Mizak v. Carborundum Co. 75 Misc. 205, 132 N. Y. Supp. 1104, affirmed without opinion in 151 App. Div. 899, 135 N. Y. Supp. 1128, it was said that experience teaches that a fairly conducted open examination of plaintiff by reputable physicians at the instance of defendant is of the greatest value, not only as a protection of defendant from unfounded claims, but also in many cases as the protection of the plaintiff from the imputation of malingering and perjury.
L.R.A.1915E.

the person of the party injured, when the circumstances of the trial make it necessary to do so and no substantial harm can result therefrom.

Same — when ordered.

3. Such examination will not be ordered unless it clearly appears that a condition exists that can be definitely determined by such examination, and cannot be satisfactorily determined without.

(May 1, 1915.)

PETITION by relator for a writ of mandamus to compel respondent to reinstate her case, which was dismissed by the court on her refusal to submit to a personal examination upon the request of defendant in an action to recover damages for personal injuries. Writ denied.

The facts are stated in the opinion.

Mr. John O. Yeiser, for relator:

The court had no power or authority to order relator to submit to a personal pri-

But the court must protect the plaintiff from disreputable and objectionable handling, and an examination dangerous to plaintiff's health will not be required against his objection. Ibid.

And physicians appointed by the court by virtue of a statute, to make physical examination, cannot be required as officers of the court to make a report to it. Ibid.

In Shamp v. Lambert, 142 Mo. App. 567, 121 S. W. 770, it was held, following the earlier Missouri decisions, that the court has the power to make and enforce an order for the physical examination of plaintiff in a personal injury action, by inflicting a proper penalty.

So, the trial court, on proper showing timely made, may require the injured plaintiff to submit to an examination. Kokomo, M. & W. Traction Co. v. Walsh, supra.

If the condition of any private part of the body of a male or female is material on any trial, and cannot be examined in court without improper exposure of the person, it should, under an order of the court, be examined out of court by experts appointed for that purpose. Cincinnati, N. O. & T. P. R. Co. v. Nolan, 161 Ky. 205, 170 S. W. 650.

On the other hand, in Atchison, T. & S. F. R. Co. v. Melson, 40 Okla. 1, 134 Pac. 388, the court adhered to the rule adopted in Kingfisher v. Altizer, 13 Okla. 121, 74 Pac. 107, 15 Am. Neg. Rep. 173, cited in note in 23 L.R.A.(N.S.) 463, that without authority conferred by statute or constitutional provisions, the courts of this state are without power in an action for personal injury to compel the plaintiff to submit to a physical examination by medical experts in advance of or during the trial of the cause. The court stated that it recognized that the weight of the state authorities supported the existence of the power, and was against the doctrine of the Altizer Case, but stated that, in view of the fact that the courts sup-

vate examination upon request of defendant.

Union P. R. Co. v. Botsford, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000; Larson v. Salt Lake City, 34 Utah, 318, 23 L.R.A.(N.S.) 462, 97 Pac. 483; May v. Northern P. R. Co. 32 Mont. 524, 70 L.R.A. 111, 81 Pac. 328, 4 Ann. Cas. 605; Austin & N. W. R. Co. v. Cluck, 97 Tex. 172, 64 L.R.A. 494, 104 Am. St. Rep. 863, 77 S. W. 403, 1 Ann. Cas. 261; Stack v. New York, N. H. & H. R. Co. 177 Mass. 155, 52 L.R.A. 328, 83 Am. St. Rep. 269, 58 N. E. 686; McQuigan v. Delaware, L. & W. R. Co. 129 N. Y. 50, 14 L.R.A. 466, 26 Am. St. Rep. 507, 29 N. E. 235; Yazoo & M. Valley R. Co. v. Robinson, — Miss. —, 65 So. 241; Parker v. Enslow, 102 Ill. 272, 40 Am. Rep. 588; Joliet Street R. Co. v. Call, 143 Ill. 177, 32 N. E. 389; Peoria, D. & E. R. Co. v. Rice, 144 Ill. 229, 33 N. E. 951; Kellyville Coal Co. v. Moreland, 121 Ill. App. 415; Pronskévitch v. Chicago & A. R.

Co. 232 Ill. 139, 83 N. E. 545; Kingfisher v. Altizer, 13 Okla. 121, 74 Pac. 107, 15 Am. Neg. Rep. 173; Mills v. Wilmington City R. Co. 1 Marv. (Del.) 269, 40 Atl. 1114; Brackett v. Southern R. Co. 88 S. C. 447, 70 S. E. 1026, Ann. Cas. 1912C, 1212; Camden & Suburban R. Co. v. Stetson, 177 U. S. 174, 44 L. ed. 722, 20 Sup. Ct. Rep. 617; Illinois C. Co. v. Griffin, 25 C. C. A. 413, 53 U. S. App. 22, 80 Fed. 282; Connell v. Western U. Teleg. Co. 116 Mo. 43, 20 L.R.A. 172, 38 Am. St. Rep. 575, 22 S. W. 345; Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, L.R.A. 1915B, 834, 34 Sup. Ct. Rep. 344; Martin v. Elliott, 106 Mich. 130, 31 L.R.A. 169, 63 N. W. 998; Shepard v. Missouri P. R. Co. 85 Mo. 629, 55 Am. Rep. 390; O'Brien v. La Crosse, 99 Wis. 421, 40 L.R.A. 831, 75 N. W. 81; Sidekum v. Wabash, St. L. & P. R. Co. 93 Mo. 400, 3 Am. St. Rep. 549, 4 S. W. 701; Shamp v. Lambert, 142 Mo. App. 577, 121 S. W. 770; Lawson v. Missouri & K.

porting the majority doctrine affirm the existence of the power principally upon reasons of necessity, as it seems to them, rather than upon judicial precedent under the common law, or upon the application of recognized principles of the common law, it was not of the opinion that it should overrule the doctrine announced in the Altizer Case.

And following earlier South Carolina decisions, it was held in *Best v. Columbia Street R. Light & P. Co.* 85 S. C. 422, 67 S. E. 1, that the circuit court has no power to require a plaintiff suing for personal injury to submit to a physical examination by defendant's physicians, or by physicians appointed by the court. And to the same effect is *Brackett v. Southern R. Co.* 88 S. C. 447, 70 S. E. 1026, Ann. Cas. 1912C, 1212.

In *Yazoo & M. Valley R. Co. v. Robinson*, — Miss. —, 65 So. 241, which is the first time this question has ever been considered by this court, it was held that, there being no statute permitting it, the circuit court has no power to order a physical examination of plaintiff in action for personal injuries, by a physician appointed by the court.

And the same was held in *Gentry v. Gulf & S. I. R. Co.* — Miss. —, 67 So. 849. The court in this case said that it considered it quite clear that the quality of the testimony given by such experts is much magnified and unduly impressed on the minds of the jury, and that this is one of the reasons why courts are denied the power to appoint expert witnesses and compel persons to submit their bodies to their inspection. It said that it could not admit that physicians or other experts appointed by a court at the request of a party to a lawsuit were more reliable and more disinterested than were others of like attainment and professional standing, simply because

cause the others have given expert testimony at the request of a party to the suit; that there was nothing in the education and training of a judge that peculiarly qualified him to discriminate in the selection of medical experts, and yet there was little room to doubt that the ordinary juror would give undue weight to the judge's nominee.

In *San Antonio & A. Pass. R. Co. v. Spencer*, 55 Tex. Civ. App. 456, 119 S. W. 716, it was held that an expression of willingness on the part of plaintiff to be examined is necessary to authorize the court to appoint a physician to make the physical examination.

And that in effect is the decision in *Missouri, K. & T. R. Co. v. Rogers*, 55 Tex. Civ. App. 93, 117 S. W. 939.

Power of Federal court to order physical examination.

The power of the Federal court to order a physical examination is controlled by the ruling in *Camden & Suburban R. Co. v. Stetson*, 177 U. S. 172, 44 L. ed. 721, 20 Sup. Ct. Rep. 617, cited in the earlier note, which holds that the power of a circuit court of United States to order a physical examination of the plaintiff in an action for damages for personal injury, in accordance with the provisions of a statute of the state in which the court is sitting, there being no law of Congress in conflict therewith, is conferred by U. S. Rev. Stat. § 721, Comp. Stat. 1913, § 1538, providing that the laws of the state shall be rules of decision in trials at common law in courts of the United States, in cases in which they apply. This decision limited the earlier decision in *Union P. R. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000, which held that Federal courts had no inherent power to order such examination,

Teleph. Co. 178 Mo. App. 124, 164 S. W. 138.

Mr. W. H. Herdman, for defendant:

The orders complained of are valid, because the district courts of this state have the power, authority, and jurisdiction to order the plaintiff, in an action to recover damages for personal injuries, to submit his or her person to a physical examination to be made by physicians appointed by the court, and on the refusal of the plaintiff to comply with such order, to dismiss the action without prejudice to a future action.

Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578, 49 Am. Rep. 724, 20 N. W. 860, 16 Am. Neg. Cas. 530; Ellsworth v. Faifbury, 41 Neb. 881, 60 N. W. 336; Chadron v. Glover, 43 Neb. 732, 62 N. W. 62; Booth v. Andrus, 91 Neb. 810, 137 N. W. 884; Alabama G. S. R. Co. v. Hill, 90 Ala. 71, 9 L.R.A. 442, 24 Am. St. Rep. 764, 8 So. 90, 9 Am. Neg. Cas. 11, 93 Ala. 514, 30 Am. St. Rep. 65, 9 So. 722; Sibley v. Smith, 46 Ark. 275, 55 Am. Rep. 584; St. Louis Southwestern R. Co. v. Dobbins, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147; Johnston v. Southern P. Co. 150 Cal. 535, 89 Pac. 349, 11 Ann. Cas. 841; Western Glass Mfg. Co. v. Schoeninger, 42 Colo. 357, 15 L.R.A. (N.S.) 663, 126 Am. St. Rep. 165, 94 Pac. 342; Denver City Tramway Co. v. Roberts,

43 Colo. 522, 96 Pac. 186; Richmond & D. R. Co. v. Childress, 82 Ga. 719, 3 L.R.A. 803, 14 Am. St. Rep. 189, 9 S. E. 602; Savannah, F. & W. R. Co. v. Wainwright, 99 Ga. 255, 25 S. E. 622; Bagwell v. Atlanta Consol. Street R. Co. 109 Ga. 612, 47 L.R.A. 486, 34 S. E. 1018; Macon R. & Light Co. v. Vining, 120 Ga. 514, 48 S. E. 232; Cedartown v. Brooks, 2 Ga. App. 583, 59 S. E. 836; South Bend v. Turner, 156 Ind. 418, 54 L.R.A. 398, 83 Am. St. Rep. 200, 60 N. E. 271; Schroeder v. Chicago, R. I. & P. R. Co. 47 Iowa, 375; Atchison, T. & S. F. R. Co. v. Thul, 29 Kan. 466, 44 Am. Rep. 659; Ottawa v. Gilliland, 63 Kan. 165, 88 Am. St. Rep. 232, 65 Pac. 252, 10 Am. Neg. Rep. 49; Atchison, T. & S. F. R. Co. v. Palmore, 68 Kan. 545, 64 L.R.A. 90, 75 Pac. 509; Dickinson v. Kansas City Elev. R. Co. 74 Kan. 863, 86 Pac. 150; Belt Electric Line Co. v. Allen, 102 Ky. 551, 80 Am. St. Rep. 374, 44 S. W. 89; Louisville & N. R. Co. v. Simpson, 111 Ky. 754, 64 S. W. 733; Lexington R. Co. v. Cropper, 142 Ky. 39, 133 S. W. 968; Graves v. Battle Creek, 95 Mich. 266, 19 L.R.A. 641, 35 Am. St. Rep. 561, 54 N. W. 757; Logan v. Agricultural Soc. 156 Mich. 537, 121 N. W. 485; United R. & Electric Co. v. Cloman, 107 Md. 681, 69 Atl. 379; Shepard v. Missouri P. R. Co. 85 Mo. 629, 55 Am. Rep. 390; Side-

to cases where the Federal court was sitting in a jurisdiction where authority to make such examination is not conferred upon the courts by statute. And so, following as authority the Stetson and Botsford Cases, it was held in Denver City Tramway Co. v. Norton, 73 C. C. A. 1, 141 Fed. 599, and Brace v. Central R. Co. 216 Fed. 718, that, as there was no such statute in the jurisdiction where the Federal court was sitting, the court was without power to order an examination.

English and Canadian cases.

In Reily v. London, 14 Ont. Pr. Rep. 171, action to recover for injuries alleged to be due to negligence, in holding that the court had no power to order plaintiff to submit to an examination by defendant's surgeons, it was said: "The order asked for, if made, would carry the law of discovery to a degree hitherto unknown to the English and Canadian law in cases of this nature. It is true that in certain exceptional cases parties have been compelled to submit to examinations such as that now asked, as, for example, in actions in the English divorce courts for annulling marriages upon grounds necessitating such examinations in order that the court might not be imposed upon. But in actions in our courts the parties have certain limited rights of examination and discovery which are defined by the rules and judges, as well as suitors, are bound by them. There is no law which authorizes me to say that the plaintiff here L.R.A.1915E.

must submit to a species of examination entirely unprovided for by any statute or rule of court; such an order must be founded upon some authority either in the common law or the statutes, or it could not be enforced, and I find none."

And in Mosseau v. Montreal, 4 Quebec Pr. Rep. 38, it was held that the courts have no power in an action for personal injury resulting from accident, to order the plaintiff against his wishes to submit himself to a medical examination.

But in Baxter v. Davis, 4 Quebec Pr. Rep. 153, it was held that the court will order plaintiff to submit to a medical examination in action for damages for injuries caused by an assault. No reason is given for the decision, nor any authorities cited, and so it is difficult to reconcile it with the other Canadian cases, unless the fact that this was a case of assault may have entered into the decision.

X-ray.

The question whether authority for a physical examination of plaintiff in an action for personal injuries includes an X-ray examination is treated in the note to State ex rel. Carter v. Call, 41 L.R.A. (N.S.) 1071; since that note it has been held in Lasher v. S. Bolton's Sons, 161 App. Div. 381, 146 N. Y. Supp. 321, that authority to require plaintiff to submit to physical examination does not include authority to require that she permit X-ray photographs to be taken.

J. H. B.

kum v. Wabash, St. L. & P. R. Co. 93 Mo. 400, 3 Am. St. Rep. 549, 4 S. W. 701; Owens v. Kansas City, St. J. & C. B. R. Co. 95 Mo. 169, 6 Am. St. Rep. 39, 8 S. W. 350, 4 Am. Neg. Cas. 590; Graham v. Sly, 177 Mo. App. 348, 164 S. W. 136; Wanek v. Winona, 78 Minn. 98, 46 L.R.A. 448, 79 Am. St. Rep. 354, 80 N. W. 851; Rief v. Great Northern R. Co. 126 Minn. 430, 148 N. W. 309; Brown v. Chicago, M. & St. P. R. Co. 12 N. D. 61, 102 Am. St. Rep. 564, 95 N. W. 153, 14 Am. Neg. Rep. 169; Lawrence v. Keim, 19 Phila. 351; Hess v. Lake Shore & M. S. R. Co. 7 Pa. Co. Ct. 565; Demenstein v. Richardson, 2 Pa. Dist. R. 825; Lane v. Spokane Falls & N. R. Co. 21 Wash. 119, 46 L.R.A. 153, 75 Am. St. Rep. 821, 57 Pac. 367; Duncan v. Hoquiam, 56 Wash. 47, 105 Pac. 149; White v. Milwaukee City R. Co. 61 Wis. 536, 50 Am. Rep. 154, 21 N. W. 524; O'Brien v. La Crosse, 99 Wis. 421, 40 L.R.A. 831, 75 N. W. 81; Chicago & N. W. R. Co. v. Kendall, 93 C. C. A. 422, 167 Fed. 62, 16 Ann. Cas. 560; Miami & M. Turnp. Co. v. Bailly, 37 Ohio St. 104.

Sedgwick, J., delivered the opinion of the court:

The relator began an action in the district court for Douglas county to recover damages for personal injuries caused, as she alleged, by the negligence of the defendant in that action. After issue was joined the defendant therein asked for an order that the plaintiff be required to submit her person to an examination by physicians to be appointed for that purpose. The court made the order, and the plaintiff refused to comply with it, and the court therefore dismissed her case without prejudice to another action. The plaintiff then applied to this court for a writ of mandamus against the judge who made the order, requiring him to reinstate her case.

The first objection is that mandamus is not the proper remedy in such case. The common-law writ of prohibition is abolished in this state, but the duty is still imposed upon this court to prevent violation of law by inferior tribunals, and when there is no adequate remedy by the ordinary course of the law, mandamus is the appropriate remedy. *State ex rel. Reynolds v. Graves*, 66 Neb. 17, 92 N. W. 144. The plaintiff is entitled to a trial of her alleged cause of action upon its merits. She believes that the law is that she is entitled to such trial without submitting to the indignity to which she so strongly objects. If she is found to be wrong as to her rights in this regard, she may elect to submit to this requirement rather than to forego her claim entirely. An appeal from this order

of dismissal, even if determined in her favor, might result in such delay as to practically defeat her action. Under such circumstances appeal is not an adequate remedy. This objection therefore must be overruled.

The relator contends that the trial court has no power under any circumstances to order a party to submit his or her person to expert examination. In her brief she says: "We waive all other questions, and counsel for the clients interested in sustaining such an order, who of such necessity represents defendant, waives all collateral questions excepting the assertion of such a power."

It is seldom that this court is called upon to determine a question of more importance or upon which there is so clear and determined difference of opinion among the courts of last resort in the several states. Each side of the controversy is ably supported by cogent and exhaustive reasoning of the many courts which have considered it. The Supreme Court of the United States has been divided upon the question, and has convincingly presented both sides of the controversy in an opinion and a dissenting opinion. *Union P. R. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000, which was decided in 1891. In general the opinions of that court declaring principles of the common law are followed with confidence by this court. The majority opinion was prepared by Mr. Justice Gray, the dissenting opinion by Mr. Justice Brewer, and concurred in by Mr. Justice Brown. In the majority opinion it is said: "No right is held more sacred or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel anyone, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass; and no order or process commanding such an exposure or submission was ever known to the common law in the administration of justice between individuals, except in a very small number of cases based upon special reasons and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country,"—with further strong reasoning and copious citations of authorities. The opinion also contains this language: "But this is not a question which

is governed by the law or practice of the state in which the trial is had. It depends upon the power of the national courts under the Constitution and laws of the United States."

Although the opinion concludes with the statement that "the order moved for, subjecting the plaintiff's person to examination by a surgeon without her consent and in advance of the trial, was not according to the common law, to common usage, or to the statutes of the United States,"—still the statement that the Federal courts are not given this power by the Constitution or laws of the United States tends to relax the authority which this opinion otherwise would have as a precedent to be followed by the courts of the several states. It will also be observed that the proposition strongly stated in this opinion, that the act of Congress which provides that "the practice, pleadings and forms and modes of proceeding in the courts of each state are to be followed in actions at law in the courts of the United States held within the same state, neither restricts nor enlarges the power of these courts to order the examination of parties out of court," has been overruled by later decisions of that court. *Camden & Suburban R. Co. v. Stetson*, 177 U. S. 172, 44 L. ed. 721, 20 Sup. Ct. Rep. 617. This later decision is now followed by the inferior Federal courts. *Chicago & N. W. R. Co. v. Kendall*, 93 C. C. A. 422, 167 Fed. 62, 16 Ann. Cas. 560. Mr. Justice Brewer, in the dissenting opinion, says: "In this country the decisions of the highest courts of the various states are conflicting. This is the first time it has been presented to this court, and it is therefore an open question. . . . The end of litigation is justice. Knowledge of the truth is essential thereto. It is conceded, and it is a matter of frequent occurrence, that in the trial of suits of this nature, the plaintiff may make in the courtroom, in the presence of the jury, any not indecent exposure of his person to show the extent of his injuries; and it is conceded, and also a matter of frequent occurrence, that in private he may call his personal friends and his own physicians into a room, and there permit them a full examination of his person, in order that they may testify as to what they see and find. In other words, he may thus disclose the actual facts to the jury if his interest require; but by this decision, if his interests are against such a disclosure, it cannot be compelled."

This language is followed by further reasoning which is worthy of careful examination. Some of the further reasoning of Mr. Justice Brewer we desire to adopt, and L.R.A.1915E.

therefore quote as follows: "It is not necessary, nor is it claimed, that the court has power to fine and imprison for disobedience of such an order. Disobedience to it is not a matter of contempt. It is an order like those requiring security for costs. The court never fines or imprisons for disobedience thereof. It simply dismisses the case, or stays the trial until the security is given. So it seems to us that justice requires, and that the court has the power to order, that a party who voluntarily comes into court alleging personal injuries, and demanding damages therefor, should permit disinterested witnesses to see the nature and extent of those injuries in order that the jury may be informed thereof by other than the plaintiff and his friends, and that compliance with such an order may be enforced by staying the trial, or dismissing the case."

While the courts of last resort of nearly a dozen of the states of the Union have refused to indorse this reasoning, and have given reasons of undoubted force and clearness for such refusal, the courts of at least twenty of the states have reached the conclusion of Mr. Justice Brewer. The reasoning of these several courts upon either side of this question is so comprehensive and complete as to make it unnecessary for us to enter upon an extensive discussion. The supreme court of North Dakota said: "If a court is powerless, in a case like this, to require a plaintiff to submit her injuries to the inspection of physicians, to the end that the exact truth as to their nature, effect, and possible duration may be ascertained, when she, by her suit, has made them the subject of judicial investigation, then the law would permit her to put forward just so much and such parts of the facts as, in her judgment, would benefit her case, at the expense of her adversary, and to invoke the court's aid to compensate her for an injury, through a partial and one-sided investigation. The court, under such circumstances, would become a means of accomplishing the grossest injustice." *Brown v. Chicago, M. & St. P. R. Co.* 12 N. D. 61, 102 Am. St. Rep. 564, 95 N. W. 153, 14 Am. Neg. Rep. 169.

The supreme court of Maryland said: "We cannot admit that the trial court has no such power in any case, for sometimes it may be apparent that a plaintiff is feigning, and has not suffered such injuries as he pretends he has sustained. Instances are not unknown to courts and counsel, who have had experience in such cases, in which jurors have been imposed on, and sometimes even reputable physicians who have been called upon to testify on behalf of plaintiffs have been deceived. When,

therefore, the ends of justice seem to require it, there can be no valid reason why an examination should not be permitted, if seasonable application is made, and the court is satisfied that no serious physical or mental injury is likely to be done the plaintiff." *United R. & Electric Co. v. Cloman*, 107 Md. 681, 69 Atl. 379.

And the supreme court of Michigan said: "The decisions are not uniform upon this question, but the very great weight of authority is in favor of the exercise of such power by the court, under proper restrictions; the rule recognizing, however, that a wide discretion is vested in the trial court, which justifies a refusal to require the examination where the necessities of the case are not such as to call for it, or where the sense of delicacy of the plaintiff may be offended by the exhibition, or where the testimony would be merely cumulative, or where, in the judgment of the trial court, it would not materially aid the jury. The power has been exercised in Iowa, Alabama, Arkansas, Georgia, Ohio, Missouri, Nebraska, Texas, Minnesota, Kansas, Wisconsin, and Indiana. . . . Testimony which is open to one party ought logically to be open to his opponent if it can be obtained with due regard to decency, and in the orderly conduct of the trial." *Graves v. Battle Creek*, 95 Mich. 266, 19 L.R.A. 641, 35 Am. St. Rep. 561, 54 N. W. 757.

The supreme court of Kansas said: "The purpose of a trial is to mete out exact justice. This cannot be accomplished when the truth is suppressed, and this may be done if the court has not the power to ascertain what the truth is. In an action for personal injuries, the injured party may call physicians, to whom he may expose his person, not for the purpose of effecting a cure, but for the purpose of using this expert testimony to assist him in the trial of his case. He may also expose the injured portion of his person to the jury, observing the rules of decency. Should the litigant be permitted to withhold the truth, or the means of ascertaining what the truth is, simply because, in the ascertainment of the truth, he may conceive the idea that an indignity is being offered? That is not an indignity which is not so intended. May he be permitted to present so much of the truth as he desires and as he thinks to his interest, and withhold the remainder? This would certainly be his privilege if the court does not possess the power to make an order that will develop the exact truth. It is suggested by some of the authorities which hold contrary to the views herein expressed, that the rule would operate harshly upon delicate and modest females. We think such may safely rely upon the courts L.R.A.1915E.

of this country. An examination should not be ordered needlessly, or where there might be a shock to one's modesty or feelings of delicacy. We only decide that the court has the power; it should be exercised according to the sound discretion of the presiding judge. It is safer in the administration of justice to trust to the courts to protect the sensibilities of the parties in such examinations, so far as it is possible to do so, and beyond that to hold them subordinate in importance and sacredness to the interest of justice, than to hold that a party to a litigation has it within his power to develop so much of the facts as may appear to be to his interest and then stop the investigation." *Ottawa v. Gilliland*, 63 Kan. 165, 88 Am. St. Rep. 232, 65 Pac. 252, 10 Am. Neg. Rep. 49.

The supreme court of Indiana said: "The cases above cited as affirming the existence of the power establish the following propositions: (1) That trial courts have the power to order the medical examination by experts of the injured parts of a plaintiff who is seeking to recover damages therefor; (2) that a defendant has no absolute right to demand the enforcement of such an order, but the motion therefor is addressed to the sound discretion of the trial court; (3) that the exercise of such discretion is reviewable on appeal, and correctible in cases of abuse; (4) that the examination should be applied for and made before entering upon the trial, and should be ordered and conducted under the direction of the court, whenever it fairly appears that the ends of justice require a more certain ascertainment of important facts, which can only be disclosed, or fully elucidated, by such an examination, and such an examination may be made without danger to the plaintiff's life or health, or the infliction of serious pain; (5) that the refusal of the motion, when the circumstances appearing in the record present a reasonably clear case for the examination under the rules stated, is such an abuse of discretion in the trial court as will operate to reverse a judgment for the plaintiff; (6) that such an order may be enforced, not by punishment as for a contempt, but by delaying or dismissing the proceeding." *South Bend v. Turner*, 156 Ind. 418, 54 L.R.A. 396, 83 Am. St. Rep. 200, 60 N. E. 271.

Although the precise question here presented, whether the trial court has under any circumstances the power to order such an investigation, has perhaps never been directly and definitely considered and determined by this court, there are several cases in which expressions have been used that might be considered as indicating the opinion of the court as to the policy of our

law. In *Stuart v. Havens*, 17 Neb. 211, 22 N. W. 419, it was stated in the syllabus that if the application is made during the trial it should be denied, and the third paragraph of the syllabus is: "If a personal examination is desired, the application should be made before the trial begins, and experts agreed upon by the parties appointed by the court."

Upon the trial in that case the plaintiff was asked "to show his arm, which he claimed was injured by falling into the excavation, to the jury. This he did without objection, and afterwards three physicians who had treated the arm professionally testified as to its condition without objection. And afterwards the defendant below asked the court below to make an order requiring Havens to exhibit his arm to four physicians called by him (the defendant). This the court refused to do."

The opinion quotes *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 724, 20 N. W. 860, 16 Am. Neg. Cas. 530, as holding: "That where the request was made during the trial, and it was sought to have the examination made by experts called by the adverse party, and not by those agreed upon by the parties, or appointed by the court, there was no error in denying the request."

It then quotes a decision of the supreme court of Wisconsin, holding that an examination may be made during the trial, but adhering to the former decisions of the court in that regard. The opinion then says: "In any event the evidence partakes somewhat of a partisan character. To avoid this, they should be agreed upon by the parties or appointed by the court, and an examination, if desired, should be made before the trial begins, although the court may permit it to be made during the progress of the trial."

It was perhaps not necessary to determine in that case that the court may permit it to be made during the progress of the trial, or that the court has power under any circumstances to order such an examination, and yet this and other similar decisions of this court have been understood by the trial courts and by the profession generally to establish the right of the trial court to make such an order. *Stuart v. Havens*, *supra*, was decided thirty years ago, and since that time the trial courts have generally exercised such power. It has been understood by the courts of other states that this court has decided that our trial courts have such powers, and their decisions classed Nebraska among the states so holding. In view of this long-established practice in this state, and that there must otherwise often be a failure of justice, we L.R.A.1915E.

conclude that we should recognize this power of the trial courts.

It is possible that, in some instances, a delicate and sensitive lady may suffer and endure a great wrong and injustice rather than present her cause to any court for a public investigation which would require her to allege in her petition and detail in her testimony facts in regard to the condition of her person which her sense of delicacy would forbid her doing. In such case she must elect, before bringing her action, whether she will bear the ills she has or fly to others that she knows not of. In bringing her action she must declare in public fashion the conditions to be investigated, and the law requires that in any legal investigation of facts the best evidence available must be produced. She may decline to present such conditions for investigation; but if she does bring them before the court she cannot dictate the means of investigation by selecting such expert witnesses as she may have reason to suppose have opinions favorable to her cause, and rejecting those that might form contrary expert opinions upon ascertaining the facts. In modern times the medical profession has the benefit of skilful women physicians, and ordinarily, other things being equal, such physicians ought to be preferred when reasonably practicable, if desired by the woman to be examined.

If such an application is made for the purpose of embarrassing or coercing the plaintiff, the trial court will be quick to discover that purpose, and will order it only under conditions above indicated, and when it clearly appears that a condition exists that can be definitely determined by such examination and cannot be satisfactorily determined without it.

Writ denied.

Petition for rehearing denied.

UNITED STATES SUPREME COURT.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY OF TEXAS, Plff. in Err.,

v.

S. O. HARRIS.

(234 U. S. 412, 58 L. ed. 1377, 34 Sup. Ct. Rep. 790.)

Constitutional law — due process of law — allowing attorney's fee to successful plaintiff.

1. Due process of law is not denied, contrary to U. S. Const., 14th Amend., by the

provisions of Texas Laws 1909, p. 93, for the allowance of a reasonable attorney's fee of not over \$20 to the successful plaintiff in a suit in which an attorney is actually employed upon a claim not exceeding \$200, against "any person or corporation doing business in this state, for personal services rendered, or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees," where such claim is not paid within thirty days after demand, and the recovery is for the full amount claimed.

Same — equal protection of the laws — allowing attorney's fee to successful plaintiff.

2. There is no denial of the equal protection of the laws, contrary to U. S. Const., 14th Amend., in the provisions of Texas Laws 1909, p. 93, for the allowance of a reasonable attorney's fee of not over \$20 to the successful plaintiff in a suit in which an attorney is actually employed upon a claim not exceeding \$200, against "any person or corporation doing business in this state, for personal services rendered, or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees," where such claim is not paid within thirty days after demand, and the recovery is for the full amount claimed, since this statute makes no classification of debtors, and the kinds of claims included cover a wide range, and do not appear to have been grouped for the purpose of bearing against any class or classes of citizens or corporations.

Commerce — state regulation — carrier's liability — allowing attorney's fee to successful plaintiff — congressional inaction.

3. The application to a claim against a carrier, based upon a loss of freight shipped in interstate commerce, of the provisions of Texas Laws 1909, p. 93, for the allowance of a reasonable attorney's fee of not over \$20 to the successful plaintiff in a suit in which an attorney is actually employed upon a claim not exceeding \$200, against "any person or corporation doing business

in this state, for personal services rendered, or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees," where such claim is not paid within thirty days after demand, and the recovery is for the full amount claimed, does not amount to a direct burden upon interstate commerce, and is therefore not repugnant to the commerce clause of the Federal Constitution, or otherwise in conflict with Federal authority, in the absence of any Congressional legislation covering the subject.

Same — conflicting state and Federal regulations.

4. A state law enacted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an act of Congress regulating commerce, unless there is actual repugnancy, or unless Congress has at least manifested a purpose to exercise its paramount authority over the subject.

Same — carrier's liability — allowing attorney's fee to successful plaintiff.

5. Congress has not so far exercised its paramount authority by enacting the Carmack amendment of June 29, 1906, to the act of February 4, 1887, § 20, regulating the liability of a carrier for the loss or damage to an interstate shipment, as to prevent the application to a claim against a carrier, based upon a loss of an interstate shipment, of the provisions of Texas Laws 1909, p. 93, for the allowance of a reasonable attorney's fee of not over \$20 to the successful plaintiff in a suit in which an attorney is actually employed upon a claim not exceeding \$200, against "any person or corporation doing business in this state, for personal services rendered, or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees," where such claim is not paid within thirty days after demand, and the recovery is for the full amount claimed.

(June 8, 1914.)

Note. — Validity of statutory provision for attorney's fee.

This note is supplementary to the note to Builders' Supply Depot v. O'Connor, 17 L.R.A.(N.S.) 910.

As to the validity of a statutory provision for attorneys' fees in proceedings involving the collection of taxes or special assessments, see note to Engbretsen v. Gay, 28 L.R.A.(N.S.) 1062.

The recent decisions, as well as those cited in the earlier note, disclose some confusion upon the question under annotation, although many of the apparently conflicting decisions may be reconciled.
L.R.A.1915E.

General provision.

The United Supreme Court, in Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 58 L. ed. 1155, 34 Sup. Ct. Rep. 678, and in Missouri, K. & T. R. Co. v. HARRIS, has recently upheld, as not denying either due process of law or the equal protection of the laws, in violation of the 14th Amendment to the United States Constitution, the provision of the Texas statute for the allowance of a reasonable attorney's fee of not over \$20 to the successful plaintiff in a suit in which an attorney is actually employed upon a claim not exceeding \$200, against "any person or corporation doing business

ERROR to the Justice Court, Precinct No. 6, of Hopkins County, to review a judgment allowing an attorney's fee to the successful plaintiff in a suit against the defendant carrier upon a claim for the loss of an interstate shipment not paid after demand. Affirmed.

The facts are stated in the opinion.

Messrs. Joseph M. Bryson, Aldis B. Browne, Alexander S. Coke, and A. H. McKnight, for plaintiff in error:

Corporations are persons within the provisions of the 14th Amendment.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; Smyth v. Ames, 169 U. S. 522, 42 L. ed. 840, 18 Sup. Ct. Rep. 418; Blake v. McClung, 172 U. S. 259, 43 L. ed. 439, 19 Sup. Ct.

Rep. 165; Hale v. Henkel, 201 U. S. 76, 50 L. ed. 666, 26 Sup. Ct. Rep. 370.

Discrimination must be based upon matters which have some relation to the object sought to be accomplished.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247.

There is no reasonable ground for the

in this state, for personal services rendered, or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees," where such claim is not paid within thirty days after demand, and the recovery is for the full amount claimed; this statute making no classification of debtors, and the kinds of claims included covering a wide range, and not appearing to have been grouped for the purpose of bearing against any class or classes of citizens or corporations.

And the mere fact that attorneys' fees are allowed by a statute to successful plaintiffs only, and not to successful defendants, does not involve a denial of the equal protection of the laws, contrary to the 14th Amendment, if the classification is otherwise reasonable. Missouri, K. & T. R. Co. v. Cade, supra.

But a statute providing for an attorney's fee where an action is brought by any laborer, clerk, servant, nurse, or other person for compensation for personal services, to be recovered as costs, has been held to be in violation of the 14th Amendment and void, apparently on the ground that it did not give the defendant in such an action a reciprocal right. Oligschlager v. Stephenson, 24 Okla. 760, 104 Pac. 345, following Chicago, R. I. & P. R. Co. v. Mashore, cited in the note in 17 L.R.A.(N.S.) 914.

And see also the other earlier cases cited in the note in 17 L.R.A.(N.S.) at page 914.

Against railroad companies.

A statute which singles out railway companies and subjects them to the payment of double damages and attorneys' fees in cases of their failure to pay within thirty days after the owner's demand, for live stock killed or injured by their trains, although litigants in general are not subjected to the same burden, does not deprive the railway companies of the equal protection of the laws (Kansas City Southern R. Co. v. Anderson, 233 U. S. 325, 58 L. ed. 983, L.R.A.1915E.

34 Sup. Ct. Rep. 599); nor is it wanting in due process of law, as applied to a case where the justice of the original demand is fully established in the suit following the failure to pay (Ibid., affirming 104 Ark. 500, 149 S. W. 58).

So, a statute authorizing the assessment of a reasonable attorney's fee against a railroad company refusing for thirty days to pay for stock killed by one of its trains is not unconstitutional as applied to a case where judgment is rendered for the amount of the claim presented to the company, which is also the amount for which suit was brought. St. Louis Southwestern R. Co. v. Cone, 111 Ark. 309, 163 N. W. 1170.

And a statute authorizing the recovery of double damages and attorneys' fees for failure of a railroad company to pay for live stock killed by one of its trains, within sixty days after the presentation of a claim therefor, is constitutional and valid as applied to a case where the claimant has obtained a verdict for the amount agreed to have been demanded, and to have been the value of the live stock killed (Seaboard Air Line R. Co. v. Robinson, — Fla. —, 67 So. 139); or as applied to a case where the railroad company denied all liability for the killing of the stock, even though the claimant has obtained a verdict fixing the value of the stock at a less amount than the value claimed both in the preliminary demand and in the declaration,—the necessity for the action having been produced by the denial of liability by the railroad company, and not by an honest difference in the valuation of the stock (Atlantic Coast Line R. Co. v. Perry, — Fla. —, 67 So. 639).

Likewise, a provision of a "reciprocal demurrage law" enacted in the exercise of the police power of the state, which requires a railroad company failing to furnish cars to a shipper, etc., to pay to the shipper reasonable attorneys' fees for bringing a suit to recover damages, is not invalid because it imposes a charge on carriers, and not on debtors generally. Hardwick Farmers' Elevator Co. v. Chicago, R. I. & P. R. Co. 110 Minn. 25, 124 N. W. 819, 19 Ann. Cas.

discrimination made by the statute in question.

Cotting v. Kansas City Stock Yards Co.; Connolly v. Union Sewer Pipe Co.; and Southern R. Co. v. Greene, *supra*.

Such statutes do not come within the scope of police regulations.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

The police power must be exercised with respect to the right of equal protection guaranteed by the Federal Constitution.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Central of Georgia R. Co.

v. Murphey, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 Ann. Cas. 514.

Every person, under our constitutional guaranties, has the right to be governed by general rules, and when particular individuals or classes of individuals are singled out and are subjected to one set of rules, when other persons or classes of persons under similar circumstances are not, or when any class of persons is subjected to arbitrary action, those so burdened are deprived of their liberty and property without due process of law.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Yick Wo v. Hopkins, *supra*; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 109, 46 L. ed. 108, 22 Sup. Ct. Rep.

1088 (reversed in 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174, on the ground that Congress, by the provisions of the Hepburn act of June 29, 1906, imposing a specific duty upon railway carriers to furnish cars for interstate traffic upon reasonable request, and giving remedies for violations of that duty, had so taken possession of the subject of the delivery, when called for, of railroad cars to be used in such traffic, as to invalidate, when applied to cars demanded for interstate transportation, the provisions of the Minnesota "reciprocal demurrage law," requiring railroad companies to furnish freight cars on demand, under penalty for each day's delay not due to certain excepted causes); Gray v. Minneapolis & St. L. R. Co. 110 Minn. 527, 124 N. W. 1100 (writ of error dismissed by the United States Supreme Court, without opinion, on the authority of counsel for the plaintiff in error, in 226 U. S. 619, 57 L. ed. 384, 33 Sup. Ct. Rep. 114).

And a statute providing that any railroad charging or receiving any greater compensation for the transportation of passengers than the law allows shall forfeit a sum not less than \$50 nor more than \$300, and the costs of suit, including a reasonable attorney's fee to be taxed by the court, does not prescribe penalties so enormous, excessive, and arbitrary as to deprive a railroad company which has charged excessive fares, of its property without due process of law, or deny it the equal protection of the laws, in violation of the 14th Amendment. Chicago, R. I. & P. R. Co. v. Davis, — Ark. —, 170 S. W. 245.

But the equal protection of the laws guaranteed by the 14th Amendment is denied to railroad companies by a statute which provides for the allowance of a reasonable attorney's fee to a shipper who successfully sues a railroad company for failure to furnish cars, without providing for such an allowance in favor of a railroad company in the event of its successful prosecution of a suit brought by it, under the same statute, against a shipper who has failed to use promptly cars placed at his disposal. L.R.A.1915E.

Atchison, T. & S. F. R. Co. v. Vosburg, post, 953, reversing 89 Kan. 114, 130 Pac. 667.

The court, distinguishing this case from the Cade Case, *supra*, said that the allowance of attorneys' fees to successful plaintiffs only, and not to successful defendants, as in the Texas statute, is not a discrimination between different citizens or classes of citizens, since members of any and every class may either sue or be sued, and the differences in the respective attitudes toward a litigation, of the plaintiff and defendant, may be made the basis of distinctive treatment respecting the allowance of an attorney's fee as a part of the costs; but "the present case is essentially different, for in the Kansas statute the distinction is not rested upon the fact that the plaintiff, whether shipper or company, has a special burden in the litigation that may reasonably be compensated by allowance of attorneys' fees; on the contrary, the act, while recognizing the existence of such burden, allows compensation for it in favor of one class of litigants, but does not allow like compensation to the other class when subjected to the like burden."

And the Arkansas statute involved in Kansas City Southern R. Co. v. Anderson, *supra*, has been held wanting in due process of law, and violative of the 14th Amendment to the Federal Constitution, when construed as imposing double liability, with an attorney's fee, upon a railroad company refusing to pay within thirty days an excessive demand for the killing of live stock by one of its trains. St. Louis, I. M. & S. R. Co. v. Wynne, 224 U. S. 354, 56 L. ed. 799, 42 L.R.A.(N.S.) 102, 32 Sup. Ct. Rep. 493, reversing 90 Ark. 538, 119 S. W. 1127, 17 Ann. Cas. 631; but see Kansas City Southern R. Co. v. Anderson, *supra*, sustaining the validity of the same statute when otherwise construed or applied.

And see also the earlier cases within the scope of this subdivision, on pages 910 and 911 of the note in 17 L.R.A.(N.S.).

As to the constitutionality of a provision in a statute requiring a railroad company to fence its tracks and build cattle guards,

30; *St. Louis, I. M. & S. R. Co. v. Wynne*, 224 U. S. 354, 56 L. ed. 799, 42 L.R.A. (N.S.) 102, 32 Sup. Ct. Rep. 493; *Interstate Commerce Commission v. Louisville & N. R. Co.* 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; *Bradley v. Richmond*, 227 U. S. 481, 57 L. ed. 605, 33 Sup. Ct. Rep. 318; *Chicago, M. & St. P. R. Co. v. Polt*, 232 U. S. 165, 58 L. ed. 554, 34 Sup. Ct. Rep. 301.

The Federal law, within certain limits, gives the shipper whose freight or express is lost or damaged in transit a cause of action, but this does not include the right to recover an attorney's fee.

for attorneys' fees as a penalty for neglect of the statutory duty, see subdivision at page 864, of note to *Missouri & N. A. R. Co. v. State*, 31 L.R.A. (N.S.) 861.

As to the constitutionality of a statute imposing a penalty or added liability, generally, for the failure of a railroad company to pay a claim, see note to *St. Louis, I. M. & S. R. Co. v. Wynne*, 42 L.R.A. (N.S.) 102.

Against carriers.

A statute authorizing the award of attorneys' fees against any common carrier who fails to pay within sixty days from the filing thereof, a claim for freight or express lost or damaged by it, or for any overcharge made by it on any freight or express, in the event that the claimant shall prevail in an action to recover on his claim, makes a classification in accordance with the requirements of the Constitution as to due process of law and the equal protection of the laws, and is constitutional and valid. *Atlantic Coast Line R. Co. v. Coachman*, 59 Fla. 130, 52 So. 377, 20 Ann. Cas. 1047.

The court said: "The statute will not be said to offend against the equal protection clause of the state Constitution or the inhibition of article XIV. of the Federal Constitution, merely because it permits a recovery of interest and attorneys' fees by the shipper, if he succeeds, and secures no such right to the carrier in the event it prevails in the suit. The shipper and the carrier are not similarly situated. The shipper assumes the discharge of no duty to the public. He injures no one. And so the statute applies to the carrier—to all carriers similarly situated—and places its penalty or burden upon the carrier, and not upon the shipper, because the carrier only is within the sphere of its operation. . . . It is not necessary that a statute passed in the exercise of the police power shall apply equally and uniformly to all persons of the state, but it is sufficient to satisfy the constitutional requirement of equal protection of the law, if it applies equally and uniformly to all persons similarly circumstanced." *Ibid.*

And a Federal statute allowing a reasonable attorney's fee to the complainant as part of the costs in an action instituted L.R.A.1915E.

Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A. (N.S.) 7, 31 Sup. Ct. Rep. 164.

Federal law supersedes or prevails over state enactments.

Sinnot v. Davenport, 22 How. 242, 16 L. ed. 247; *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; *Northern P. R. Co. v. Washington*, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; *Southern R. Co. v. Reid*, 222 U. S. 438, 56 L. ed. 260, 32 Sup. Ct. Rep. 140; *Southern R. Co. v. Reid*, 222 U. S. 444, 56 L. ed. 263, 32 Sup. Ct. Rep. 145; *Second Employers' Liability Cases (Mondou v.*

under the interstate commerce act, against a carrier to recover for reparation directed by the Interstate Commerce Commission to be made for excessive freight charges, is not unconstitutional or void as class legislation. *Chicago, B. & Q. R. Co. v. Feintuch*, 112 C. C. A. 126, 191 Fed. 482.

And the Texas provision for an attorney's fee, as applied to a claim against a carrier based upon a loss of freight shipped in interstate commerce, does not amount to a direct burden upon interstate commerce, and is therefore not repugnant to the commerce clause of the Federal Constitution, or otherwise in conflict with Federal authority, in the absence of any congressional legislation covering the subject. *Missouri, K. & T. R. Co. v. HARRIS*.

Nor has Congress so far exercised its paramount authority by enacting the Carmack amendment of June 29, 1906, § 20, regulating the liability of a carrier for the loss of or damage to an interstate shipment, as to prevent the application of the Texas provision for an attorney's fee to a claim against a carrier based upon the loss of an interstate shipment. *Ibid.*

But, by the provisions of the act of June 29, 1906, imposing a specific duty upon railway carriers to furnish cars for interstate traffic upon reasonable request, and giving remedies for violations of that duty, Congress has so taken possession of the subject of the delivery, when called for, of railroad cars to be used in such traffic, as to invalidate, when applied to cars demanded for interstate transportation, the provisions of the Minnesota "reciprocal demurrage law" (*Laws of Minnesota 1907, chap. 23*), requiring railroad companies to furnish freight cars on demand, and, for delay not due to certain excepted causes, imposing upon them liability to pay a certain penalty, together with the damages sustained and a reasonable attorney's fee. *Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co.* 226 U. S. 426, 57 L. ed. 284, 46 L.R.A. (N.S.) 203, 33 Sup. Ct. Rep. 174.

And a statute imposing a liability of \$500 as liquidated damages, together with a reasonable attorney's fee, for every charge by a common carrier in excess of the rates therein fixed for shipments of oil between

New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174; Adams Exp. Co. v. Croninger, 226 U. S. 401, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33

Sup. Ct. Rep. 729; Barrett v. New York, 232 U. S. 14, 58 L. ed. 483, 34 Sup. Ct. Rep. 203.

The supremacy of Congress in the field of interstate commerce is well settled. Where its jurisdiction is exclusive, as is the case in matters that regulate, burden, or interfere with such commerce, the states cannot legislate at all. Their enactments are void, whether Congress acts or not.

Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; Central of Georgia R. Co. v. Murphey, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 Ann. Cas. 514; McNeill v. Southern

points in the state, has been held wanting in due process of law, and violative of the 14th Amendment to the Federal Constitution. Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961, reversing 82 Kan. 222, 108 Pac. 89.

In the last case, however, only the \$500 for which liability was imposed as "liquidated damages" seems to have been considered in declaring the statute unconstitutional, and the provision for an attorney's fee might have been upheld, if alone involved.

And see also earlier cases on page 911 of note in 17 L.R.A.(N.S.).

As to the constitutionality of a statute imposing a penalty or added liability, generally, for the failure of a carrier to pay a claim, see note to Mobile & O. R. Co. v. Brandon, 42 L.R.A.(N.S.) 106.

In mechanics' lien cases.

For the earlier decisions, see pages 913 and 914 of the note in 17 L.R.A.(N.S.).

The recent mechanics' lien cases show the same conflict as those cited in the earlier note. Thus, a statute authorizing the allowance of an attorney's fee to a successful lien claimant in an action to foreclose a mechanics' lien has been held constitutional and valid. Gray v. New Mexico Pumice Stone Co. 15 N. M. 478, 110 Pac. 603, following the earlier case of Genest v. Las Vegas Masonic Building Assn., cited in the note in 17 L.R.A.(N.S.) 914.

And in Nelson Bennett Co. v. Twin Falls Land & Water Co. 14 Idaho, 5, 93 Pac. 789, and Shaw v. Martin, 20 Idaho, 168, 117 Pac. 853, it was held, following Thompson v. Wise Boy Min. & Mill. Co., cited in the note in 17 L.R.A.(N.S.) 914, that a provision of the lien law for the allowance of reasonable attorneys' fees to the lien claimant, upon the foreclosure of a mechanics' lien, was constitutional and valid, although it did not provide for an allowance to the adverse party in case he should be successful.

So, it has been held that a statute providing that judgment in favor of a lienholder in an action to foreclose a lien on real estate for labor or material shall include costs to be fixed by the court is not, when L.R.A.1915E.

construed as permitting the allowance of attorneys' fees as costs to a prevailing lienholder in such an action, unconstitutional, either as special or class legislation (Lindquist v. Young, 119 Minn. 219, 138 N. W. 28; Behrens v. Kruse, 121 Minn. 90, 140 N. W. 339), or as denying the equal protection of the laws, or equal rights and privileges to all citizens (Behrens v. Kruse, supra).

And a Federal statute providing that, in all suits to enforce mechanics' liens in a certain territory, the court, on entering judgment for the plaintiff, shall allow as part of the costs a reasonable amount as attorneys' fees, is not unconstitutional,—the 14th Amendment to the Federal Constitution having no application, because "its prohibitions are addressed to the states only," and no other provision of the Federal Constitution being violated. Cascaden v. Wimbish, 88 C. C. A. 277, 161 Fed. 241; Pioneer Min. Co. v. Delamotte, 108 C. C. A. 90, 185 Fed. 752.

But in Union Lumber Co. v. Simon, 150 Cal. 751, 89 Pac. 1077, 1081, following Builders' Supply Depot v. O'Connor, annotated in 17 L.R.A.(N.S.) 909, it was held that a statute allowing an attorney's fee to one who establishes a mechanics' lien, which is not allowed to the defendant should he prevail, or to other classes of litigants, is unconstitutional and void, as violating the constitutional guaranty of the equal protection of the laws, uniformity of laws, and equal rights in the acquisition and protection of property.

And to the same effect are Hill v. Clark, 7 Cal. App. 609, 95 Pac. 382, also following the O'Connor Case; Farnham v. California Safe Deposit & T. Co. 8 Cal. App. 266, 96 Pac. 788, following the O'Connor and the Simon Cases; and Los Angeles Pressed Brick Co. v. Higgins, 8 Cal. App. 514, 97 Pac. 414, 420.

And in Mills v. Olsen, 43 Mont. 129, 115 Pac. 33, overruling the earlier Montana case of Wortman v. Kleinschmidt, cited in the note in 17 L.R.A.(N.S.) 914, on the authority of Builders' Supply Depot v. O'Connor, annotated in 17 L.R.A.(N.S.) 910, and Gulf, C. & S. F. R. Co. v. Ellis, cited in the note in 17 L.R.A.(N.S.) 910, and other cases principally from the courts of California

R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Yazoo & M. Valley R. Co. v. Greenwood Grocery Co. 227 U. S. 1, 57 L. ed. 389, 33 Sup. Ct. Rep. 213; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Barrett v. New York, 232 U. S. 14, 58 L. ed. 483, 34 Sup. Ct. Rep. 203.

No appearance for defendant in error.

Mr. Justice Pitney delivered the opinion of the court:

In this case the plaintiff below (now defendant in error) recovered a judgment for \$3.50 damages for loss of certain freight that was shipped from St. Louis, Missouri, consigned to plaintiff at Como, Texas, and delivered by the initial carrier to defendant

for transportation to destination; the loss having occurred on defendant's line in Texas. The judgment includes an attorney's fee of \$10, allowed by virtue of the local statute approved March 19, 1909, Laws, p. 93, Tex. Rev. Civ. Stat. 1911, arts. 2173 and 2179, which was under consideration in Missouri, K. & T. R. Co. v. Cade, decided May 11, 1914, 233 U. S. 642, 58 L. ed. 1135, 34 Sup. Ct. Rep. 678, and is set forth *verbatim* in a marginal note to the opinion in that case. The controversy turns upon the allowance of the attorney's fee, the same Federal questions having been raised in the state court and in this court that were raised in the Cade Case. So far as the 14th Amendment is concerned, our opinion in that case renders further discussion un-

and Colorado,—it was held that a statute allowing attorneys' fees to successful lien claimants in actions to foreclose their liens was unconstitutional.

So, in Illinois a provision of the mechanics' lien law for a reasonable attorney's fee to be taxed as a part of the costs in favor of the lien creditor in all cases where mechanics' liens are enforced has been held unconstitutional and void as special legislation, conferring a right upon persons entitled to liens by virtue of the mechanics' lien law, and not conferring that right upon other lienholders. *Manowsky v. Stephan*, 233 Ill. 409, 84 N. E. 365; *Olson v. Nilson*, 142 Ill. App. 436.

And a Wyoming statute providing that, in any suit or action in the district court to enforce a mechanics' lien, when the plaintiff shall obtain judgment, \$25 for attorneys' fees shall also be taxed as costs and recovered from the adverse party, has also been held unconstitutional and void as denying the equal protection of the laws. *Becker v. Hopper*, — Wyo. —, 138 Pac. 179.

Against insurance companies.

For earlier cases, see pages 911 and 912 of the note in 17 L.R.A.(N.S.).

A state statute allowing a penalty and attorneys' fees against insurance companies which fail to pay the amount of losses after demand and within the time specified in their policies is valid. *Pacific Mutual L. Ins. Co. v. Carter*, 92 Ark. 378, 123 S. W. 384 (dissenting opinion in 92 Ark. 387, 124 S. W. 764).

And a statute providing for the recovery of an additional 12 per cent upon the amount of the policy as damages, and reasonable attorneys' fees, in an action against a life or health insurance company which has failed to pay a loss within a prescribed time after demand, is not unconstitutional as contravening the 14th Amendment. *Manhattan L. Ins. Co. v. Cohen*, — Tex. Civ. App. —, 139 S. W. 51, following *Fidelity Mut. Life Asso. v. Mettler*, cited in the note in 17 L.R.A.(N.S.) 911.

But a statute providing that "any for-

eign life or accident insurance company that contests any claim for insurance, and has judgment rendered against it, shall be taxed with all costs, including an attorney's fees for the attorney for the successful party, such fees to be fixed by the court before whom the case was tried," is unconstitutional and invalid, as discriminating against a foreign life or accident insurance company, and in favor of a domestic corporation of the same class, in violation of the Federal Constitution, and as contravening § 6 of the Colorado Bill of Rights, since it discriminates in favor of a plaintiff against a defendant, the latter not being entitled thereunder to a like privilege in case it succeeds in defeating the action. *Pacific Mut. L. Ins. Co. v. Van Fleet*, 47 Colo. 401, 107 Pac. 1087.

In libel and slander actions.

A statute providing for the allowance of \$100 to cover counsel fees in actions for libel and slander, to the plaintiff in case he recovers judgment, or to the defendant in case the action is dismissed or he recovers judgment, is not subject to the "equal protection of the law objection," as all litigants in this class of cases, whether plaintiffs or defendants, are placed upon an equal footing, and the statute is constitutional and valid. *Skrocki v. Stahl*, 14 Cal. App. 1, 110 Pac. 957; *Carpenter v. Ashley*, 16 Cal. App. 302, 116 Pac. 983; *Engel v. Ehret*, 21 Cal. App. 112, 130 Pac. 1197.

And a statute allowing a counsel fee as costs to the prevailing party in a libel or slander action, if constitutional when passed, is not affected by a new Constitution, or rendered invalid as special legislation by a provision first appearing in the new Constitution against such legislation. *Skrocki v. Stahl* and *Carpenter v. Ashley*, *supra*.

In actions against the Sanitary District of Chicago.

For earlier cases, see page 913 of the note in 17 L.R.A.(N.S.).

necessary. But since the claim of the present plaintiff was based upon freight lost in interstate commerce, we must now pass upon the question whether the allowance of an attorney's fee in such a case, pursuant to the Texas statute, is repugnant to the commerce clause of the Federal Constitution, or the act to regulate commerce and amendments thereof.

By way of preface, we should repeat that the state court of last resort has construed the act as relating only to the collection of claims not exceeding \$200 in amount; that by its terms it applies to claims "against any person or corporation doing business in this state, for personal services rendered or for labor done, or for material furnished, or for overcharges on freight or

express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees" [art. 2178]; and that, in the Cade Case, we have held it to be a police regulation designed to promote the prompt payment of small but well-founded claims, and to discourage unnecessary litigation in respect to them; and have held it, in its general application, to be not repugnant to either the "equal protection" or the "due process" clauses of the 14th Amendment.

Such being the character of the statute, and it having a broad sweep which only incidentally includes claims arising out of interstate commerce, it follows that it cannot be held to constitute a direct burden

A statutory provision authorizing the allowance of attorneys' fees to the plaintiff in an action against the Sanitary District of Chicago for damages resulting from the overflowing of land is not unconstitutional, either as depriving the Sanitary District of its property without due process of law, or depriving it of the equal protection of the laws (*Gentleman v. Sanitary Dist.* 260 Ill. 317, 103 N. E. 234), or as special legislation granting a special privilege to certain individuals, as the statute under which the Sanitary District of Chicago is organized is public in its nature, and the provision in question affects alike all persons in the class to which it applies, and the classification is founded upon a reasonable basis (*Miller v. Sanitary Dist.* 242 Ill. 321, 90 N. E. 1; *Gentleman v. Sanitary Dist.* supra).

In proceeding by state to abate a liquor nuisance.

A statutory provision authorizing the allowance and taxation as costs of an attorney's fee to the plaintiff's attorney in a proceeding by the state to abate a nuisance maintained in violation of the liquor law does not deny to the defendant the equal protection of the laws, in violation of the 14th Amendment. *Fritz v. State*, 80 Kan. 168, 101 Pac. 1013.

In mandamus proceedings.

A state statute authorizing the allowance of attorneys' fees for services rendered to a successful plaintiff in a state court as a part of the damages in mandamus proceedings against one refusing to obey the peremptory writ of mandamus does not deny to the defendant the equal protection of the laws, contrary to the 14th Amendment, although the statute authorizes no such allowance in other cases, and authorizes no reciprocal allowance to the defendant in case of his success. *Missouri P. R. Co. v. Larabee*, 234 U. S. 459, 58 L. ed. 1398, 34 Sup. Ct. Rep. 979.

To successful defendant in statutory civil action for a penalty.

Likewise, a statute providing that if a L.R.A.1915E.

civil action for a penalty brought thereunder fails, the defendant shall have judgment against the plaintiff for all costs and reasonable attorneys' fees, does not violate the constitutional guaranty of complete and impartial protection under the law, on the ground that the plaintiff is not given any right to recover attorneys' fees; nor does it violate the constitutional prohibition of special legislation on a subject-matter already covered by a general law. *Johnson v. Hudspeth*, 136 Ga. 771, 72 S. E. 69.

In partition cases.

A statute providing that, in all partition cases in the courts of the state, the court may, in its discretion, order the fees of the attorneys for the parties to be paid out of the common fund where the property is sold for partition, and taxed as costs in cases where the property is partitioned in kind, is not unconstitutional, either as being a delegation of legislative functions to the judicial department, or as violating either provisions of the state Constitution, against the taking of property other than by the judgment of the peers of the party or by the law of the land, or against class legislation; or against the taking of property without just compensation; or of the 14th Amendment to the Federal Constitution, requiring due process of law and the equal protection of the laws. *Scott v. Marley*, 124 Tenn. 388, 137 S. W. 492.

Validity as affected by title to act.

The Tennessee statute providing for the payment of the fees of the attorneys for the parties to any partition action out of the common fund, under the title, "An Act to Regulate the Practice in Partition Cases, and to Provide for the Expense of the Same," does not violate a constitutional provision that the title of an act must express the subject of the legislation in the body of the act,—it not being essential that the body of the act shall cover the whole domain within the title; nor does it violate a constitutional requirement that no bill shall become a law which embraces more

upon such commerce, and hence repugnant to the commerce clause of the Constitution, or otherwise in conflict with the Federal authority, in the absence of legislation by Congress covering the subject. To this extent, the case is controlled by the decision in *Atlantic Coast Line R. Co. v. Mazursky*, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378, where it was held that a South Carolina statute which required common carriers doing business in the state to settle claims for loss or damage to property while in the possession of the carrier within forty days, in case of shipments wholly within the state, and within ninety days, in case of shipments from without the state, and that failure to adjust and pay a claim within the prescribed period should subject the carrier to a penalty of \$50 in case the full amount claimed was recovered, as the statute was applied to a claim for loss or damage to interstate freight while in the possession of the carrier within the state, was not an unwarrantable interference with interstate commerce, in the absence of legislation by Congress, but was rather a regulation in aid of the performance by the carrier of its legal duty. The decision was rested upon the authority and reasoning of *Sherlock v. Alling*, 93 U. S. 99, 104, 23 L. ed. 819, 820; *Smith v. Alabama*, 124 U. S. 465, 478, 31 L. ed. 508, 511, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Western U. Teleg. Co. v. James*, 162 U. S. 650, 660, 40 L. ed. 1105, 1108, 16 Sup. Ct. Rep. 934; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 137, 42 L. ed. 688, 692, 18 Sup. Ct. Rep. 289; *Pennsylvania R. Co. v. Hughes*, 191

U. S. 477, 491, 48 L. ed. 268, 273, 24 Sup. Ct. Rep. 132; *Missouri P. R. Co. v. Larabee Flour Mills Co.* 211 U. S. 612, 623, 53 L. ed. 352, 361, 29 Sup. Ct. Rep. 214. And see *Western U. Teleg. Co. v. Commercial Mill Co.* 218 U. S. 406, 416, 54 L. ed. 1088, 1091, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; *Western U. Teleg. Co. v. Crovo*, 220 U. S. 364, 55 L. ed. 498, 31 Sup. Ct. Rep. 399; *Minnesota Rate Cases (Simpson v. Shepard)* 230 U. S. 352, 402, 408, 410, 57 L. ed. 1511, 1542, 1545, 1546, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

But the "act to regulate commerce" (act of February 4, 1887, 24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154) is now invoked, together with its amendments, and especially that part of the Hepburn act of June 29, 1906, known as the Carmack amendment (34 Stat. at L. 584, 595, chap. 3591, U. S. Comp. Stat. Supp. 1911, pp. 1288, 1307); and it remains to be considered whether the Texas statute, as applied to claims for loss or damage to interstate freight while in the possession of the carrier in the state of Texas, is repugnant to this Federal legislation. It is, of course, settled that when Congress has exerted its paramount legislative authority over a particular subject of interstate commerce, state laws upon the same subject are superseded. *Northern P. R. Co. v. Washington*, 222 U. S. 370, 378, 56 L. ed. 237, 239, 32 Sup. Ct. Rep. 160; *Erie R. Co. v. New York*, decided May 25, 1914, 233 U. S. 671, 58 L. ed. 1149, 52 L.R.A.(N.S.) 266, 34 Sup. Ct. Rep. 756. But it is equally well settled that the mere creation of the Interstate Commerce Commission, and the grant to it of a measure of control over interstate commerce, does not of itself, and

than one subject, that subject to be expressed in the title,—only one subject being covered by the title of the act, *viz.*, the practice in partition cases. *Ibid.*

And the title, "An Act to Prohibit the Manufacture and Sale of Intoxicating Liquors, Except for Medical, Scientific and Mechanical Purposes, and to Regulate the Manufacture and Sale Thereof for Such Excepted Purposes," is broad enough to include a provision authorizing the taxing of attorneys' fees as costs in prosecutions brought by the attorney general or his assistant under the act. *Re Ellis*, 76 Kan. 368, 91 Pac. 81.

But where the title to an act reads, "An Act to Regulate the Presentation and Collection of [certain] Claims . . . , and Providing a Reasonable Amount of Attorneys' Fees to be Recovered, in Cases Where the Amount of Such Claims Shall Not Exceed Two hundred (\$200) Dollars," and the body of the act provides for the recovery of attorneys' fees in all suits upon such claims without regard to the amount there-

of, and is so framed that claims embraced by it, and not included in the title, cannot be rejected from its operation without changing or adding to the language of the act, the act is unconstitutional and void in its entirety, for violating a constitutional provision that no bill shall contain more than one subject, which shall be expressed in its title. *Ft. Worth & D. C. R. Co. v. Loyd*, — Tex. Civ. App. —, 132 S. W. 899, recognized in *Gulf, C. & S. F. R. Co. v. Dennis*, 224 U. S. 503, 56 L. ed. 860, 32 Sup. Ct. Rep. 542, where a judgment awarding an attorney's fee in addition to damages in an action against a railroad company for the killing of a cow was reversed without considering the Federal question involved, and remanded to the state court, because the statute under which the attorney's fee was awarded had been adjudged invalid under the state Constitution in the *Loyd Case*, since this case was brought to the United States Supreme Court.

A. C. W.

in the absence of specific action by the Commission or by Congress itself, interfere with the authority of the states to establish regulations conducive to the welfare and convenience of their citizens, even though interstate commerce be thereby incidentally affected, so long as it be not directly burdened or interfered with. *Missouri P. R. Co. v. Larabee Flour Mills Co.* 211 U. S. 612, 623, 53 L. ed. 352, 361, 29 Sup. Ct. Rep. 214; *Southern R. Co. v. Reid*, 222 U. S. 424, 437, 56 L. ed. 257, 260, 32 Sup. Ct. Rep. 140.

In the *Larabee Mills Case* it was held that the railroad company, by engaging in the business of a common carrier, had become subject to certain duties imposed upon it by general law, including the obligation to treat all shippers alike; that the enforcement of this duty and the regulation of matters pertaining to it were within the authority of the state, although interstate commerce was thereby indirectly affected; and that until specific action by Congress or the Commission, the control of the state over such incidental matters remained undisturbed. Hence, a decision by the supreme court of Kansas, awarding a mandamus to require the company to restore the service of transferring cars between the lines of another railroad and the *Larabee* mills and elevator, in aid of interstate and intrastate shipments alike, was affirmed. This case arose after the enactment of the *Hepburn act*.

On the other hand, it was held in the *Reid Case* that since Congress had taken control of the subject of the making of rates and charges, and by § 2 of the *Hepburn act* had forbidden the carrier to engage or participate in transportation unless the rates, fares, and charges had been filed and published in accordance with the provisions of the act, a state law requiring railroad companies to receive freight for transportation whenever tendered at a regular station, and to forward the same over the route selected by the person offering the shipment, under a penalty of \$50 a day, besides all damages incurred, was in necessary conflict, since it required the carrier to do the very things forbidden by the Federal law.

So, in *Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co.* 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174, it was held that since, by the *Hepburn act*, Congress had legislated concerning deliveries of cars in interstate commerce by carriers subject to the act, specifically requiring the carrier to

provide and furnish "transportation" (cars being embraced within the definition of the term) upon reasonable request, the authority of the state of Minnesota to legislate upon the subject of the delivery of cars when called for to be used in interstate traffic was superseded. And see *Yazoo & M. Valley R. Co. v. Greenwood Grocery Co.* 227 U. S. 1, 57 L. ed. 389, 33 Sup. Ct. Rep. 213.

These cases recognize the established rule that a state law enacted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an act of Congress, unless there is actual repugnancy, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject. The rule rests upon fundamental grounds that should not be disregarded. In *Reid v. Colorado*, 187 U. S. 137, 148, 47 L. ed. 108, 114, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506, the court, speaking by Mr. Justice Harlan, said: "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together. *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. ed. 243, 247.'" In *Savage v. Jones*, 225 U. S. 501, 533, 56 L. ed. 1182, 1194, 32 Sup. Ct. Rep. 715, the court said: "When the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished,—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect,—the state law must yield to the regulation of Congress within the sphere of its delegated power [citing cases]. But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly in-

terpreted, is in actual conflict with the law of the state." [Citing many cases].

With respect to the specific effect of the Carmack amendment (set forth in the margin†), it has been held, in a series of recent cases (*Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; *Chicago, B. & Q. R. Co. v. Miller*, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; *Chicago, St. P. M. & O. R. Co. v. Latta*, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155; *Wells, F. & Co. v. Neiman-Marcus Co.* 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; *Chicago, R. I. & P. R. Co. v. Cramer*, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383; *Great Northern R. Co. v. O'Connor*, 232 U. S. 508, 58 L. ed. 703, 34 Sup. Ct. Rep. 380, 8 N. C. C. A. 53; *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. ed. 868, L.R.A. 1915B, 450, 34 Sup. Ct. Rep. 526), that the special regulations and policies of particular states upon the subject of the carrier's liability for loss or damage to interstate shipments, and the contracts of carriers with respect thereto, have been superseded.

But the Texas statute now under consideration does not in anywise either enlarge or limit the responsibility of the carrier for the loss of property intrusted to it in transportation, and only incidentally affects the remedy for enforcing that responsibility. As pointed out in the *Cade Case*, 233 U. S. 642, 58 L. ed. 1135, 34 Sup. Ct. Rep. 678, it imposes not a penalty, but a compensatory allowance for the expense of employing an attorney, applicable in cases where the carrier unreasonably delays payment of a just demand and thereby renders a suit necessary. In fact and effect, it merely authorizes a moderate increment of the recoverable costs of suit in the large class of cases that are within its sweep, among which are incidentally in-

cluded claims for freight lost or damaged in interstate commerce.

It is true that in *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 208, 55 L. ed. 167, 183, 31 L.R.A. (N.S.) 7, 31 Sup. Ct. Rep. 164 (a case arising since the *Hepburn act*), it was held that § 8 of the act of February 4, 1887, does not authorize the allowance of a counsel or attorney's fee in an action for loss of property intrusted to the carrier for purposes of transportation. But that is far from holding that it is not permissible for a state, as a part of its local procedure, to permit the allowance of a reasonable attorney's fee, under proper restrictions. In claims of this character, based upon the ordinary liability of the common carrier, although regulated by the commerce act, the state courts have full jurisdiction, and some differences respecting the allowance of costs and the amount of the costs are inevitable, as being peculiar to the *forum*. And we think that where a state, as in this instance, for reasons of internal policy, in order to offer a reasonable incentive to the prompt settlement of small but well-founded claims, and as a deterrent of groundless defenses, establishes by a general statute otherwise unexceptionable the policy of allowing recovery of a moderate attorney's fee as a part of the costs, in cases where, after specific claim made and a reasonable time given for investigation of it, payment is refused, and the claimant succeeds in establishing by suit his right to the full amount demanded, the application of such statute to actions for goods lost in interstate commerce is not inconsistent with the provisions of the commerce act and its amendments. The local statute, as already pointed out, does not at all affect the ground of recovery, or the measure of recovery; it deals only with a question of costs, respecting which Congress has not spoken. Until Congress does speak, the state may enforce it in such a case as the present.

Judgment affirmed.

†That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; Pro-L.R.A.1915E.

vided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

UNITED STATES SUPREME COURT.

ATCHISON, TOPEKA, & SANTA FE
RAILWAY COMPANY, Plff. in Err.,
v.

J. B. VOSBURG.

(238 U. S. 56, 59 L. ed. —, 35 Sup. Ct.
Rep. 675.)

**Constitutional law — equal protection
— police regulations.**

1. A police regulation is, like any other law, subject to the equal protection of the laws clause of the 14th Amendment to the Federal Constitution.

Same — classification — attorneys' fees.

2. The equal protection of the laws guaranteed by U. S. Const., 14th Amend., is denied to railroad companies by a statute under which a reasonable attorney's fee is allowed to a shipper who successfully sues a railroad company for failure to furnish cars, while no such allowance may be made in favor of a railway company in the event of its successful prosecution of a suit brought by it under such statute against a shipper who has failed to use the cars promptly.

(June 1, 1915.)

ERROR to the Supreme Court of Kansas to review a judgment which affirmed a judgment of the District Court for Edwards County allowing an attorney's fee in an action successfully prosecuted by plaintiff against defendant for the latter's failure to furnish cars. Reversed.

The facts are stated in the opinion.

Messrs. Gardiner Lathrop, Robert Dunlap, William R. Smith, and William Osmond, for plaintiff in error:

Attorneys' fees in no respect constitute a part of the damage which may be suffered by one through the wrongful or unlawful act of another, because obviously the alleged wrongdoer may avoid the same by settling the claimant's demand by yielding to his terms, and thus avoid a resort to the courts.

Stewart v. Sonneborn, 98 U. S. 187, 198, 25 L. ed. 116, 120; *Day v. Woodworth*, 13 How. 363, 14 L. ed. 181; *Oelrichs v. Spain* (*Oelrichs v. Williams*) 15 Wall. 230, 231, 21 L. ed. 45; *Hicks v. Foster*, 13 Barb. 663; *Good v. Mylin*, 8 Pa. 51, 49 Am. Dec. 493.

The classification is based upon persons, and not upon the character of the litigation. It is capricious and arbitrary.

Chicago, St. L. & N. O. R. Co. v. Moss, 60 Miss. 641.

Note. — As to validity of statutory provision for attorney's fee, see note to *Missouri, K. & T. R. Co. v. Harris*, ante, 942. L.R.A.1915E.

Messrs. Arthur M. Jackson and Wilber E. Broadie, for defendant in error:

The constitutionality of an act classifying and penalizing certain persons or corporations depends upon whether such act is arbitrary, a meddling with purely private affairs, and without natural or obvious justification; or whether it is fair and reasonable and intended to regulate matters affecting the public interest. The right of a state to classify and to impose special duties and penalties where public interest and welfare justify such action is a valid exercise of police power.

Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; 8 Cyc. 1101; *Chicago, B. & Q. R. Co. v. Cram*, 228 U. S. 70, 57 L. ed. 734, 33 Sup. Ct. Rep. 437; *Yazoo & M. Valley R. Co. v. Jackson Vinegar Co.* 228 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40; *Chicago, M. & St. P. R. Co. v. Polt*, 232 U. S. 165, 58 L. ed. 554, 34 Sup. Ct. Rep. 301; *Atlantic Coast Line R. Co. v. Coachman*, 59 Fla. 130, 52 So. 377, 20 Ann. Cas. 1047; *Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 78, 52 L. ed. 110, 28 Sup. Ct. Rep. 28; *Hardwick Farmers' Elevator Co. v. Chicago, R. I. & P. R. Co.* 110 Minn. 25, 124 N. W. 819, 19 Ann. Cas. 1088.

Mr. Justice Pitney delivered the opinion of the court:

The Federal question involved in this case is concisely stated in the opening paragraph of the opinion of the supreme court of Kansas (89 Kan. 114, 130 Pac. 667), whose judgment we have under review:

"Chapter 345 of the Laws of 1905, as amended by chapter 275 of the Laws of 1907 (Gen. Stat. 1909, §§ 7201 et seq.), concerns the furnishing of cars by railway companies to shippers of freight. When cars applied for under this statute are not duly furnished, the railway company is liable to the shipper for all actual damages suffered, for a penalty of \$5 per day for each car not supplied, and for a reasonable attorney fee. Shippers who fail to use cars placed at their disposal are subject to a penalty for their detention, but are not liable for attorney fees. The plaintiff [Vosburg] recovered a judgment against the defendant for a violation of this statute, including an attorney fee, and the defendant appeals on the ground that the provision relating to attorney fees denies it the equal protection of the law guaranteed by the Federal Constitution."

Upon a review of certain decisions of this court, *viz.*, *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19

Sup. Ct. Rep. 609; Fidelity Mut. L. Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662, and Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565, the state court held (p. 130), that since the act in question is a police regulation prescribing duties properly enforceable by penalties in the form of *per diem* forfeits and attorney fees recoverable in suitable actions, and because of the control of railroad companies over their cars, their capacity to disturb and obstruct trade, and the helplessness of shippers when cars are carelessly or arbitrarily withheld, railroad companies might properly be placed in a class by themselves for the purpose of securing sufficient car service, and that the equal protection of the law required no more than that all railway companies should be penalized alike. The court, in conclusion, said: "It is true that shippers may offend somewhat by failing to make expeditious use of cars when furnished them. Whether or not they too shall be penalized, and if so to what extent, is a fit subject for legislative consideration. But the railroad companies cannot complain if the legislature chooses to exempt shippers from any punishment, or chooses to prescribe some penalty suitable to the nature of their delinquency, but different from that imposed upon the companies themselves."

The enactment in question is commonly called the "reciprocal" or "mutual" demurrage law. (82 Kan. 260, 108 Pac. 137, 85 Kan. 282, 116 Pac. 906.) It provides that a railway company failing to furnish cars upon proper application shall pay, to the party applying, "\$5 per day for each car failed to be furnished as exemplary damages, . . . and all actual damages that such applicant may sustain for each car failed to be furnished, together with reasonable attorney fees." At the same time it requires the applicant to load the cars within forty-eight hours after they are placed, "and upon failure to do so he shall pay to the company the sum of \$5 per day for each car not used, while held subject to the applicant's order. . . . And if the said applicant shall not use such cars so ordered by him, and shall so notify the said company or its agent, he shall forfeit and pay to the said railroad company, in addition to the penalty herein prescribed, the actual damages that such company may sustain by the said failure of the said applicant to use said cars." [Gen. Stat. 1909, §§ 7203, 7204.]

We agree that this legislation is properly to be regarded as a police regulation, and in that respect differs from the act that was under consideration in the *Ellis Case*, L.R.A.1915E.

supra, which simply imposed a penalty upon railroad corporations for a failure to pay certain debts. But we cannot at all agree that a police regulation is not, like any other law, subject to the "equal protection" clause of the 14th Amendment. Nothing to that effect was held or intimated in any of the cases referred to. The constitutional guaranty entitles all persons and corporations within the jurisdiction of the state to the protection of equal laws, in this as in other departments of legislation. It does not prevent classification, but does require that classification shall be reasonable, not arbitrary, and that it shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation. Thus, in *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, the responsibility imposed upon railroad companies for attorneys' fees in addition to damages was sustained because designed to enforce care on the part of those companies to prevent the communication of fire and the destruction of property along their lines,—a duty imposed upon them, and not upon the owners of the property. We need not review the decisions, the subject being so familiar that extended discussion is unnecessary.

The precise question now presented is: What is there in the object of the legislation under consideration that furnishes a ground of distinction between railway company and shipper upon which it is reasonable to say that the latter should be allowed to recover attorney fees when it successfully sues the former, and not *vice versa*? The statute recognizes that the duty of the company to furnish cars, and the duty of the shipper to promptly use them, are reciprocal, and for a breach of either duty the delinquent is penalized in favor of the other party in precisely the same amount—\$5 per day per car. The shipper may also recover his actual damages, if any. The company recovers actual damages, in addition to the penalty, only under special circumstances. No complaint is now made that this is a denial of equal protection, and we lay no stress upon it. But the statute clearly recognizes that either party may be obliged to sue the other in order to recover the penalty, or damages, or both. No reason is suggested, and none occurs to us, why the railroad company, when plaintiff in such an action, will not require the services of an attorney as well as the shipper when he is plaintiff. There is nothing in the nature of the cause of action that renders the burden of preparation more onerous, as a rule, to the shipper when he is plaintiff than to the company when

it is plaintiff. There is nothing discernible, therefore, in the purposes of the legislation—which are: to require the prompt furnishing of cars for use, and the prompt use of cars when furnished, and to redress a disregard of either of these requirements by suit when necessary—to give ground for a distinction granting attorneys' fees to the shipper when he sues, and denying attorneys' fees to the company when it sues. In short, it is erroneous to test the classification by its supposed relation to the object of securing adequate car service, because it really relates rather to the object of securing adequate prosecution in court of actions respecting car service.

In *Missouri, K. & T. R. Co. v. Cade*, 233 U. S. 642, 650, 58 L. ed. 1135, 1138, 34 Sup. Ct. Rep. 678, we had under consideration a Texas statute respecting claims of certain classes against persons or corporations doing business in the state, which provided that if any such claim were not paid within a limited time after presentation, suit might be instituted thereon, and if plaintiff obtained judgment for the full amount of the claim as presented he should recover the amount claimed and costs, and in addition a reasonable amount as attorneys' fees. In sustaining the act we said (p. 650): "If the classification is otherwise reasonable, the mere fact that attorneys' fees are allowed to successful plaintiffs only, and not to successful defendants, does not render the statute repugnant to the 'equal protection' clause. This is not a discrimination between different citizens or classes of citizens, since members of any and every class may either sue or be sued. Actor and reus differ in their respective attitudes towards a litigation; the former has the burden of seeking the proper jurisdiction and bringing the proper parties before it, as well as the burden of proof upon the main issues; and these differences may be made the basis of distinctive treatment respecting the allowance of an attorney's fee as a part of the costs." (Citing *Atchison, T. & S. F. R. Co. v. Matthews*, supra, and *Farmers' & M. Ins. Co. v. Dobney*, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565.)

The present case is essentially different, for in the Kansas statute the distinction is not rested upon the fact that the plaintiff, whether shipper or company, has a special burden in the litigation that may reasonably be compensated by allowance of attorneys' fees; on the contrary, the act, while recognizing the existence of such burden, allows compensation for it in favor of one class of litigants, but does not allow like compensation to the other class when subjected to the like burden. This, in our opinion, L.R.A.1915E.

ion, is a denial of the equal protection of the laws guaranteed by the 14th Amendment.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

ALABAMA SUPREME COURT.

MARY H. STOKELY, Appt.,
v.

FIDELITY & CASUALTY COMPANY OF
NEW YORK.

(— Ala. —, 69 So. 64.)

Insurance — accident — death resulting from operation.

The bursting of the stitches closing a wound made by an operation for appendicitis, by a fit of coughing and vomiting, requiring a second operation, in which the patient dies under the influence of the anesthetic, is not within the operation of a policy insuring against bodily injury through accidental means, resulting directly, independently, and exclusively of all other causes, in death.

(February 4, 1915.)

APPEAL by plaintiff from a judgment of the City Court of Birmingham in defendant's favor in an action brought to recover the amount alleged to be due on a policy of accident insurance. Affirmed.

The facts are stated in the opinion.

Note. — Liability under accident policy for death or injury resulting from surgical operation or medical treatment.

This note is supplementary to the note to *Gardner v. United Surety Co.* 26 L.R.A. (N.S.) 1004, where the early cases upon the question under consideration are gathered.

In *Vernon v. Iowa State Traveling Men's Asso.* 153 Iowa, 597, 138 N. W. 696, it was held that a provision excepting accidental death resulting wholly or in part directly or indirectly from medical or surgical treatment would not relieve the insurer from liability if such treatment was necessary, or thought to be necessary, for the purpose of relieving the insured from the results of an accidental injury, and that such provision was apparently enacted to cover cases of accident growing out of medical or surgical treatment. Generally, as to applicability of exception as to a certain condition when that condition is itself the result of an accident, see note in 8 L.R.A. (N.S.) 1014.

And following the case of *Dezell v. Fidel-*

Messrs. Frank S. White & Sons, Stokesly, Scrivner, & Dominick, and I. M. Engel, for appellant:

The court erred in ruling as a matter of law that there was no evidence from which the jury could draw a legitimate inference that the death of the assured came within the terms of the policy.

Moon v. Order of United Commercial Travelers, 96 Neb. 65, 52 L.R.A.(N.S.) 1203, 146 N. W. 1037; Railway Officials & E. Acci. Asso. v. Coady, 80 Ill. App. 563; Freeman v. Mercantile Mut. Acci. Asso. 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013; Ætna L. Ins. Co. v. Hicks, 23 Tex. Civ. App. 74, 56 S. W. 87; Manufacturers' Acci. Indemnity Co. v. Dorgan, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed.

954; Bohaker v. Travelers' Ins. Co. 215 Mass. 32, 46 L.R.A.(N.S.) 543, 102 N. E. 342; United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; New Amsterdam Casualty Co. v. Shields, 85 C. C. A. 122, 155 Fed. 54; Preferred Acci. Ins. Co. v. Muir, 61 C. C. A. 456, 126 Fed. 926; Miller v. Fidelity & C. Co. 97 Fed. 836; Thompson v. Royal Neighbors, 154 Mo. App. 109, 133 S. W. 146; Ludwig v. Preferred Acci. Ins. Co. 113 Minn. 510, 130 N. W. 5; Modern Woodmen Acci. Asso. v. Shryock, 54 Neb. 250, 39 L.R.A. 826, 74 N. W. 607; Hall v. American Masonic Acci. Asso. 86 Wis. 518, 57 N. W. 366; Fetter v. Fidelity & C. Co. 174 Mo. 256, 61 L.R.A. 459, 97 Am. St. Rep. 500, 73 S. W. 592; Continental Casualty Co. v.

ity & C. Co. 176 Mo. 253, 75 S. W. 1102, which is set out in the earlier note, it was held in *Beile v. Travelers' Protective Asso.* 155 Mo. App. 629, 135 S. W. 497, that a provision in an accident policy that it does not cover "injuries, fatal or otherwise, resulting from any poison or infection or from anything accidentally taken, administered, absorbed, or inhaled," does not include medicine even though it contains poison, or anything taken or administered in good faith to alleviate physical pain, although it results, as it did in the instant case, in unexpected and unintentional death.

In that case, there being evidence that the insured died from a dilation of the heart caused by the administration of chloroform preparatory to an operation, it was held that the trial court erred in holding as a matter of law that the insured's death was not by accident.

And under a policy insuring against death by accident, but excluding liability in case of death caused wholly or in part by a bodily or mental infirmity or disease, a prima facie case of death by accident is made by a showing that the insured was in apparent good health up to the time chloroform was administered to him, that the chloroform was administered for the purpose of relieving him from pain during an operation, and that he died while it was being administered, there being testimony by a medical witness that the immediate, direct, and proximate cause of death was acute dilation of the heart immediately caused by the chloroform, and that the insured's diseased condition had nothing to do with causing death. *Ibid.*

Under the evidence in the *Beile* Case it was held that the jury's finding that "surgical treatment," as used in a provision excluding liability for death resulting from such treatment, did not include the administering of chloroform, was justified. The court said: "The Standard Dictionary defines 'surgery' as 'the branch of the healing art that relates to external injuries, deformities, and other morbid conditions to be remedied directly by manual operations or instrumental appliances.' 'Surgical' is de-

finied as being 'of, or pertaining to, surgery.' 'Treatment' means the act or manner of treating. To 'treat' means to 'apply remedies to,' as to treat disease or a patient. A 'remedy' is something used 'for the cure or relief of bodily disease or ailment.' We gather from reading these definitions that 'surgical treatment' means treating a disease or a patient by means of surgery, which in turn means applying manual operations or instrumental appliances to the affected part for the purpose of curing or relieving the bodily disease or ailment. Administering chloroform as was done in this case does not come within any of these definitions or meanings. It was not a manual operation or the application of an instrumental appliance, and was not resorted to as a remedy or for the purpose of curing or relieving *Beile's* ailment. It was administered as preparatory to the surgical operation; but so might have been his bath, and if he had died in his bath it would not be seriously contended that he died as a result of a surgical treatment. And the meaning of 'surgical treatment,' as the dictionary indicates it, is in accordance with the usual and ordinary understanding. The most that might be claimed for defendant is that the language of the exception is so vague and general, not identifying the subject-matter, that parol evidence was admissible to identify it, to show just what was comprehended within the term 'surgical treatment,' and that the jury should have been left to decide the matter as a question of fact."

In *Maryland Casualty Co. v. Glass*, 29 Tex. Civ. App. 159, 67 S. W. 1082, where the insured died while chloroform was being administered, and the policy, which insured against an accident causing injury, excluded from the operation of the clause excepting certain injuries, injuries or death from anesthetics administered by a physician, the court stated that the policy might be regarded as an insurance against death resulting from chloroform independently of all other causes, and held that the burden of establishing that the insured's death was so caused was upon the plaintiff.

Lloyd, 165 Ind. 52, 73 N. E. 824; Driskell v. United States Health & Acci. Ins. Co. 117 Mo. App. 362, 93 S. W. 880; Beile v. Travelers' Protective Asso. 155 Mo. App. 629, 135 S. W. 497; Thornton v. Travelers' Ins. Co. 116 Ga. 121, 94 Am. St. Rep. 99, 42 S. E. 287; Bailey v. Interstate Casualty Co. 8 App. Div. 127, 40 N. Y. Supp. 513; Jenkins v. Hawkeye Commercial Men's Asso. 147 Iowa, 113, 30 L.R.A.(N.S.) 1181, 124 N. W. 199; Baker v. Patterson, 171 Ala. 88, 55 So. 135; Louisville & N. R. Co. v. Lancaster, 121 Ala. 471, 25 So. 733; Louisville & N. R. Co. v. Andrews, 171 Ala. 200, 54 So. 553.

Messrs. Cabaniss & Bowie, for appellee:

Where the insured, at the time he received an injury, is suffering from disease,

bodily defect, or infirmity, which, acting with the injury as a contributing factor, brings about death, or when such existing disease, defect, or infirmity aggravates the effect of the injury, or the injury aggravates the effects of the disease, and both acting together cause death, the injury is not the sole cause of death, and there is no liability under such a policy as the one here sued upon.

National Masonic Acci. Asso. v. Shryock, 20 C. C. A. 3, 36 U. S. App. 658, 73 Fed. 774; Travelers' Ins. Co. v. Selden, 24 C. C. A. 92, 42 U. S. App. 253, 78 Fed. 285; Commercial Travelers' Mut. Acci. Asso. v. Fulton, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423, 35 C. C. A. 493, 93 Fed. 621; Hubbard v. Mutual Acci. Asso. 98 Fed. 930;

The evidence in the last case was held to show beyond a doubt that the insured's death did not result from chloroform independently of all other causes, there being medical testimony that he was at the time of the operation suffering from appendicitis, and that there was no chance of his recovery without an operation, and little with one, and that his physical condition and the chloroform administered were contributory causes to his death. Generally, for previous diseased condition as affecting liability for death or injury, see notes in 34 L.R.A.(N.S.) 445, and 52 L.R.A.(N.S.) 1203.

In *Early v. Standard Life & Acci. Ins. Co.* 113 Mich. 58, 67 Am. St. Rep. 445, 71 N. W. 500, where the insured died as the result of a poison given him by mistake by a druggist, the case was held to be within an exception of the accident policy excluding liability for death or injuries resulting wholly or partly, directly or indirectly, from poison, so that no recovery could be had.

And in *Riley v. Interstate Business Men's Acci. Asso.* — Iowa, —, 152 N. W. 617, it was held that there could be no recovery where the policy insured against injury or death from external, violent, and accidental means, but excluded liability for disability or death resulting from the voluntary or involuntary taking of poison, and the insured died as a result of taking medicine prescribed by a physician which contained strychnine, it being held that his death resulted from a cause within the exception. The court said: "By the terms of the policy, recovery is limited to death resulting from bodily injuries effected solely by external, violent, and accidental means. The cause of the injury, therefore, must be accidental, to entitle the plaintiff to recover. Therefore an exception to liability for accidents exempt the company from accidents occurring under the exception. It cannot be said that a thing is accidental which is intentionally and voluntarily done, and the word 'voluntarily' infers an act done with volition; infers an act done with knowledge and intent. 'In-

voluntary' is an antonym of voluntary; therefore it is an act done without volition, without knowledge and intent."

It has been held that under an accident policy providing for an indemnity of a stated sum for the loss of an eye through accidental means, and promising the payment of a weekly sum in case the injury, from the date of the accident, rendered the insured continuously unable to perform any of his business duties, and resulted in the loss of one eye, the insured cannot recover the weekly indemnity where he was not rendered unable to perform his duties by reason of an accident to his eye, but his disability resulted from medical treatment to the disabled member. *Hummer v. Midland Casualty Co.* 181 Mich. 386, 148 N. W. 413.

In *Vernon v. Iowa State Traveling Men's Asso.* 158 Iowa, 597, 138 N. W. 696, where the only claim of accident under the policy, which insured against injury by accidental means, was an abrasion inflicted by a bath attendant, and, under the instruction given, the plaintiff was bound to show such an abrasion to justify a recovery, there was held to be no prejudicial error, in view of the instructions given, in refusing to instruct that if the insured, by reason of an operation performed upon him to relieve a sore or boil, came to his death, there was no accident within the meaning of the law.

In *Maryland Casualty Co. v. Ohle*, 120 Md. 371, 87 Atl. 763, the injury resulted to the physician, and not the patient, during the course of an operation, and the case is therefore not strictly within the scope of the note. The policy in this case provided that the insurance extended to physicians or surgeons, and covered loss of sight caused by blood poisoning from septic matter introduced into the system through wounds suffered in professional operations, and the evidence, which tended to show a loss of eyesight by the insured, a physician, as a result of septic matter injected into his system during the course of an operation, was held to bring the case within the terms of the policy.

J. T. W.

Hubbard v. Travelers' Ins. Co. 98 Fed. 932; National Asso. v. Scott, 83 C. C. A. 652, 155 Fed. 92; Illinois Commercial Men's Asso. v. Parks, 103 C. C. A. 286, 179 Fed. 794; Stanton v. Travelers' Ins. Co. 83 Conn. 708, 34 L.R.A.(N.S.) 445, 78 Atl. 317; Moore v. Illinois Commercial Men's Asso. 160 Ill. App. 38; Crandall v. Continental Casualty Co. 179 Ill. App. 330; Sharpe v. Commercial Travelers' Mut. Acci. Asso. 139 Ind. 92, 37 N. E. 353; Binder v. National Masonic Acci. Asso. 127 Iowa, 25, 102 N. W. 190; Pacific Mut. L. Ins. Co. v. Despain, 77 Kan. 654, 95 Pac. 580; Stull v. United States Health & Acci. Ins. Co. — Ky. —, 115 S. W. 234; Aetna L. Ins. Co. v. Bethel, 140 Ky. 609, 131 S. W. 523; Thomas v. Fidelity & C. Co. 106 Md. 299, 67 Atl. 259; Jiroch v. Travelers' Ins. Co. 145 Mich. 375, 108 N. W. 728; White v. Standard Life & Acci. Ins. Co. 95 Minn. 77, 103 N. W. 735, 884, 5 Ann. Cas. 83; Ward v. Aetna L. Ins. Co. 82 Neb. 499, 118 N. W. 70, 85 Neb. 471, 123 N. W. 456; Penn v. Standard Life & Acci. Ins. Co. 158 N. C. 29, 42 L.R.A.(N.S.) 593, 73 S. E. 99, on rehearing 160 N. C. 399, 42 L.R.A.(N.S.) 597, 76 S. E. 262; Aetna L. Ins. Co. v. Dorney, 68 Ohio St. 151, 67 N. E. 254; Continental Casualty Co. v. Peltier, 104 Va. 222, 51 S. E. 209.

When the insuring clause of an accident policy relating to death limits liability to bodily injury sustained through accidental means, and resulting directly, independently, and exclusively of all other causes, in death, or where words of substantially the same meaning are used, the legal effect of the policy is precisely the same as though it contained an additional provision to the effect that there should be no liability if death should result directly or indirectly from disease or bodily defect or infirmity.

Penn v. Standard Life & Acci. Ins. Co. 158 N. C. 29, 42 L.R.A.(N.S.) 593, 73 S. E. 99, 160 N. C. 399, 42 L.R.A.(N.S.) 597, 76 S. E. 262; Crandall v. Continental Casualty Co. 179 Ill. App. 330; National Asso. v. Scott, 83 C. C. A. 652, 155 Fed. 92; Stanton v. Travelers' Ins. Co. 83 Conn. 708, 34 L.R.A.(N.S.) 445, 78 Atl. 317; Stull v. United States Health & Acci. Asso. — Ky. —, 115 S. W. 234; Thomas v. Fidelity & C. Co. 106 Md. 299, 67 Atl. 259; Ward v. Aetna L. Ins. Co. 82 Neb. 499, 118 N. W. 70, 85 Neb. 471, 123 N. W. 456; Continental Casualty Co. v. Peltier, 104 Va. 222, 51 S. E. 209; Aetna L. Ins. Co. v. Bethel, 140 Ky. 609, 131 S. W. 523.

The burden of proof was on the plaintiff to show that death resulted from accidental injury, and that it resulted from such injury directly, independently, and exclusively of all other causes.

National Masonic Acci. Asso. v. Shryock, L.R.A.1915E.

20 C. C. A. 3, 36 U. S. App. 658, 73 Fed. 774; National Asso. v. Scott, 83 C. C. A. 652, 155 Fed. 92; Illinois Commercial Men's Asso. v. Parks, 103 C. C. A. 286, 179 Fed. 794; Commercial Travelers' Mut. Acci. Asso. v. Fulton, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423; Hubbard v. Mutual Acci. Asso. 98 Fed. 930; Hubbard v. Travelers' Ins. Co. 98 Fed. 932; Binder v. National Masonic Acci. Asso. 127 Iowa, 25, 102 N. W. 190; White v. Standard Life & Acci. Ins. Co. 95 Minn. 77, 103 N. W. 735, 884, 5 Ann. Cas. 83; Aetna L. Ins. Co. v. Dorney, 68 Ohio St. 151, 67 N. E. 254; Penn v. Standard Life & Acci. Ins. Co. 158 N. C. 29, 42 L.R.A.(N.S.) 593, 73 S. E. 99, 160 N. C. 399, 42 L.R.A.(N.S.) 597, 76 S. E. 262; Maryland Casualty Co. v. Glass, 29 Tex. Civ. App. 159, 67 S. W. 1062.

Sayre, J., delivered the opinion of the court:

Plaintiff, who takes this appeal, sued defendant on a policy of insurance by which defendant insured John Arthur Haire against "bodily injury sustained . . . through accidental means, . . . and resulting directly, independently, and exclusively of all other causes, . . . in death." After all the evidence was in, the trial court gave the general affirmative charge on defendant's request. Hence this appeal.

The evidence may be fairly stated as follows: During the life of the policy the assured was sick of appendicitis. He submitted himself to an operation by which his appendix was removed. The operation was performed and the wound closed in the usual routine of such cases. The four layers of the wall of the stomach, from peritoneum to outer skin, were in turn returned with catgut. For four or five days assured came along without apparent complication and with every promise of a rapid recovery; but when the surgeon visited him on the morning of the fourth or fifth day his patient vomited and coughed for a spell and then complained of severe pain. Upon examination it was found that the wound had opened and the patient's intestines were protruding through the wound caused by the operation. Immediately the patient was again anesthetized and his wound again closed. He never recovered consciousness, and died in the course of a few hours. The surgeon testified that he saw no reason in the world why the patient should not have recovered, had the stitches in the wound not broken. There was nothing else wrong with the patient,—by which, of course, the witness meant nothing wrong as operations for appendicitis go. To sum up, witness was of opinion (and this is clear even to the nonprofessional mind) that the patient's

disease brought on the first operation, the coughing and vomiting burst the stitches, bringing on the second anesthetic and the second operation, and at the end of the sequence came death.

Plaintiff settled upon the bursting of the stitches as the accident in the case, and certainly there was none other. Without conceding that there was any bodily injury sustained through accidental means within the protection afforded by the contract, we will allow the result to turn upon the point to which counsel have directed their arguments.

Many reported cases have been cited in which the courts, with diverging views, have considered when and in what circumstances a death in which both bodily injury sustained and concurrent bodily weakness or disease of unrelated origin have probably operated must be said, as matter of law, to have resulted from the injury directly, independently, and to the exclusion of all other causes, within the meaning of this policy. On its face this question may seem to answer itself, unless, indeed, it be assumed that the contract does not mean precisely and utterly what its very letter seems to express. But frequently literal construction does not carry the interpreter far, and to hold that the insurer in policies of this character is answerable only in the event the death of the assured is caused by bodily injury to the absolute exclusion of all other contributing causes,—to hold, in other words, that the physical injury must have been of such violence and extent as to have inevitably produced death, regardless of all other conditions and circumstances,—would leave scarcely any field in which the contract would operate to afford protection,—would well-nigh nullify the policy. Evidently the contracting parties did not intend this; at least it is safe to say the assured did not intend this; and such contracts are construed with favor to the assured with a view to giving him the protection it must be presumed he thought he was getting when he entered into the contract.

On the other hand, cases occur in which the mind is irresistibly driven to the conclusion that causes other than those against which the insurer, on any fair interpretation, intended to give protection, have materially contributed to the result. In such cases that which is ordinarily a question of fact becomes a question of law, and is properly determined by the court. So in this case. There would have been no stitches nor any rupture but for the disease and the wound it made necessary. Nor would there have been any coughing or vomiting, though it is not supposed that

these were accidents or the result of an accident, had not the disease made the administration of an anesthetic and the performance of the operation necessary. The rupture of the stitches, if an accident in any proper sense, was not an accident causing bodily injury and death; it was merely the failure of means taken to prevent a death threatened by other independent causes. The death which followed was undeniably and in a most material way contributed to, if not exclusively caused by, the disease with which assured was afflicted and the means taken for his relief. We are clear to the conclusion that, if there was any accident in this case, it was not an accident causing bodily injury, and resulting directly, independently, and exclusively of all other causes, in death, within the meaning of the policy; and hence that defendant was entitled to the general charge which it got. In this view of the case, other errors assigned are of no consequence.

Affirmed.

Anderson, Ch. J., and McClellan and Gardner, JJ., concur.

Petition for rehearing denied May 20, 1915.

CONNECTICUT SUPREME COURT OF ERRORS.

JOHN R. COFFIN

v.

SIEGFRIED LASKAU, Appt.

ANTONIO UMBROGIA

v.

SAME, Appt.

(89 Conn. 325, 94 Atl. 370.)

Appeal — correction of finding — sufficiency of evidence.

1. A conclusion as to the proximate cause

Note. — Automobile: violation of statute or ordinance by plaintiff as precluding recovery for negligence in action by or against driver or owner of automobile.

For defendant's violation of law as affecting his right to avail himself of the defense of contributory negligence, see note to *Ludke v. Burck*, L.R.A.1915D, 968.

Generally, as to operating automobile on highway without license, see notes to *Dudley v. Northampton Street R. Co.* 23 L.R.A. (N.S.) 561; *Hemming v. New Haven*, 25 L.R.A. (N.S.) 734; *Feeley v. Melrose*, 27 L.R.A. (N.S.) 1156; *Lindsay v. Cecchi*, 35 L.R.A. (N.S.) 699; *Atlantic Coast Line R.*

of an injury will not be corrected on appeal if there is evidence to support it, and there was no refusal to find any fact established by undisputed evidence.

Bridge — definition — causeway.

2. A strip of highway 300 feet long and 26 feet wide, constituting a fill over low land, with a brook passing through a culvert under it, and constructed of earth held in place by stone walls with iron railings on top, cannot be held, as matter of law, to be a bridge within the meaning of a statute limiting speed on bridges.

Highway — unlawful speed — collision — right to recover damages.

3. One traveling at a prohibited rate of speed on the highway, when he collides with a negligently driven vehicle, is not prevented from holding the owner of the other ve-

hicle liable for his injuries, unless his violation of the law was the proximate cause of the injury.

Witness — expert — value of automobile.

4. One who has dealt for two or three years in automobiles of a particular kind, and has made inquiries as to their price, new and secondhand, may be permitted to testify as to the value of such a car injured by a collision.

Evidence — damages — injury to automobile.

5. Upon the question of damages to be allowed for injury to an automobile, evidence is admissible of its value before and after the accident.

(June 10, 1915.)

Co. v. Wier, 41 L.R.A.(N.S.) 307; Conroy v. Mather, 52 L.R.A.(N.S.) 801; and Armistead v. Lounsberry, L.R.A.1915D, 628.

Generally, for speed of automobile as negligence, see note to *Lauson v. Fond du Lac*, 25 L.R.A.(N.S.) 40.

For violation of Sunday law as defense to action for personal injuries, see note to *Hughes v. Atlanta Steel Co.* 36 L.R.A.(N.S.) 547.

Before considering the cases that fall within the scope of this note, it is to be observed that a decision that the violation of a statute or ordinance by plaintiff does not preclude his recovery does not mean that the act or conduct which amounts to such violation may not constitute contributory negligence precluding recovery if it would have that effect in the absence of the statute or ordinance. The latter question is, of course, beyond the scope of this note.

Action by owner of automobile.

The neglect of the owner of an automobile to comply with the statute in its requirement as to automobiles may subject him to a penalty, and he may be prima facie liable for any injury he may occasion, if he is in default in this respect; but he can, like any other citizen, recover, if he is injured on a public street through the negligence of another, where his default does not contribute to the injury. It was so stated in *Lawrence v. Channahon*, 157 Ill. App. 560, where a village was held liable to one injured when a dilapidated bridge over which he was passing gave way, precipitating him and his automobile into a river,—plaintiff's failure to have a red light burning on the rear of his automobile at the time of the accident constituting no defense in the absence of proof that such default contributed to the injury.

As stated in *COFFIN v. LASKAU*, in order to bar a recovery by plaintiff, the violation of law must be the proximate cause of the injury.

So, the fact that one is operating his automobile in violation of statute will not preclude a recovery for injury received in a L.R.A.1915E.

collision with a car operated by another, unless such violation is shown to have been the contributing cause of the injury. *George v. McManus*, — Cal. App. —, 150 Pac. 73.

So, one injured by his automobile colliding with another car coming out of an intersecting street is not precluded from recovery by being on the left-hand side of the street in violation of ordinance, where the violation was not the proximate cause of the injury. *Reynolds v. Pacific Car Co.* 75 Wash. 1, 134 Pac. 512.

So, in *Lloyd v. Calhoun*, 78 Wash. 438, 139 Pac. 231, reversing 82 Wash. 35, 143 Pac. 458, an action for injury sustained when two automobiles collided in the highway, plaintiff, in turning to the left, while acting as a reasonable man upon the honest belief that he would thereby avoid a collision with defendant, was absolved from obeying the law of the road, and turning to the right.

It was held in *Latham v. Cleveland, C. C. & St. L. R. Co.* 164 Ill. App. 559, that the fact that a chauffeur's badge was not in sight as required by statute would not preclude a recovery by the owner of an automobile for damages received in a collision with a street car negligently operated, where the location of the badge in no way contributed to the accident. And upon a later appeal of this case, 179 Ill. App. 324, an instruction directing a verdict for defendant if the jury believed plaintiff was violating a speed ordinance was held properly modified so as to provide that such negligence must have contributed to the injury.

While the violation of a statute or ordinance, if proximately causing an injury, may be set up as a defense, the statute or ordinance violated must have been enacted for the benefit of the party who seeks to invoke its violation, as distinguished from the public generally, or a class to whom the ordinance necessarily applies. Consequently, it was held in *Watts v. Montgomery Traction Co.* 175 Ala. 102, 57 So. 471, that a street car company, in an action against it for damaging an automobile, could not plead by way of contributory negligence that

APPEAL by defendant from a judgment of the Court of Common Pleas for Fairfield County in favor of plaintiff Coffin in an action brought to recover damages for injury to his automobile through a collision with defendant's auto truck. Affirmed.

APPEAL by defendant from a judgment of the Court of Common Pleas for Fairfield County in favor of plaintiff Umbrogia in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's chauffeur. Affirmed.

The facts are stated in the opinion.

Mr. Robert R. Rosan for appellant.

Messrs. Walsh & Wright, for appellees:

The passageway for Horseneck brook through the fill or causeway falls within

the definition of a culvert, but a culvert is not a bridge within the meaning of the statute requiring county commissioners to construct and repair bridges over streams and water courses.

Carroll County v. Bailey, 122 Ind. 46, 23 N. E. 672; 2 Words & Phrases, 1782; Duncan v. State, 29 Fla. 439, 10 So. 815; 5 Cyc. 1052; Enfield Toll Bridge Co. v. Hartford & N. H. R. Co. 17 Conn. 40, 42 Am. Dec. 716; New Haven v. New York & N. H. R. Co. 39 Conn. 128.

The violation of an ordinance by a plaintiff does not in itself bar a recovery by him for injuries received during his act of violation. It must also appear that his violation of the ordinance was a proximate cause of the injuries he sustained.

the owner of the automobile was in the center of the street contrary to an ordinance requiring vehicles to keep to the right of the center of the street, since this ordinance was not intended to keep vehicles off the street car track, although laid in the center of the street, nor was it intended for the protection of street car companies.

But the failure of the driver of an automobile to comply with an ordinance respecting speed and efficient brakes renders him guilty of negligence precluding a recovery for injuries received in a collision with a street car, provided the negligence entered into or contributed to the collision at the time of the injury. Garrett v. People's R. Co. 6 Penn. (Del.) 29, 64 Atl. 254.

So, where the overturning of an automobile in an attempt to avoid a train at a railroad crossing was directly attributable to the violation of a speed ordinance, it was held in Houston Belt & Terminal R. Co. v. Rucker, — Tex. Civ. App. —, 167 S. W. 301, that the owner of the automobile could not recover damages.

So, an automobilist who attempts to run after dark with only a dim oil light, which does not comply with the statute, along a little used section line trail with which he is not familiar, is so negligent that, in case the machine runs into an unguarded excavation made by a railroad company across the trail, he cannot hold the railroad company liable for the resulting injuries. Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co. L.R.A.1915B, 953, 133 C. C. A. 9, 216 Fed. 503.

Action against owner of automobile.

The fact that a person at the time of receiving injury in a collision with an automobile was violating a statute by operating his motor cycle on the highway while under the influence of intoxicating liquor will not defeat a recovery unless the violation was the proximate cause of the injury. Allen v. Pearson, — Conn. —, 94 Atl. 277.

In Scott v. Dow, 162 Mich. 636, 127 N. W. 712, an action for personal injuries received by the operator of a motor cycle in a L.R.A.1915E.

collision with an automobile, the court stated that, had the jury determined that plaintiff was at the time of the accident operating his machine at a speed greater than 4 miles per hour (the ordinance limit), his recovery would not necessarily have been barred. Breach of an ordinance is evidence of negligence, not negligence *per se*.

Where an automobile ran down and injured a person riding a bicycle, it was held in Cloberty v. Griffiths, 82 Wash. 634, 144 Pac. 912, that the failure of the bicyclist to leave the extreme right side of the road, and go over to the left side, leaving the right half of the way clear for the defendant to pass in his automobile, did not necessarily defeat a recovery for the injury sustained when the automobile and bicycle collided, since it was a question for the jury whether plaintiff (the bicyclist) acted with due prudence in the emergency presented, and whether the driver of the automobile, knowing of the presence and position of plaintiff, exercised that degree of care for the safety of plaintiff which should mark the conduct of a man of ordinary prudence acting under like circumstances, was also for the jury, notwithstanding the statute.

Where a telephone employee, while superintending work being done in a manhole in a city street, was run over and killed by an automobile, it was held in Case v. Clark, 83 Conn. 183, 76 Atl. 518, that deceased's violation of a city ordinance in failing to fix, after the beginning of twilight, a lighted red lantern to the red rack or fence which was placed over the opening of the manhole, would not preclude a recovery unless such violation contributed to cause the injury. Regarding the effect of the violation of the ordinance, the court said to the jury, among other things, that the burden rested upon the plaintiff to prove that the plaintiff's intestate "was free from negligence and from illegal conduct which contributed to produce the accident;" that "the defendant and his driver . . . had a right to expect that others would comply with the ordinance requiring a lighted red lantern in case of an opening in the street;" that the law was "perfectly clear and settled that

Farrington v. Cheponis, 84 Conn. 1, 78 Atl. 652; Broschart v. Tuttle, 59 Conn. 1, 11 L.R.A. 33, 21 Atl. 925; Case v. Clark, 83 Conn. 183, 76 Atl. 518; Elliott v. New York, N. H. & H. R. Co. 83 Conn. 320, 76 Atl. 298.

The finding of the trial court of freedom from contributory negligence is conclusive.

O'Connor v. Connecticut R. & Lighting Co. 82 Conn. 170, 72 Atl. 934; McKiernan v. Lehmaier, 85 Conn. 111, 81 Atl. 969; Bradbury v. South Norwalk, 80 Conn. 298, 68 Atl. 321; Clarke v. Connecticut Co. 83 Conn. 219, 76 Atl. 523; Arnold v. Connecticut Co. 83 Conn. 97, 75 Atl. 78; Hourigan v. Norwich, 77 Conn. 358, 59 Atl. 487, 17 Am. Neg. Rep. 445; Farrell v. Waterbury Horse R. Co. 60 Conn. 239, 21 Atl. 675, 22 Atl. 544; Daniels v. Saybrook, 34 Conn. 377; Congdon v. Norwich, 37 Conn. 414; Young v. New Haven, 39 Conn. 435; Brennan v. Fair Haven & W. R. Co. 45 Conn. 284, 29 Am. Rep. 679, 2 Am. Neg. Cas. 277; Davis v. Guilford, 55 Conn. 351, 11 Atl. 350.

Defendant was guilty of negligence in driving his motor vehicle at said time and place.

Young v. New Haven, 39 Conn. 435; Farrell v. Waterbury Horse R. Co. 60 Conn. 239, 21 Atl. 675, 22 Atl. 544; Fox v. Kinney, 72 Conn. 404, 44 Atl. 745, 7 Am. Neg. Rep. 25; Chase v. Waterbury Sav. Bank, 77 Conn. 295, 69 L.R.A. 329, 59 Atl. 37, 1 Ann. Cas. 96, 17 Am. Neg. Rep. 186; Dinini v. Mechanics' Sav. Bank, 85 Conn. 225, 82 Atl. 580; Nolan v. New York, N. H. & H. R. Co. 70 Conn. 159, 43 L.R.A. 305, 39 Atl. 115; Lawler v. Hartford Street R. Co. 72 Conn. 74, 43 Atl. 545.

Plaintiff was competent to testify as an expert regarding the damages sustained by him as a result of the accident.

The determination of the qualification of

if the plaintiff's intestate was violating this ordinance at the time of the accident, such unlawful act, if it directly contributed to the injury, was a conclusive bar to recovery in this action," but that, "if there was abundant light about the scene of this accident, and the servant of the defendant could, by the exercise of reasonable care, have seen the plaintiff in the highway, so that the failure to display a red lantern was not related to, or did not in fact aid in producing, the injury, then the violation of the ordinance by failure to display a red lantern, if such was the fact, would not excuse the defendant from being guilty of negligence."

But where an infant is capable of violating a city ordinance, and does so by riding his bicycle on the left-hand side of the street, he is guilty of negligence *per se*, and cannot recover for injury by colliding with

an expert is largely a matter for the discretion of the trial court.

State v. Main, 69 Conn. 123, 36 L.R.A. 623, 61 Am. St. Rep. 30, 37 Atl. 80; Barber v. International Co. 73 Conn. 687, 48 Atl. 758; Hygeia Distilled Water Co. v. Hygeia Ice Co. 70 Conn. 516, 40 Atl. 534; Barber v. Manchester, 72 Conn. 675, 45 Atl. 1014, 7 Am. Neg. Rep. 306; 1 Wigmore, Ev. 674.

Damages through a negligent injury of this kind can be established by deducting the value of the injured object after the injury, from its value before the injury, the difference being the measure of the damage.

13 Cyc. 148; 2 Sedgw. Damages, 835; Barker v. Lewis Storage & Transfer Co. 78 Conn. 198, 61 Atl. 363, 3 Ann. Cas. 889; Pickles v. Ansonia, 76 Conn. 278, 56 Atl. 552; Cadwell v. Canton, 81 Conn. 288, 70 Atl. 1025.

Roraback, J., delivered the opinion of the court:

These actions were tried together in the court below and upon appeal in this court by consent of counsel. It appears from the finding that at about the hour of 3 o'clock in the afternoon of May 30, 1913, there was a collision between the defendant's motor truck, driven by his son, and John R. Coffin's automobile, driven by Antonio Umbrogia. The place of the collision was in Greenwich, Connecticut, upon a highway known as the "post road." The road at this place is at the foot of quite a steep hill which slopes westerly. The highway at the foot of the hill consists of a fill of the natural depression in the surface of the ground, which constitutes what is called a causeway. This causeway is 300 feet long. There is an iron pipe rail upon uprights along both sides of the causeway. These uprights are fastened in the top of the

an automobile, if, considering his age, degree of intelligence, activity, prudence, and discretion, he was at the time of the accident guilty of contributory negligence, constituting the proximate cause, or one of the proximate causes, of the injury. *Travers v. Hartman*, — Del. —, 92 Atl. 855.

Plaintiff's violation of a statute in *Donovan v. Lambert*, 139 Ill. App. 532, by driving a buggy upon the wrong side of the road, precluded a recovery for injury by being struck by an automobile.

And whether a person riding a bicycle, in danger of being run down by a motor truck, was guilty of contributory negligence in the emergency in turning to the right of the street in violation of statute, was held a question for the jury in *Sheffield v. Union Oil Co.* 82 Wash. 386, 144 Pac. 529.

J. D. C.

stone walls which compose the sides of the causeway. A brook passes through a culvert under the causeway. The road at this point is about 26 feet wide. The surface of this road is paved with Warrenite. At the time of the accident it was slippery from grease dropped by passing automobiles. At the time of the accident there was another automobile standing at the foot of the hill, which had stopped for repairs. This automobile was headed westerly and standing near the north side of the road. There was also an open survey drawn by two horses proceeding easterly along the right-hand side of this highway. The plaintiff's car was a five-passenger touring car, going in an easterly direction at a speed of about 18 miles an hour. The defendant's car was a heavy motor truck weighing 3 tons. Just before the accident it was coming down the hill and going westerly at a high rate of speed of at least 25 miles an hour. When the defendant's car was descending the hill the driver saw the automobile standing on the northerly side of the road, and swung his car to the middle of the road to avoid it. The motor truck then skidded and got beyond the control of the chauffeur, and with great force collided, head on, with the plaintiff's automobile, which at this time was on the southerly side of the highway and within 2 feet of the foot path used by pedestrians. There was sufficient room for the motor truck to have safely passed the plaintiff's car when the collision occurred, had the defendant's motor truck been operated at a safe rate of speed and in a proper manner. The result of the collision was the telescoping of the front of the plaintiff's automobile back to the driver's seat. Umbrogia, the driver, by this collision, was pinned down in the driver's seat and severely injured. Umbrogia at the time of the accident was in the exercise of due care, and not guilty of contributory negligence.

The court of common pleas reached the conclusion that the direct and proximate cause of the accident was due to the negligence of the defendant's servant. The defendant contends that this conclusion is not warranted by the evidence which comes before us under § 797 of the General Statutes, and we are asked to make numerous corrections in the finding. A careful examination of the record shows that there was evidence tending to support the conclusions embodied in the finding, and it does not appear that the court refused to find any fact which was established by undisputed evidence. Therefore the motion to correct is denied.

The defendant's contention that "the plaintiff's chauffeur, and therefore the plain-L.R.A.1915E.

tiff, was guilty of contributory negligence, as a matter of law, in traveling at a speed exceeding 10 miles an hour when approaching and traversing a bridge, and while his view of the road and traffic was obstructed," is not supported by the record. It appears from the finding that the place of the collision was a highway or road. There is no precise legal meaning attaching to the word "bridge" applicable to all cases where the definition of this word is involved. "What is a bridge or a highway," is more a question of fact than of law. This is to be determined by the particular circumstances of each case and the law applicable thereto. *Phillips v. East Haven*, 44 Conn. 30; *Norwalk v. Podmore*, 86 Conn. 662, 86 Atl. 582.

In this instance the complaints in both cases describe the place where the accident occurred as a highway known as the "post road." The defendant in his answer admits this allegation. The trial court in its finding has detailed at length the manner in which the roadway at this point was constructed and its relation to its surroundings, and we cannot say that, as a matter of law, there is error in finding that the *locus in quo* is not a "bridge."

Assuming that it had been found that the chauffeur of the plaintiff was traversing a bridge, and, in fact, violating the law upon this subject, it does not necessarily follow that this would bar the plaintiff's right to recover. It should also appear that this violation was the proximate cause of the injury sustained. *Farrington v. Cheponis*, 84 Conn. 1, and cases cited upon page 8, 78 Atl. 652. This does not appear.

The plaintiff had had dealings for two or three years in cars of the make now in question. He was acquainted with the price of secondhand cars. He had ascertained the price of new cars like the one damaged, and he had made extended inquiries as to the value of his car after the accident. The decision of the trial court that the witness knew enough about automobiles to give his opinion as to the value of his car after it was injured, and as to the damage he had sustained in consequence of such injury, was not erroneous.

The determination of the qualification of an expert is largely a matter for the discretion of the trial court. *State v. Main*, 69 Conn. 123, 140, 36 L.R.A. 623, 61 Am. St. Rep. 30, 37 Atl. 80; *Barber v. International Co.* 73 Conn. 587, 48 Atl. 758; *Hygeia Distilled Water Co. v. Hygeia Ice Co.* 70 Conn. 516, 40 Atl. 534.

"Some facts must be shown as the foundation of such an opinion, but there is no rule of law declaring the precise facts which must be proved before such an opin-

ion may be received in evidence. It is largely a matter of judicial discretion whether a witness has been shown to have sufficient experience and opportunity of observation to render his opinion of value upon a question of this kind." *Barber v. Manchester*, 72 Conn. 675, 884, 45 Atl. 1014, 1017, 7 Am. Neg. Rep. 396.

"The decision of a trial judge in admitting a witness to testify as an expert will not be reviewed, unless it is clearly shown to have been based on incompetent or insufficient evidence." *State v. Main*, 69 Conn. 123, 141, 36 L.R.A. 623, 61 Am. St. Rep. 30, 37 Atl. 80.

The testimony of the plaintiff as to the diminution in the value of the car in consequence of the collision was properly admitted. *Brainard v. Boston & N. Y. C. R. Co.* 12 Gray, 407, 409, 411; *Baltimore v. Smith & S. Brick Co.* 80 Md. 458, 31 Atl. 423; *Cadwell v. Canton*, 81 Conn. 288, and cases cited page 293, 70 Atl. 1025.

It was claimed on the part of the defendant that the court below erred in admitting testimony as to the value of the car before and after the accident.

"Just compensation in money for the actual loss sustained is the basic principle of the rule of damages in a case like this. It is not always necessary in such cases to prove what the property would sell or could be purchased for in the market, before and after the accident. Such a machine as that owned by the plaintiff may have had no such market value as would fairly measure the plaintiff's real loss. Evidence of the fair cost of the repairs made necessary by the injury, less the increased value of the repaired machine above its value before the accident was legitimate evidence of the plaintiff's damage." *Cadwell v. Canton*, supra.

Evidence of the value of the automobile before and after the accident could fairly be considered with the other facts in the case from which the court might determine the amount of the plaintiff's damages. It was made a reason of appeal in both cases that the plaintiff introduced no competent evidence to prove the damages sustained by the collision. In cases of this nature damages cannot always be computed by mathematical calculation. *Knight v. Continental Automobile Mfg. Co.* 82 Conn. 293, 73 Atl. 751. The record clearly demonstrates that there was an abundance of competent evidence which fully justified the finding of the court upon the question of damages.

Other assignments of error relating to the finding of the court upon the question of negligence and contributory negligence L.R.A.1915E.

call for no decision in view of our conclusion upon the motion to correct.

There is no error.

The other Judges concur.

LOUISIANA SUPREME COURT.

MRS. WILLIAM BASEY et al.

v.

LOUISIANA RAILWAY & NAVIGATION COMPANY, Appt.

(— La. —, 68 So. 824.)

Carriers — duty to warn passenger of danger of riding in coal car.

1. A carrier who has so overcrowded its train that passengers are compelled to stand must warn those taking a position in an open coal car that it is more dangerous to stand there than in the passenger coach, if such danger in fact exists and the passengers are not aware of it.

Same — slackening speed — negligence.

2. A railroad company is not negligent in suddenly slackening the speed of its train to avoid running over horses that have gotten upon the track, so as to render it liable for injury to a standing passenger who is thrown against an obstruction by the resulting jolt.

Same — failure to provide accommodations — liability for injury.

3. A carrier which, by advertisement and special rates, attracts an unusual number of passengers at a particular time to attend an exhibit at a point along the road, is negligent in failing to provide extra ac-

Note. — The duty of a carrier to provide a passenger with a seat is discussed in the note to *Cave v. Seaboard Air Line R. Co.* L.R.A.1915B, 915; and the question whether actionable negligence may be predicated of a sudden stopping of a train in an emergency, in the note to *Dorr v. Lehigh Valley R. Co.* L.R.A.1915D, 368.

The reversal of the judgment for plaintiff in *BASEY v. LOUISIANA R. & NAV. CO.* appears to have been upon the ground that the evidence was insufficient to show an injury that could be regarded as contributing to the death of the decedent. In view of the evidence that the decedent was suffering from tuberculosis, a slightly different state of the evidence as to the injury received might have raised the question considered in the note to *Jones v. Caldwell*, 48 L.R.A. (N.S.) 119, on pre-existing disease or condition of person injured as affecting recovery from one negligently causing the injury. Closely related to that question is the subject considered in the note to *Allison v. Fredericksburg*, 48 L.R.A. (N.S.) 93, as to extent and character of developments following personal injury for which one inflicting the injury is liable.

commodations for them, and is therefore liable for injury to a passenger who, being compelled to stand because of the crowd, is thrown against an obstruction by the sudden slackening of the speed of the train to avoid collision with animals on the track.

Evidence — sufficiency — death from carrier's negligence.

4. A verdict against a carrier for a passenger's death is not supported by evidence that he was thrown against an obstruction by the sudden slackening of the speed of the train, received assistance, complained of pain, and sought medical and legal advice because of an alleged bruise on his side, where, after the injury, for the remainder of the day, he was upon his feet, sight-seeing, and immediately planned suit against the corporation, in connection with which he misstated facts and finally abandoned his suit, while there is evidence that his death was due to tuberculosis existing prior to the alleged injury.

(May 24, 1915.)

A PPEAL by defendant from a judgment of the Judicial District Court for the Parish of Rapides, in plaintiffs' favor in an action brought to recover damages for the death of their son, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Edwin L. Lafargue, White & Thornton & Holloman, and Wise, Randolph, Rendall, & Freyer, for appellant:

Plaintiff cannot recover except upon a showing that the act of the defendant caused the death of her son.

Oliver v. Louisville & N. R. Co. 43 La. Ann. 804, 9 So. 431, 3 Am. Neg. Cas. 566; Bemias v. New Orleans City & L. R. Co. 47 La. Ann. 1671, 18 So. 711; Shamblin v. New Orleans & N. W. R. Co. 114 La. 468, 38 So. 421; Goodwin v. Boston & M. R. Co. 84 Me. 203, 24 Atl. 816; Shelton v. Louisville & N. R. Co. 19 Ky. L. Rep. 215, 39 S. W. 842, 2 Am. Neg. Rep. 362; McDade v. Philadelphia Rapid Transit Co. 215 Pa. 105, 64 Atl. 327; Kirchner v. Oil City Street R. Co. 210 Pa. 45, 59 Atl. 270.

Messrs. J. H. Ducote, J. W. Joffrion, and Blackman & Overton for appellees.

Provosty, J., delivered the opinion of the court:

Mrs. Basey, aided and assisted by her husband, sues in damages for the sufferings and death of Wilson Scallan, a son of hers by a former marriage,—a young man in his twenty-second year. The evidence as a whole leads us to believe that he died of tuberculosis, but the contention is that his death was brought on by a blow he received in the side through the negligence

of the defendant company while a passenger on one of its trains. The negligence is alleged to have consisted in that, although the defendant company knew, or ought to have known, that, owing to certain advertisements it had caused to be made, there would be that day a large increase in the number of passengers to be carried, it failed to provide additional accommodation; so that the overcrowded condition of the train forced the young man and others to ride standing in an open gondola, or coal, car, where he received the fatal injury by being thrown off his balance by a violent jerk of the train and precipitated against and upon a square post which served as a support for the side of the coal car.

The defendant company denies that there was any necessity for the young man to ride in the coal car or in any other unsafe place on the train; denies that he was otherwise injured than by a trifling scratch on the hand; avers that he died of tuberculosis; and denies that his death was brought on by any injury he may have received on the occasion in question.

The train was the regular train for that day. It consisted of freight cars and one passenger coach and a baggage car. This baggage car was an ordinary box car which had been converted into a baggage and general utility car by the opening of windows and end doors in it. The gondola car in question was the rearmost car of the train. Next to it, in the direction of the locomotive, was the passenger coach; then came the freight car converted into a baggage and general utility car; then the line of freight cars; and finally the locomotive.

There was to be on that day, the 14th of May, 1910, and the next, an aviation exhibition in the city of Alexandria, and the defendant company had advertised the event along its line and announced a reduced passenger rate and an excursion for those who should desire to attend. The train was a local, leaving Naples, in Avoyelles parish, in the morning, and going to Alexandria, a distance of 52 miles. The seating capacity of the coach was about 60, and there were two cushioned benches in the baggage car about 10 feet long. The passengers on the entire trip numbered 127. How many of these had already gotten off or had already come on board, at the time the jolt occurred from which the alleged injury is said to have been received, is uncertain. The distance from Hessmer, where plaintiff's son boarded the train, to Alexandria, is not stated; but, the number of stations between Naples and Hessmer being the same as between Hessmer and Alexandria, the probability is that Hessmer is halfway between the two termini, and that therefore the dis-

tance between it and Alexandria is 26 miles.

There were still vacant seats in the coach when the train reached Hessmer, and plaintiff's son secured one. But when the train reached Echo, the second station from Hessmer, a crowd came aboard, among whom were ladies, and the young man gave up his seat. It is contended that he was ordered by the conductor to do so, and also to go into the baggage car; but the conductor denies this, and there is no other evidence of it but the halting testimony of one witness, A. M. Fontane, and that of another, Cyriaque Ducote, who admits he did not understand English, in which language the conductor spoke. One other witness, who testified to having given up his seat to the ladies when this crowd came on board, says that he did so because he preferred it to seeing the ladies stand; and he does not say that he was forced to leave the coach for the box car, but that he did so of his own free will.

Of the 127 passengers, one of them, C. W. Wright, was the bridge inspector of the defendant company, who stood at the rear end of the coal car in order to view the bridges as he passed over them; and another, F. E. Dearman, was his friend, who stood with him for the sake of his company. The other 124 had not yet all boarded the train at the time of the alleged accident; for the testimony is to the effect that passengers kept coming on board at every station. But assuming that none of those who had come on board that morning had left, and that all who came on board subsequently to the alleged accident were already on board, the whole number would have been 124; and we do not see that that number of persons could not have remained on the coach and the baggage car without the necessity of any one of them going into the coal car. The evidence shows, however, we think, that after the young man had given up his seat he could not have secured another seat.

While this is so, the evidence leaves it doubtful whether the going into the coal car was not more for the fun of it than from any actual necessity or even convenience. The son of plaintiff was with a crowd of other young men, most of them from the same neighborhood, and the trip was for pleasure, and all were in the spirit of having a good time. Some even climbed to the top of the baggage car. They were all very gay. For amusement they pushed and shoved each other about in horse play, and picked up pieces of coal from the floor of the coal car and threw them at the telegraph poles and whatever else appeared to be an inviting target as they went along.

It was not while so engaged, however, L.R.A.1915E.

that the young man was injured, but while he stood leaning against the side of the car, and we have no reason to believe that he was in greater danger of being thrown down by a jolt of the train while standing there than he would have been if standing in the baggage car or even in the coach.

Moreover, as the day was excessively warm, and the inside of the coach and baggage car was more or less uncomfortably crowded, there was some reason for these young men having recourse to this open air riding, and, if there was any serious danger in it, we think the duty rested upon the carrier, in fulfillment of its obligation to carry them safely, to give them more significant or pointed warning than was done of the danger. True, the conductor says that he told some of them that they should not go there; but nothing shows that this information reached plaintiff's son, and the warning, if such it was, must have been of the most perfunctory kind, since the conductor admits that he collected fares from some of them while they were in this coal car, and he says nothing of his having notified them while so doing that they should not ride in there, or that there was any greater danger in their doing so than in riding standing in the coach or in the baggage car; and we think that if such greater danger really existed, and the young men appeared to be unaware of it, it was the legal duty of the conductor to give them serious warning while collecting these fares. Under certain circumstances, it is the duty of the carrier to protect the passenger against his own negligence, under penalty of the failure to do so being regarded as the proximate cause of a resulting accident. 6 Cyc. 641. And all the more imperative is this duty in a case where it has been the overcrowding of the train, resulting from the mismanagement of the carrier, that has forced the passenger to occupy the dangerous position. *Jackson v. Natchez & W. R. Co.* 114 La. 982, 70 L.R.A. 294, 103 Am. St. Rep. 366, 38 So. 701.

The evidence leaves no doubt that there was a severe jolt. It was caused by the sudden reduction of the speed of the train, from about 20 miles an hour to a rate not fixed, in order to avoid running over some horses that had got on the track. But an occurrence of that kind is unavoidable in the operation of a train, and therefore does not constitute negligence on the part of the carrier. Hence, if it be true that the young man was injured by this jolt, the negligence of the defendant company will have to be sought for elsewhere. It can be found, we think, in the failure to provide sufficient accommodation for the passengers. True, the train in question was the regular train,

and it had the usual accommodation; but the company had made advertisements and reduced its rate for obtaining a greater number of passengers, and should have foreseen that there would be an increased number, and should have made provision accordingly. It is the duty of a railroad company, when it has had notice of an unusual number of passengers, and especially when it had been itself instrumental in inducing such extraordinary travel over its line, to provide reasonable seating accommodations for all passengers to whom it sells tickets; and it is liable for an injury to a passenger resulting from its failure to do so. *Trumbull v. Erickson*, 38 C. C. A. 536, 97 Fed. 891. See also *Reem v. St. Paul City R. Co.* 77 Minn. 503, 80 N. W. 638, 778, 6 Am. Neg. Rep. 588. A carrier which furnishes an insufficient number of cars, thereby compelling passengers to stand in the aisles and on the platforms, is guilty of negligence. *Graham v. McNiell*, 20 Wash. 466, 43 L.R.A. 300, 72 Am. St. Rep. 121, 55 Pac. 631, 5 Am. Neg. Rep. 484; *International & G. N. R. Co. v. Williams*, 20 Tex. Civ. App. 587, 50 S. W. 732. For the same reason that it is negligence on the part of a passenger to stand unnecessarily when a seat has been provided for him, thereby increasing the danger of being injured, it is negligence on the part of the carrier not to provide a seat for him when it should have foreseen that the seat would be required, and that therefore his danger of being injured would be increased if the seat were not provided.

The evidence, however, leaves entirely too uncertain whether the young man's subsequent illness, and his death, which occurred ten months later, can have been caused by any injury received on the occasion in question for any judgment to be rendered against the defendant company.

Two witnesses, Xavier Nucere and Fulgence Villemarette, testified to the manner in which plaintiff's son, Wilson Scallan, received his injury.

Xavier Nucere testified as follows:

Wilson Scallan was in the gondola car, when all at once there was a jerk which hurled him on the side of the gondola car. He was about 3 feet from the end of the car. . . . He fell on his left side, and his whole side went up against the front end of the car. He was thrown against the front part of the car.

Q. Do you know the place Scallan pointed out to you where he was hurt in the side?

A. Yes, sir; it was here on the side. (Witness indicates a point at the border of the lower rib on the left side, anteriorly.) L.R.A.1915E.

This witness was standing on the platform of the coach.

The other witness to the manner of the alleged injury, Fulgence Villemarette, was in the gondola car, leaning on its side, slightly in the rear of Scallan. He says:

Wilson Scallan was thrown with force from his feet by the jolt and struck against a square post inside the wall of the car. When he fell, I was by his side, and he remained doubled up, and I thought that he had been hurt from the manner he was acting, and I went to him and asked him if he had received any injury, and helped him to arise.

Q. When you asked him if he had received any injury, did he answer?

A. Yes, sir; he made a motion of his head indicating that he had been. He was thrown kind of head foremost, but sideways to his left side. (Witness indicates that he was struck in the region of the thorax, indicating the waist line.)

Q. Did it seem to you that he could not speak and therefore had to answer by a nod of his head?

A. It looked like that, since he did not answer me.

Q. When you assisted him, where did you assist him to go?

A. He wanted to cross over to go to the platform of the coach.

Q. He did go to the platform of the coach?

A. Yes, sir.

Q. When he got on the rear platform of the coach after your assistance, what did you do with him, and what did he do?

A. Nothing. I stood there a little while, and then left and did not pay any more attention. He sat down on the rear platform of the coach.

Q. When he sat down on the platform of the coach right after receiving this injury, did he seem to be suffering from an injury?

A. Yes, he appeared to be.

Xavier Nucere corroborates this witness in the latter's statement of his having assisted Scallan to arise and to go to the platform of the coach. These two witnesses are neighbors of the plaintiff. Two other witnesses, F. E. Dearman, who was in the gondola car at the time the jolt in question occurred, and E. J. Normand, who was standing on the rear platform of the coach, testify as follows: F. E. Dearman says that he stood at the rear end of the gondola car; that there were 15 to 20 persons in the car, and that one of them might have fallen without his seeing him, but that he did not see anyone fall, and did not hear of anyone having been hurt, and did not

see anyone attended to by anybody as if hurt, and saw no one being assisted out of the car. Attention is called by plaintiff to the fact that this witness was at one time in the employ of the defendant company, from August, 1910, to August, 1911, part of the time as flagman and part of the time as expressman; but these dates show that he was not an employee of defendant either at the date of the alleged accident or at the time of giving his testimony. At the time of testifying, he was in the employ of the Southern Pacific Railroad.

The other witness, E. J. Normand, is a farmer and a neighbor of the plaintiff, but is also an employee of the defendant company for carrying the mail from the railroad to the postoffice at night, for which he is paid \$10 a month. He stood on the rear platform of the coach close to the front end of the gondola car where Scallan was.

He testified as follows:

I did not see anyone fall, but, soon after the jerk was given by the train, I saw Wilson Scallan. He was got up, but I did not see him fall at all, and when he got up he just took his hand like this (looks at his hand), and I saw his hand was bleeding, and I asked him what was the matter, and he said, "I got hurt in my hand." He got his pocket handkerchief and wrapped the blood up, and put it back (the handkerchief) on his hand, and then took it off, and the blood stopped.

Q. Well, when you saw him after he had got up, what was it about his appearance that made you ask him if he had got hurt?

A. Because I saw the blood on his hand.

Q. Did not he also look to you like he was suffering?

A. No, sir; I did not pay any attention to that.

Q. You did not notice whether he was suffering or not?

A. No, he was suffering over his hand, I know, a little, because he raised up his hand like that, and looked where his hand was cut a little, so he got his handkerchief, and put it on the blood to stop it bleeding.

Q. He may have been suffering, and showed that he was suffering from something else; but, as I understand your testimony, you did not pay any attention?

A. I did not pay any attention to anything else, but he looked at the blood on his hand like that, and I asked him if he had got hurt, and he said, "Yes, look at my hand."

Q. Did he say anything about being hurt anywhere else at that time?

L.R.A.1915E.

A. No, sir; not at that time, not that I heard.

Q. When you had that conversation, where was he, and where were you?

A. I was on the platform right close to the gondola car.

Q. Where was he when he was talking to you?

A. In the gondola car. . . . After that happened he just come out from the coal car and went on the platform, and just a little while after that I left him there.

Q. On reaching the platform, did he sit or stand?

A. I don't know. I don't remember.

Q. And you don't remember whether someone assisted him from the coal car onto the passenger platform?

A. I don't remember.

The conductor testified as follows:

Q. After this jolt, what did you do?

A. I didn't do anything. The train just slowed down and proceeded, and I walked back through the coach to see whether anybody was shook up or anything. I went back to the rear end of the train.

Q. Did you go back to the rear platform?

A. I did.

Q. Did anybody make any complaint as to being hurt?

A. None whatever.

Q. What was the average height of the sides of the gondola car?

A. About 4 feet.

The order of the stations was: Hessmer, Belledeau, Echo, Magda, Richland, Whittington, Latanier, Arno, and Alexandria. These stations were not far apart, as the distance between Hessmer and Alexandria was, as already stated, only about 26 miles. The conductor says that the jolt occurred a mile or two before Arno was reached. The witness Xavier Nucere testified at first that it had occurred before Echo was reached, and afterwards corrected this statement and said it was between Richland and Whittington. The witness Teska Guillot was asked, "Between what stations was this that you first saw him after he was injured?" and answered:

"A. I saw him just before they made the stop at Latanier. He came into the coach and told me he had got hurt. He told me he was suffering."

According to this testimony, Scallan could not have remained long seated on the platform of the coach.

Cyriaque Ducote testified that, after they got off of the train at Alexandria, Scallan told him he had been very badly hurt on the train, and asked him to go and see a doctor with him; but that he lost Scal-

lan in the crowd, and did not see him any more.

A. M. Fontane testified that, right after they got off the train at Alexandria, Scallan told them that he had got hurt on the train, and asked Cyriaque Ducote to go to the drug store with him.

G. E. Morrow testified that about 2 o'clock in the afternoon of that day he met Scallan on the street in Alexandria, and the latter told him he had been injured on the train, and asked his advice as to what to do about it; and that he advised him to go and see a lawyer, and that they went together to the office of Mr. Overton, the present counsel in the case; that Mr. Overton was out, but that they met him on the street about two blocks from the office, and that he would not take the case because he said, "We don't take a railroad case unless a man would lose an eye or an arm or a leg, or something serious," and so they left him, and he (witness) advised Scallan to see a physician, and then he could see another lawyer, and he said he would not see any physician here, but would go back home and see another lawyer, and (he witness) referred him to his brother, W. A. Morrow; that he and Scallan were together about an hour; and that, while Scallan complained of having been hurt, he (witness) could not know whether it was true or not.

Xavier Nucere met Scallan on the street that day about an hour before sundown, and asked him how he felt, and Scallan answered he felt sick.

The only other witness who testified to having seen Scallan in Alexandria was L. O. Gremillon, at whose house he spent the night, who says that on reaching home that night at 9 o'clock he was told that Scallan had received an injury and was in bed, and he found him in bed, and was told by him that he was suffering from an injury in his side; that Scallan left the next morning by the early train for Hessmer.

All this evidence is not very satisfactory as to the gravity of the alleged injury. While the jolt of the train is shown to have been severe enough to throw a standing person off of his balance, Scallan seems to have been the only one of the large number who were standing who was thus thrown; and neither his fall nor the effect of it upon him would seem to have been severe enough to have caused a commotion among the bystanders, or even apparently to have attracted the attention of more than three of them. The hurt was not severe enough to prevent him from being on his feet all that day. His request to Cyriaque Ducote to go with him to a drug store, or to consult a doctor (whichever it

L.R.A.1915E.

was), must have been lightly spoken and lightly received, for it was not followed up. Ducote says that he lost him in the crowd; and we find that when he and Morrow, some hours later, were going about in search of a lawyer, he had not yet consulted a doctor; and nothing shows that he had gone to a drug store. To Normand he complained only of the injury to his hand.

Apart from the testimony of Nucere and Villemarette that they saw Scallan fall against the sides of the car, the entire evidence to support plaintiff's case with regard to this injury comes out of the mouth of the young man himself, consists of what he told his doctors and others of the pains he had in his side; and suspicion attaches to it, for the idea of recovering damages from the railroad company, whether originating with him or inspired by Morrow, very soon began to be entertained by him; and from that moment he had a pecuniary interest—one which, in all likelihood, offered to his mind the prospect of a fortune—to locate an injury in his side, and to magnify it.

Mr. G. E. Morrow, with whom he had gone while in Alexandria to consult a lawyer, advised him to consult a physician, and then to employ a lawyer; and recommended his brother, Mr. W. A. Morrow, of Marksville. This was on the 14th. On the 16th, he consulted Dr. Poret; and this doctor, after having examined him, sent him to Dr. Saucier, who also examined him. These doctors saw no marks, or indications, of any kind, of any injury. No abrasion, no bruise, no discoloration, no redness, no inflammation. But, accepting as true the statements of the patient, that he had received a severe blow in the side and was suffering from the effects of it, they gave him the following certificates:

Hessmer, La., May 16, 1910.

This is to certify that I have examined Wilson Scallan, of Hessmer, Louisiana, and I found him suffering with internal injuries, caused by a fall on the Valley train, on May 14, 1910.

E. A. Poret, M. D.

Marksville, La., May 17, 1910.

This is to certify that I have examined Wilson H. Scallan, of Hessmer, Louisiana, and have found rather a severe bruise on his left thorax anteriorly, and in the region of the left lobe of the liver; also found a left-sided varicocele. His trouble, he states, was caused by a fall on the Valley Railroad in May, 1910.

M. E. Saucier, M. D.

Reinforced by these certificates,

Scallan

went to Mr. W. A. Morrow (or perhaps had been required by Mr. Morrow to go first and consult the doctors), and Mr. Morrow wrote to the claim agent of the defendant company the following letter:

Dear Sir:—

Last Saturday, the 14th inst., Mr. Wilson Scallan of Hessmer was a passenger on one of your special excursion trains going to Alexandria, and while said train was going 25 or 30 miles per hour, Mr. Scallan was walking to the cooler to drink, the train stopped suddenly and threw him with a terrific force on the end of an arm of one of the seats, causing him great internal injury. He also bruised very badly one of his hands and knees.

He has since been attended by two reputable physicians, who certify that his injuries caused by that fall may prove permanent. He has suffered considerably and is now a sick man. We consider the injury has caused him damages to the extent of \$2,500. I am writing this letter as an amicable demand for the amount above stated to your company, and I shall await an early reply from you before suit is filed for said amount. Let me hear from you at once.

Yours truly,
Wm. A. Morrow.

The defendant company would not entertain this demand, and later on Mr. Morrow refused to go on with the case, and Scallan also, so far as appears, relinquished all idea of bringing suit, for he never did. And it was only after his death, after the positive evidence of what he had really died of had been buried with him and was no longer available, that this suit was brought. And plaintiff produces experts to testify that such a thing is possible as that a person should receive severe internal injury from a blow or shock, without there being any outward indications; that such a thing is possible as that by this blow a pus or abscess formation might have been caused, which might have emptied into the lung and caused death. And Dr. Poret, who gave one of the above-transcribed certificates, and who was the family physician, testified that it was his opinion that nothing else than this injury had caused Scallan's death. And neighbors of the young man testified to his having repeatedly told them that he suffered constantly from this pain in his side, and to his having been sick more or less all the time after having received this injury, and gradually lost flesh and strength until his taking to his bed and dying. One witness who had dressed the dead body says that when he removed the plaster from his

side the place was "greenish black;" that there was a "lump about four fingers long, and I suppose two fingers wide;" and that Scallan while alive had told him that "it was that lump (indicating his left side) that would kill him."

Plaintiff herself testified that Scallan suffered all the time and complained every day; that from the time he returned from the Alexandria trip she saw him "dry up, decrease, and suffering;" that the last month before he died she noticed the place in his side was very red; that she made applications to the spot of preparations of her own, and also of iodine prescribed by the physician; that sometimes he would complain in his sleep. "He would jump and wake up, and I would ask him, 'What is the matter?' and he would say, 'I am suffering from my side;'" that she noticed discoloration at the spot about three or four weeks after the accident.

Dr. Poret testified: That Scallan came to him for treatment a few days after the Alexandria trip. That he examined the side and saw no marks at that time nor later, but that a few weeks before he died he observed "a slight discoloration, red and a little bit swollen, very slight." That this might have been caused by plasters or poultices. That at this first examination the spot, which was between the eighth and ninth ribs, was tender and very sensitive under pressure, but that, naturally, he could know this only from what the patient told him. That at this place "you first have the pleura and then the lower lobe of the lung, and the spleen also right back of it." That for eight or ten months before this accident he had been treating him for chronic malaria. That "about seven years ago he was a plump, good size fellow. Q. How long ago did he begin to become sickly? A. Well, about ten or twelve months before he was hurt, that is, about four years ago. (N. B. The case was being tried three years after the death of the young man.) Q. Then he began to grow weak and sickly? A. Well, he was sick at the time with fever, malaria." That from the time of the accident the young man would come to see him about every two or three weeks: "What symptoms did you observe? A. Well, there was pain in breathing, rapid breathing and very sensitive, and there was pain also on pressure, and he had a slight fever, if I remember correctly. I had to give him opiates."

That these symptoms continued down to the last time he saw him, which was about three weeks before his death, and became more aggravated as time went on.

Q. When he called on you on May 16,

was he a man of normal weight for his height?

A. Well, yes, of course like a man who had had malarial fever for several months before.

Q. I made note that you stated that emaciation had set in; when was that?

A. Two or three months after he was hurt.

Q. Isn't it a fact that emaciation, fever, and labored breathing are symptoms that are more characteristic of tuberculosis than they are of an internal tumor?

A. It is, in a way; yes, sir.

Q. Didn't you tell me that when you were treating this boy you had looked into his family history and found that his father, or some member of his family, was consumptive?

A. No, sir; I told you that I heard that his father had died of consumption, but that I did not know it personally.

Q. But that on examination of the boy's history that that had come to your knowledge?

A. Yes, sir.

As already stated, Dr. Poret expressed the opinion that the young man died as the result of this blow received in the side, which caused a pus formation. He refused to be positive, however, that the young man had not been consumptive, and that his wasting away and death had not been caused simply by consumption. But he says that he examined him for consumption, and did not observe the indications of it.

No post mortem examination was made.

Dr. Saucier testified as follows:

Scallan came to my office on the 17th day of May with a verbal request from Dr. Poret, would I examine him. I was at home at the time—it was raining, but I went down to the office, and I asked him the history of the case and how it happened, and he said he was riding on the train; that he had come to Alexandria on an excursion train; and that he had gotten up from his seat to go to the cooler and get water; and that while going to get water the train came to a sudden stop and he was thrown on the side of the seat. Now, I made the man strip, take off his coat and shirt, and examined him by palpation, percussion, etc., and the evidence that he gave under examination were those of suffering, apparently of a man suffering from pain when you touched him. There was no discoloration of any kind or character, that I can remember. There were no fractured ribs. I sent a report of the result of my examination to Dr. Poret, stating that I found a rather severe bruise in the region of the

left lobe of the liver, anteriorly, and made comment of some other things I found on patient that have no connection with this case. The explanation I wish to make of this report is this: The report that I made states that the bruise was a rather severe bruise, and it was written in that way to offset the opinion in my mind that Dr. Poret and the patient had that he had been seriously injured, because my recollection of it was that he had no bruise externally, no fracture or bruise of any kind, although he acted pain, and made out as if he were suffering under the examination. At the time I must have thought that he was suffering.

Q. (by the court) You say he made out as if he was suffering—you don't mean to convey the idea that he was trying to deceive you?

A. At this time I don't pretend to say whether he was or not.

Q. Did you ever, at any subsequent time, make a further examination of Mr. Scallan's condition?

A. Yes, sir; I saw him again on the 27th day of June, 1910, as my books show.

Q. Please state as well as you recall why he came to you on that occasion?

A. On the occasion of his second visit to my office I don't remember whether he had any definite object or not, but he must have come because he felt sick. At any rate, I found him badly fallen off, markedly fallen off in weight and appearance, and I again examined him.

Q. Please state the result of your examination.

A. The result of the second examination showed plainly that the man was suffering from a rather advanced stage of consumption in both lungs.

Q. Please state what developments, if any, were shown on this second examination concerning the injury to his side about which he had complained.

A. I remember nothing having been said about the side at that time; my mind is a blank on that point.

Plaintiff's learned counsel seek to discredit this witness by showing that the prescription given on that occasion was not for consumption, but was tincture of iodine for application to the side and quinine and a tonic for malaria; but the doctor explains that the purpose was to get rid first of the malaria, and that he told the patient to come back, and he never did; that the local application of tincture of iodine is often used in cases where the pleura is involved.

Dr. Regard was consulted by the young man on November 10, 1910. He testified

that from his diagnosis of the case he is positive that the malady of the young man was consumption. He does not remember that when he was consulted anything was said about any internal injury. He is positive nothing was said about it.

This witness was the local surgeon of the defendant company, and also president of the Bank of Mansura. He was sought to be discredited by the testimony of the plaintiff herself, who testified that she accompanied her son to his office, and that her son did tell him that he had come to consult him about the pain in his side.

Some neighbors of the plaintiff testified that the young man had been ailing and unable to do much work for some time before his alleged injury, and that his father had died of consumption, in the very same way that he had. The greater number of witnesses testified, however, to the very opposite, namely: That, whereas up to the time of the alleged injury he had been well and strong, he had rapidly declined from that time on and apparently suffering all the time, and that his father had not died of consumption, but of pneumonia. All this testimony as to the suffering of the young man consists mainly, however, of what he himself said; and the fact that he himself abandoned all idea of bringing suit against the defendant company is very significant. Had he brought the suit, a very simple expert examination would have conclusively determined the nature of his injury.

The probative force which his statements as to his sufferings derive from their contemporaneousness is much detracted from by the fact that when he began making them he had a strong inducement to do so as going to confirm the claim he was making, or about to make, for an amount of damages which to him would have appeared to be a fortune; and is further detracted from by the fact that, in the letter which his lawyer wrote to the claim agent of the defendant company, the manner of the injury is stated to have been by falling upon a seat in the coach while going to the water cooler for a drink of water,—a statement, which, by the way, he appears to have made to Dr. Saucier as well, and which, if made, was certainly false, and would go to show him possessed of a designing mind, and not much hampered by any sense of obligation to speak only the truth.

As already stated, the true cause of the young man's death is left by the evidence too much in doubt for a judgment to be rendered against the defendant company.

The judgment appealed from is set aside, and the suit is dismissed; the plaintiff to pay the costs in both courts.
L.R.A.1915E.

MARYLAND COURT OF APPEALS.

ROBERT H. GREEN, Appt.,
v.

LYDIA M. GREEN.

(125 Md. 141, 93 Atl. 400.)

Divorce — effect of plaintiff's wrongdoing.

A man guilty of adultery is not entitled to a divorce from his wife for desertion although the statutory period of desertion had elapsed before his act was committed, and the abandonment was the inciting cause of his act.

(January 14, 1915.)

APPEAL by plaintiff from a decree of the Circuit Court of Baltimore City, dismissing his bill for a divorce. Affirmed.

The facts are stated in the opinion.

Mr. Henry H. Dinneen, for appellant:

Appellant was entitled to a divorce.

Fisher v. Fisher, 95 Md. 314, 93 Am. St. Rep. 334, 52 Atl. 898; Setzer v. Setzer, 128 N. C. 172, 83 Am. St. Rep. 666, 38 S. E. 731; 14 Cyc. 649; Wood v. Wood, 27 N. C. (5 Ired. L.) 674; Moss v. Moss, 24 N. C. (2 Ired. L.) 55; Steel v. Steel, 104 N. C. 631, 10 S. E. 707; Leidig v. Leidig, 13 Pa. Co. Ct. 29; Snook v. Snook, 67 L. T. N. S. 389; Whittington v. Whittington, 19 N. C. (2 Dev. & B. L.) 64; Tew v. Tew, 80 N. C. 316, 30 Am. Rep. 84; Foy v. Foy, 35 N. C. (13 Ired. L.) 90; Williamson v. Williamson, 46 L. T. N. S. 920, 51 L. J. Prob. N. S. 54, L. R. 7 Prob. Div. 76, 30 Week. Rep. 616; 2 Bishop, Marr. Div. & Sep. § 1483; Johnsen v. Johnsen, 78 Wash. 423, 139 Pac. 189, 1200; Ford v. Ford, 143 Mass. 577, 10 N. E. 474; Detrick's Appeal, 117 Pa. 452, 11 Atl. 882; Black v. Black, 30 N. J. Eq. 215; Boyce v. Boyce, 23 N. J. Eq. 337; Carter v. Carter, 62 Ill. 439; Lawrence v. Lawrence, 3 Paige, 267; Kershaw v. Kershaw, 5 Pa. Dist. R. 551; Martin v. Martin, 33 W. Va. 695, 11 S. E. 12; Harding v. Harding, 22 Md. 337; O'Connor v. O'Connor, 109 N. C. 139, 13 S. E. 887; Hitchcock v. Hitchcock, 15 App. D. C. 81; Lynch v. Lynch, 33 Md. 328; Cornish v. Cornish, 23 N. J. Eq. 208.

Note. — Subsequent adultery as recriminatory defense to desertion or cruelty.

For a discussion of the converse question whether desertion or cruelty is a recriminatory defense to subsequent adultery, see the note to Ellett v. Ellett, 39 L.R.A. (N.S.) 1135.

As to the effect of the husband's own adultery to prevent him from relying on the wife's adultery as a defense to an action for support, see the note to Hawkins v. Hawkins, 19 L.R.A. (N.S.) 468.

Stockbridge, J., delivered the opinion of the court:

Robert H. Green, the appellant, filed his bill in the circuit court of Baltimore city for a divorce *a vinculo matrimonii* from Lydia M. Green, his wife, upon the ground of abandonment. The bill alleges, and the proof substantiates it, that the parties were married in November, 1908; that for no apparent reason on the 7th May, 1909, the defendant abandoned her husband, and this desertion has continued uninterruptedly ever since, and is without reasonable expectation of reconciliation. In the course of the proof the plaintiff was asked by the examiner whether, since his wife had been away from him, he had ever been with other women, and the witness answered, Once, three or four years after the abandonment happened. Upon the submission of the papers in the case to the auditor and master, Mr. Robertson reported that the bill should be dismissed, relying upon the case of *Fisher v. Fisher*, 95 Md. 316, 93 Am. St. Rep. 334, 52 Atl. 898. Exceptions were filed to this report, which, after hearing,

were dismissed, and the bill of complaint was also dismissed. It is from such decree of dismissal that the present appeal is taken.

Lydia M. Green made no defense in the circuit court to the charge of desertion: although summoned, she did not appear, and a decree *pro confesso* was entered against her, and she has not been represented on this appeal.

The argument of the counsel for the appellant is apparently based upon two grounds: (1) That the abandonment of the wife was the inciting cause of the subsequent act of adultery upon the part of the husband; and (2) that the statutory period of desertion having elapsed before the act of adultery was committed, the right of the plaintiff had become fixed and could not be affected by his subsequent act. In support of his position he cites numerous authorities, some of which are applicable and some not, but the question involved in the case is of sufficient importance to make a review of the more important authorities appropriate.

There appears to be little dissent from the general proposition that adultery is a good recriminatory defense to an action for divorce upon any sufficient ground. It is fundamental that the efficacy of this defense is based, not upon the theory that the plaintiff's conduct is deemed to justify or excuse that of the defendant, but upon the theory that inasmuch as the plaintiff has not performed his marital duty, he is not entitled to complain of the defendant's dereliction.

This being so, it would seem that the mere fact that the plaintiff's adultery occurred after the defendant's ill conduct should in no way affect the force of the defense of adultery. However, it is quite possible that the particular facts of an individual case may make it seem equitable to deny effect to the defense. But this points more to justification and provocation, which depend upon considerations which are foreign to the doctrine of recrimination.

It was held in *Setzer v. Setzer*, 128 N. C. 170, 83 Am. St. Rep. 666, 38 S. E. 731, that a wife whose cruelty forced the husband to abandon her could not set up his subsequent adultery as a defense to his action for divorce, where the statute did not authorize divorce for adultery alone, but required that the husband separate from the wife and live in adultery.

But in *Stiehr v. Stiehr*, 145 Mich. 297, 108 N. W. 684, it was held that although there was evidence of conduct on the part of the husband likely to estrange the wife, where, upon balancing the account of marital misconduct, the remainder either way would be insignificant, a wife could not have a divorce for cruelty where she had committed adultery.
L.R.A.1915E.

And in *Redington v. Redington*, 2 Colo. App. 8, 29 Pac. 811, a wife's adultery after her husband's desertion had ripened into a right of action for divorce was held a good recriminatory defense to her action for divorce upon the ground of the desertion, where there was no evidence to show the gravity of her temptation, or to indicate how far the husband's desertion was responsible for her conduct.

Although a wife's right to divorce arises as soon as her husband's sentence to infamous punishment becomes final, she loses such right by subsequently committing adultery. *Abshire v. Hanks*, 119 La. 425, 44 So. 186.

In *Clapp v. Clapp*, 97 Mass. 531, it was held that a husband cannot have a divorce upon the ground of desertion where he has since committed adultery; at least, where his act was committed before the desertion had continued long enough to authorize a divorce.

In *Earle v. Earle*, 43 Or. 293, 72 Pac. 976, holding a wife who had lived in prostitution since desertion by her husband disentitled to a divorce for the desertion, the court laid down the generality that the law denies redress to a plaintiff who is in equal fault with the defendant, and that it does not matter that defendant made default.

No stress was laid on the fact that the cruelty preceded the plaintiff's adultery, in *Decker v. Decker*, 193 Ill. 285, 55 L.R.A. 697, 86 Am. St. Rep. 325, 61 N. E. 1108, holding that such adultery was a good recriminatory defense when pleaded in the defendant's answer. It was further held that a statute providing that if both parties have been guilty of adultery, when adultery is the ground of complaint, then no divorce

Taking first the text-books, we find the rule stated in 14 Cyc. 650, that "any misconduct on the part of complainant which constitutes ground for divorce bars his suit, without reference to the nature of the offense of which he complains;" but adds, "in some states a contrary rule prevails, by statute or otherwise, and the two offenses must be of the same character." In the present case under the Maryland statute the desertion set out in the bill, and proved by the evidence, was a sufficient ground for the granting of an absolute divorce. Also the adultery of the husband constituted a sufficient ground, under the statute, for which Mrs. Green, if she had seen fit, might have filed her bill, and, if the proof substantiated the allegations, have obtained an absolute divorce. If, therefore, the rule as stated in 14 Cyc. is supported by the authorities, there can be no question but what the decree of the circuit court in dismissing the bill was correct.

will be granted, cannot be construed to mean that adultery is a recriminatory defense only when adultery is charged in the complaint, the court saying that the statute merely covers a case in which the court shall act when no such defense is pleaded, leaving adultery when properly pleaded a good defense to cruelty.

In *Eikenbury v. Eikenbury*, 33 Ind. App. 69, 70 N. E. 837, a wife was denied a divorce on general principles without comment on the fact that the wife and child were abandoned by the husband for a long period, and that the wife formed a new alliance of which the charge of adultery was predicated.

In New York cases in which no emphasis was laid on the fact that the plaintiff's adultery occurred after the defendant's cruelty, it was held that the adultery was not a defense, because not connected with the acts charged in the complaint; and not a counterclaim, because it did not arise out of the transaction which formed the basis of the plaintiff's suit. *Henry v. Henry*, 27 How. Pr. 5, 17 Abb. Pr. 411; *Doe v. Roe*, 23 Hun, 19, followed in *Crow v. Crow*, 7 N. Y. Civ. Proc. Rep. 423. But these cases were overruled in *Terhune v. Terhune*, 40 How. Pr. 258, in which the adultery preceded the defendant's cruelty, upon the ground that the defense of adultery was made available by a statute providing that the defendant might prove in justification ill conduct on the plaintiff's part, and that on establishing such defense, the bill should be dismissed. It was pointed out that this meant not that the plaintiff's wrongdoing justified that of the defendant, but that the plaintiff, having violated his matrimonial duty to an extent which would entitle the plaintiff, if unoffending, to a divorce, should have no right to divorce.

By the application of the doctrine *expressio unius est exclusio alterius*, early Pennsylvania cases denied effect to adultery

In *Nelson on Divorce & Separation*, vol. 1, § 429, the statement is as follows: "It is a general rule almost without exception [the reference here is to *Ristine's Case*, 4 Rawle, 460] that one who has committed adultery does not 'come into court with clean hands,' and is not entitled to divorce for any matrimonial offense. This was the doctrine in the ecclesiastical courts. If the plaintiff had committed adultery he could not complain of his wife's adultery. No decree of divorce can be obtained for cruelty if the plaintiff has committed adultery. Adultery is also an absolute bar to relief for desertion."

In 2 *Bishop on Marriages, Divorce, & Separation*, § 350, it is said: "By all opinions, English and American, one shown to be guilty of adultery cannot have a divorce for adultery committed by the other, and it makes no difference which was the earlier offense, or even that the plaintiff's

as a defense where the plaintiff sought a divorce on the ground of desertion or cruelty, inasmuch as the statute made adultery a defense in actions on the ground of adultery, but made no mention of actions brought on other grounds. *Ristine v. Ristine*, 4 Rawle, 460, in which that doctrine was laid down, involved adultery of the plaintiff, the husband, after desertion by the wife, which was alleged in defense to have been induced by the plaintiff's cruelty. *Mendenhall v. Mendenhall*, 12 Pa. Super. Ct. 290, emphasized the fact that the statutory period of desertion for which a divorce was obtainable elapsed before the adultery was committed. In *Leidig v. Leidig*, 13 Pa. Co. Ct. 29, the court laid down *obiter* the doctrine of *Ristine v. Ristine*, although the defense was not available because not seasonably pleaded.

Ristine v. Ristine, *supra*, was distinguished in *Eichert v. Eichert*, 3 W. N. C. 290, holding that although, according to the *Ristine Case*, adultery after a desertion was not a bar to divorce, an open celebration of a marriage of the husband to another was a bar, as it made the wife's return impossible, and thus removed the presumption that he was willing to receive her.

In *Vellis v. Vellis*, 4 Pa. Co. Ct. 100, in which the testimony of the plaintiff herself showed that after the desertion, she was delivered of a bastard child, and it appeared that the child's father was willing to marry the mother, and was contributing to the expense of the divorce proceedings, it was held that the "recrimination established by herself was a bar to the suit."

The case of *Mathewson v. Mathewson*, 18 R. I. 456, 49 Am. St. Rep. 782, 28 Atl. 801, is sufficiently set out in *GREEN v. GREEN*.

It should be stated that no attempt has been made to include cases which turn on justification, provocation, condonation, or connivance.

L. A. W.

followed a separation which took place on discovery of the defendant's."

In *Brown on Divorce*, page 84, the rule is laid down as follows: "Where each of the . . . parties has committed a matrimonial offense which is a cause for divorce, so that when one asks for this remedy, the other is equally entitled to the same, whether the offenses are the same or not, the court can grant the prayer of neither."

In *Stewart on Marriage & Divorce*, § 314, the rule is concisely stated as follows: "Divorce is a remedy provided for an innocent party. . . . If both parties have a right to divorce, neither has."

If now we turn from the text writers to the adjudicated cases, we find a wide diversity of decisions, much greater than the statements in the text-books give any indication of. The case most frequently cited is the *Ristine Case*, in 4 Rawle, 460, decided in 1834, in which it was held that adultery committed by a husband after a wife had separated herself from him was no bar to his obtaining a divorce in consequence of his wife's wilful and malicious desertion and absence, without reasonable cause, for two years, and the same rule was subsequently followed in Pennsylvania, in the case of *Mendenhall v. Mendenhall*, 12 Pa. Super. Ct. 290; but it is to be observed, in connection with these cases, that they were both decided upon the supposed necessity to observe certain established rules of statutory construction, and the same may be said of the decision in the *Case of Buerfening*, 23 Minn. 563. Other Pennsylvania cases, however, are not in accord with the doctrine of the *Ristine Case*; thus, in *Vellis v. Vellis*, 4 Pa. Co. Ct. 100, it was held that a decree of divorce on the ground of desertion would not be granted to a wife where it appeared by her own evidence that she was delivered of a bastard child begotten after the desertion, the court saying: "The libellant is not an innocent and faithful wife. She does not come into court with clean hands. . . . Recrimination established by herself is a bar to her suit. . . . Divorce is a remedy provided for the innocent party, and is not intended for cases in which both parties are guilty."

In that case, as in this, the defendant was entirely unrepresented. This case was subsequently followed, though not referred to in the case of *Hugo v. Hugo*, 21 Pa. Co. Ct. 607, where it was held that where a husband and wife had both committed matrimonial offenses which would justify a decree of divorce, whether the offenses are the same or not, the court will grant the prayer of neither. The *Leidig Case*, 13 Pa. Co. Ct. 29, cited by the appellant, L.R.A.1915E.

was based upon the *Ristine Case*, and is not entirely applicable. The real question there was whether or not the act of adultery committed by one of the parties was a sufficient justification for desertion by the other, and it was so held to be.

Without reviewing seriatim the cases in North Carolina, it will be sufficient to say that they are in accord with the *Ristine Case*, but like that case were decided upon the construction of the statute of that state.

The *Williamson Case*, 46 L. T. N. S. 920, 51 L. J. Prob. N. S. 54, L. R. 7 Prob. Div. 76, 30 Week. Rep. 610, is hardly an authority for the proposition advanced by the appellant. In that case the complaint was filed by the husband, and it set forth that shortly after the marriage, the wife was arrested and convicted of a felony; that on the expiration of her term, instead of returning to her husband, she took service, and while so in service committed the act of adultery, and the court held that no act of the husband had conduced to her adultery, and he was granted the divorce; but there was no suggestion in the case that he had been in any way in fault.

In the case of *Snook v. Snook*, 67 L. T. N. S. 380, there had been a decree of divorce nisi, and the husband, who had so obtained the divorce, was told by his solicitor that he might marry again after the expiration of six months. He did so at the expiration of that time, although the decree had not been made absolute, and it was held that he had acted in ignorance of the law, had no intention of committing adultery, and that notwithstanding his second marriage amounted to adultery, a discretion would be exercised in his favor and the divorce made absolute.

In the case of *Moors v. Moors*, 121 Mass. 232, an almost similar condition was presented. A decree nisi of divorce had been entered, to become absolute after the expiration of six months. The complainant, believing the divorce to be absolute, married another woman, and had intercourse with her, and the Massachusetts court held that this was an act of adultery, so as to disentitle him to have the nisi decree made absolute.

In the *Cumming Case*, 135 Mass. 386, 46 Am. Rep. 476, it was held that "a suitor for divorce cannot prevail if open to a valid charge of any matrimonial offense whatever of equal grade," and to the same effect is *Handy v. Handy*, 124 Mass. 394.

Directly in point, as bearing upon the second ground urged by the appellant, is the case of *Mathewson v. Mathewson*, 18 R. I. 456, 49 Am. St. Rep. 782, 28 Atl. 801, where it was held that a divorce will not be granted when it appears that the

petitioner, although otherwise entitled to a divorce, has been guilty of conduct that is cause for a divorce. So where a man had deserted his wife and enlisted in the military service, writing to her but once or twice soon after his enlistment, and then remaining silent for twenty-seven years, and she, believing him to be dead by reason of common report, married again, after which the first husband appeared with another wife and several children, but the plaintiff continued for a short time to live with her second husband, then ceased to cohabit with him and applied for a divorce from her first husband, she was held not to be entitled to the divorce because she was guilty of conduct authorizing a divorce after she knew that her first husband was alive.

In *Wheeler v. Wheeler*, 18 Or. 261, 24 Pac. 900, where the party seeking the divorce was liable to a charge which was a cause for divorce, it was held that fact would prevent him from obtaining a divorce even though the wife had likewise been guilty of misconduct. The same rule was affirmed in *Earle v. Earle*, 43 Or. 293, 72 Pac. 976.

The case of *Whippen v. Whippen*, 147 Mass. 294, 17 N. E. 644, presents many points of similarity to the present case. The husband in that case had been deserted by his wife for seven years, and had no actual knowledge that she was alive. He went through a form of marriage, which was fully consummated, then learning that, his first wife was still alive, applied for a divorce from her. She did not appear or make any defense to the suit. The conclusion of the court was that by his act he had been guilty of adultery and was therefore precluded from obtaining a divorce for the desertion.

In *Smith v. Smith*, 4 Paige, 432, 27 Am. Dec. 75, after the complainant had filed his bill for divorce, he was guilty of an act of adultery, and this was brought to the knowledge of the court by a supplemental answer filed by the wife, and the fact of such adultery, irrespective of the merits of the original bill, was held to preclude him from the relief which he sought.

Peculiarly apposite to the present case is the decision in *Tracey v. Tracey*, — N. J. Eq. —, 43 Atl. 713, where the following language is used by Vice Chancellor Grey of New Jersey: "All the cases, however, declare that if the complainant, in proving his case, discloses his own guilt, the court will refuse him relief, even if his misconduct be not pleaded against him. . . . The complainant cannot exhibit to the court his own breach of his marriage vows and successfully ask for relief because of the L.R.A.1915E.

defendant's failure in marital duty. He comes into the court with unclean hands and cannot rightfully ask its aid. In the case before me, the complainant's breach of his marriage vows appears in his own proofs, by his own oath. The bill should be dismissed."

In concluding this review of the decisions, they cannot be better summarized than was done by the court of appeals of Colorado, in the *Redington Case*, 2 Colo. App. 8, 29 Pac. 811. "In the hopeless conflict among the authorities, both English and American, . . . we must follow what seems to be the current of the main stream of judicial determination, influenced, perhaps, by our own judgment of what the law should be in such cases. . . . It is the conclusion of this court that the *Cases of Ristine*, 4 Rawle, 460, and *Buerfening*, 23 Minn. 563, are not in harmony with the general doctrine of the American courts."

And to the cases named should properly be added the decisions in North Carolina, and a few isolated decisions in other states.

From this summary it follows that the judge of the circuit court committed no error in overruling the exceptions of the complainant to the report of the master, and dismissing the bill, and the decree will accordingly be affirmed.

Decree affirmed, with costs.

MICHIGAN SUPREME COURT.

GEORGE E. HUTTON et al., Appts.,

v.

CHARLES BERRY SHERRARD et al.

(183 Mich. 356, 150 N. W. 135.)

Brokers — minimum price — right to purchase.

1. Real estate brokers who are to receive for their services all over a specified minimum price which they can obtain for the property may themselves become the purchasers.

Same — approval of contract — rejection — good faith.

2. One, contracts for the sale of whose property by agents are subject to his approval, cannot refuse to approve a contract for lack of financial ability of the purchaser, if he refuses to make an investigation as to such ability.

(December 19, 1914.)

Note. — Right of real estate broker entitled to all over a minimum price to purchase property himself.

The general rule is that an agent to sell real estate cannot himself become the purchaser in the absence of an express con-

APPEAL by complainants from a decree of the Circuit Court for Wayne County in defendants' favor in a suit to compel specific performance of contracts for the sale of land. Reversed.

The facts are stated in the opinion.

Messrs. Beaumont, Smith, & Harris for appellants.

Messrs. Angell, Boynton, McMillan, Bodman, & Turner for appellees.

Bird, J., delivered the opinion of the court:

In June, 1905, complainants entered into an agreement with Joseph Berry of Detroit, whereby they were to act as his selling agents, for a period of two years, of certain lots owned by him in Fairview village. Certain preliminary work was necessary to get the lots ready for the market, and it was stipulated that complainants should look after this work, such as grading roads, planting trees, and constructing sidewalks, the cost of which was to be borne by Mr. Berry. The cost of advertising and selling and making collections on deferred pay-

ments was to be borne by complainants. Lots were to be sold for cash or on contract. A minimum sale price was fixed at \$28.50 per front foot for Jefferson avenue lots, and \$200 each for all other lots, plus the cost of the sidewalk appurtenant thereto. The compensation of complainants was stipulated to be all they might realize on a sale over and above the minimum selling price. A down payment of \$25 was to be made on all lots sold on contract, and all contracts were to be subject to the approval of Mr. Berry. The preliminary work was carried on by complainants, and the sale of the lots was progressing when Mr. Berry died, in 1907. A new contract was then made with the heirs and administrator of Mr. Berry's estate on substantially the same terms as the original one, save an increase in the minimum selling price of the Jefferson avenue property to \$36.50 per front foot, and an increase of \$310 for the other lots. This contract expired on January 1, 1910. On December 31, 1909, complainants tendered to defendants \$300 as the down payment on twelve lots remaining unsold,

sent of the principal. And this rule is not inapplicable when the employment is to sell at a fixed price (see *Tilleny v. Wolverton*, 40 Minn. 256, 48 N. W. 908; *Ruckman v. Bergolz*, 37 N. J. L. 437; *Colbert v. Shepherd*, 89 Va. 401, 16 S. E. 246), or at a net price (*O'Meara v. Lawrence*, 159 Iowa, 448, 141 N. W. 312; *Meek v. Hurst*, 223 Mo. 688, 135 Am. St. Rep. 531, 122 S. W. 1022), or at a minimum price (*Rich v. Black*, 173 Pa. 92, 33 Atl. 880); nor can an agent, on failure of purchaser to take, take himself at the price agreed upon (*McNutt v. Dix*, 83 Mich. 328, 10 L.R.A. 660, 47 N. W. 212). These cases, however, are not exhaustive on the point, as it is beyond the scope of the present note.

In no one of these instances was there an agreement that the agent should have all in excess of a certain price, but, on the contrary, a percentage commission was to be received. The doctrine of *HUTTON v. SHERRARD*, that where an agent is entitled to all over a certain sum, he may become the purchaser himself, and so, taking the case without the general rule, would seem to be based on sound principle, as in such a case there is no conflict between the broker's own interests and his duty to the owner; and that doctrine finds support in the only other reported case found where the agreement was that the agent was to have all over a certain price.

Thus, in *Synnott v. Shaughnessy*, 2 Idaho, 122, 7 Pac. 82, cited in *HUTTON v. SHERRARD*, it was held that an agent for sale of land under an agreement that he is to have all above a certain price can with perfect propriety become the purchaser himself, and so is under no obligation to reveal anything of value in the land to his principal.

The doctrine of these cases is not opposed L.R.A.1915E.

by *Chezum v. Kreighbaum*, 4 Wash. 680, 30 Pac. 1098, 32 Pac. 109, holding that a contract giving one the exclusive sale of property for a specified sum, and providing that he "must get his commission about that," simply conferred an agency, and did not create an option authorizing such person to demand and receive a deed to himself, since the decision in that case was based on a construction of the contract entitling the owner to the benefit of all that might be realized over the price named, allowing the other party merely a commission, whereas in *HUTTON v. SHERRARD*, by the express terms of the contract, the broker was to receive all that might be realized over the minimum price. It is obvious that such construction of the contract in the *Chezum* Case rendered it unnecessary for the court in that case to pass upon the question involved in the *HUTTON* CASE, to which this note is confined, since to raise the question the contract must, either in express terms or by construction, entitle the agent or broker to the amount that may be realized in excess of the minimum price, whether more or less than his commissions. It is obvious that the preliminary question of construction referred to may arise in cases not involving the right of the agent or broker to purchase the property, but his right to the excess in case of sale to a third person. See, for example, *Turnley v. Michael*, 4 Tex. App. Civ. Cas. (Willson) 363, 15 S. W. 912, cited in the *Chezum* Case.

While not strictly within the scope of the present note, the principle underlying the decision in *HUTTON v. SHERRARD* is the basis of the decision in *Robinson v. Easton*, 93 Cal. 80, 27 Am. St. Rep. 167, 28 Pac. 796. In this case the agent was to receive as commission all over a certain sum. A sale

with themselves named as the purchasers, and demanded the execution and acceptance of the contracts. Defendants refused to approve and execute them, and this bill is filed to compel such execution. They justify their refusal upon the grounds: (1) That complainants, as selling agents, had no legal right to sell the lots to themselves. (2) As all contracts were subject to the approval of defendants, they had a right to disapprove of any contract tendered without assigning any reason for their refusal.

1. It is a general rule of law that an agent for the selling of property may not sell it to himself. *McNutt v. Dix*, 83 Mich. 328, 10 L.R.A. 660, 47 N. W. 212; *Green v. Knoch*, 92 Mich. 26, 52 N. W. 80. The reason why public policy has so decreed is to prevent the selfish interest of the agent from coming in contact with his duty to his principal. In all transactions where the agent's loyalty is liable to be affected by his selfish interest, the general rule will apply, even though no fraud is practised. *McKay v. Williams*, 67 Mich. 547, 11 Am. St. Rep. 597, 35 N. W. 159. Measured by this test, is the transaction before us one to which the rule should be applied? The minimum price fixed in the contract belongs to the principal. If a sale is made, the principal is entitled to the minimum sum, plus the cost of the sidewalk, and nothing more. The agent's diligence in securing the best price obtainable therefor is no benefit to defendants beyond the minimum price. Whether a lot sells for \$1 or \$100 in excess of the minimum price, the result is the same to the principal; he neither gains nor loses by the transaction. This

differs widely from a contract which fixes a minimum selling price and a percentage commission. In such a case the principal profits by any price in excess of the minimum, whereas in the case before us he profits nothing beyond the minimum price.

Warvelle, in his work on Vendors, page 236, in discussing this subject, has the following to say: "In accordance with the foregoing rule it has been held that an agent cannot become the purchaser of property confided to his care, and that a purchase made under such circumstances carries fraud upon its face. But this, perhaps, is carrying the application of the rule to extreme lengths; for the true spirit and meaning of the rule is that the agent shall not so act toward the subject of the agency for his own benefit as to work injury to his principal. He will not therefore be allowed to purchase where he has a duty to perform which is inconsistent with the character of the purchaser, nor to speculate for his private gain with the subject-matter committed to his care. This may be regarded as the true extent of the rule; and an agent placing himself beyond it may lawfully contract with his principal with relation to the property."

The case of *Synnott v. Shaughnessy*, 2 Idaho, 122, 7 Pac. 82, is in point. In this case a similar contract was involved, and the same question was raised as to its validity. The court said: "He [the agent] was at perfect liberty to get all he could above \$2,000. He could, with perfect propriety, become the purchaser himself."

We are of the opinion that, inasmuch as the record shows that the purchase of the

was made on condition that the title of the property would be insured by a title insurance company, and upon the title insurance company refusing to insure, the deposit made was returned by the agent to the prospective purchaser. In an action by the owner of the property against the agent to recover this deposit, commenced upon the theory that the deposit was received by the agent in his capacity as agent, and so was the owner's money in such agent's hands, in affirming judgment in favor of the agent the court said: "The relation of the defendant to the plaintiffs was not that of a mere agent. While its authority to sell the land was derived from the plaintiffs, yet the sale was to be made for its own account and benefit, as well as for that of the plaintiffs. Although the authority to sell was not so coupled with an interest as to create in the defendant an interest in the land, or to prevent the plaintiffs from revoking the authority, yet by the terms of the authorization the defendant acquired such a right to a portion of the proceeds of the sale as to enable it to make a contract of sale upon terms of its own choos-

ing. The plaintiffs, in effect, gave to the defendant an option for five days to endeavor to sell the block of land for whatever sum it could obtain, and upon whatever terms it might make, provided they should receive therefor the sum of \$10,000, and agreed that defendant should have whatever sum it could realize therefor above that amount. The relation thus created between them was rather that of a vendor and purchaser under a contract of sale, than one of principal and agent, and a sale by the defendant thereunder was in the capacity of a vendor upon its own account, and not for the account of the plaintiffs. Inasmuch as the defendant was entitled to all the proceeds of the sale in excess of \$10,000, it had the right to make the sale upon such terms as in its judgment would enable it to realize the highest price for the land. Upon a sale by it the plaintiffs were entitled to the immediate payment of the \$10,000, but the defendant could sell the land either for cash or upon time, as it might choose, and its terms of sale did not require ratification by the plaintiffs."

J. H. B.

property by complainants would be in no-wise inconsistent with their duty as agents of the defendants, they had a right to purchase the lots on their own account.

2. The complainants contend that defendants' refusal to approve the contracts was equivocal, arbitrary, and not a good faith refusal. The defendants take the position in this court that their refusal is sufficient without assigning any reason therefor, and in support thereof, cite the familiar case of *Wood Reaping & Mowing Mach. Co. v. Smith*, 50 Mich. 565, 45 Am. Rep. 57, 15 N. W. 906. The reserved right of approval in the contract involves the judgment of the defendants, and therefore appears to fall within the doctrine of that case. But it is said that, even in cases falling within that rule, the right must be exercised honestly and in good faith. The dissatisfaction must be actual and not feigned, real and not merely pretended. 9 Cyc. 624; *Isbell v. Anderson Carriage Co.* 170 Mich. 304, 136 N. W. 457. It is also said in *Hartford Sorghum Mfg. Co. v. Brush*, 43 Vt. 528, that if the purchaser is in fact satisfied, but fraudulently and in bad faith declares that he is not, the condition is performed. The question, therefore, presented, is whether we can say on the face of this record that bad faith was the basis of defendants' refusal to approve the contracts.

The obvious purpose of this undertaking was to dispose of the lots on the subdivision at a satisfactory price. And the only apparent object of reserving the right to approve the contracts was to pass upon the financial responsibility of those desiring to purchase. When complainants tendered the contracts in question for approval, defendants replied requesting a financial statement of complainants. In response to this request complainants refused to make a written statement, but instead referred defendants to their bankers, indicating who they were, and made the following offer of security: "You hold now land contracts of various parties, wherein our equity at this date, according to our record, amounts to \$10,374.77. If at any time we should default in making any payment of principal or interest on any of the contracts submitted by us to you on the 30th ultimo, you are hereby authorized to apply upon any such contract in default enough of the moneys collected by you from time to time, for us, to satisfy such default in payment, and this authority is to be a continuing one until one half of the principal and all accrued interest is paid upon the contracts so submitted to you."

The defendants being unmoved by this information and offer of security, the complainants filed this bill of complaint. In L.R.A.1915E.

their answer the defendants deny they based their refusal on the financial irresponsibility of the complainants. That portion of their answer reads: "They admit that before refusing to accept said payment on said contracts, they asked for a financial statement showing the responsibility of of Messrs. Hutton, Tigchon, & Nall, and that such statement was not exhibited to them, but show that their refusal to enter into said agreements was not based upon the financial irresponsibility of the proposed purchaser, but was within their legal rights as defined by said agreement."

Later, at the hearing, Mr. Hoyt, who represented the administrator, testified that "at the time we declined to make these contracts, we questioned their financial responsibility. We did not get to a point of passing on it, because we were not furnished the information for which we asked. Our position in part was that, not having been furnished that financial statement, we would not sell to them. The other part was that they had no right, no legal right, to make this contract for themselves under the sales agreement that we had with them."

In view of this testimony we must assume that defendants based their refusal to approve the contracts in part upon the financial irresponsibility of the complainants. In order to meet this objection, complainants referred defendants to their bankers in the city of Detroit, and to further satisfy their misgivings, they offered to permit defendants to retain their equity in lots already sold, amounting to upwards of \$10,000, as it was collected, and apply it upon the purchase price of the lots in question. Defendants made no reply to the offer of security, and refrained from making any inquiry of complainants' bankers. And they say in their testimony that they did not pass upon complainants' financial responsibility because they were not furnished the information requested. We think it can hardly be said to be consistent with good faith to question a business man's financial standing, and, when it is met by a reference to his banker and an offer of security, to ignore the offer of security and refuse to investigate when the avenue leading to the desired information is open. Such conduct would not pass current in the business world as good faith, and we cannot accept it as such. But it is said that the defendants deny they were referred to complainants' bankers. If we consider this denial as conclusive, the fact still remains that the administrator had at its command all the avenues of information concerning the financial standing of business men about town that a large trust company usually has, and had its desire been

to learn the financial standing of these complainants, we cannot believe it would have been very long without the desired information.

Another phase of the testimony which has influenced us in reaching a conclusion on the question of good faith is the fact that complainants have been permitted to become the owners of several defaulted contracts for lots on the subdivision with the knowledge and consent of the defendants. Why their financial ability should be questioned in one case and not in another of like kind is a discrimination not easily understood.

Complainants charge in their brief that defendants were moved to withhold their approval of the contracts because of the enormous increase in the value of the lots since the contract of agency was made. Whatever may have been the motive for their refusal, we are satisfied that their dealings lacked the candor and good faith which their agreement with the complainants demanded of them. For this reason the decree of the trial court must be reversed, and one entered in harmony with these conclusions. The complainants will recover their costs in both courts.

Petition for rehearing denied.

MICHIGAN SUPREME COURT.

LETTIE RATHMAN
v.

NEW AMSTERDAM CASUALTY COMPANY, Plff. in Err.

(— Mich. —, 152 N. W. 983.)

Insurance — misrepresentation — materiality.

1. That the holder of an accident policy who warranted that he had never made any claim, nor received any indemnity, for any accident, had received indemnity for injury to his knee, does not, as matter of law, show such a misrepresentation as will prevent recovery on the policy for his death by falling from a ship at sea.

Same — accident — disease contributing to accident.

2. No recovery can be had for the death of one falling from a ship at sea while suffering from hardened arteries, nephritis, heart trouble, and weakness affecting his mind, under a policy insuring against death by accident independent of all other causes,

Note. — For previous diseased condition as affecting liability under policy of accident insurance for death or injury from accident, see notes to *Stanton v. Travelers' Ins. Co.* 34 L.R.A. (N.S.) 445, and *Moon v. United Commercial Travelers*, 52 L.R.A. (N.S.) 1203. L.R.A.1916E.

which provides that the insurer shall not be liable for any loss caused or contributed to by disease, since the disease rendered the insured less able to care for himself, and therefore contributed to the loss.

(June 7, 1915.)

ERROR to the Circuit Court for Kent County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due under an accident insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. Kleinhans, Knappen, & Uhl, for plaintiff in error:

There is not sufficient testimony upon which a jury can find accidental death; the court should have directed a verdict, and later should have set aside the verdict of the jury and granted a new trial.

Sharpe v. Commercial Travelers' Mut. Acci. Asso. 139 Ind. 92, 37 N. E. 353; *Carnes v. Iowa State Traveling Men's Asso.* 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683; *Smouse v. Iowa State Traveling Men's Asso.* 118 Iowa, 436, 92 N. W. 53.

The accident was caused or contributed to by disease.

Manufacturers' Acci. Indemnity Co. v. Dorgan, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945; *Carr v. Pacific Mut. L. Ins. Co.* 100 Mo. App. 602, 75 S. W. 180; *White v. Standard Life & Acci. Ins. Co.* 95 Minn. 77, 103 N. W. 735, 884, 5 Ann. Cas. 83; *Ætna L. Ins. Co. v. Dorney*, 68 Ohio St. 151, 67 N. E. 254; *Travelers' Ins. Co. v. Selden*, 24 C. C. A. 92, 42 U. S. App. 253, 78 Fed. 285; *Commercial Travelers' Mut. Acci. Asso. v. Fulton*, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423.

Applicant has engaged that his answers are true, and if they are not, there is no insurance in force.

Hann v. National Union, 97 Mich. 513, 37 Am. St. Rep. 365, 56 N. W. 834; *Ketcham v. American Mut. Acci. Asso.* 117 Mich. 521, 76 N. W. 5; *Tobin v. Modern Woodmen*, 128 Mich. 161, 85 N. W. 472; *Moore v. Mutual Reserve Fund Life Asso.* 133 Mich. 526, 95 N. W. 573; *Bonewell v. North American Acci. Ins. Co.* 160 Mich. 137, 125 N. W. 59; *Kasprzyk v. Metropolitan L. Ins. Co.* 79 Misc. 263, 140 N. Y. Supp. 211; *McClain v. Provident Sav. & Life Assur. Soc.* 105 Fed. 834; *Doll v. Equitable Life Assur. Soc.* 71 C. C. A. 121, 138 Fed. 705; *Holabird v. Atlantic Mut. L. Ins. Co.* 2 Dill. 166, note, Fed. Cas. No. 6,587; *Ætna L. Ins. Co. v. France*, 91 U. S. 510, 23 L. ed. 401.

To impute knowledge of an agent to a principal, that knowledge must have been acquired in the course of his business.

Mechem, Agency, 2d ed. §§ 1809, 1848, 1850; Bonewell v. North American Acci. Ins. Co. 167 Mich. 274, 132 N. W. 1067, Ann. Cas. 1913A 847; Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234, 24 L. ed. 689; Merserau v. Phoenix Mut. L. Ins. Co. 66 N. Y. 274; Conway v. Phoenix Mut. L. Ins. Co. 140 N. Y. 79, 35 N. E. 420; Cook v. Standard Life & Acci. Ins. Co. 84 Mich. 12, 47 N. W. 568.

The representation as to injury was material.

Peterson v. Des Moines Life Asso. 115 Iowa, 668, 87 N. W. 397; McDermott v. Modern Woodmen, 97 Mo. App. 636, 71 S. W. 833; United Brethren Mut. Aid Soc. v. O'Hara, 120 Pa. 256, 13 Atl. 932; Van Cleave v. Union Casualty & S. Co. 82 Mo. App. 668; Metropolitan L. Ins. Co. v. McTague, 49 N. J. L. 587, 60 Am. Rep. 661, 9 Atl. 766; Caruthers v. Kansas Mut. L. Ins. Co. 108 Fed. 487; Cobb v. Covenant Mut. Ben. Asso. 153 Mass. 176, 10 L.R.A. 666, 25 Am. St. Rep. 619, 26 N. E. 230; Providence Life Assur. Soc. v. Reutlinger, 58 Ark. 528, 25 S. W. 835; Modern Woodmen v. Van Wald, 6 Kan. App. 231, 49 Pac. 782; Fidelity Mut. Life Asso. v. McDaniell, 25 Ind. App. 608, 57 N. E. 645; Mutual L. Ins. Co. v. Arhelger, 4 Ariz. 271, 36 Pac. 895; Brady v. United L. Ins. Asso. 9 C. C. A. 252, 20 U. S. App. 337, 60 Fed. 727.

Mr. Myron H. Walker, with Messrs. Holmes & Holmes and Don. E. Minor, for defendant in error:

Forfeitures are not favored.

Bonenfant v. American F. Ins. Co. 76 Mich. 663, 43 N. W. 682; Lyon v. Travelers' Ins. Co. 55 Mich. 146, 54 Am. Rep. 354, 20 N. W. 829.

The contract having been prepared by the insurers, it should be construed most strongly against them.

19 Am. & Eng. Enc. Law, 2d ed. 42; Clement v. New York L. Ins. Co. 42 L.R.A. 253-261, and notes, 101 Tenn. 22, 70 Am. St. Rep. 650, 46 S. W. 561; Massachusetts Ben. Life Asso. v. Robinson, 104 Ga. 277, 42 L.R.A. 261, 30 S. E. 918; Miner v. Michigan Mut. Ben. Asso. 63 Mich. 343, 29 N. W. 852.

Where death may be attributable to either suicide or accident, the presumption of law is against suicide.

Niblack, Ben. Soc. §§ 377, 727; Burnham v. Interstate Casualty Co. 117 Mich. 142, 75 N. W. 445; Ingersoll v. Knights of Golden Rule, 47 Fed. 272; 4 Joyce, Ins. § 3773; Wright v. Sun Mut. Ins. Co. 29 U. C. C. P. 221; Travellers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; Leman v. Manhattan L. Ins. Co. 46 La. Ann. 1189, 24 L.R.A. 589, 49 Am. St. L.R.A. 1915E.

Rep. 348, 15 So. 388; Mallory v. Travelers' Ins. Co. 47 N. Y. 52, 7 Am. Rep. 410; Washburn v. National Acci. Soc. 32 N. Y. S. R. 34, 10 N. Y. Supp. 366; Freeman v. Travelers' Ins. Co. 144 Mass. 572, 12 N. E. 372; Whitlatch v. Fidelity & C. Co. 78 Hun, 262, 28 N. Y. Supp. 951; Coburn v. Travelers' Ins. Co. 145 Mass. 226, 13 N. E. 604; Furbush v. Maryland Casualty Co. 133 Mich. 479, 95 N. W. 551; Cronkhite v. Travelers' Ins. Co. 75 Wis. 116, 17 Am. St. Rep. 184, 43 N. W. 731; 4 Cooley, Briefs on Ins. p. 3255, and cases.

The burden rested upon defendant to prove suicide when offered as a defense.

Ruterbusch v. Supreme Court, 1 O. F. 162 Mich. 213, 128 N. W. 288; Ferris v. Court of Honor, 152 Mich. 322, 116 N. W. 448; Burnham v. Interstate Casualty Co. 117 Mich. 149, 75 N. W. 445; John Hancock Mut. L. Ins. Co. v. Moore, 34 Mich. 45; Cronkhite v. Travelers' Ins. Co. 75 Wis. 116, 17 Am. St. Rep. 184, 43 N. W. 731; Travellers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; Mallory v. Travelers' Ins. Co. 47 N. Y. 52, 7 Am. Rep. 410; Peck v. Equitable Acci. Asso. 52 Hun, 255, 5 N. Y. Supp. 215; Freeman v. Travelers' Ins. Co. 144 Mass. 572, 12 N. E. 372; Richards v. Travelers' Ins. Co. 89 Cal. 170, 23 Am. St. Rep. 455, 26 Pac. 762; Provident L. Ins. & Invest. Co. v. Martin, 32 Md. 310; 3 May, Ins. p. 1225; McGlinchey v. Fidelity & C. Co. 80 Me. 251, 6 Am. St. Rep. 190, 14 Atl. 13; North American Life & Acci. Ins. Co. v. Burroughs, 69 Pa. 43, 8 Am. Rep. 212; Standard Life & Acci. Ins. Co. v. Thornton, 49 L.R.A. 116, 40 C. C. A. 564, 100 Fed. 582; Travelers' Ins. Co. v. Randolph, 24 C. C. A. 305, 47 U. S. App. 260, 78 Fed. 754.

The warranty that assured is in "good health" is comparative, and not absolute.

Manhattan L. Ins. Co. v. Carder, 27 C. C. A. 344, 42 U. S. App. 659, 82 Fed. 986; Brown v. Metropolitan L. Ins. Co. 65 Mich. 306, 8 Am. St. Rep. 894, 32 N. W. 610; Hann v. National Union, 97 Mich. 513, 37 Am. St. Rep. 365, 56 N. W. 834; Plumb v. Penn Mut. L. Ins. Co. 108 Mich. 94, 65 N. W. 611; Pudritzky v. Supreme Lodge, K. H. 76 Mich. 428, 43 N. W. 373.

The truth or falsity of the applicant's answers to questions regarding medical attendance is a question for the jury.

3 Cooley, Briefs on Ins. p. 2169.

Notice to the agent is notice to the principal, and taking the premium and issuing the policy waive the provisions as to the agent's authority.

Peoria, M. & F. Ins. Co. v. Hall, 12 Mich. 202; Michigan Shingle Co. v. State Invest. & Ins. Co. 94 Mich. 397, 22 L.R.A. 319, 53 N. W. 945; 3 Trask's Mich. Brief and Notes,

p. 80; *Minnock v. Eureka F. & M. Ins. Co.* 90 Mich. 236, 51 N. W. 367; *Richards v. Washington F. & M. Ins. Co.* 60 Mich. 420, 27 N. W. 586; *Kotwicki v. Thuringia Ins. Co.* 134 Mich. 82, 95 N. W. 976; *Rediker v. Queen Ins. Co.* 107 Mich. 224, 65 N. W. 105; *Kitchen v. Hartford F. Ins. Co.* 57 Mich. 142, 58 Am. Rep. 344, 23 N. W. 616.

The issuance of the renewal receipt was merely a continuance of the original contract.

Mutual Ben. L. Ins. Co. v. Robertson, 59 Ill. 123, 14 Am. Rep. 8; *Northwestern Mut. L. Ins. Co. v. Amerman*, 119 Ill. 329, 59 Am. Rep. 799, 10 N. E. 225; *Aurora F. & M. Ins. Co. v. Kranich*, 36 Mich. 289; *Farley v. Spring Garden Ins. Co.* 148 Wis. 622, 134 N. W. 1054; *Bemis v. Pacific Coast Casualty Co.* 125 Minn. 54, 145 N. W. 622; *Hilt v. Metropolitan L. Ins. Co.* 110 Mich. 517, 68 N. W. 300.

Steere, J., delivered the opinion of the court:

This action was brought by plaintiff as the beneficiary named in an accident insurance policy issued by defendant to her husband, Paul Rathman, who, on the evening of July 10, 1912, lost his life by falling or jumping overboard from the steamer *Kaiser Wilhelm II.*, while *en route* between Bremen and New York. No question is raised as to the pleadings. Her declaration is in assumpsit, upon the policy of insurance according to prescribed form. Defendant's plea is the general issue, with special notices which raise the question of whether death of the assured, if proven, was accidental, or caused or contributed to by disease, illness, or suicide, with the affirmative defense that breaches of warranties in deceased's application for insurance indorsed upon the policy and made part of the contract of insurance rendered the same void. A trial of said cause in the circuit court of Kent county before a jury resulted in her recovering a verdict and judgment for the full amount which could be claimed under the policy, and, after motion for a new trial, which was refused, defendant removed the case to this court for review upon a writ of error containing many assignments.

Defendant's main contention is directed against refusal of the court to direct a verdict against plaintiff in the first instance, followed by denial of its motion for a new trial; it being urged and argued that there was in the case no evidence to support the verdict, which was contrary to and against the great weight of evidence, because it was not shown death of the insured was accidental, while the evidence disclosed that the accident, if any, was caused or con-

tributed to by disease, and there were material breaches of the warranties contained in the schedules indorsed on the policy.

In outline, it was disclosed by the evidence that on March 16, 1910, the date of the policy in question, deceased, at the solicitation of one La Bare, who was defendant's general agent for the state of Michigan, made application for accident insurance; that upon such application La Bare countersigned, as special agent, and delivered to him, the policy in question, at the city of Grand Rapids, in the state of Michigan, where both resided; that the application signed by deceased was forwarded to the home office of the company and there approved. Statements made by defendant in said application were copied upon said policy, and upon renewals thereof, made in 1911-12, were by express terms made a part of the same. By the terms of his application assured warranted all statements contained in it to be true, in the following language: "(14) This agreement is made in consideration of the premiums and of the statements contained in the said schedule indorsed hereon and made a part hereof, which statement the assured makes on acceptance of this policy and warrants to be true, and this policy and schedule contain the entire contract except as the same may be affected by any table of rates and classification of risks filed by the company with the insurance department of the state wherein the policy is issued or delivered."

The policy was for \$3,000, and provided for payment of the full sum in case of loss of life, indemnities to be doubled if the loss was sustained by assured riding as a passenger in a public conveyance, with a further provision for increased indemnity if the policy was renewed continuously.

The provisions as to loss of life and notice of any loss are as follows: "Loss of life shall be deemed to mean death of the assured from bodily injuries not intentionally self-inflicted, which, independently of all other causes, are effected solely and exclusively by accidental means, resulting in ninety days of the event causing such bodily injuries, or resulting during a period of total disability as herein defined, and within two hundred weeks of the event causing such bodily injuries as aforesaid."

For notice of loss are as follows: "Written notice of any loss for which claim is to be made, with full particulars thereof, must be given to the company at its home office in New York city by the assured, the beneficiary, or legal representative, within twenty days from the event causing the injury, unless such notice shall be shown not to have been reasonably possible. Affirmative proof of death or of loss of hand

or foot or of sight or of duration of any disability must also be furnished to the company at its home office in New York city within sixty days of the time of death or of loss of hand or foot or of sight or of the termination of disability. The company agrees to pay the indemnity due hereunder within sixty days after receipt at the home office of the company of due proof of such claim."

The policy expressly provided that the insurer should not be liable for any loss caused or contributed to by suicide, illness, or disease, or by disappearance, whether assured be sane or insane.

By their terms the renewal certificates issued to deceased expressly stated that the insurance was continued in force subject to all such conditions and warranties, both written and printed, whether indorsed upon the policy or attached thereto, provided the statements and warranties contained in such policy indorsed thereon or attached thereto remained and were true at the date of issuing the renewal certificates, and nothing had occurred, known to assured, rendering the hazard greater or different than originally represented.

Upon her return to Grand Rapids, plaintiff notified La Bare, defendant's special agent, of the time and manner of her husband's death, and through him presented to the company proofs of loss. Payment was refused on the grounds before referred to, and also because notice was not given nor proofs of loss furnished according to the terms of the policy.

The statements in insured's application which defendant claims were false are as follows:

"Statement 14. I have never made claim nor received indemnity for any accident, disease, or illness, except as follows: No exceptions."

"Statement 16. My habits of life are correct and temperate; my hearing and vision are unimpaired; I have never been afflicted with hernia, articular rheumatism, cataract, any disease of the eye, nor insanity, and I am in sound condition mentally and physically, except as follows: No exceptions."

"Statement 17. I have not been disabled nor have I received medical or surgical attention during the past five years, except as follows: No exceptions."

In support of its claim that said statement 14 was untrue, defendant points out the following in plaintiff's affidavit as beneficiary, making proofs of loss: "Had deceased ever received indemnity from a life, health, benefit, or accident insurance company, association, or order? (A) Thirty dollars from Travelers, of Hartford, Connecticut. Injury to knee."

L.R.A.1915E.

When and under what circumstances this was paid is not shown. La Bare, defendant's general agent, who assisted plaintiff with her proofs of loss, testified that deceased carried with him a policy in the Hartford for several years. Plaintiff testified her husband did not tell her about his business affairs, and she had no knowledge of the collection of \$30 as stated. Manifestly the fact alleged to have been misrepresented has no relation to the cause of death. Under the circumstances of this case, it cannot be said, as a matter of law, that this amounted to a material and prejudicial misrepresentation which necessarily worked a forfeiture of the policy. At most, it became a matter for the jury. *Hann v. National Union*, 97 Mich. 513, 37 Am. St. Rep. 365, 56 N. W. 834. The answers to statements 16 and 17 are more directly related to the cause of loss and involve more serious consideration.

It is shown both by plaintiff's testimony and proofs of loss that deceased had experienced ill health and received medical attention at times for several years before his death, although the testimony wavers somewhat as to the nature and extent of his troubles. He was an old resident of Grand Rapids, sixty-five years of age, an officer of the Grand Rapids Brewery Company, in charge of its bottling department, and had been one of its directors for over twenty years. His health had been such that in 1910 he visited Europe and took baths at Bad-Neuheim, Germany, from which he was benefited. When abroad he was treated by, and consulted with, two physicians, Dr. Pappe, of Baden Neuheim, and Dr. (Professor) Mattias, of Cologne and Marburg. In December, 1911, at his home in Grand Rapids, he suffered a severe illness, accompanied by profuse bleeding at the nose, and when Dr. Hutchinson, his physician, was called, was excessively weak, breathing with difficulty, and his radial pulse gone. He revived, under the doctor's treatment, from this attack, and his general condition improved for a time. In his certificate, which was part of plaintiff's proofs of loss, the doctor certifies as follows:

October 12, 1912. This is to certify that I have treated Mr. Paul Rathman, deceased, more or less for the past four or five years, and quite constantly during the last year of his life. His illness was of such a nature that at times he had great difficulty in breathing; during this time more or less stupor prevailed; during these attacks there were periods of mental aberration, during which time he was certainly irresponsible.

R. J. Hutchinson, M. D.

Upon the trial Dr. Hutchinson testified that prior to the serious illness of 1911 he had not visited deceased professionally at his home, but had treated him at different times for four or five years as he would "any other person with some minor ailment;" that insured recovered from the serious attack referred to, and later made visits to the doctor's office, became better again, and his general condition improved; that he was, however, weak—not well, and during the spring the doctor gave him a tonic to build him up, but did not think he ever fully recovered. The doctor appears to refrain from naming his patient's ailments, whether minor or major, and seemed reluctant to admit on cross-examination that he had not fully recovered.

On April 27, 1912, deceased, accompanied by his wife, started for Europe, going to Bad-Neuheim, where he again took baths. While abroad he became better at times and traveled some, but finally, while at Berlin, his condition became serious, and a physician was called to attend him. On July 8th he started, accompanied by plaintiff, for Bremen to take ship for home. During his stay in Europe he was again treated by Dr. Mattias, at Marburg, where he remained for two weeks, returning to Neuheim again for baths. The physician who attended him in Berlin accompanied and cared for him until on board the boat at Bremen. His condition had then become such that it was necessary to carry him, and he was moved in an ambulance. On board the boat he was out of his head part of the time,—for about three hours the first night,—had difficulty in breathing, his heart bothered him, and he was at times propped up in bed in his stateroom, where he remained, not being out of his berth except for temporary necessities. He was rational at times and at times out of his head, said little, but manifested an anxiety to get home. They occupied an outside stateroom which opened upon a short passageway leading out to the open deck, around which was a railing. On the evening of July 10th, at about 10:05 o'clock, assured disappeared overboard, under the following circumstances as stated by plaintiff in her proofs of loss, and confirmed by her testimony at the trial:

"While lying in my berth, I heard the door of our cabin close, and I immediately followed him to the deck (he was clad in his nightshirt) just in time to grab his hand, his body being on outside of railing, and the next thing I heard was a splash in the water. We were returning home from Europe, left Bremen July 9, 1912."

She testified that at the time she caught him he was over the railing, holding by

his hand which she seized, but was torn from her before the steward, who came running when she screamed, could reach her; that the night was foggy and the sea then rough.

Plaintiff testified, "No physician that we ever consulted ever made any statement as to what Mr. Rathman's trouble was," although the following appears in her affidavit in proofs of loss: "What diseases or ailments did the deceased have on or about July 10, 1912? A. Specialists claimed he had kidney trouble."

Dr. (or Professor) Max Mattias, who made an affidavit for her proofs of loss as "attending physician," stated in said affidavit that he was director of the Medical University clinic at Marburg; that he examined deceased in private clinic at Cologne in 1910 and at Marburg in 1912; treated him in May, June, and July, 1912; that he found him afflicted with chronic nephritis, uremia, arterio-sclerosis, and hypertrophy of the heart; that the duration of his last illness was "several years," the predisposing cause being arterio-sclerosis. Dr. Vandenburg, of Grand Rapids, testified as an expert that chronic nephritis is of long duration, always a few years and, as a rule, many years; that "it takes a long time to get a hypertrophied heart;" that in some forms and stages of nephritis, albumen is not found in the urine; while Dr. Hutchinson testified that nephritis could not exist without showing albumen in the urine; that he made careful examination of assured in December, 1911, and found no trouble with the urine; that there is no way of telling, from an examination, how long standing nephritis may have been, and "it would be guesswork how long that attack had lasted." These matters upon which the testimony is in conflict would, of course, present questions for a jury if controlling; but, aside from this somewhat conflicting evidence of experts at the trial, the undisputed evidence produced by plaintiff shows that before, and at the time, assured was taken on board the ship, he was very ill, in a serious condition requiring that he be moved in an ambulance, his heart troubling him and breathing with difficulty, his mind affected,—"out of his head" at times,—confined to his stateroom and bed on board the boat, stricken with nephritis and its complications, the same disease with which the expert whom he consulted on both his trips to Europe found him afflicted in a chronic condition, two years previous.

This is purely an accident policy, covering loss of life "from bodily injuries, not intentionally self-inflicted, which independently of all other causes are effected solely and exclusively by accidental means,"

and it is further plainly provided in the contract of insurance that the insurer shall not "be liable for any loss caused or contributed to by illness or disease or disappearance or by suicide, whether the assured be sane or insane." These provisions applied to the facts leading up to and surrounding the assured's death present the most meritorious and serious questions arising in the case.

Incidental to and bearing directly upon this feature is the statement made a part of the policy of the insured, warranted to be true, and reaffirmed by accepting a renewal certificate in March, 1912, that he had not been disabled nor received medical or surgical attention during the past five years. The materiality of the statement is obvious in this case. That such statements in assured's application, when attached to and made part of the policy, are affirmative warranties in the contract, in accident as well as life insurance, is well settled. May, Ins. 4th ed. §§ 158, 159; Bonewell v. North America Acci. Ins. Co. 167 Mich. 274, 132 N. W. 1067, Ann. Cas. 1913A, 847.

It must be conceded as largely conjectural whether assured's death was accidental or intentional and suicidal. There are evidential facts in the case persuasive of the latter view, while the legal presumptions against self-destruction are in favor of the former. Conceding, however, that it was accidental, plaintiff cannot recover if the accident was caused or contributed to by illness or disease. The trial court so held, but adopted the view that this was an issue of fact for the jury.

The burden of proof was upon the plaintiff to prove accidental death within the terms of the policy. The question of remote and proximate cause as applied in negligence cases is not controlling under the provisions of this contract of insurance. It may be said that the proximate cause of death was falling from the ship into the ocean and drowning; but if there was a causal relation between the concededly serious illness with which the insured was then suffering, and the fatal event, even if accidental, there can be no recovery.

The attending facts and circumstances of assured's death, and events leading up to it, are established by plaintiff's proofs, and undisputed. There was no question as to the proximate cause of death and positive proof of debilitating disease, apparently to a point of helplessness, which seriously impaired both his natural strength and judgment, and the free, full, and normal exercise of his faculties in protecting himself from harm or accident, particularly when in a strange place, on shipboard, traveling by sea. While so traveling, he had L.R.A.1915E.

been by his illness confined to his stateroom and berth,—feeble, distressed in breathing, his heart troubling him, and his mind unbalanced at times. He had then been confined to his bed most of the time for "about twenty days" with disease of the kidneys designated by his physicians "chronic nephritis," complicated by enlargement of the heart and uremia, a condition resulting from retention in the blood of waste products of the system which would normally be eliminated by the kidneys. About 10 o'clock of the second night out, which was rough, dark, foggy, and very damp, just after plaintiff had lain down and closed her eyes, he arose from his berth and slipped out upon deck, followed immediately by plaintiff, who heard him close the door, and when she overtook him he was outside the deck railing, and as she seized his hand it was torn from her, and "there was a splash in the water" as he disappeared. The facts are undisputed, and the conclusion is unavoidable that this catastrophe, whether intentional or not, had causal connection with, and was attributable in whole or in part to, his illness and the disease which so impaired both his normal mental and physical ability to guard himself against accidents.

In the case of Carr v. Pacific Mut. L. Ins. Co. 100 Mo. App. 602, 75 S. W. 180, plaintiff, while ill of la grippe in a hospital, suffering with a high fever, and delirious, escaped from his nurse, who had left him for a few moments, and jumping out of a window fell a distance of 20 feet, receiving serious injuries. He brought action against defendant on an accident policy issued by it to him, which by its terms did not cover or insure against "injuries, fatal or otherwise, received while or in consequence of being or having been under the influence of, or affected by, or resulting directly or indirectly, in whole or in part, from, intoxicants, anesthetics, etc., . . . or any disease or bodily infirmity, . . ." etc. In deciding that under this policy, as applied to the undisputed facts, there should have been a directed verdict for defendant, the court said in part: "We can appreciate the theory that if the individual is sick, and that he merely suffers from an accident which happens to him while sick, but is not brought about as a result of such sickness, that the sickness is neither the proximate nor remote cause of his injury. . . . But the question presented under the terms of the policy is not whether the plaintiff's sickness was the proximate and immediate cause of his injury, but whether the injury was directly or indirectly caused by his disease. . . . For the reasons given, we are of the opinion that

plaintiff's injury was the direct result of his sickness; and whether it was or was not is immaterial, for it cannot be denied that it was not at least the indirect result of his condition. In either event the defendant would not be liable under the terms of the policy."

We are impelled to conclude it affirmatively appears from the undisputed evidence in this case that the assured's death was not occasioned by an accident independent of all other causes, but was contributed to by, and the result of, the illness or disease with which he was afflicted.

The judgment is therefore reversed, without a new trial.

NEW YORK COURT OF APPEALS.

JOHN L. SHULTZ et al., Respts.,
v.
C. H. QUEREAU COMPANY et al., Appts.
JOSEPH M. TALCOTT, Respt.,
v.
SAME, Appts.
(210 N. Y. 257, 104 N. E. 621.)

Lien — highway improvement — coal furnished contractor.

Coal sold to a highway contractor and used to generate steam to propel road roll-

Note. — Mechanics' lien: materials wholly or partially consumed in process of work, but not becoming a part of the structure.

Supplementing the notes in 36 L.R.A. (N.S.) 866, and 51 L.R.A. (N.S.) 1040.

As to mechanics' lien upon premises for an improvement not placed thereon, but having a beneficial connection therewith, see the note to *Speer Hardware Co. v. Bruce Bros.* 42 L.R.A. (N.S.) 354.

As to the nature of labor or materials which will support an action upon a contractor's bond, see the note to *Standard Boiler Works v. National Surety Co.* 43 L.R.A. (N.S.) 162.

Generally.

As shown in the earlier notes to *B. F. Avery & Sons v. Woodruff*, 36 L.R.A. (N.S.) 866, and *Moritz v. Lewis Constr. Co.* 51 L.R.A. (N.S.) 1040, the present question is entirely distinct from the one presented where materials furnished are not used in any way. The latter question is discussed in the note to *Pittsburgh Plate Glass Co. v. Leary*, 31 L.R.A. (N.S.) 746.

The cases involving appliances which are plainly a part of the contractor's equipment are also excluded. This statement refers to machinery, tools, and appliances which are unquestionably a part of such equipment, L.R.A. 1915E.

ers and traction engines used on the contract is not within the operation of a statute giving a lien to any person furnishing material to a contractor for "the construction of a public improvement," upon the moneys due him by the state.

(February 24, 1914.)

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Special Term for Onondaga County in favor of plaintiffs in consolidated actions to foreclose mechanics' liens. Modified and affirmed.

The facts are stated in the opinion.

Mr. William F. Rafferty, for appellants:

It was error for the court to allow the lien for items consisting of coal.

Cincinnati, R. & M. R. Co. v. Sherea, 36 Ind. App. 315, 73 N. E. 293; *Mossburg v. United Oil & Gas Co.* 43 Ind. App. 465, 87 N. E. 992; *McAuliffe v. Jorgenson*, 107 Wis. 132, 82 N. W. 706; *Stewart-Chute Lumber Co. v. Missouri P. R. Co.* 33 Neb. 29, 49 N. W. 769; *Perrault v. Shaw*, 69 N. H. 180, 76 Am. St. Rep. 160, 38 Atl. 724; *Standard Oil Co. v. Lane*, 75 Wis. 636, 7 L.R.A. 191, 44 N. W. 644; *Baschor & Co. v. Baltimore & O. R. Co.* 65 Md. 99, 3 Atl. 285; *Knapp v. St. Louis, K. C. & N. R. Co.* 6 Mo. App. 205; *Central Trust*

and which, in the nature of things, are sold on the contractor's credit. This distinction between materials consumed and those which become a part of the contractor's equipment is well illustrated by *Johnson v. Starrett*, 127 Minn. 138, L.R.A. 1915B, 708, 149 N. W. 6, allowing a lien for coal and gasoline for the generation of power, dynamite for blasting, lubricants, lighting materials and supplies, and materials for the erection of a tool house, but denying a lien for supplies for, and repairs to, and parts of, excavating machinery, upon the ground that they were merely contributions to the personal property of the contractor.

Materials for temporary purposes, such as, for instance, lumber for concrete forms or false work, may or may not be part of the contractor's equipment. It is quite possible, and indeed it often occurs, that such materials are so used as to render them valueless for further undertakings. And this would seem to be the only proper test to determine whether the materials are lienable, if the law is to keep step with the progress that has been made in the building methods. Concrete forms are as familiar sights now as were scaffolds for brick and stone work comparatively a few years ago, and false work for iron bridges and the like now appear, whereas bridges were built entirely of wood when the legislatures began to turn to the question of mechanics'

Co. v. Texas & St. L. R. Co. 27 Fed. 178; Re Waters-Pierce Oil Co. 23 Fed. 703; Dudley v. Toledo, A. A. & N. M. R. Co. 65 Mich. 655, 32 N. W. 884; Mahone v. Big Flat Gravel Min. Co. 76 Cal. 578, 18 Pac. 772; Gordon Hardware Co. v. San Francisco & S. R. R. Co. 86 Cal. 620, 25 Pac. 125; Rapauno Chemical Co. v. Greenfield & N. R. Co. 59 Mo. App. 6.

Mr. George B. Dolsen also for appellants:

Mr. E. C. Miller, for respondents:

Plaintiffs Shultz and De Witt are entitled to a lien for coal furnished for the construction of the state roads in question to the amount of \$207.58.

Schaghticoke Powder Co. v. Greenwich & J. R. Co. 183 N. Y. 306, 2 L.R.A.(N.S.) 288, 111 Am. St. Rep. 751, 76 N. E. 153,

liens. Nearly every man who owns a pick, shovel, and crowbar is nowadays going into the contracting business, and many of them are of slight personal responsibility. The practical question underlying the construction of mechanics' lien statutes is whether the man who owns a building under construction by a financially or otherwise irresponsible contractor is to pay for materials which are consumed in the work, or whether a materialman who in good faith furnishes such materials on the credit of the owner and in reliance upon the efficacy of the mechanics' lien statute, where possibly he would not have furnished them upon the responsibility of the contractor alone, is to be denied the protection which the law broadly professes to give him, merely because his mind was not trained to indulge in such unsubstantial distinctions as that which constitutes the basis of the decision in SHULTZ v. C. H. QUEREAU CO.

Wisconsin appears to have struck the right note in holding that the materials are lienable to the extent to which their value is depreciated by use. This position of the Wisconsin courts is discussed in the earlier notes in 36 L.R.A.(N.S.) 866, and 51 L.R.A.(N.S.) 1040.

Consistently with its decision in Moritz v. Sands Lumber Co. (Moritz v. Lewis Constr. Co.) 158 Wis. 49, 51 L.R.A.(N.S.) 1040, 146 N. W. 1120, that lumber used for temporary purposes is lienable to the extent that its value is depreciated by use,—the Wisconsin supreme court subsequently in Wiedenbeck-Dobelin Co. v. Mahoney, 160 Wis. 641, 152 N. W. 479, proceeded upon the assumption that lumber used for concrete forms was not lienable where it appeared that the forms were removed and remained fit for use for construction of other buildings, thus becoming a part of the contractor's equipment, instead of materials used in the work.

While the position of the Wisconsin court finds no support in Builders' Material Co. v. Johnson, 158 Ill. App. 411, denying a lien for materials furnished to a contractor and used by him in making concrete molds, this case is not necessarily L.R.A.1915E.

5 Ann. Cas. 443; Zipp v. Fidelity & D. Co. 73 App. Div. 20, 76 N. Y. Supp. 386; Hazard Powder Co. v. Byrnes, 21 How. Pr. 189; Gallagher v. Karns, 27 Hun, 375; Beals v. Fidelity & D. Co. 76 App. Div. 526, 78 N. Y. Supp. 584, affirmed in 178 N. Y. 581, 70 N. E. 1095; Troy Public Works Co. v. Yonkers, 207 N. Y. 81, 44 L.R.A.(N.S.) 311, 100 N. E. 700; Upson v. United Engineering & Contracting Co. 72 Misc. 541, 130 N. Y. Supp. 726.

Collin, J., delivered the opinion of the court:

The actions are to foreclose mechanics' liens. The single question requiring discussion is: Is coal sold to a contractor and builder of a state highway, and used in

inconsistent with that position because it appears that the lumber was removed by the contractor after the work was completed, and probably became a part of his equipment, no apparent effort having been made to claim a lien to the extent of the depreciation of the value. It may be further noted that in this case it was held that a statute providing that no lien should be defeated because of lack of proof that the material, after the delivery, actually entered into the construction, operated merely to relieve the materialman in the first instance from the burden of proving that the material actually entered into the construction of the building, and still left it possible to defeat the lien by proving that the material did not become a part of the completed structure.

It is also shown in the earlier notes that the tendency in Missouri is toward the attitude of the Wisconsin cases. A recent Missouri case holds that where a materialman furnishes materials for a building, in good faith and with reasonable cause to believe that all the materials are necessary and are to be used, he is entitled to a lien even where, by defaults and delinquencies of the contractor, more materials are wasted than should have been. Hydraulic Press Brick Co. v. Green, 177 Mo. App. 308, 164 S. W. 250.

On the authority of Kennedy v. Com. 182 Mass. 480, 65 N. E. 828, which is cited in the note in 36 L.R.A.(N.S.) 866, but without further discussion, the Massachusetts court has subsequently held that one who furnished lumber for concrete forms and netting to screen sand could not successfully invoke a statute authorizing the highway commission to retain out of sums due the contractor enough to pay for labor and materials contracted for on account of the work. Thomas v. Com. 215 Mass. 369, 102 N. E. 428.

Fuel, lubricants, and explosives.

Supplementing the notes in 2 L.R.A.(N.S.) 288; 36 L.R.A.(N.S.) 866; and 51 L.R.A.(N.S.) 1040.

generating steam in the boilers of road rollers and traction engines used on the contract, materials furnished for the construction of the highway within the meaning and intent of § 5 of the lien law (Consol. Laws, chap. 33)?

Section 5 is: "A person performing labor for or furnishing materials to a contractor, his subcontractor or legal representative, for the construction of a public improvement pursuant to a contract by such con-

tractor with the state or a municipal corporation, shall have a lien for the principal and interest of the value or agreed price of such labor or materials upon the moneys of the state or of such corporation applicable to the construction of such improvement, to the extent of the amount due or to become due on such contract, upon filing a notice of lien as prescribed in this article."

We have decided that dynamite used in

As to whether lubricants, fuel, and explosives furnished to a contractor will support an action upon his bond, see the note to *Standard Boiler Works v. National Surety Co.* 43 L.R.A.(N.S.) at page 187.

There is an uncertain something in the distinction made in *SHULTZ v. C. H. QUEREAU Co.* between explosives and fuel. Certain it is that the courts must stop somewhere. The *QUEREAU CASE* shows that New York, along with some other jurisdictions, has chosen to stop on the border line between explosives and fuel, upon the theory that the explosives used in blasting are applied directly to the earth removed, while the fuel is furnished merely as an adjunct to a steam shovel which, as an article of substance, is not applied to the construction, but becomes a part of the contractor's equipment. The fact that the steam shovel in which the coal was consumed was not a part of the contractor's equipment would not, of itself, seem to be a valid reason for denying a lien for the coal, else consistency would demand that the man who operates the steam shovel could not have a lien for his wages, while the man who did the blasting might have. The distinction, if any substantial distinction exists, rests in the fact that explosive is used directly in contact with the land, while the coal is indirectly a means through which like work is done. Now, ignoring the fact that the steam shovel is a part of the contractor's equipment, a fact which is pertinent only for the purpose of ascertaining the lienability of the steam shovel itself, it would appear that if the coal is not lienable, no lien could be had for the fuses by means of which the blast was exploded, for the fuses are just as far removed from the result of the explosion as is the coal from the work of excavation.

Then, again, suppose the excavating machine had been operated by hand power instead of by steam, is there any doubt that the men who furnished the power for the same would be entitled to a lien for their wages? Why, then, should there be no lien for a substance which science and genius have made a substitute for hand power?

It may also be said that the principal reason underlying a strict construction of lien statutes looks to the protection of the owner of the premises. No such reason for a strict construction obtains in *SHULTZ v. L.R.A.1915E.*

C. H. QUEREAU Co., where the lien is claimed under a statute giving persons who furnish materials for the construction of a public improvement, a lien for the agreed price of such labor and materials upon the money of the state or of the municipal corporation, "to the extent of the amount due or to become due on such contract." The quoted provision protects the municipality against claims in excess of the contract price, and therefore the amount of its liability is not affected by the number of claimants or the aggregate amount of their claims, and the hackneyed reason for strict construction does not apply.

Without discussion the Massachusetts court in *Thomas v. Com.* 215 Mass. 369, 102 N. E. 428, held that one who furnished coal to a contractor for the operation of a steam roller on highway work could not successfully invoke a statute authorizing the highway commission to retain out of funds due the contractor enough to pay for the labor and materials contracted for on account of the work. The court reaches its conclusion on the authority of *George H. Sampson Co. v. Com.* 202 Mass. 326, 88 N. E. 911, which makes a distinction similar to that made in *SHULTZ v. C. H. QUEREAU Co.*, as is shown in the note to *Standard Boiler Works v. National Surety Co.* 43 L.R.A. (N.S.) 162, dealing with the question of the nature of labor or materials which will support an action upon the contractor's bond, wherein the *Sampson Case* is cited.

On the other hand, the distinction made in the *QUEREAU CASE* is vigorously criticized in *Johnson v. Starrett*, 127 Minn. 138, L.R.A. 1915B, 708, 149 N. W. 6, holding that coal and gasoline for generation of power, dynamite for blasting, lubricants, lighting materials and supplies, and materials for the erection of a tool house furnished excavating contractors, are lienable under the Minnesota statute providing that whoever contributes to the improvement of real estate by performing labor or furnishing skill, material, or machinery for the erection of any building or for excavating the same shall have a lien upon the land for the price or value of such contribution. In reaching its conclusion, the court said: "It is said that these materials were not furnished to excavate defendant's premises or for them, but, on the contrary, for use in and as a part of the plant and equip-

breaking up frozen earth required by a construction contract to be excavated, so that it could be handled by means of a steam shovel, was material furnished for the improvement of real property, and its furnishing a lawful subject of a lien within the meaning of § 3 of the lien law. *Schaghticoke Powder Co. v. Greenwich & J. R. Co.* 183 N. Y. 306, 2 L.R.A.(N.S.) 288, 111 Am. St. Rep. 751, 76 N. E. 153, 5 Ann. Cas. 443. We have also held that the rent of a

steam shovel leased to the contractor for use and used in the construction of a public improvement was not the lawful subject of a lien within § 5 already quoted. *Troy Public Works Co. v. Yonkers*, 207 N. Y. 81, 44 L.R.A.(N.S.) 311, 100 N. E. 700. While the line of demarcation between these two decisions is not broad, it is real and indestructible, and a clear definition of it will suggest, at least, the answer to the question presented.

ment of the contractors for the purpose of creating power, and therefore were not lienable. This contention, we think, is too restricted both as to facts and law. It ignores both the policy and settled construction of the statute, and also modern methods employed in performing building contracts. Both the coal and gasoline were materials, and both were components of the resultant achievement. Had the excavation and removal of the earth been done by manual labor, the right to a lien therefor would be undoubted, and we cannot differentiate such a case from one where the same result is reached by other and modern methods. The value of defendant's property was thereby enhanced, and it can make no difference that this was accomplished by the use of power obtained from materials furnished by the lien claimants instead of by common labor."

Attention is directed to *Indiana Powder Co. v. St. Louis, K. C. & C. R. Co.* 116 Mo. App. 364, 92 S. W. 150, denying the furnisher of powder to the owner of a quarry a lien upon a railroad upon which the stone quarried was used as ballast. This case was decided not upon the ground that the powder was not lienable, but upon the ground that the contract between the quarry owner and the railroad company did not indicate that the stone was to be used as ballast, or upon the railroad in any way, and that therefore the quarry owner was not a contractor, but bore the nature of a vendor. Such cases are therefore of no value in the present connection, and they bear a closer resemblance to cases dealing with a right to a lien for labor in preparing materials in manufactured form, which is discussed in a note to *Munroe v. Clark*, 30 L.R.A.(N.S.) 82.

Giant Powder Co. v. Oregon Western R. Co. 59 Or. 236, 117 Pac. 279, Ann. Cas. 1913C, 93, involved a lien sought to be enforced against a railroad for explosives furnished to a contractor, but no point appears to have been made as to the lienability of the explosives, and the opinion is devoted solely to the question whether a lien can be claimed against a railroad under a statute giving a lien for work or materials in the construction of any building, wharf, bridge, ditch, flume, tunnel, fence, machinery, aqueduct, or any structure or superstructure.
L.R.A.1915E.

Food for men and teams.

Supplementing the note in 15 L.R.A.(N.S.) 509.

As to whether food and supplies for men and teams of a contractor will support an action upon his bond, see the note to *Standard Boiler Works v. National Surety Co.* 43 L.R.A.(N.S.) at page 169.

Meals and lodging furnished the workmen on a building are not lienable under a statute giving a lien for materials furnished for construction and repair. *Van Horn Trading Co. v. Day*, — Tex. Civ. App. —, 148 S. W. 1129.

So, provisions furnished to a contractor are not materials within the meaning of a statute providing that every person furnishing material in the construction of a railroad shall have a lien upon the same for the material furnished. *Armour & Co. v. Western Constr. Co.* 36 Wash. 529, 78 Pac. 1106. The doctrine of this case was reaffirmed in a subsequent decision which held further that the legislature did not, by changing the title of the statute, which previously read "An Act Creating and Providing for the Enforcement of Liens for Labor and Material," so that it read "An Act Relating to Liens for Labor Performed, Material, Provisions, and Supplies Furnished,"—add any force to the word "material" as contained in the body of the act, so as to make it embrace provisions and supplies. *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. 869, modified on other grounds in 53 Wash. 237, 102 Pac. 766.

One who, under a contract with the owner of brickworks, boards workmen, does not furnish materials for making brick so as to give him a lien thereon, under a statute providing that if a person shall perform labor or furnish materials for making brick by virtue of a contract with the owner, he shall have a lien upon the kiln containing such brick for such labor and materials. *Perrault v. Shaw*, 69 N. H. 180, 76 Am. St. Rep. 160, 38 Atl. 724.

Attention is also directed to *R. Haas Electric & Mfg. Co. v. Springfield Amusement Park Co.* 236 Ill. 452, 23 L.R.A.(N.S.) 620, 127 Am. St. Rep. 297, 86 N. E. 248, holding that no mechanics' lien for meals and street car tickets can be charged against a property owner under his agreement to permit his lessee to place improvements on the property.
L. A. W.

The dynamite was applied directly to the earth which had to be removed so that the structure might be completed as planned. The removal of the earth was an essential part of the construction. The dynamite was furnished and used to effect, in part, by its direct action, that construction, and entered wholly into it. The construction primarily, and not mediately, absorbed and included it. It and the substances which in the process of construction took the place of the earth it released entered into the construction in the same sense and with the same reality, although it did not remain a visible part of the completed improvement.

It was not thus with the steam shovel. It, as an article or substance, was not applied to the construction, upon the completion of which it remained substantially as it was at the beginning, and ready to be taken to and used upon another undertaking. Its effects, and not it, were applied directly to the construction, which did not absorb or include it. It did not lose its identity nor cease to exist as a separate article. It promoted and aided in, but was not a material furnished for, the construction. The distinction we are here expressing was made clear by our decisions already mentioned.

Was the coal used to operate the steam rollers and traction engines to be considered as an adjunct to those machines or as materials furnished for the construction of the highway? While article 2 of the lien law, which contains § 5, should receive a liberal, it should not be given a forced and unnatural, construction, or be extended to a state of facts not fairly within its general scope. The facts underlying the decision that the furnishing of the dynamite in the Schaghticoke Case upheld a lien for its cost do not exist as to the coal furnished the contractor in this case. It was applied to the machines, and not directly to the highway, and they, and not it, absorbed it. Without stating further reasoning leading to the decision that the price of the coal in question was not a lawful subject for the liens, we refer to important decisions supporting that conclusion. In *George H. Sampson Co. v. Com.* 202 Mass. 326, 88 N. E. 911, the court, in holding that coal burned in engines used on the work to furnish power was not materials used in the construction of the work, said: "We are of the opinion that there is a plain distinction between materials so used and materials that enter directly into the work and become a part of it, or those that are

consumed by being applied directly to substances to be moved or changed to make a place for the structure, or be incorporated into it. Under statutes like that of Massachusetts, liens for coal so used have generally been denied." In *Thomas v. Com.* 215 Mass. 369, 102 N. E. 428, it was held, upon the authority of the *Sampson Co. Case*, supra, that coal used in operating the steam roller used in the construction of a state highway was not materials furnished for the construction of the highway. In *Barker & S. Lumber Co. v. Marathon Paper Mills Co.* 146 Wis. 12, 36 L.R.A. (N.S.) 875, 130 N. W. 866, the court, after deciding that the materials used in a cofferdam constructed specially to make possible the building of the dam contracted to be built, and which were, in effect, destroyed by their use in the cofferdam or subsequent use, were the lawful subject of a mechanics' lien (concerning which decision we express no opinion), used the language which we quote with approval: "It is certainly true that this doctrine must be carefully guarded, or it may be carried to extreme and fanciful lengths. Thus it might be argued that upon the same principle coal that is used in portable engines, oil that is used in the lubrication of building machinery, and even food which is eaten by laborers, are all consumed in the construction of the building, and hence are lienable materials. But all these things seem quite plainly distinguishable. They are at least one step further removed from the actual work of construction. They have neither physical contact nor immediate connection with the structure at any time. They are used only to facilitate and make possible the operation of tools, machinery, or men, which in their turn act upon the structure. The authorities are unanimous in holding that no lien accrues for such materials. *George H. Sampson Co. v. Com.* 202 Mass. 326, 88 N. E. 911; *Philadelphia v. Malone*, 214 Pa. 90, 63 Atl. 539; *Standard Oil Co. v. Lane*, 75 Wis. 636, 7 L.R.A. 191, 44 N. W. 644; *Luttrell v. Knoxville, L. F. & J. R. Co.* 119 Tenn. 492, 123 Am. St. Rep. 737, 105 S. W. 565."

The judgments of the Appellate Division and Special Term should be modified so as to disallow the sums paid for coal used for operating the road rollers and traction engines, and as so modified affirmed, without costs to either party.

Willard Bartlett, Ch. J., and Werner, Chase, Cuddeback, Hogan, and Miller, JJ., concur.

NORTH DAKOTA SUPREME COURT.

MAGDALENA WILSON, Resp.,

v.

NORTHERN PACIFIC RAILWAY COMPANY, Appt.

(30 N. D. 456, 153 N. W. 429.)

Appeal — uncertain verdict — reversal.

1. In a personal injury action the jury returned the following verdict: "We, the jury in the above-entitled action, find for the plaintiff and against the defendant and assess the damages in the sum of \$2,400; \$109.25 doctor bill, 7 per cent interest on damages from October 4, 1912, to date." At the request of the plaintiff the court entered judgment allowing interest merely on the \$2,400 item. Held, that the uncertainty of the verdict, if any, is no ground for the reversal of the judgment.

Damages — anticipation — necessity.

2. In a tort action damages can be recovered for injuries which proximately follow from the wrongful act, whether such injuries were or could have been anticipated or not.

Negligence — forbidden act.

3. An act is negligent and furnishes the foundation for an action in tort if the same is forbidden by law, or the person doing it might reasonably anticipate that it might be injurious to someone. It is not necessary, however, that that someone should be the person who is actually injured.

Damages — amount — compensation.

4. For a breach of an obligation not arising from contract, and except when otherwise provided by the Code of North Dakota, the measure of damages is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

Proximate cause — exertion to extinguish fire.

5. Where a prairie fire is negligently caused by a railway company, and the wife of a homesteader who is left at home alone with her young daughter uses every reasonable effort to put out such fire, and in doing so overworks and strains herself so that permanent injuries ensue, she can recover damages from such company therefor, provided that she did not unreasonably and recklessly expose herself to such injury. Whether she was reckless and negligent in

this respect is primarily a question of fact for the jury, and not of law for the court to pass upon.

Appeal — absence of exceptions to instructions.

6. Where the record on appeal contains no exceptions to the instructions of the jury, and omits such instructions entirely, the presumption will be that the jury was properly instructed on all of the phases of the case.

Action — fire — extinguishment — interest.

7. It is not necessary, in order that a married woman may recover damages for injuries sustained in an attempt to stop a prairie fire which threatens her home, that such woman should own the fee of the property, and the fact that she has merely a homestead interest in the same is no bar to her recovery.

Damages — aggravation — fright.

8. Though as a rule damages which are occasioned by fright alone cannot be recovered in a tort action without proof of a physical injury, the mere fact that a person may have been frightened by fire, and that such fright may have had some influence in inducing her to fight against it, does not preclude a recovery for injury sustained in such attempt, where the exertion put forth was the exertion that a reasonably prudent person would have put forth under like circumstances.

Same — duty to mitigate.

9. Where a tort has been committed it is the duty of the injured party to use reasonable efforts to avoid the consequences thereof, and to reduce the damages sustained thereby, and if in such reasonable attempt he is injured, damages may be recovered therefor.

Trial — jury — negligence.

10. The questions of negligence and of contributory negligence are primarily questions of fact for the jury to pass upon.

Trial — refusal to strike unresponsive answer.

11. Where a part of an answer is responsive, and a defendant objects to the whole answer as being not responsive, and moves to have the same stricken out, the verdict will not be set aside because of the failure of the court to so order.

Evidence — objections — sufficiency.

12. Various objections to rulings on the introduction of the testimony examined, and held not to constitute reversible error.

Headnotes by BRUCE, J.

(May 12, 1915.)

Note. — Negligently setting out fire as proximate cause of injury to one injured while attempting to protect his property.

This note is supplementary to the one accompanying Illinois C. R. Co. v. Siler, 15 L.R.A.(N.S.) 819.

There is little authority upon the question subsequently to that note.

L.R.A.1915E.

In Illinois C. R. Co. v. Thomas, — Miss. —, 68 So. 773, where an action was brought against a railroad to recover for injuries received by the plaintiff while endeavoring to extinguish a fire set out by the defendant's trains and prevent damage to his property, it was held unnecessary that the railroad's negligence should have been the sole proximate cause of the plaintiff's injury in order to render it liable.

APPEAL by defendant from a judgment of the District Court for Stutsman County in plaintiff's favor in an action brought to recover for personal injuries alleged to have resulted to plaintiff from efforts to extinguish a fire set out by defendant. Affirmed.

The facts are stated in the opinion.

Messrs. Watson & Young and E. T. Conmy, for appellant:

Evidence of the conduct, general health, and physical condition of the plaintiff before the injury is admissible as tending to prove the extent, nature, and probable effects of the injury.

13 Cyc. 24; Gardner v. Detroit Street R. Co. 99 Mich. 182, 58 N. W. 49, 4 Am. Neg. Cas. 163; Warren v. Wright, 103 Ill. 298;

Houston & T. C. R. Co. v. Ritter, 16 Tex. Civ. App. 482, 41 S. W. 753; Hood v. Chicago & N. W. R. Co. 95 Iowa, 331, 64 N. W. 261.

A new trial will be granted where the verdict is uncertain as to the amount found to be due plaintiff.

Goosely v. Holmes, 3 Call (Va.) 424; Lake v. Hardee, 57 Ga. 459; Dorsett v. Crew, 1 Colo. 18; Holmberg v. Hendry, 2 Cal. Unrep. 650, 10 Pac. 395; Macoleta v. Packard, 14 Cal. 178; Minot v. Boston, 201 Mass. 10, 25 L.R.A.(N.S.) 311, 86 N. E. 783; Bashford v. Kendall, 2 Ariz. 6, 7 Pac. 176; Halum v. Dickinson, 47 Ark. 120, 14 S. W. 777; Voves v. Great Northern R. Co. 26 N. D. 110, 48 L.R.A.(N.S.) 30, 143 N. W. 760.

And it was held that the setting out of the fire by the defendant's train was a proximate cause of the plaintiff's injury. *Ibid.*

And the court further held that, conceding that the plaintiff was guilty of negligence in the manner in which he attempted to extinguish the fire, yet the railroad was not, under the Mississippi concurrent negligence statute, exonerated from all liability by reason thereof. *Ibid.*

There was evidence in this case that when the flame was blown in the plaintiff's face he closed his eyes, and that probably his eyes would not have been burned had he not been forced to open them when he ran into a post. The court charged the jury that if they believed from the evidence that the fire was set out by sparks negligently allowed to escape from the defendant's locomotive, and that the fire so set out spread and threatened the destruction of the plaintiff's property, and that the plaintiff, exercising due care, undertook to extinguish the fire to prevent it from destroying his property, and while fighting the fire and exercising due care, the flames were blown in his face and he was burned and injured thereby, the defendant would be liable for all the injuries resulting on account of said burning, and that, in estimating the plaintiff's damages, they should take into consideration not only his loss of time, but the pain and suffering endured by him, if any, and also what damage was done to his eyesight, if there was any such damage. This charge was held correct, although counsel for the railroad contended that the jury should have been told that if, while the plaintiff was engaged in fighting a fire, as stated in the first part of the charge given, and "the flames were blown against him and he was burned and injured on the nose, face, and hands, . . . and that if you further believe that, in attempting to get out of reach of the flames, the plaintiff struck his head against a post and that that caused him to open his eyes, and that the opening of his eyes caused him to get burned in the eyes, and you further believe from all the circumstances of the L.R.A.1915E.

case that the defendant foresaw, or ought to have foreseen, that the burning of plaintiff's eyes would be the natural and reasonable result of the setting out of the fire, then the defendant is also liable for the injuries to plaintiff's eyes." *Ibid.*

The decision in McKay v. Atlantic Coast Line R. Co. 160 N. C. 260, 75 S. E. 1081, Ann. Cas. 1914C, 412, is not directly in point, but is of value in this connection. In that case, where the evidence in an action to recover for the death of the plaintiff's intestate tended to show that she lived alone in a cabin on a wooded tract of land, and that she was burned to death while attempting to beat back a fire negligently started by one of the defendant's trains, which threatened to destroy, and but for the subsequent efforts of her neighbors would have destroyed, her home, it was held error for the court to hold as a matter of law that the deceased was guilty of contributory negligence. The court said: "While our decisions would seem to make some distinction between the risks allowable when human life is at stake, and those when the destruction of property is presently threatened, all of the authorities here and elsewhere are to the effect that it is both the right and duty of an owner to make every reasonable endeavor to save his property from destruction, and that, in passing upon his conduct, full allowance shall be made for the natural impulse prompting the effort and for the emergency under which he acts."

The broader aspect of the principles involved in the cases falling within the scope of these notes is discussed in the note to Cavanaugh v. Centerville Block Coal Co. 7 L.R.A.(N.S.) 907, on "Negligence responsible for accident as proximate cause of personal injury sustained in the performance of an act or work rendered necessary by the accident."

As to duty of owner of property adjoining a railroad right of way to protect it from fires set out by passenger locomotives, see note to Hawley v. Sumpter Valley R. Co. 12 L.R.A.(N.S.) 526. J. T. W.

The negligence of defendant was not the proximate cause of the injury, nor could it reasonably anticipate the results of said negligence.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 470, 24 L. ed. 256, 257; Seale v. Gulf, C. & S. F. R. Co. 65 Tex. 274, 57 Am. Rep. 604; Logan v. Wabash R. Co. 96 Mo. App. 461, 70 S. W. 734; Ewing v. Pittsburgh, C. C. & St. L. R. Co. 147 Pa. 40, 14 L.R.A. 660, 30 Am. St. Rep. 709, 23 Atl. 340; New Orleans & N. E. R. Co. v. McEwen & Murray, 49 La. Ann. 1184, 38 L.R.A. 134, 22 So. 675; Cleveland, C. C. & St. L. R. Co. v. Lindsay, 109 Ill. App. 533; Currier v. McKee, 99 Me. 364, 59 Atl. 442, 3 Ann. Cas. 57; Bannon v. Pennsylvania R. Co. 29 Pa. Super. Ct. 231; Sjorgren v. Hall, 53 Mich. 274, 18 N. W. 812; Garraghty v. Hartstein, 26 N. D. 148, 143 N. W. 392; Fox v. Borkey, 126 Pa. 164, 17 Atl. 604.

The undisputed testimony shows that the injury to plaintiff, if any, was occasioned by, and is the direct result of, fright, terror, alarm, or mental anxiety, unaccompanied by physical injury, and the negligence of this defendant is not the proximate cause thereof.

Henderson v. Weidman, 88 Neb. 813, 130 N. W. 579; American Nat. Bank v. Morey, 113 Ky. 857, 58 L.R.A. 956, 101 Am. St. Rep. 379, 69 S. W. 760; Birmingham Waterworks Co. v. Martini, 2 Ala. App. 652, 56 So. 832; White v. Sander, 168 Mass. 296, 47 N. E. 90, 2 Am. Neg. Rep. 573; Kalen v. Terre Haute & I. R. Co. 18 Ind. App. 202, 63 Am. St. Rep. 343, 47 N. E. 694; Haile v. Texas & P. R. Co. 23 L.R.A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557; Missouri P. R. Co. v. Cox, 2 Tex. App. Civ. Cas. (Willson) 217; Nelson v. Crawford, 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335; Russell v. Western U. Teleg. Co. 3 Dak. 315, 19 N. W. 408; Trigg v. St. Louis, K. C. & N. R. Co. 74 Mo. 147, 41 Am. Rep. 308; Smith v. Postal Teleg. Cable Co. 174 Mass. 576, 47 L.R.A. 323, 75 Am. St. Rep. 374, 55 N. E. 380, 7 Am. Neg. Rep. 54; Spade v. Lynn & B. R. Co. 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 89, 2 Am. Neg. Rep. 566; Mitchell v. Rochester R. Co. 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121; Balding v. Andrews, 12 N. D. 277, 96 N. W. 305, 14 Am. Neg. Rep. 615; Meehan v. Great Northern R. Co. 13 N. D. 443, 101 N. W. 183; Scherer v. Schlaberg, 18 N. D. 421, 24 L.R.A. (N.S.) 520, 122 N. W. 1000; Garraghty v. Hartstein, 26 N. D. 148, 143 N. W. 390; Camererson v. Great Northern R. Co. 8 N. D. 131, 77 N. W. 1016, 5 Am. Neg. Rep. 454. L.R.A.1915E.

No recovery can be had for fright or its consequences.

Morse v. Chesapeake & O. R. Co. 117 Ky. 11, 77 S. W. 361; Nelson v. Crawford, 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335; Smith v. Postal Teleg. Cable Co. 174 Mass. 576, 47 L.R.A. 323, 75 Am. St. Rep. 374, 55 N. E. 386, 7 Am. Neg. Rep. 54; Texarkana & Ft. S. R. Co. v. Anderson, 67 Ark. 123, 53 S. W. 673; Gulf, C. & S. F. R. Co. v. Trott, 86 Tex. 412, 40 Am. St. Rep. 866, 25 S. W. 419; Chicago, R. I. & P. R. Co. v. Hitt, — Tex. Civ. App. —, 31 S. W. 1084; Southern P. Co. v. Ammons, — Tex. Civ. App. —, 26 S. W. 135; Reed v. Ford, 129 Ky. 471, 19 L.R.A. (N.S.) 225, 112 S. W. 600; Morris v. Lackawanna & W. Valley R. Co. 228 Pa. 198, 77 Atl. 445; McGee v. Vanover, 148 Ky. 737, 147 S. W. 742; Mitchell v. Rochester R. Co. 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121; Spade v. Lynn & B. R. Co. 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566; Kalen v. Terre Haute & I. R. Co. 18 Ind. App. 202, 63 Am. St. Rep. 343, 47 N. E. 694; White v. Sander, 168 Mass. 296, 47 N. E. 90, 2 Am. Neg. Rep. 573; Braun v. Craven, 175 Ill. 401, 42 L.R.A. 199, 51 N. E. 657, 5 Am. Neg. Rep. 15; Ewing v. Pittsburgh, C. C. & St. L. R. Co. 147 Pa. 40, 14 L.R.A. 666, 30 Am. St. Rep. 709, 23 Atl. 340; Bucknam v. Great Northern R. Co. 76 Minn. 373, 79 N. W. 98, 6 Am. Neg. Rep. 302; Chesapeake & O. R. Co. v. Tinsley, 116 Va. 600, 82 S. E. 732; Kentucky Traction & Terminal Co. v. Bain, 161 Ky. 44, 170 S. W. 499; Huston v. Freemansburg, 212 Pa. 548, 3 L.R.A. (N.S.) 49, 61 Atl. 1022; Linn v. Duquesne, 204 Pa. 551, 93 Am. St. Rep. 800, 54 Atl. 341; Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303; Ward v. West Jersey & S. R. Co. 65 N. J. L. 383, 47 Atl. 561; Cleveland, C. C. & St. L. R. Co. v. Stewart, 24 Ind. App. 374, 56 N. E. 917; Chittick v. Philadelphia Rapid Transit Co. 224 Pa. 13, 22 L.R.A. (N.S.) 1073, 73 Atl. 4; Phillips v. Dickerson, 85 Ill. 11, 28 Am. Rep. 607; Chesapeake & O. R. Co. v. Robinett, 151 Ky. 778, 45 L.R.A. (N.S.) 433, 152 S. W. 976.

Messrs. Knauf & Knauf, for respondent:

Negligence of defendant was the proximate cause of the injury, and the injury should have been anticipated as a result of such negligence.

Southern R. Co. v. Com. 12 L.R.A. (N.S.) 526, note, and citations; Page v. Bucksport, 64 Me. 51, 18 Am. Rep. 239; Liming v. Illinois C. R. Co. 81 Iowa, 250, 47 N. W. 66; Hockstedler v. Dubuque & S. C. R. Co. 88 Iowa, 236, 55 N. W. 74; Glanz v.

Chicago, M. & St. P. R. Co. 119 Iowa, 611, 93 N. W. 575; McKenna v. Baessler, 86 Iowa, 197, 17 L.R.A. 311, 53 N. W. 103; Illinois C. R. Co. v. Siler, 229 Ill. 390, 15 L.R.A.(N.S.) 819, 82 N. E. 362, 11 Ann. Cas. 368; Berg v. Great Northern R. Co. 70 Minn. 272, 68 Am. St. Rep. 524, 73 N. W. 648; Wasmer v. Delaware, L. & W. R. Co. 80 N. Y. 212, 36 Am. Rep. 609.

Bruce, J., delivered the opinion of the court:

The complaint in this action alleges that the defendant company negligently started a prairie fire, and that "for the purpose of protecting her said property and buildings, this plaintiff, then aged fifty-two years, worked in a diligent and proper manner to protect said property, and in such a manner as an ordinarily prudent and diligent person and woman would have done, and did carry out from said house and on plowed ground and on safe premises bedding, clothes, and furniture, and did then and there carry water, and assist in preventing said fire from burning up said grain, hay, buildings, house, and property, as any woman in the exercise of due diligence, prudence, and care should do in aiding to protect the same under such threatened destruction, and while in the exercise of due care in the premises aforesaid, this plaintiff became so greatly heated, exercised, and excited, and so greatly worked, as to cause her immediately thereafter to be sick, sore, and lame, and to become permanently injured in her back, head, mind, limbs, body, and nerves, rendering her thereby permanently sick, sore, lame, and a nervous wreck, to her damage in the sum of \$2,500, and a necessary cost for physicians' and surgeons' service, and medicines, board, care, and railroad fare expense in the further sum of \$500."

Both, at the conclusion of the plaintiff's case and of that of the defendant, the defendant moved the court to direct a verdict in its favor on the following grounds: "First, there is no testimony in this case to show that this defendant is guilty of any negligence which proximately caused the injury to the plaintiff here; and secondly, the undisputed testimony shows 'that if this plaintiff suffered any injury, it was caused by her own negligence, and her own negligence contributed thereto; thirdly, the undisputed testimony shows that the injury to this plaintiff, if any, was occasioned by and is the direct result of fright or fear, unaccompanied by any physical injuries whatsoever, and the negligence of this defendant, if any, is not the proximate cause thereof, and this plaintiff cannot recover; L.R.A.1915E.

the damages being too remote and speculative."

These motions were denied. The jury returned a verdict in favor of the plaintiff, and the defendant has appealed.

The principal questions to be determined are: (1) Whether a married woman who attempts to protect the family property and homestead against a prairie fire which is negligently started may recover damages against the wrongdoer for injuries which arise from her overexertion in such attempt; (2) whether there is any competent proof in the record that the defendant was guilty of any negligence which proximately caused the injury. There are also several minor exceptions to the rulings upon the evidence, which will be considered later. There is also to be determined in this case, and preliminary thereto, the fact as to whether there is any evidence that the plaintiff suffered any physical injury other than that which was resultant upon the fright. It is also claimed that the court erred in accepting and receiving the verdict of the jury without requiring them and instructing them to correct it, it being claimed that the verdict was uncertain, informal, and insufficient, the verdict being as follows: "We, the jury in the above-entitled action, find for the plaintiff and against the defendant, and assess the damages in the sum of twenty-four hundred dollars (\$2,400); \$109.25, doctor bill, 7 per cent interest on damages from October 4, 1912, to date."

We see no merit in the objection to the verdict of the jury. It is claimed that it is uncertain as to whether the interest should be computed on the verdict as a whole, that is, on the \$2,400, plus the \$109.25 doctor's bill, or on the sum of \$2,400 alone. The record shows that on motion of the plaintiff interest was only allowed by the court in the final judgment on the sum of \$2,400. This the jury certainly intended. Whether they intended that there should also be interest allowed on the doctor's bill is immaterial here. We very much doubt if the verdict was in any way uncertain. Even if it was uncertain, defendant has no ground for complaint.

We next come to the point that the negligence of the defendant in starting the fire, if negligence there was "was not the proximate cause of the injury, nor could it reasonably anticipate the results of said negligence."

The defendant's position is stated in its brief as follows: "We will concede, for the sake of the argument, that this defendant railroad negligently set the fire which burned over to the land of plaintiff's husband and burned some of his property.

There is no question but that, under such circumstances, the defendant would be liable to Mr. Wilson for the value of his property destroyed, and also for the value of his time, or that of his wife, spent in fighting the fire so set. The defendant, we think, must anticipate that people would get out and fight fire which was threatening to destroy their property. In fact, we believe, a great many authorities hold that it is their duty to exercise ordinary care to prevent the spread of such fires and the destruction of their property by such fires. But this defendant is not bound to anticipate, and could not reasonably anticipate, that one would be so foolish as to get out and injure himself permanently in the fighting of a prairie fire of this kind. And it certainly could not anticipate that a strong, healthy woman, such as this plaintiff claims to have been before the fire, would so work or so conduct herself as to permanently impair her health. Nor could this defendant reasonably anticipate that the setting of a prairie fire of this kind would cause a person to become so frightened and scared as to injure her nervous system permanently. This is especially applicable when we consider that the fire in question was a small fire, and was put out by three men who came to the Wilson place in less than one half an hour. And it must also be remembered that the head fire, or main fire, went by at least a quarter of a mile east of the Wilson place, and the fires came up toward the buildings against the wind slowly, as all side fires do."

There is no doubt that some authorities may be found in support of defendant's contention, and which are based upon the erroneous assumption that only those damages can be recovered in a tort action which can be reasonably anticipated by the person who occasioned the injury at the time of his wrongdoing. These cases, however, do not express the rule which prevails in this jurisdiction, nor do they express the general rule. They are founded upon a confusion between what constitutes actionable negligence in the first place and what should be the measure of damages in the action, provided that actionable negligence is once shown. That an act cannot be held to be negligent unless the same is forbidden by law, or the person doing it may reasonably anticipate that it might be injurious to someone, is true. But this goes to the question of whether there is any cause of action at all, and, even in this case, the someone need not necessarily be the person who is in fact injured. The question as to damages, too, is an entirely different one. The rule contended for by defendant is the rule which prevails in actions upon con-

tract. It is not the rule which prevails in actions of tort. In contract actions only those damages can be recovered which were anticipated at the time of the making of the contract, or were so reasonably probable that if one had thought upon the matter at all, he must be presumed to have anticipated them. In tort actions, however, damages can be recovered for injuries which proximately follow from the wrongful act, whether such injury was or could have been anticipated or not.

In the case of *Garraghty v. Hartstein*, 26 N. D. 148, 143 N. W. 390, we quoted with approval from the opinion in *Christianson v. Chicago, St. P. M. & O. R. Co.* 67 Minn. 94, 69 N. W. 640, 16 Am. Neg. Cas. 314, where Judge Mitchell, in speaking for the Minnesota court, says: "What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow."

This certainly expresses the rule which prevails in North Dakota, for § 7165, Compiled Laws of 1913, being § 6582, Rev. Codes 1905, provides: "For the breach of an obligation not arising from contract, the measure of damages, except when otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

See also *Needham v. Halverson*, 22 N. D. 594, 135 N. W. 203; *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. 676.

There can be no question that the defendant must have anticipated that the fire

would be injurious to someone. The act, therefore, was negligent, and gives rise to a cause of action. The only question to be determined is whether the injury to the plaintiff was a proximate result of that act. If so, damages can be recovered therefor, even though they were not anticipated.

A reasonable effort to save one's property and to combat a prairie fire is certainly a proximate result of such fire and of the original negligence which occasioned it. It is one's duty, indeed, to minimize and to reduce damages, and even if we adopt the idea of anticipation, one must presume and anticipate in this prairie country, where not only crops, but homes and lives, are at stake, that efforts will be made, and should be made, by the settlers to save their property and lives and to combat fires which are negligently started. The fighting of the fire was therefore the proximate result of the fire. Was overexertion in so doing a proximate result of such fighting, or did contributory negligence necessarily intervene at the moment proper exertion ceased and overexertion began? Plaintiff could certainly recover damages if all of the property were her own, for her loss of time and services in fighting the fire, and this is on the theory of the duty of reducing the damages, if on no other. Is she precluded from recovering on the ground that she had merely a wife's homestead interest in the premises, and that there might have been a point where she could have desisted without injury to herself, and that this point it is the court's duty to locate and to determine? We hardly think that this is or should be the law. The question as to whether she unnecessarily and unreasonably exerted herself is certainly one which, under the circumstances of the case, the jury, and not the court, should have passed upon. The farm was her home. Part of the personal property and clothing in the house must certainly have belonged to her. The woman was alone on the prairie with her little girl, of some thirteen years of age. She was in charge of the farm, even if she did not own it. It was her home. If one lives in a rented house, is he precluded from fighting a fire which threatens it merely because he does not own the building, and has a married woman who has a homestead interest in her husband's property any lesser rights? Must and should the wife of a homesteader, who is left alone at home with her children upon the prairie while her husband is away earning his daily bread, sit idly by and allow her home and all that the family possesses to be reduced to ashes, merely because the fee title to the property is in the name of her husband? Was the poet

Burns's solicitude for the "wee mousie" whose nest and winter stores were destroyed by his plowshare only justifiable provided that the mouse he saw was a male and a freeholder? This cannot be the law! In the case of *Page v. Bucksport*, 64 Me. 51, 18 Am. Rep. 239, the court said: "The plaintiff was driving . . . a horse and gig over a defective bridge in the defendant town, when the horse broke through the bridge and fell. The plaintiff immediately jumped from his gig and undertook to extricate the horse from the hole in the bridge. In doing so, in the struggle of the horse to free himself, he was struck by the horse's head and personally injured thereby. He was at the time of the injury in the use of common care. The question is whether the defect in the way can be considered as the direct and proximate cause of the injury complained of. The defendants contend that it was not. Their counsel attempt to fortify this position by many plausible and interesting illustrations. There may be a good deal of subtlety and refinement of argument upon questions of this kind. There can be no fixed and immutable rule upon the subject that can be applied to all cases. Much must therefore, as is often said, depend upon the circumstances of each particular case. Upon the facts of this case, we think that the defect in the way was the proximate cause of the injury, and that the defendants are liable for the damages sustained. The foundation of this liability is the service rendered, or attempted to be rendered, by the plaintiff for the benefit of the town, when the injury was received. The law required such services of the plaintiff. It was his duty to save the horse if possible. He would have been guilty of negligence towards the town if he had failed to make all reasonable attempts to do so. It is a general rule of law that, where a person may sustain an injury by the fault of another, common care should be used upon his part to render the injury for which the party in fault is responsible as light as possible. He may be compensated for an injury received when in the exercise of such care and prudence, although a mistake may be made. In *Lund v. Tyngsboro*, 11 Cush. 563, 59 Am. Dec. 159, it was held that a town was liable to a traveler who, in the exercise of common care and prudence, leaps from his carriage because of its near approach to a dangerous defect in the highway and thereby sustains an injury, although he would have sustained no injury if he had remained in the carriage. The same principle was established in *Ingalls v. Bills*, 9 Met. 1, 43 Am. Dec. 346, 9 Am. Neg. Cas. 426; and

the same doctrine was applied to the facts in the case of *Stover v. Bluehill*, 51 Me. 439. The defendants, however, seek to distinguish those cases from this. They admit that such a doctrine would be applicable if the injury had happened here to the horse instead of the driver. But we do not perceive that there would be any difference upon principle whether the injury was to the plaintiff's person or his property. The accident to the horse was an injury sustained by the owner of the horse. The plaintiff was attempting to relieve himself of an injury to his horse, and thereby of an injury to himself, when the horse in his struggles struck him with his head. This view of the facts is supported by the case of *Stickney v. Maidstone*, 30 Vt. 738, cited upon the plaintiff's brief, which is as near a copy of the facts in this case as two cases could well be alike. We think that all which took place at the time of the accident was, as between these parties, but a single happening or event. It was but one accident."

In the case of *Harris v. Clinton Twp.* 64 Mich. 447, 8 Am. St. Rep. 842, 31 N. W. 425, the court said: "It is not a universal rule that the defendant is excused from liability merely because the plaintiff, knowing of the danger caused by the defendant's negligence, voluntarily incurs that danger. If the defendant has so acted as to induce the plaintiff, acting with reasonable prudence, to incur the danger, . . . the defendant is liable."

Again in the case of *Glanz v. Chicago, M. & St. P. R. Co.* 119 Iowa, 611, 93 N. W. 575, the court said: "Appellants contend that plaintiff's injuries were not the proximate result of the setting out of the fire, and that the court should have so instructed the jury. The testimony shows that there was a high wind blowing, that the fire was coming directly toward the house and barn on plaintiff's premises, and that in the barn there was a large amount of personal property belonging to plaintiff and her husband; and that, had the barn caught fire, the house would also have burned. It also appears that plaintiff and her husband, with others, undertook to extinguish the fire, or to stay its progress for the purpose of saving this property; and that in so doing plaintiff's clothing was partially destroyed, her person burned, and she made sick and disabled from work. The court instructed, in effect, that, if defendant was negligent in setting out the fire, it would be liable to plaintiff for any such personal injuries received by her as were the natural and direct result of her exertions in trying to extinguish the fire and save her property, to which she did

not, by her own negligence, contribute; and on the question of contributory negligence gave the following: 'In respect to the question of whether the plaintiff was or was not guilty of negligence which contributed to her alleged injuries, you are instructed that the plaintiff had the right to make such reasonable exertions for the protection of her property as a reasonably prudent person would have done under like circumstances. But if she exerted herself to a greater extent or more violently than an ordinarily prudent person would have done under like circumstances, and her injuries, if any, resulted from such exertions, then, even though she acted in good faith, or under the belief that what she did was necessary, she cannot recover for such injuries, if any, to her health. In determining whether the plaintiff was or was not guilty of negligence that contributed to the alleged injury to her health, you would not be justified in finding that she was free from any negligence that contributed to her injuries, if any, from the facts alone (if they be facts) that the danger to her property was great, or appeared to be great, and that she acted in good faith, in an honest purpose to prevent the spread of the fire, and thus protect her property from destruction or injury; for her motive or conduct, however honest or well intended, cannot be made the basis of a recovery, if, as a matter of fact, she did not act as a reasonably prudent person would have acted under like circumstances. In determining this question, however, you should take all the facts and circumstances concerning the fire, and the acts of the plaintiff as disclosed by the evidence, into consideration.' It is contended that the fire was not the proximate cause of plaintiff's injuries and sickness, and that, as these results were brought about by her own volition, she cannot recover. The question of proximate cause is always difficult, and, but for the case to which we shall presently refer, we should have difficulty in determining the proposition here presented. In *Liming v. Illinois C. R. Co.* 81 Iowa, 250, 47 N. W. 66, the exact question now before us was considered; and it was there held that a stranger who received injuries in attempting to extinguish a fire set out by a railway company, to save property from destruction, might recover from the company; that defendant's negligence in such a case was the proximate cause of an injury to the person who attempted to save property from the consequences thereof; that the injured party was entitled to recover, provided he did not negligently contribute to the results. In that case it is said, in effect, that one who, acting with reasonable pru-

dence, voluntarily exposes himself to danger for the purpose of protecting his property, may recover for the consequent injuries he receives from the person whose wrong caused the injury to himself, and the danger to the property he sought to protect. See also McKenna v. Baessler, 86 Iowa, 197, 17 L.R.A. 310, 53 N. W. 103. In attempting to extinguish the fire in question, plaintiff was in the strict line of her duty; and, if she acted with ordinary care and prudence, there is no reason, in justice or law, why she should not recover for the injuries received. Bound as she was by law to save herself from the consequences of defendant's negligence, the defendant should not be permitted to say that her act was entirely voluntary, and that the injuries she received did not follow proximately from its original wrong. The Liming Case is not without support in other jurisdictions. See Rajnowski v. Detroit, B. C. & A. R. Co. 74 Mich. 20, 41 N. W. 847; Berg v. Great Northern R. Co. 70 Minn. 272, 68 Am. St. Rep. 524, 73 N. W. 648. Defendant attempts to distinguish the Liming Case from the one at bar on the ground that in the former Liming was injured by the fire itself, while here the plaintiff's sickness was due to overexertion. Admitting the difference in facts, it does not follow that there is any distinction in principle. In either case the injury was the result of the fire, unless the party injured was doing a negligent and reckless act in attempting to extinguish the fire. Whether or not he was guilty of contributory negligence was a question for the jury, under proper instructions. It should not be said that defendant could not anticipate the wrong complained of. If it negligently set out a fire which endangered property, it knew that the owner was bound to make all reasonable efforts to save himself from harm; and if, in the exercise of reasonable care in the performance of this duty, he received an injury, the original fault of the defendant is something more than a condition. It was, as we view it, the efficient cause of the injury. That injury may result from an actual contact with the fire or from overexertion, and in either case is a proximate result."

See also Rajnowski v. Detroit, B. C. & A. R. Co. 74 Mich. 20, 41 N. W. 848; *Id.*, 78 Mich. 681, 44 N. W. 335; McKenna v. Baessler, *supra*.

Again, in the case of Illinois C. R. Co. v. Siler, 229 Ill. 390, 15 L.R.A. (N.S.) 819, 82 N. E. 362, 11 Ann. Cas. 368, we find the following: "The cases which sustain the position of the appellant we think are wrong in principle and opposed to the weight of authority. One whose property is exposed to

danger by another's negligence is bound to make such effort as an ordinarily prudent person would to save it or prevent damages to it. If in so doing, and while exercising such care for his safety as is reasonable and prudent under the circumstances, he is injured as a result of the negligence against the effect of which he is seeking to protect his property, the wrongdoer whose negligence is the occasion of the injury must respond for the damages. It is not just that the loss should fall on the innocent victim. We regard this as the result of the authorities which we have been able to examine, aside from the two above mentioned, as sustaining the position of appellant."

And in *Berg v. Great Northern R. Co.* *supra*, the court also says: "Referring first to the second question, we are of opinion that, leaving out of consideration for the present the question of plaintiffs' contributory negligence, there was no intervention of another independent agency inflicting the injury, to break the causal connection between the negligent act of the defendant and the injuries suffered by the plaintiffs. It may be true that if the plaintiffs had remained where they were when they discovered the fire approaching, and made no effort to save the stacks, they would not have been injured. But, assuming that they acted with reasonable prudence and care, plaintiffs' effort to save the property was a mere condition, and not the cause of these injuries. In making reasonable efforts for that purpose they would be doing, not only what the law authorized, but what their duty to the defendant required; and if, in doing this, they sustained injury, the defendant, which was responsible for the fire, would be liable. . . . This doctrine has been held and applied under so great a variety of circumstances that we shall only cite two cases in which it has been applied to 'fire cases' like the present,—*Liming v. Illinois C. R. Co.* 81 Iowa, 246, 47 N. W. 66; *Rajnowski v. Detroit, B. C. & A. R. Co.* 74 Mich. 20, 41 N. W. 847, and 78 Mich. 681, 44 N. W. 335. We have confined the decision to the particular facts of this case, but do not wish to be understood as holding that the rule would be different had plaintiffs attempted to save the property of another."

See also *Wasmer v. Delaware, L. & W. R. Co.* 80 N. Y. 212, 36 Am. Rep. 609. Again in the case of *Glanz v. Chicago, M. & St. P. R. Co.* 119 Iowa, 611, 618, 93 N. W. 575, 577, Mr. Justice Deemer says: "In either case [that is, whether the plaintiffs' injuries were occasioned by physical contact with the fire or by overexertion in attempting to extinguish it and save his

property] the injury was the result of the fire, unless the party injured was doing a negligent and reckless act in attempting to extinguish the fire. Whether or not he was guilty of contributory negligence was a question for the jury, under proper instructions. It should not be said that defendant could not anticipate the wrong complained of. If it negligently set out a fire which endangered property, it knew that the owner was bound to make all reasonable efforts to save himself from harm; and if, in the exercise of reasonable care in the performance of this duty, he received an injury, the original fault of the defendant is something more than a condition. It was, as we view it, the efficient cause of the injury. That injury may result from actual contact with the fire or from overexertion, and in either case is a proximate result."

In the case at bar the instructions are not incorporated in the record and are not before us. We must presume, therefore, that they were correct and applicable to the case on trial, and that the questions of fright and contributory negligence were adequately and properly submitted to the jury. We must presume, indeed, that some such instructions were given as were given in the case of *Glanz v. Chicago, M. & St. P. R. Co. supra*. Concerning these instructions the Iowa court said: "The court instructed, in effect, that, if defendant was negligent in setting out the fire, it would be liable to the plaintiff for any such personal injuries received by her as were the natural and direct result of her exertions in trying to extinguish the fire and save her property, to which she did not, by her own negligence, contribute, and on the question of contributory negligence gave the following: 'In respect to the question of whether the plaintiff was or was not guilty of negligence which contributed to her alleged injuries, you are instructed that the plaintiff had the right to make such reasonable exertions for the protection of her property as a reasonably prudent person would have done under like circumstances. But if she exerted herself to a greater extent or more violently than an ordinarily prudent person would have done under like circumstances, and her injuries, if any, resulted from such exertions, then, even though she acted in good faith, or under the belief that what she did was necessary, she cannot recover for such injuries, if any, to her health. In determining whether the plaintiff was or was not guilty of negligence that contributed to the alleged injury to her health, you would not be justified in finding that she was free from any negligence that contributed to her injuries, if any, from the facts alone (if they be facts)' L.R.A.1915E.

that the danger to her property was great, or appeared to be great, and that she acted in good faith, in an honest purpose to prevent the spread of the fire, and thus protect her property from destruction or injury; for her motive or conduct, however honest or well intended, cannot be made the basis of a recovery, if, as a matter of fact, she did not act as a reasonably prudent person would have acted under like circumstances. In determining this question, however, you should take all the facts and circumstances concerning the fire, and the acts of the plaintiff as disclosed by the evidence, into consideration."

But counsel contends that there is no evidence of any injury which was occasioned by such overexertion, but evidence of injuries which were the result of fright alone, and that the law is well established that damages for fright alone, without accompanying physical injury, cannot be recovered. We do not so read the evidence, however, and though fright might have entered into the question, there is sufficient evidence to go to the jury on the question as to whether the physical exertions were or were not responsible for at least a part of the injury. One certainly cannot escape liability because an injury which he has occasioned has been increased by the injured person's own act, even though he might not be liable if such other act were taken by itself. Dr. Peake certainly testified that the work which plaintiff did at the fire and the strain which she underwent were, in his opinion, the cause of her present condition. He testified that he found "rigidity of the muscles along the spine, not more on one side than on the other," and in answer to the question, "Does such a condition of the muscles arise from fright?" answered, "No."

Counsel also ingeniously argues that no damages can be recovered for fright alone, and therefore not for the result of fright, and that as plaintiff admits that it was the fear of the fire that made her work as hard as she did, no recovery can be had. This argument, however, hardly appeals to us. Of course she was afraid of the fire, and of course it was the fear of the fire and the destruction that it would create that induced her to work to suppress it and to save her property. Such fear, however, is the impelling cause in every such attempt. Fortunately for the progress of the human race we, as a rule, are not jellyfish, but human beings, who are gifted with nerves and with feelings, and the law must be administered upon this assumption.

The fact is that defendant's theory that the injuries sustained by the plaintiff were the result of fright, and of fright alone,

seems to us to be based upon conjecture rather than upon the testimony. Outside of the fact, indeed, that plaintiff testifies that she lies awake at night thinking and scared of the fire, there is practically no evidence of any injuries except those which are the direct result of the strain and the exertion, and it is very natural for a person who is awakened at night by physical pain caused by overexertion during a fire, to think of the fire during the periods of her wakefulness. It is true that there is evidence that plaintiff is in a nervous condition, but a nervous condition can arise from physical injuries just as much as from mental. These facts, we believe, will be apparent from an examination of the record. It will also, we believe, be apparent that the plaintiff did no more than an ordinary woman left alone with a young daughter on the prairie would do under the circumstances in order to protect her home against destruction by fire.

Her testimony is, in effect, as follows: "All at once I looked up to the hills and I seen smoke coming down in the fields. It was about 12 o'clock. We had a quarter section of land. We had a little frame house and granary and chicken coop and barn. I and my daughter and husband live in that house. When I first discovered the fire my daughter was looking for her cows. It was coming from the southwest, and kept on coming to the northeast until it got up to my husband's farm, where I was living. I went home after I saw the fire, and then went to doing some work to save some of the things before the fire got too close to the buildings. I first went to take the washtubs outside near the house. Two of them I set out. I took two pails, each holds about 12 quarts of water, and I was trying to carry water right along to fill those tubs and fill some wooden pails that I set there. Next I believe I tried to climb in the granary to get the sacks out and lay around to be handy if I got help to fight the fire. I think I carried my rocking chair down to the cow corral first. Then I went to take a bushel basket, took all my books and laid them in, took the things out of the writing desk, and the papers and coverings, then the clothes, and carried them down in the cow corral. I came right back and got clothes. I took my big dish pan, filled it up with groceries, and carried it down, and then I went right along all the time carrying things down. I took some of my bedding, some clothing, my linens in the drawers I had in the bureaus, and my best clothes and my husband's clothes and his big coats and pants and shoes and anything I chanced to get, L.R.A.1915E.

and put them into boxes and carried them down.

Q. You carried those down to the corral?

A. Yes.

Q. Who came, if anybody, to help you fight the fire that you remember of?

A. There didn't come anybody for a long time. The girl came home. At first I was alone carrying things; the fire was almost up to our place. I told her to go quick as she could on horseback and get some men from the threshing machine. She went right off and left me alone again, and I didn't get any help until Mr. Keyes,—he was the first one to come to the place. And Charlie McDermott and he was down by the well at first. Then I tried to take pails of water up and carry to them to fight the fire with, the fire was near the granary then, and the chicken coop was almost on fire. I helped fight the fire. I carried some water for them. After that I carried more water up about the house. I walked up, and I seen they had lots of water left, and I didn't carry any more up. I took some other things up. I went down to the barn and let the colt out of the barn. There was a horse in the barn, too, and I took her and tied her to the wagon by the house.

Q. Now, after Mr. Keyes came and helped with the fire, did they leave before the fire was all out?

A. Yes.

Q. And did you fight any fire yourself?

A. Yes. I was so afraid the barn would be on fire. The fire went around behind the barn. I looked, and I seen there was nobody to fight it there. I didn't have water, and so I took ground and threw on the fire to put it out along the lines, and I called the girls to come over with some water and help fight this fire. They brought water over. We took wet sacks and fought it with them. During the afternoon some of my husband's grain stacks burned up. I went up to the stacks, and I felt so sorry; and there was lots of people that couldn't come to help fight it; and the wind come so hard that we couldn't save them. After the men went away, and I had the fire out, I tried to carry the things back in the house. I felt all played out. I felt awfully weak. Then they carried in my sewing machine, my girl and the other girl, and I helped them carry it over to the house, and I got such a pain in my hip, and I couldn't carry it any further, over there a little way; they had to carry it themselves. I carried some little things, some clothes and things like that, and bread and groceries. They helped me carry those other things in. I felt awfully weak. I was hardly able to walk any more. I was never sick of any sickness

that I know of before this fire. There was some headaches once in a while. Sometimes had a cold. Never had a sick cough in the winter time, never as long as I lived on the farm. Before this fire I did gardening on the farm. We always had a garden, and had my housework besides. I did the washing and attended to the milking. The first years I had to make butter every week day before we had a cream separator. Since the fire I wasn't able to do hardly anything. I couldn't do the milking or make any garden. I feel sick all over my body. I feel so shaky; my nerves bother me; my head I couldn't move around at times; and I feel nervous, and I couldn't hardly talk to anybody. My back feels weak all the time. My hip hurts to. This one (indicating left hip). I never had any of those pains before the fire. I was sick right the next Sunday. I wasn't able to be out at all. I got awfully sick to my head and had a sick headache. From that time down to the present, I have never felt all right again. I feel so weak and aching in my body. In the morning I couldn't dress. To lay on my back I couldn't rest. I wake up in the night scared about the fire quite often. In the morning when I want to get up, I was hardly able to dress myself or comb my hair. I wasn't able to move my arms. . . . I never feel all right. My nerves bother me, in the head the most, and when I want to do anything I get sick to my back and shake, and I am not able to do anything When I first saw the fire coming I got two tubs out of the house. I put them on the east side of the house, about 350 feet from the pump. Then I carried water uphill to fill them. It is downhill to the well. I carried water up and filled those tubs. I tried to pump water in that barrel so that they could take the water out of there. I had to carry water to put out the fire. The manure was burning around the barn by the corner, and there was lots of smoke and fire, and it would burn right along, and I carried water to put that out, after the men were gone. The fire in the manure by the barn occurred after the men had gone. . . . The next day the grain stacks burned until 9 o'clock,—it wasn't burned down. My girl tried to get the potatoes on the wagon, and Saturday night my man came home. I have not done any chores since the fire. I never was nervous in my head in my younger years. I never had any nervous troubles of any kind. Before the fire I never had any nervous or hysterical trouble.

L.R.A.1915E.

Dr. Francis Peake also testifies in substance:

I told Mr. Wilson I couldn't do much for her without seeing and looking her over to see what the trouble was. Then she came to me. I found her very nervous and trembly and shaky, and complaining of her being "all played out" as she called it. I examined her to find out where the trouble was. I examined her physically,—her heart and her lungs and back and limbs, giving her a good, thorough examination; and her kidneys and a urinary test. And I tested her reflexes and examined her back. She complained of her back more than anything else; had headaches and backaches; and she was, as I say, nervous and weak and trembly and couldn't sleep nights; said she didn't rest well. She said that she was all the time dreaming of fire and would wake up startled and excited in the night. I made the usual examination which I considered necessary for the treatment. After I made my diagnosis and came to the conclusion that she was suffering from a weakened state brought on by overexertion and nervous fright, or, as I would express it, the cause of this nervous state, her waking up in the night and dreaming and crying out of the fire, I knew it affected her nerves and nervous system, and that she had been through some ordeal. She then told me about this fire and about all that she did. I also questioned her about it. Then prescribed for her for the effects of the overstraining and overexertion, and I judged she had perhaps taken some cold after overexerting that had settled in her back and caused her to have backache, which would be a natural condition resulting from such exposure. I gave her medicine for that condition, and also a treatment or two at that time with the light, the electric lamp, for her back. . . . I found rigidity of the muscles along the spine, not more on one side than on the other. These treatments bring the heat in the muscles and release the tension of the muscles, and I gave her these treatments to overcome some of these conditions of the muscles in the back. She seemed to be suffering more through the back and up, and through the stomach, so that the stomach was easily upset on the least exertion,—in coming to town she would get all upset and would be sick for a day or two. Once she was sick for three days when she came to see me, just in getting down here. I treated her that way at different times. She was down here most every month but one. At one time I had her here four weeks under treatment to relieve these conditions of the back. She complained of headaches and trouble of that kind,—would be sick two

or three days at a time. Not exactly a sick headache, but a nervous headache. She has been under treatment the biggest share of the time since, and she has been taking what I prescribed for the stomach conditions—for those conditions brought on, or that brought on, the headaches—as much as she could, and for the backaches. My opinion is that she is permanently injured.

Q. In your opinion, are those injuries due to the exertions that she put forth at the time of this fire in question?

A. I think that it could be the cause of it all right. Assuming that the statements are true given by her on the witness stand as to not being disabled before, and having been more or less disabled at all times since, in my opinion the work that she did and strain she underwent in that fire would be the cause of her present condition.

There is, it is true, evidence in the record, and furnished by two doctors who were called by the defendant, that the plaintiff, when examined by them, had no signs of injury other than that she was in a more or less nervous condition. The case, however, was tried to a jury, and, even if this evidence be given the fullest credence, the fact nevertheless remains that competent testimony was introduced by the plaintiff tending to show serious injuries which were occasioned by the overexertion at the fire, and, such being the case, the question as to the injuries and their cause was for the jury, and not for the court to pass upon. The evidence of the plaintiff, also, to our mind, shows a necessary and natural effort to extinguish the fire, and such an effort as any woman who had her home and buildings to protect would naturally put forth, and would be reasonably called upon to put forth, under the circumstances which confronted her. It was her duty to do what she reasonably could to reduce the damages, and it is idle to say that she was merely the wife of the fee owner of the land. Not only was her home and her immediate personal property in danger, but she was the person in control, and there can be no question that, if she had refrained from making the very efforts which are now sought to be imputed as negligence against her, their omission would have been imputed as contributory negligence to her husband and urged as a defense to any action which he might have brought for the destruction of his grain and buildings.

"Where an injured party finds that a wrong has been perpetrated on him," says the author of 13 Cyc. 71, "he should use all reasonable means to arrest the loss. He cannot stand idly by and permit the loss L.R.A.1915E.

to increase and then hold the wrongdoer liable for the loss which he might have prevented. It is only incumbent upon him, however, to use reasonable exertion and reasonable expense, and the question in such cases is always whether the act was a reasonable one, having a regard to all of the circumstances in the case. The application of this rule sometimes has the effect of enhancing the damages rather than reducing them, and where a reasonable and bona fide attempt has been made on the part of the plaintiff to reduce the damages and provide for his own safety in case of a personal injury, it does not relieve the defendant from a full recovery of the damages sustained."

Even if the wife did not own the property in fee, she had the right to live with her children in the house and on the farm, and it cannot be said that one may start a fire and drive tenants and their families out of buildings, and not merely destroy their immediate personal property and clothing, but drive them out into the open and fire-devastated prairie, without being guilty of a tort against them. Nor can it be said that it is lack of ordinary care for a woman under such circumstances to try to save her home and the provisions of her family and her own and her children's clothing, to say nothing of the property which belongs to her and to her husband. The case is well summed up in *Illinois, C. R. Co. v. Siler*, 229 Ill. 390, 15 L.R.A. (N.S.) 819, 82 N. E. 362, 11 Ann. Cas. 368, where a woman was burned while attempting to save her home from a similar conflagration, and where the courts said: "The question presented, so far as the demurrer is concerned, is whether one who has negligently set fire to another's premises can be held liable for damages caused by burning the owner while engaged in trying, with reasonable prudence and care, to extinguish such fire. Even though one's property has been negligently set on fire by another, the owner cannot permit it to be consumed without an effort to save it, and then claim reimbursement from the setter out of the fire. He must use every reasonable effort, consistent with his personal safety, to preserve the property. *Toledo, P. & W. R. Co. v. Pindar*, 53 Ill. 447, 5 Am. Rep. 57; *Chicago & A. R. Co. v. Pennell*, 94 Ill. 448. Where a person sees his property exposed to imminent danger through the negligence of another, he is justified in using every effort to save it which a reasonably prudent person would use under similar circumstances, even though the effort exposes him to some danger which he would otherwise have avoided. Due care depends upon the circumstances surround-

ing the action. It is to be determined with reference to the situation in which he finds himself at the time. What is due care in one situation might be gross recklessness under different circumstances. Every one is bound to anticipate the results naturally following from his acts. The appellant was therefore bound to anticipate, when the fire started, that the decedent would try to put it out. This she was doing, and the allegation is that she was using all due care and caution for her own personal safety. If in so doing the fire which appellant had negligently set out spread to and ignited her clothing without any want on her part of the care which an ordinarily prudent person would exercise under the circumstances, the appellant should be held to have anticipated such result as probable, and to be liable therefor. In order to make a negligent act the proximate cause of an injury it is not necessary that the particular injury and the particular manner of its occurrence could reasonably have been foreseen. *Dixon v. Scott*, 181 Ill. 116, 54 N. E. 897. If the consequences follow in unbroken sequence from the wrong to the injury without an intervening efficient cause, it is sufficient if, at the time of the negligence, the wrongdoer might, by the exercise of ordinary care, have foreseen that some injury might result from his negligence. *Chicago & A. R. Co. v. Pennell*, supra; *Pullman Palace Car Co. v. Laack*, supra, 143 Ill. 242, 18 L.R.A. 215, 14 Am. Neg. Cas. 291, 32 N. E. 285; *Chicago Hair & Bristle Co. v. Mueller*, 203 Ill. 558, 68 N. E. 51. The rule as to what constitutes proximate cause was considered in the case of *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362, and it was said: 'Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence, and if they are such as might with reasonable diligence have been foreseen, the last result, as well as the first and every intermediate result, is to be considered in law as the proximate result of the first wrong cause. But whenever a new cause intervenes which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequence could not have happened, then such injurious consequences must be deemed too remote to constitute the basis of the cause of action.' In *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256, it is said: 'The question always is, Was there an unbroken connection between the wrongful act and the injury,—a continu-

ous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? . . . The inquiry must therefore always be whether there was any intermediate cause, disconnected from the primary fault and self-operating, which produced the injury.' It is true that in this case the voluntary act of the decedent intervened between the negligent act of the appellant in setting out the fire and the injury occasioned by the burning of decedent. But this act was one of the intervening causes which the appellant, with reasonable diligence, might have foreseen. It was a consequence of the wrongful act of appellant which it ought to have anticipated. It was not a new and independent cause intervening between the wrong and the injury or disconnected from the primary cause and self-operating, but was itself the natural result of appellant's original negligence. The case of *Seale v. Gulf, C. & S. F. R. Co.* 65 Tex. 274, 57 Am. Rep. 602, has been cited by appellant and fully sustains its position. That case holds that, whether the deceased was negligent or not in her attempt to put out the fire, it was this attempt, and not the original negligence of the defendant in starting the flame, that was the proximate cause of her death. This case was followed by the Missouri court of appeals in *Logan v. Wabash R. Co.* 96 Mo. App. 461, 70 S. W. 734. In the case of *Chattanooga Light & P. Co. v. Hodges*, 103 Tenn. 331, 60 L.R.A. 459, 97 Am. St. Rep. 844, 70 S. W. 616, the injury resulted from 'an act committed by the injured party so obviously fraught with peril as should be sufficient to deter one of reasonable intelligence.' The court, while reversing the judgment against the defendant, said: 'The rule has been extended so as to give the injured party redress where his effort to save property has been such as a reasonably prudent man would have made under similar circumstances.' The cases which sustain the position of the appellant we think are wrong in principle, and opposed to the weight of authority. One whose property is exposed to danger by another's negligence is bound to make such effort as an ordinarily prudent person would to save it or prevent damages to it. If in so doing, and while exercising such care for his safety as is reasonable and prudent under the circumstances, he is injured as a result of the negligence against the effect of which he is seeking to protect his property, the wrongdoer whose negligence is the occasion of the injury must respond for the damages.

It is not just that the loss should fall on the innocent victim. We regard this as the result of the authorities which we have been able to examine, aside from the two above mentioned as sustaining the position of appellant. *Berg v. Great Northern R. Co.* 70 Minn. 272, 68 Am. St. Rep. 524, 73 N. W. 648; *Liming v. Illinois C. R. Co.* 81 Iowa, 246, 47 N. W. 66; *Glanz v. Chicago, M. & St. P. R. Co.* 119 Iowa, 611, 93 N. W. 575; *Wasmer v. Delaware, L. & W. R. Co.* 80 N. Y. 212, 36 Am. Rep. 608; *Page v. Buck-sport*, 64 Me. 51, 18 Am. Rep. 239."

The rule is laid down by Judge Elliott in his work on Railroads, vol. 3, § 1247, where he says: "It sometimes happens that personal or other injuries, aside from the mere burning of property, are caused by fires set out by railway companies. In such cases, where the injuries are the direct and proximate result of the railway company's negligence, it will be liable to one who is free from contributory negligence for damages on account of such injuries. . . . Where loss of life is caused by a fire negligently set, without any contributory negligence on the part of the person bringing an action, or his intestate, the company setting the fire may be liable, but where a person voluntarily exposes himself to danger and is injured by the fire, there can be no recovery."

In the case at bar the risk was not voluntarily assumed, but was assumed in recognition of a duty which was owing to the railway company, and the failure to perform which would have given rise to the defense of contributory negligence. Whether the plaintiff went too far in her efforts, to an extent to which no reasonable person would go, so that her efforts merged into a voluntary incurring of the danger, was clearly a question for the jury to pass upon. We certainly cannot say, as a matter of law from our perusal of the record, that she did any more than one would be presumed or expected to do under the circumstances. A prairie fire is a thing that should be stamped out immediately, and is not to be trifled with.

We have carefully examined the cases cited by counsel for appellant. We find, however, that few, if any of them, are applicable to the case at bar. Some of them were cases where the person injured was a volunteer merely, upon whom no duty of reducing damages was placed. See *Pike v. Grand Trunk R. Co.* (C. C.) 39 Fed. 255.

In the case at bar the plaintiff was protecting her own home. Others are cases where the risk was recklessly encountered, and where the danger of injury was apparent. See *Cook v. Johnston*, 58 Mich. 437, 55 Am. Rep. 703, 25 N. W. 388; *Chat-L.R.A.1915E.*

tanooga Light & P. Co. v. Hodges, 109 Tenn. 331, 60 L.R.A. 459, 97 Am. St. Rep. 844, 70 S. W. 616. There is no evidence of recklessness in the case before us. Others still are cases where the court absolutely fails to distinguish between the element of anticipation when considering actionable negligence and the damages which may be recovered when that negligence exists and is actionable. See *Chattanooga Light & P. Co. v. Hodges*, supra; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Seale v. Gulf, C. & S. F. R. Co.* 65 Tex. 274, 57 Am. Rep. 602; *Logan v. Wabash R. Co.* 96 Mo. App. 461, 70 S. W. 734; *Cleveland, C. C. & St. L. R. Co. v. Lindsay*, 109 Ill. App. 533.

Not only are these last mentioned cases opposed to the great weight of authority absolutely untenable on principles of legal logic, but the statute of North Dakota expressly provides that one guilty of a tort shall be liable "for all the detriment proximately caused thereby, whether it could have been anticipated or not." Comp. Laws 1913, § 7165.

The questions of negligence and contributory negligence and proximate cause which are presented by the case before us were for the jury, and not for this or the trial court to pass upon, and the conclusions of that jury are binding upon us.

Counsel contends that the court erred in overruling defendant's objection to the following question and answer:

Tell us what you did in tracing where the fire started?

A. I went over to the track, and I found great big cinders about the size of a hen's egg, sent out of the engine or else out of the smokestack—

Mr. Conny: We move to strike out the answer as not responsive, and incompetent, irrelevant, and immaterial, no foundation laid.

We really see no merit in this objection. A part, at least, of the answer, was responsive, competent, relevant, and material. The motion was directed to the whole answer, and it therefore should not have been sustained.

There is also clearly no merit in counsel's objection to the testimony of Mrs. Knutson, a neighbor, and to the ruling of the court during the following examination:

Q. Where were you when you first saw the fire?

A. At my home on section 14.

Q. In what direction from you was the fire when you first saw it?

A. It was southwest.

Q. And in reference to the Northern Pacific Railway Company railroad, where was it?

A. It was started near the track.

Mr. Conny: We move to strike out the answer on the ground it is not responsive to the question, and no foundation laid. (Motion denied.)

Q. Where was the fire when you first saw it?

A. Near the track.

Q. Which way was your home, the place where you lived, from where the fire was?

A. It is north and a little east.

Q. Did you see any more than one fire at that place?

A. No, sir.

Q. Do you know whether that fire came to the northeast and burned over part of your place, down toward the Wilson farm?

A. Yes, sir.

Q. They live on the same section you live on?

A. Yes.

A good deal is said in criticism of the answer "Near the track," but no objection seems to have been made to the question and the answer in this respect. The only exception taken was to the court's refusal to strike out the answer, "It started near the track," and the only objection in this case was that the answer was not responsive to the question, and no foundation laid. The questions were: "In what direction from your place was the fire when you first saw it?" and "With reference to the Northern Pacific Railway Company railroad, where was it?" It would seem to us that the answer was both responsive and that a foundation had been laid. The witness had testified that she had seen the fire; that part of it had burned over her own farm, and what she said in answer to the question, "With reference to the Northern Pacific Company railroad, where was it?" her answer, "It started near the track," was certainly responsive. If she had answered, "The first indications of the fire that I saw were near the track," there could not possibly have been any objection. It appears to us, therefore, that the objection of counsel is merely technical.

Nor did the court commit reversible error in refusing to strike out the answer of the witness Keyes, when, in answer to the question, "Where did you first notice the smoke of this fire?" he said, "It appeared to me from where I was it was on the railroad track." The objection was made that the answer was merely the "opinion of the witness and a conclusion." It is true that afterwards in his testimony the witness stated that he was $2\frac{1}{2}$ miles from the fire at L.R.A.1915E.

this time, but this fact had not been proved at the time of the question, nor do we consider it controlling. The testimony was certainly competent as tending to show from what direction the fire came, and of course it was a conclusion. Every result of the use of the eyesight is as a matter of last analysis a deduction or a conclusion. If judgments were reversed for answers such as the one before us, none of them would stand. The direction from which the fire came was an important matter, as well as the fact that it was on the railroad track. In fact it was not necessary that it should have been started on the railroad track itself in order that the company be liable. The witness was merely testifying as to the direction from which the fire was coming, and to the conclusions which he arrived at from his observation. If he had said, "The first indications of the smoke that I noticed was near a tall tree which stands on the corner of the section," the answer would certainly not have been objectionable. Why, then, should it have been objectionable when he used the railroad track as a means of description or location, rather than a tree or other landmark.

Nor do we see any merit in the contention that the court erred in sustaining the objection to the question propounded to the daughter of the plaintiff, "Were the relations of your mother and Mr. Wilson before this fire always satisfactory?" nor the refusal to allow the answer to the question propounded to the witness Lester, "Did Miss Florence Wilson ever tell you at your house that Richard Wilson came home drunk one night and drove her and her mother out of the house?" The objection was that no foundation had been laid, either in point of time or as to persons or as to place, and as not admissible under the pleadings in this case. It is sufficient, however, to say that the testimony sought to be elicited was purely hearsay, and could, at the most, have had but a remote connection with the case.

As far as the first question is concerned, surely no error was committed. The word "always" is far-reaching, and the materiality of the relationship of the parties during their whole married life is not apparent to us. Nor do we find any error in the rulings of the court during the following examination of Dr. Gerrish:

Q. It has been your experience that a patient suffering such pain as would keep them from sleeping nights for a period extending over a year, you would be able to discover that?

A. I think I would, Yes.

Q. What would you expect to find in a patient suffering along that line?

Mr. Knauf: Objected to, unless applying to the patient in question, whom the doctor says he has never seen. No proper foundation laid.

The Court: The question should be based upon a state of facts of some kind.

Q. A patient who states that she has not been able to sleep well nights, some nights has wakened up frequently, has wakened up and has been some two or three days at a time for a period extending over a year, would be in what condition after that period in your judgment?

Mr. Knauf: Objected to, unless applying to the patient in question. No proper hypothesis for the testimony being given. (Objection sustained.)

What injury could possibly have been sustained from the rulings of the court in this matter it is difficult for us to see. There could only have been one answer, and that would have been that she was in a nervous condition. Counsel says: "We offered testimony to show that her health was poor before the fire; that she had doctored for her health before the fire. The above testimony was offered to show the treatment the plaintiff received from her husband, and the fact that he was a drunkard and abused her and drove her out of the house and kept her out. It would seem that treatment of this kind could have a tendency at least to produce nervous trouble in a woman, and it was most relevant and material, in that it had a tendency to show that possibly matters other than the fire were responsible for a part of the plaintiff's nervous condition."

All of this may be true, but what had the question to do with the causes of her lying awake nights? The question was not directed to what causes induced her to be in the condition which made her lie awake, but to what would be the result of her lying awake. Even if the question were unobjectionable on technical grounds, its relevancy hardly seems apparent to us.

The judgment of the District Court is affirmed.

TENNESSEE SUPREME COURT.

L. C. POWERS, Appt.,

v.

JOURNEYMEN BRICKLAYERS' UNION
NO. 3 et al.

(130 Tenn. 643, 172 S. W. 284.)

Trade union — failure to notify contractors of wage scale — liability.

1. A trade union having absolute con-

trol of the labor market in a particular locality is liable to a contractor for the amount in which he is compelled to pay for labor under the scale fixed by it, in case it fails to notify him of a reduction in the scale, so that he continues to pay the former rates.

Pleading — speaking demurrer — validity.

2. A demurrer to a bill to hold a trade union liable for overpayments by a contractor to employees because of its failure to notify him of a reduction in the wage scale, on the ground that the loss fall on the builder, and not on him, is invalid as a speaking demurrer, where such fact does not appear in the bill.

Same — objection to injunction — demurrer.

3. Objection to a portion of a bill seeking damages against a trade union which seeks to enjoin the withdrawal of its funds from a bank cannot be taken by demurrer.

(Buchanan, J., dissents.)

(December 21, 1914.)

APPEAL by plaintiff from a decree of the Court of Civil Appeals affirming a decree of the Chancery Court for Knox County sustaining a demurrer to a bill filed to recover an amount paid by plaintiff for labor in excess of the wage schedule fixed by the defendant union. Reversed.

The facts are stated in the opinion.

Mr. A. Y. Burrows, for appellant:

Failure to pay the scale as fixed would put the contractor out of business.

Defendants therefore employed duress.

Martin, Labor Unions, p. 66; Aikens v. Wisconsin, 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3; 7 Labatt, Mast. & S. p. 8159; Erle, Trade Unions, p. 12; Allen v. Flood [1898] A. C. 14, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 253, 17 Eng. Rul. Cas. 285.

The union was involved.

Connett v. United Hatters, 76 N. J. Eq. 212, 74 Atl. 188; Jones v. Maher, 62 Misc. 388, 116 N. Y. Supp. 180, affirmed in 141 App. Div. 919, 125 N. Y. Supp. 1126; 7 Labatt, Mast. & S. p. 8391; State ex rel.

Note. — Duty of labor union to notify employer of change of scale.

Questions as to the liability of a labor union on contracts with employers of its members have infrequently arisen, and no other case involving the point here presented has been found. For other cases involving contracts between labor unions and employers of its members, see note in 39 L.R.A. (N.S.) 1190, as to the law of union labels; and in 45 L.R.A. (N.S.) 184, as to agreements between the employer and a labor union.

Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098.

Damages inflicted by the use of intimidation is actionable.

Purington v. Hinchliff, 219 Ill. 159, 2 L.R.A.(N.S.) 824, 109 Am. St. Rep. 322, 76 N. E. 47; Doremus v. Hennessy, 176 Ill. 608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524.

There was fraud in not disclosing the change in conditions.

1 Page, Contr. § 163; 1 Elliott, Contr. § 125; Susong v. Williams, 1 Heisk. 631; Gibson, Suit in Ch. 2d ed. 45; Mooney v. Davis, 75 Mich. 188, 13 Am. St. Rep. 425, 42 N. W. 802; James v. Mercer University, 17 Ga. 515; Loewer v. Harris, 6 C. C. A. 394, 14 U. S. App. 615, 57 Fed. 368; Lindauer v. Hay, 61 Iowa, 663, 17 N. W. 98; Ingram v. Morgan, 4 Humph. 66, 40 Am. Dec. 626.

Messrs. Green, Webb, & Tate, for appellees:

This is an effort to avoid a contract on the ground of duress.

There was no duress here.

Wilkerson v. Bishop, 7 Coldw. 24; Belote v. Henderson, 5 Coldw. 471, 98 Am. Dec. 432; Waller v. Parker, 5 Coldw. 476; Eslow v. Albion, 153 Mich. 720, 22 L.R.A. (N.S.) 872, 117 N. W. 328; F. H. Mills Co. v. State, 187 N. Y. 552, 80 N. E. 1109; Matthews v. William Frank Brewing Co. 26 Misc. 46, 55 N. Y. Supp. 241.

Neill, Ch. J., delivered the opinion of the court:

The case stated by the bill is this: The defendant union is composed of all of the bricklayers in Knoxville and vicinity. Under the terms of the organization there is devolved upon it the duty of fixing the rate of wages for all of its members for each year in advance. The union fixes this scale about the beginning of the calendar year, and gives notices to contractors before the employment or union year begins, which runs from the 1st day of May of any given calendar year to the last day of April of the following year. The complainant is a contractor in Knoxville, and necessarily has to employ the members of the union to work for him in carrying out his contracts, as he can obtain no others. He received a notice in the early part of the year 1910 that the regular wage for the ensuing union year would be 62½ cents per hour. On the faith of this notice, and accepting the terms, he employed certain of the members, and for a series of months paid them at the rate of 62½ cents, without any knowledge or notice that the rate had been changed by the union, after it had been

given to him. The fact was, however, that after he had been notified of the 62½-cent rate, and had employed the men, the union changed the rate to 56½ cents per hour, but gave complainant no notice. In ignorance of the change, he continued to pay his employees at the rate of 62½ cents, the result of which was that he suffered a loss of \$322.59 difference in his profits between the 56½-cent and 62½-cent wage. He sues for this sum.

There was a demurrer filed which raised the point that the above facts did not state a cause of action. The chancellor and the court of civil appeals so held. We think they were both in error.

A labor union organized for the purpose of regulating the wages of its members and protecting them in their contracts and the promotion of their interests as laboring people is lawful. Rohlfs v. Kasemeier, 140 Iowa, 182, 23 L.R.A.(N.S.) 1284, 132 Am. St. Rep. 261, 118 N. W. 276, 17 Ann. Cas. 750; Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 22 L.R.A.(N.S.) 607, 128 Am. St. Rep. 492, 114 S. W. 997; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; Thomas v. Cincinnati, N. O. & T. P. R. Co. (C. C.) 4 Inters. Com. Rep. 788, 62 Fed. 803. It has even been held that it is lawful for a single employer to contract with a labor union that he will employ only union men. Jacobs v. Cohen, 183 N. Y. 207, 2 L.R.A.(N.S.) 292, 111 Am. St. Rep. 730, 76 N. E. 5, 5 Ann. Cas. 280; Mills v. United States Printing Co. 99 App. Div. 605, 91 N. Y. Supp. 185.

The situation in Knoxville, under the allegations of the bill, was such that the union had absolute control of the labor market in respect of the services of bricklayers, fixed the terms of employment and the wages, and the bricklayers all had agreed thereto by becoming members of the union which exercised this power. The result was that the complainant was bound to accept these terms if he employed any of their men. He could employ no other. Now, while each several contract of employment was made with the men who agreed to work for him, and while they might accept his employment or refuse it, yet, if a contract was made between them and the complainant, it was bound to be on the terms fixed by the union. So, while there was no contract between the union and the complainant for the services of the men who worked for him, yet the relation established by the facts existing at the time was the same in practical effect and result as if he had agreed with the union to employ no one but its members. Possessing the power, as it did, to make it

impossible for the complainant to employ any member except on terms fixed by it, and having assumed, as a part of the duty imposed, the obligation to give notice of the terms on which contractors were authorized and expected to rely, the duty was likewise imposed on the union by necessary implication of law to give notice of any change made in these rates which would affect the rights of contractors justified in acting under a previous notice. To hold differently would authorize the conclusion that the union could with impunity use its lawful powers for the purpose of enabling its members to practise a fraud on contractors who justly relied on, and were expected to rely on, its representations or notices as to the rate of wages. In issuing these notices the union necessarily informed the contractors that they were final, and were to be the basis of contracts, or at least were to continue for the period fixed in the notice, unless changed by the same power which issued the notice. When the union so issued a notice, knowing it must be and would be relied on by the contractor, and issued it for the purpose of having it relied on, and it was relied on and acted on by the contractor to his prejudice because of a subsequent change made without notice, the liability arose against the union to make good the injury so caused. The notice of the rate fixed for a year was a continuing representation on the part of the union that such was the agreed basis of contract with the men for the whole year, and upon a subsequent change of the basis without notice to the contractor such former notice thereafter operated as a continuing misrepresentation, and, being relied on by the contractor to his prejudice, raised a cause of action against the party making such misrepresentation; that is the union. The failure to give the notice of the change in the rate naturally resulted in such damages as is claimed by the complainant in the present case, and of this the union was bound to take notice.

There is a ground of demurrer to the effect that such injury as occurred was necessarily suffered not by the contractor, but by the persons with whom he contracted for the erection of buildings; this on the assumption that he figured the cost of the wages into the price of his work. This is a speaking demurrer, and hence bad, because there is nothing in the bill to justify it. On the contrary, there was an amendment to the bill in which the complainant stated, in effect, that in getting his contracts for work he was compelled to compete with other bidders, and obtained the contracts, if at all, at the lowest prices, and in this L.R.A.1915E.

way the difference in the wages came out of his profits.

There is another ground of demurrer directed to those parts of the bill which lay the basis for an injunction against the union's withdrawing certain funds it has in bank. This is not a proper matter for demurrer, but for motion in the court below to dissolve the injunction. Such a motion was made and disallowed.

Before closing the opinion we should say that it appears from the bill that the union is an unincorporated association. As such, of course, it cannot be made a party. *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A. (N.S.) 1067, 1081, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638. To avoid this difficulty the complainant made sundry members of the union parties defendant, stating that these were all he could learn the names of. It is not distinctly alleged in the bill that these were made defendants as representing all others of the same class; that is, standing for the union. *Ibid*; *Brown v. Brown*, 86 Tenn. 277, 279, 310, 6 S. W. 869, 7 S. W. 640; *United States Fidelity & G. Co. v. Rainey*, 120 Tenn. 357, 384, 113 S. W. 397. Proper allegations, however, can be made on this subject when the case again reaches the chancery court on the remand.

On the ground stated we are of the opinion that both the Chancery Court and the Court of Civil Appeals committed error in dismissing the bill. Their decrees are therefore reversed, and the cause remanded to the end that the amendment above mentioned may be made, and that an answer may be filed and proof heard.

Buchanan, J., dissents.

WISCONSIN SUPREME COURT.

RE ESTATE OF WILHELM BOECK, Deceased.

HERMAN AUGUST BOECK, Appt.

(160 Wis. 577, 152 N. W. 155.)

Will — evidence to locate description of property.

A devise, by the owner of only the south half of a quarter section of land, of the northwest quarter of such quarter section,

Note. — Correction of misdescription of land in will.

This note is a supplement to that appended to *Lomax v. Lomax*, 6 L.R.A. (N.S.) 942, under the same title. It includes the cases reported since the publication of the primary note, and none other, wherein the courts have held a testamentary devise of real estate which the testator did not own

may be shown by parol to have meant the southwest quarter, where otherwise the southwest quarter will be intestate property, and no provision will be made for the two children to whom the devise is made.

(Kerwin and Barnes, JJ., dissent.)

(April 16, 1915.)

APPEAL by Herman August Boeck from a judgment of the Circuit Court for Waushara County reversing in part the final judgment of the County Court construing the will of Wilhelm Boeck, deceased, and assigning the residue of his estate. Reversed.

Statement by Marshall, J.:

Wilhelm Boeck died testate October 13th, 1912. He had owned continuously, up to that time, for many years, south half of northwest quarter of section 13, township 18, range 12 east in Waushara county, Wisconsin, the east forty of which was his homestead. He never owned any other land in said quarter section. The west forty which he owned is the subject of this action. He was sixty-nine years old at the date of the will. He was survived by eight children. All were named as beneficiaries. There was no residuary clause in the will. All the property, by specific mention, was distributed among the survivors except the

either was or was not effective to carry to the devise a title to land which the testator did own and supposedly intended to devise.

It is not deemed necessary to discuss anew the fundamental principles which apply in cases of this kind. Whatever the practical result of any decision in a concrete case, no court in giving its opinion has denied that the intention of the testator is the largest and most potent factor in interpreting and giving effect to his will; that courts will seize upon the slightest indications of that intention which can be found in the will to determine the real objects and subjects of the testator's bounty; that errors in describing the subject of a testamentary gift indicated by some data in the will as that which the testator intended to bestow may be corrected, or, if it is imperfectly or vaguely described, may be accurately and definitely defined; that the testator's intention must be determined from the language he used in the will, and cannot be inferred solely from extrinsic evidence and oral testimony; and, finally, that no court rightfully may exercise judicial power so to reform a will as to make it transfer to a supposedly intended donee any property of the testator respecting which his will contains not the faintest allusion.

In *Higgins v. Tennessee Coal, Iron & R. Co.* 183 Ala. 639, 63 So. 774, the will under consideration devised a tract of land in a designated township and range, but omitted to state the section number. As the description given might apply to and fit equally well any like tract in any one of all the sections in the township and range named, it was the opinion of the court that the imperfect description created an ambiguity in the will, either or somewhat between a latent and a patent one, which rendered admissible for the purpose of identifying the subject of the devise parol evidence that the testator owned and had owned only one tract of land in such township and range, which fitted as much of the description as was given in the will.

The Arkansas Supreme Court, by three of its five judges, in the case of *Eagle v. Oldham*, — Ark. —, 174 S. W. 1176, 1199, decided that a tract of land which a tes-

tator owned should pass as the one he intended to devise to the devisees of a tract that he did not own but had specifically devised by a description locating it in a township, range, and section of designated numbers where he owned no land, but where the description would have fitted a tract in an adjoining township, range, and section if the appropriate numbers had been used.

The decision was rested upon the undisputed principle that the intention of the testator is controlling in all doubtful cases, and the authority of the United States Supreme Court in *Patch v. White*, 117 U. S. 210, 29 L. ed. 860, 6 Sup. Ct. Rep. 617, 710. The doctrines that the intention of a testator must be ascertained from the language of the will itself, and that extrinsic evidence is only admissible to show the meaning of the words he used, and not his purpose in mind apart from what the words express, were conceded.

In the terms the testator had employed in his will, read in connection with the circumstances environing him when he made it, the majority found evidence sufficient to convince it that by the specific devise under scrutiny the testator intended to give to the devisees the tract of land answering the description in all but numbers which he owned, and misdescribed it.

The will was holographic, and the testator was unskilled in drafting legal instruments. He made several other mistakes in describing sundry parcels of land which he devised. The will recited that the testator had deeded to his wife in her lifetime his home in Little Rock and some lots of land, and that she had been possessed of \$5,000 in money, which he had divided among her brothers and sisters. It proceeded by declaring it to be the testator's purpose (he being a childless widower), first to give his own brothers and sisters the advantage of the property he had inherited from his father, and then, taking into account the homestead, money, and lots before mentioned, to divide his estate equally between his wife's and his own brothers and sisters. The will closed by devoting all the real and personal estate not specifically bequeathed and devised, to the payment of debts and legacies, and disposed of

40 acres involved in the action. To Herman August Boeck he, in terms, gave the northeast quarter of the northwest quarter of said section 13. Herman was not otherwise remembered on anywhere near the basis of his brothers. The will was duly admitted to probate in Waushara county and in due course the estate was assigned. Thereby the southwest quarter of the northwest quarter of said section 13 was dealt with as having been intended for Herman August Boeck. The two daughters appealed to the circuit court, insisting that the forty not mentioned in the will was intestate property. The circuit court in due course so held, and gave judgment accordingly, and awarded the contestants \$60 as attor-

neys' fees, to be paid out of the estate. Judgment was so entered.

Herman August Boeck appealed.

Mr. John J. Wood, Jr., for appellant:

In construing a will, the vital thing is to find the testator's intention, which must be gathered from the instrument, read in the light of circumstances surrounding him when he made it.

Flint v. Wisconsin Trust Co. 151 Wis. 231, 138 N. W. 629, Ann. Cas. 1914B, 67; *Ohse v. Miller*, 137 Wis. 474, 119 N. W. 93.

Whenever the words of a will, fairly construed, are such as to carry the whole estate, it will be presumed that the testa-

any surplus that might remain to the testator's brothers and sisters or their heirs as residuary legatees.

Among the real estate specifically devised to the testator's brothers and sisters were some parcels described in some respects erroneously or defectively, but not very difficult to identify from the descriptions given, and the particular parcel in controversy.

The two judges who dissented conceded that *Patch v. White*, supra, had laid down a correct rule, and that under that rule there was a sufficient description in the will of one tract of land to warrant the court in correcting errors in it by extrinsic evidence, but they insisted that to substitute a description of one for another tract amounted to nothing short of reformation of the will to make it accord with what the oral testimony showed to have been the real intention of the testator. "We have before us," they said, "nothing to explain or alter the imperfect descriptive words used by the testator except the bare fact that he did not own the lands answering the descriptive words of the will but did own other lands which he doubtless intended to describe." They thought there was no escape from the conclusion that when the court undertakes to substitute words it in effect reforms the will, or permits it to be varied by oral testimony. The case was not, they declared, like *Patch v. White*, supra, where property devised was described by two methods, one correct and the other incorrect, so that the court could discard the incorrect description: for in the case at bar there was only one description, and when that was discarded there was nothing left. The process of the court, therefore, was substitution pure and simple, based on oral testimony.

In *Albury v. Albury*, 63 Fla. 329, 58 So. 190, the will involved specifically devised a piece of land, describing it as all that tract of land on Long Key, Monroe county, Florida, containing 236 acres, more or less, described as lot number 2, sections 4 and 5, township 65, south of range 36. The lot, section, township, and range numbers did L.R.A.1916E.

not fit any land which the testatrix owned, nor, indeed, any land at all on Long Key, in said county. The testatrix, however, did own on Long Key, Monroe county, Florida, a continuous tract of land containing by an accurate survey 227 acres, but that tract consisted of lot 3, section 33, township 64, south of range 35 E.; lot 2, section 4, township 65, S. range 35 E.; lot 1, section 5, same township and range; and lot 3, section 4 in the same township and range.

If the numbers given in the description of the will were discarded, the devise would read: "all that tract of land on Long Key, Monroe county, Florida, containing, 236 acres more or less," and that language would identify and sufficiently describe the tract of land actually owned by the testatrix, and which plainly she intended to devise in her will. Accordingly the court held that the latter tract passed by the devise to the devisees, and constituted no part of the residuary estate.

The case of *Oliver v. Henderson*, 121 Ga. 836, 104 Am. St. Rep. 185, 49 S. E. 743, arose upon demurrer to a petition praying leave to present oral evidence to prove a testator's intention by a devise in his will to the petitioner of a tract of land he did not own, to devise one that he did own.

The petition alleged that the testator in his will had devised to the petitioner a parcel of real estate described therein as "lot of land (78) in the second district of D. county," but that he did not own lot 78, but did own lot 68, in said district and county, and had said in his lifetime that he intended to give lot 68 to the devisee, and often spoke of it as the latter's property. The court sustained the demurrer, and held the petition insufficient to warrant the admission of extrinsic evidence.

To have made the evidence admissible, said the court, the petition should have alleged that the testator owned only one lot in the second district of D. county, which lot was number 68.

If this had been alleged the court might have said as against the demurrer that, inasmuch as the testator manifestly in-

tor's intention was to dispose of all his property.

Saxton v. Webber, 83 Wis. 617, 20 L.R.A. 509, 53 N. W. 905.

And the fact that there is no residuary clause in the will strengthens this presumption.

40 Cyc. 1409; Felkel v. O'Brien, 231 Ill. 329, 83 N. E. 170; Collins v. Capps, 235 Ill. 560, 126 Am. St. Rep. 232, 85 N. E. 934.

Where, on inquiry, it is found that descriptive words of a devise on their face clear are in part incorrect in that land not belonging to the testator has been devised, a latent ambiguity is shown, rendering extrinsic evidence to identify the property intended admissible.

tended to devise a lot in the second district of D. county, he must have meant lot 68 to pass, because that was the only one he owned in that district and county.

A devise of a lot of land by a wrong number, located in a named district and county, when the testator owned only one lot in that district and county which bore another number, might, in the opinion of the court, very well be decreed to pass to the devisee the lot the testator owned, since, striking out the number, the naming of the district and county in which it lies affords a basis for identifying the lot the testator intended to devise by extrinsic oral evidence: but if the testator died seized of other lots in that district and county, the court cannot, after discarding the number given in the will, make what is left of the description fit any one lot in particular, and hence cannot receive parol evidence of the testator's intention.

The doctrine of the supreme court of Illinois as it appears in the opinions in the recent cases of Douglas v. Bolinger, 228 Ill. 23, 119 Am. St. Rep. 409, 81 N. E. 787; Felkel v. O'Brien, 231 Ill. 329, 83 N. E. 170, and Collins v. Capps, 235 Ill. 560, 126 Am. St. Rep. 232, 85 N. E. 934, is, succinctly stated, as follows: If land is devised in a will under a description containing false words, and, when the false words are eliminated, there is enough left of such description which, read in the light of the circumstances environing the testator at the time he made his will, suffices fairly to identify land he intended to devise, the false words may be discarded and the rest of the description be applied to such land and made to pass it to the devisee. To warrant a court, however, in correcting a description of land devised by will which the testator did not own, so as to make it apply to and pass land which he did own, there must, after eliminating the false words, remain enough of the description at least fairly to identify the parcel which the testator owned and intended to devise: if what is left of the description after the false words have been discarded cannot by itself be made to fit the parcel which the L.R.A.1915E.

Felkel v. O'Brien, supra; Patch v. White, 117 U. S. 210, 29 L. ed. 860, 6 Sup. Ct. Rep. 617, 710; Flood v. Kerwin, 113 Wis. 673, 89 N. W. 845.

Where there is a latent ambiguity in the language of the will, or the will contains inconsistent provisions, extrinsic evidence is admissible to enable the court to ascertain and give effect to the intention of the testator as expressed in the will, when read in the light of all the surrounding circumstances as they existed at the time the will was executed.

Hanley v. Kraftczyk, 119 Wis. 352, 96 N. W. 820; Illinois Steel Co. v. Budzisz, 139 Wis. 281, 119 N. W. 935, 121 N. W. 362; Lins v. Seefeld, 126 Wis. 610, 105 N. W. 917; Grossbach v. Brown, 72 Wis. 458,

testator owned, the court cannot insert in it or add to it any words not found in the will, to make it apply.

In each of these cases a way was found to make a testamentary devise of a tract of land the testator did not own apply to and pass to the devisee one which he did own.

In Douglas v. Bolinger, supra, the will indicated the intention of the testator to die testate, by devising to two of his sons separately substantially like parcels of land, and contained no residuary clause. In describing the land devised to one of the sons the will called it the "north half of the northwest quarter" of a certain section. The testator did not own the north half, but did own the west half, of that quarter section. The testator's intention being to devise the half he did own, the court struck out the first word "north" from the description as false, and held the remaining words, viz., "half of the northwest quarter," etc., sufficient to identify and pass the west half of the quarter section which the testator owned.

The will in Felkel v. O'Brien, supra, contained no residuary clause. It purported to devise the "north half of the southeast quarter of section 27, containing 80 acres." The testator owned half of this quarter section, but not the north half. When the court had eliminated the word "north" from this description as false, there was enough left to identify the tract the testator owned.

The will in Collins v. Capps, supra, contained a residuary clause, but the court held that this made no difference. In that case the land devised was a 76-acre farm in a named county. It was erroneously described as the west half of a certain quarter section. The testator did not own the west half, but did own the north half, of that quarter section. The court struck out of the description the word "west" as false, and applied the rest of it to the tract the testator did own.

A somewhat parallel case to the last was Morrall v. Morrall, 236 Ill. 640, 86 N. E.

40 N. W. 494; *Scott v. West*, 63 Wis. 529, 24 N. W. 161, 25 N. W. 18; *Thompson v. Jones*, 4 Wis. 106; *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175; *Begg v. Begg*, 56 Wis. 534, 14 N. W. 602; *Keller v. Keller*, 80 Wis. 318, 50 N. W. 173; *Mills v. Chicago & N. W. R. Co.* 103 Wis. 192, 79 N. W. 245; *Felkel v. O'Brien*, 231 Ill. 329, 83 N. E. 170; *Collins v. Capps*, 235 Ill. 560, 126 Am. St. Rep. 232, 85 N. E. 934; *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750; *Whitcomb v. Rodman*, 156 Ill. 116, 28 L.R.A. 149, 47 Am. St. Rep. 181, 40 N. E. 553; *Vestal v. Garrett*, 197 Ill. 398, 64 N. E. 345; *Douglas v. Bolinger*, 228 Ill. 23, 119 Am. St. Rep. 409, 81 N. E. 787; *Gano v. Gano*, 239 Ill. 539, 22 L.R.A.(N.S.) 450, 88 N. E. 146; *Stewart v. Stewart*, 96 Iowa, 620, 65

N. W. 976; *Eckford v. Eckford*, 91 Iowa, 54, 26 L.R.A. 370, 58 N. W. 1093; *Merrick v. Merrick*, 37 Ohio St. 126, 41 Am. Rep. 493; *Pate v. Bushong*, 161 Ind. 533, 63 L.R.A. 593, 100 Am. St. Rep. 287, 69 N. E. 291.

Mr. Gad Jones for respondent.

Mr. Charles T. Taylor, guardian *ad litem*.

Marshall, J., delivered the opinion of the court:

There are no two opinions as to what the testator intended. He purposed recognizing his son Herman by giving him the 40 acres of land which was not otherwise disposed of by his will, and to burden it with a legacy of \$150 in favor of his daughter

578. In that case the testator devised his homestead. He faultily and imperfectly described the land, but did not misdescribe it. The court corrected the description in the light of extrinsic explanatory evidence respecting the circumstances and intention of the testator, holding the designation "homestead" used in the will a sufficient identification of the subject of the devise.

The next case to demand the attention of the Illinois supreme court to the question in hand was that of *Gano v. Gano*, 239 Ill. 539, 22 L.R.A.(N.S.) 450, 88 N. E. 146.

There the testator, after devising to his wife the life use of all his real estate, gave at her death to one of his sons the southeast [quarter of the northeast quarter] and northeast quarter of the northwest quarter of section 14, township 19, north range 3, east of the third principal meridian. The testator owned the whole northwest quarter of section 14 in said township and range, and he owned no land at all in the northeast quarter section. Consequently only one of the tracts which he thus devised belonged to him. For forty years before he died he had been in possession of the southeast quarter of the northwest quarter of section 14 aforementioned, claiming under a deed which erroneously described it as the southeast quarter of the northeast quarter of that section. The description in this deed had been copied into the will. The widow and adult heirs of the testator, assuming his intention to devise to the son the half of the northwest quarter of the section, had conveyed to the devisee all their interest in that land, but the infant children of a deceased son brought an action to partition the southeast quarter of the northwest quarter of section 14, upon the theory that as to that the testator died intestate, save for the life estate of the widow.

A majority of the court, four of the seven judges, were of the opinion that the words of the description above inclosed in brackets might be discarded from the devise as false, and then the remaining language would correctly describe the land L.R.A.1915E.

owned by the testator, as to half of which there was no controversy.

The other three judges dissented. Mr. Justice Vickers (in whose opinion Justice Farmer concurred) said: The desire of courts to avoid the consequences of holding a will invalid may be commendable, but it ought not to be carried to the extent of making a new will for the testator, or reforming one so imperfectly made that it is necessary to strike out one matter of substance and insert another. To do so is to carry the restricted latitude allowed in construction to the boundless field of reformation. . . . The testator devised the southeast quarter of the northeast quarter of section 14, etc., which is a perfect description of a tract of land that actually existed. The majority opinion strikes out "southeast." There are four quarter sections in section 14, each of which has a southeast quarter, so that it is impossible to locate the land devised without reading into the will the words "northwest quarter" in lieu of the word eliminated. This is something more than construction,—it is reformation.

Mr. Chief Justice Cartwright, who united in the dissent, put it thus: The terms of the devise to David T. Gano are plain and free from doubt or ambiguity. The subject-matter is described in certain and definite language, which clearly refers to a certain and definite tract of land according to its government description; and in my opinion to allow the natural and definite meaning of the words to be contradicted by parol evidence, and another and different tract of land to be substituted, is to make a new will, and thereby violate the rule requiring wills to be in writing.

In the case of *Graves v. Rose*, 246 Ill. 76, 30 L.R.A.(N.S.) 303, 92 N. E. 601, soon afterwards decided by the same court, the facts were so similar to those in *Gano v. Gano*, supra, as to make it difficult to distinguish the two, but the minority in the *Gano* Case became a majority in the *Graves-Rose* Case.

In the latter case the will devised three parcels of land, to wit, (a) the west half of

Bertha. That he intended to deal with the land he did not own, and thereby practically disinherit both son and daughter, notwithstanding the careful remembrance of them and all other members of his family, would be too absurd to be seriously thought of. This was the view below: but, —influenced by the observation in the editor's note in 6 L.R.A.(N.S.) 977, to *Lomax v. Lomax*, 218 Ill. 629, 75 N. E. 1076, that "if the will containing the devise . . . contains a complete, accurate description of a tract of land not owned by the testator, and no language whatever pointing in any wise to an intention to devise another tract which he did own, the devise fails, it cannot be made to apply to a different parcel by extrinsic evidence; but if, anywhere in

the will, there can be discovered words connecting the devise . . . with a tract of land that belonged to the testator, or indicative of his intention by such devise to devise a tract of land owned by him, courts will seize upon such words to make effectual the testator's intended devise," and, further influenced by expressions, found now and then in judicial writings and encyclopædic codifications of decisions, such as this, now cited to us by counsel for respondent: "Where the will is plain, simple, and unambiguous on its face, no evidence of the surrounding circumstances can be admitted,"—the learned circuit judge supposed the judicial hands were so tied to the rock of precedent that they

the northwest quarter of section 12; (b) the east half of the same quarter section; and (c) the east half of the northwest quarter of section 9. The testator owned the northeast quarter of section 12 and the south half of the northwest quarter of section 9. Consequently he owned but half of parcel c, and did not own at all either parcel a or b. The suit was an effort to have the court correct the descriptions of the parcels devised so as to make them fit the land the testator in fact owned, conformably to his supposed intention, established by extrinsic evidence.

The majority of the court decided that this could not be done, for the reason that after cutting out of the descriptions in the will the words which fitted them to lands the testator did not own there would not be enough left of the descriptions to connect them with the lands he did own, and to make them fit, it would be necessary to insert in lieu of the excised parts other letters, words, or figures identifying the supposed subjects of the devises. This in the judgment of the majority of the court would amount to reforming the will, and not merely to rectifying a false or perfecting an imperfect description in it.

The three judges who dissented adhered to their views when they were with the majority in the *Gano Case*, and denied the necessity of inserting anything in place of the discarded false parts of the descriptions.

The rule that when property devised by will is described only in part truthfully, and in part erroneously, the false portion may be effaced and the true portion retained when enough of the description is correct to identify the subject of the devise, but that nothing can be substituted to replace the eliminated words, if such should be requisite to show what the testator intended to devise, was reiterated in *Clancy v. Clancy*, 250 Ill. 297, 95 N. E. 141, where the court without dissent held that a devise of land of which the testator owned but a part could not be so amended as to make it cover some 80 acres of land that was not described which he did own, and L.R.A.1915E.

that as to those 80 acres he had died intestate.

A testamentary devise of the testator's home farm, under the designation as such, containing in all 200 acres, more or less, will pass to the devisee the testator's home farm of 200 acres, consisting of one tract of 160 acres correctly described, and another tract of 40 acres falsely described and not owned by the testator, because after striking out the false description of the 40-acre tract not owned the devise is plainly identified by the remaining language. *Lawrence v. Lawrence*, 255 Ill. 365, 99 N. E. 675.

Where a devise of a tract of land is twice described in the will in such wise that the two descriptions conflict, one of them being correct and the other erroneous, the false description may be rejected as surplus, and the land will pass under the correct description. *McGovern v. McGovern*, 268 Ill. 135, 108 N. E. 1024.

Although land devised in a will is inaccurately described, it will still pass to the devisee if the description is reasonably sufficient to identify the subject of the devise. *Taylor v. Taylor*, 174 Ind. 670, 93 N. E. 9.

A testamentary devise of the north half of the northwest quarter of a certain numbered section of land, when the testator did not own and never had owned that tract, was made by the Iowa supreme court in *Whitehouse v. Whitehouse*, 136 Iowa, 165, 125 Am. St. Rep. 250, 113 N. W. 759, to pass the north half of the northeast quarter of the same section, which he did own and was found to have intended to devise, by the following method. First, the court struck out as false the word "west," leaving the devise to read, "the north half of the north quarter of" the section. This done, the court held, second, that a latent ambiguity had been created, since there were two north quarters—a northeast and a northwest quarter—in the section. It then held, third, that such latent ambiguity might be explained by extrinsic evidence, and was dissipated by proof that the testator owned the north half of the north-

could not be so loosened as to do justice in the particular case.

This is a good illustration of the danger of taking literally mere expressions sometimes found in law writings, for a guide. That danger is progressive directly as the volume of such writings increases, and, perhaps, want of clearness of expression and tendency to follow precedent, instead of principle, increases.

In the literal sense, the second quotation above, taken from 14 Encyclopedia of Evidence, page 504, is at least very misleading, and likewise the first quotation. If either means that the language of a will which is plain in its words cannot be changed in that respect by characterizing circumstances, and the ambiguity solved by reading the

instrument in the light of the entire situation with which the testator dealt, it is wrong. Such a rule would make of law, in many cases, an instrument for perpetrating wrongs, instead of one for vindicating rights.

It is useless to try to harmonize the many expressions found in the books in respect to the subject under discussion. There are some well-established principles which are of the highest dignity. So far as such expressions do not accord therewith, they are wrong. The dominant of all such principles is this: The intention of the testator, so far as it can be discovered from his will, must be considered as expressed therein. With that goes all the principles for judicial construction. The

east quarter, and did not own the north half of the northwest quarter. It was then plain sailing to the conclusion that the devise passed the north half of the northeast quarter, instead of the tract described.

A will which by clear and explicit language devises under an accurate description the southwest quarter of the northeast quarter of a certain section of land which the testator did not own cannot, on the theory that a mistake was made in describing the land, be made by judicial decree to pass to the devisee the southwest quarter of the northwest quarter of said section, the only land in that section which the testator owned or ever had owned; neither can oral testimony be received to prove that it was the intention of the testator to devise the latter tract, when there can be found in the will no language whatever indicative of such an intention on his part. *Chrisman v. Magee*, — Miss. —, 67 So. 49.

A devise of "my Kansas City property on Olive street, No. 705 and 1489," was construed to pass lots numbers 1705 and 1914 on the same street in the same city, the only property the testatrix owned there, in *Methodist Episcopal Church, South v. May*, 201 Mo. 360, 99 S. W. 1093, because the property intended to be devised was sufficiently identified by the general description, "my Kansas City property on Olive street," after the false numbers had been stricken out.

In *McMahan v. Hubbard*, 217 Mo. 624, 118 S. W. 481, the land devised was described in the will as "seven acres part of the southwest quarter of the southeast quarter, also the northwest quarter of southeast quarter, also the east one half of the southwest quarter, and that part of the west one half of the southwest quarter lying east of the present fence running on the east side of said tract; also the twenty-three acres being part of the northeast quarter of the northwest quarter of section 33, all the above land in township 25, of range 31." The testator was shown to have owned a farm, in township 25 of range 31, forming a continuous tract of land answer-

ing the description in the will, but of which only that mentioned in the last clause of the description was located in section 33. The rest of it was a part of section 28, which adjoined section 33 on the north. If the call of section 33 was restricted to the 23-acre tract, then the rest of the description was imperfect by the omission of section No. 28, but was sufficient in other respects to identify the subject of the devise; but if the call of section 33 was applied to the whole description, then the farm was divided into two unequal, separate tracts of land, of which the larger one did not belong to the testator at all. In this condition of affairs, the court construed, and rightly, the designation of section 33 to attach only to the 23-acre tract devised, and admitted extrinsic evidence to identify the rest of the land described somewhat imperfectly by the omission of the true section number.

Devises of several parcels of land described correctly as lying in a section, township, and range designated by their numbers, without reference to state or county, may be identified by evidence that the testator owned, lived many years and died upon land in a particular county and state, which answered in every respect to the descriptions in the will. *Myher v. Myher*, 224 Mo. 631, 123 S. W. 806.

In *St. James Orphan Asylum v. Shelby*, 75 Neb. 591, 106 N. W. 604, the Nebraska supreme court, resting upon the authority of and following the decision in *Seebrook v. Fedawa*, 33 Neb. 413, 29 Am. St. Rep. 488, 50 N. W. 270, which it declared decisive of the case at bar, held against residuary devisees in possession ever since the testator's death, that a devise to the Roman Catholic Bishop of Omaha, of the southwest quarter of the northwest quarter of section 35, township 16, range 13, a tract the testator did not own, was good to pass the title to the southwest quarter of the southwest quarter of said section, township, and range, which he did own, on the ground that the testator intended to devise the latter tract, and misdescribed it.

basic one of such principles is that judicial construction begins only when uncertainty of meaning arises. With that goes the explanatory principle that uncertainty of meaning may arise as well by application of the words of a will to the subject with which it deals as from the words of the will themselves; and the one that while extrinsic evidence cannot be resorted to for the purpose of changing or explaining a will, it may be for the purpose of showing the circumstances characterizing its making, and, for the purpose of determining the meaning in fact, and intended to be expressed therein, it may be read in the light of such circumstances. These principles for construction have been so often stated in the decisions of this court that

they must be considered as an undoubted part of our unwritten law, regardless of expressions here or elsewhere which might be viewed as not in harmony therewith.

Our attention is called to *Sherwood v. Sherwood*, 45 Wis. 357, 30 Am. Rep. 757, to support the idea that ambiguity in a will cannot be created by reading it in the light of circumstances established by extrinsic evidence, nor such ambiguity explained by reading it in the light of like circumstances, but the contrary is the fact. There the distinction is drawn between reformation and construction, the former not being permissible as to a will, and the latter just as legitimate as in respect to any other written instrument. There also it was held that "evidence of the intention of

Referring to the cited case, which the court deemed decisive, it said: "In that case the testator devised lots 4, 9, and the west half of 10 in block 32 in the city of Lincoln. He was not the owner of lot 4, but did own lots 3, 9, and the west half of 10, and those were all of the lots possessed by him in that block, and it was held that lot 3 passed by the will."

In the *Seebrock* Case thus cited, the testator first gave to his widow all his personal estate of every description and nature wheresoever situated and not specifically bequeathed to others, and next in that immediate association devised to her the lots 4 and 9 and the west half of lot 10 in block 32 in the city of Lincoln. She was to have and to hold this land while she remained the testator's widow, or until the youngest of his four children by his second marriage reached majority. There was a remainder over to these four children equally share and share alike.

Then followed specific legacies of money to each of the testator's three children by his first wife. Finally the testator gave, devised, and bequeathed "all the rest, residue, and remainder of my estate, both real and personal," to his widow, and "as well the lots numbered 4 and 9 and the west half of 10 of block numbered 32, in Lincoln, Nebraska," subject to the same conditions.

The court held that this will let in extrinsic evidence that the testator did not own lot 4, but did own lot 3 and intended to devise lot 3, and that the latter should pass to the widow and her four children.

The will involved in the *St. James Orphan Asylum* Case is not set forth in the report.

The case of *Pemberton v. Perrin*, 94 Neb. 718, 144 N. W. 164, Ann. Cas. 1915B, 68, was an application of the principle that a false term may be stricken out of the description of land in a testamentary devise, and the rest of the description used to identify the subject of the devise.

In that case the testator devised a tract of land which was described in the will as L.R.A.1915E.

the northwest quarter of the northeast quarter of section 8, township 17, range 9 east in Washington county, Nebraska. This description fitted accurately a tract of land which the testator owned in the county of Washington in every particular except the number of the range; the scrivener having by mistake substituted 9 for 10 in that respect. As the description could be applied to the tract the testator owned, the court discarded the false number, and received oral testimony showing that the testator owned only one tract fitting the description, and that was in range 10 and was intended to be devised by the will.

A devise by a testatrix residing in a foreign state, in a will presumptively intended to dispose of all her property, of "my piece of land in Providence, R. I.," will pass the title to the only piece of real estate which she owned in the state of Rhode Island, viz., a small parcel located in East Providence, and the court will treat the description as a misdescription, and construe the devise so as to carry out the intention of the testatrix, not by inserting the word "East" before Providence, but by striking out the word "Providence" instead. *Merrill v. Macomber*, — R. I. —, 93 Atl. 642.

A specific testamentary devise of "my two freehold cottages or tenements with the appurtenances belonging thereto, situate at Trowbridge, known as Nos. 19 and 20, Castle street," etc., proof being made that the testator owned two houses in Trowbridge numbered 19 and 20, but that they were in Thomas street, not in Castle street, as the will stated, passes title to the Thomas street houses, because the word "my" is an essential part of the description, and the words "Castle street" are not, for the reason that when the words "Castle street" are omitted from the description of the land devised there is no difficulty in identifying the subject of the devise from the remaining language used in the will, as the testator's two freehold cottages, etc., at Trowbridge, numbered 19 and 20. *Re Mayell*, [1913] 2 Ch. 488, 83 L. J. Ch. N. S. 40, 109 L. T. N. S. 40.

the testator, extrinsic to the will itself, is not admissible for the purpose of explaining, construing, or adding to the terms of a will; but such intention must be spelled out from the words of the will itself, *read in the light of the circumstances surrounding the testator when he made it*. In cases where there are inconsistent provisions in the will, evidence of such circumstances is always admissible." That is in perfect harmony with what we have said.

In view of the foregoing, keeping in mind the fact that, where the intention of the testator is plain, the court may and should go to the uttermost limits of construction authority to discover it expressed in the language used to that end, there does not seem to be any difficulty in reading the will in question as devising 40 acres of land to Herman August Boeck. That much is literally expressed, and there is no difficulty in applying it to the particular forty, since

that is the only one the testator had after devising one to his son Samson.

That manner of reading a will to carry out a testator's intention is so grounded in principle that judicial authorities could only serve to illustrate it. So far as any may be found seemingly out of harmony with it, a close scrutiny will, in general, show that the seeming conflict does not exist or was not intended. Such is the fact we think in regard to the language used in *Lomax v. Lomax*, which efficiently challenged the attention of the trial court unfavorably to the conclusion we have reached. That is very evident, since in each of the several cases decided before and after it, cited in the brief of counsel for appellant,—*Decker v. Decker*, 121 Ill. 341, 12 N. E. 750; *Whitcomb v. Rodman*, 156 Ill. 116, 28 L.R.A. 149, 47 Am. St. Rep. 181, 40 N. E. 553; *Felkel v. O'Brien*, 231 Ill. 329, 83 N. E. 170; *Collins v. Capps*, 235 Ill. 560, 126 Am. St. Rep. 232, 85 N. E.

It is, apparently, a well-matured opinion of jurists in Ontario, Canada, that the judicial power to give force and effect to the testamentary intentions of a testator is not without a limit. It was said, in the case of *Re Clement*, 22 Ont. L. Rep. 121, 17 Ont. Week. Rep. 110, 2 Ont. Week. N. 127, that if a testator has devised land which he did not own, with nothing in the will to assist the court, although there may be little or even no doubt whatever that thereby he intended to devise some land which he did own, the latter land will not pass by the devise, and any evidence that the testator intended that it should pass cannot be admitted: but if there are any words in the will which would be effective to dispose of the land actually owned by the testator if the false description was entirely eliminated, the land he owned will pass by the will, and the wrong description will constitute *falsa demonstratio*, to be removed by evidence as a latent ambiguity.

Applying that doctrine in the *Clement Case*, a will which, first, appointed executors; second, directed debts to be paid; third, devised to the testator's widow, for life, the "S. W. quarter of lot 3, in the 4th concession of the township of North Dorchester;" fourth, directed that after the widow's death "said S. W. quarter of lot 3 in the 4th concession of North Dorchester" should be equally divided among all save one named, of the testator's children; and, fifth, made a specific bequest of an article of personal property, was held by the court to contain nothing which would enable it to make the devise of land effective, when as a matter of fact it was shown that the testator did not own the S. W. quarter of lot 3 in concession 4 of North Dorchester township, but did own, and beyond all reasonable doubt intended by the will to devise, the south half of

the north half of lot 3 in said concession and township.

At the same time, by the same judge, in the case of *Smith v. Smith*, 22 Ont. L. Rep. 127, 17 Ont. Week. Rep. 251, 2 Ont. Week. N. 179, it was found that the will there under consideration contained enough to warrant the court in receiving extrinsic evidence of the testator's intention to devise land that he did own, by a devise of land he did not own, and to give effect to that intention by judicial decree. The will in that case began with revoking all previous ones, and proceeded with, "I give, devise, and bequeath all my real and personal estate of which I may die possessed, in manner following, that is to say." Then followed a devise to the testator's grandson of the S. W. 50 acres of lot 1, concession 12, of Lobo, which the testator did not own, although he did own the S. W. half of the N. W. half of concession 12 of Lobo, a tract 50 acres in extent. This latter tract was held to pass under the devise of the former, with the description corrected to make it fit, notwithstanding a general residuary clause in the will.

If any court in giving effect to a testator's testamentary intention to pass property which he owned under a devise of property which he did not own means to repudiate the doctrine that an indication of such intention must be found somewhere in the will before evidence *dehors* the instrument may be received, and may not be deduced solely from extrinsic oral testimony, it ought candidly to say so; and, if it still adheres to this ancient doctrine, and gives effect to a will devising land the testator did not own to pass to the devisee land that he did own, it ought to call attention to language somewhere contained in the will in virtue of which parol testimony was admitted to support its conclusion.

J. B. G.

934, ambiguity was created and explained by applying the language used to the circumstances characterizing the making of the will, and it was construed by regarding words in place which were there by necessary implication.

It may be that cases have been disposed of here where, either in the decisions or discussions leading up thereto, it was not appreciated that in the field for judicial construction and the circumstances under which occasion may arise for such construction, rules are just as broad in respect to wills as other written instruments. The principles have been, perhaps, viewed more broadly and explained in greater detail in recent years than formerly. All that makes for judicial efficiency in execution of the purpose for which courts were created,—to prevent and redress wrongs.

The judgment is reversed, and the cause remanded, with directions to affirm the judgment of the county court.

Kerwin and Barnes, JJ., dissent.

IOWA SUPREME COURT.

HARRY I. STELTZER

v.

CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY, Appt.

(156 Iowa, 1, 134 N. W. 573.)

Master and servant — agreement to apply wages on board claims — validity.

1. A contract between a railroad company and its employees, authorizing it to pay claims against the employees for board and lodging, and deduct the amount from wages which may become due, is valid.

Same — assignment — effect.

2. An assignment by a railroad employee of his wages to be earned does not take precedence of an agreement in his employment contract giving the corporation the right to pay for his board and lodging and deduct the amount from his wages.

Note. — A careful search has disclosed no other cases passing upon the validity, character, or effect of an agreement permitting an employer to pay the claims of third persons out of an employee's wages to be earned. Generally as to validity of assignment of wages or salary to be earned, see note to *Rodijk v. Andrews*, 5 L.R.A. (N.S.) 564. As to constitutionality of statutes restricting the right to assign salary or wages, see notes to *Massie v. Cessna*, 28 L.R.A. (N.S.) 1108, and *Mutual Loan Co. v. Martell*, 43 L.R.A. (N.S.) 746, and later L.R.A.1915E.

Conflict of laws — garnishment — protection against second judgment.

3. A railroad company which is garnished in one state for wages due its employee will be protected by the courts of another state against a second payment to an assignee of the wages, residing there, if, upon receiving due notice of the garnishment, he neglects to appear and protect his claim, so that judgment was rendered in favor of the original creditor and paid.

(February 10, 1912.)

CROSS APPEALS from a judgment of the Superior Court for Perry County in a suit to recover wages alleged to be due and unpaid which had been assigned to plaintiff, but against which defendant claimed set-offs for advances under the employment contracts; plaintiff appealing from the disallowance of a portion of his claim, and defendant appealing from refusal to allow the set-offs. Reversed on defendant's appeal.

Statement by Sherwin, J.:

Suit to recover on assignments of wages. The cause was tried in equity, and both parties appeal. The defendant will be designated as the "appellant."

Messrs. J. C. Cook, J. N. Hughes, and C. R. Sutherland for appellant.

Messrs. H. S. Dugan, G. J. Dugan, and W. W. Cardell for appellee.

Sherwin, J., delivered the opinion of the court:

The plaintiff sued on assignments of wages to be earned in the future by men in the employ of the defendant railway company; the assignments having been made to the plaintiff to secure indebtedness to him. All of the men making these assignments entered into the employ of the railway company under written contracts, the material part of which is as follows: "In consideration of my being employed by the Chicago, Milwaukee, & St. Paul Railway Company, and to enable me to receive credit for board, meals, and lodging while I am in its employ, I hereby agree and con-

case, *Heller v. Lutz*, L.R.A.1915B, 191. It will be observed that the agreement upheld in *STELTZER v. CHICAGO, M. & ST. P. R. Co.* was confined to debts due for board and lodging, and had a legitimate relation to the employer's interests in that it tended to insure a continued supply of labor necessary to the accomplishment of the work. A general indefinite agreement, unrestricted as to the character of claims, might be open to more serious question, upon grounds of public policy.

sent that the said Chicago, Milwaukee, & St. Paul Railway Company may deduct and withhold from my wages any and all sums that may be due or owing from me to any and all persons for board, meals, or lodging, and that it may pay the same for me and on my account, and deduct the amount so paid or so required from any and all wages due me at any time."

The defendant pleaded that it was necessary, and for many years had been the custom of defendant, to secure credit for its employees engaged in the operation of its trains to enable them to secure meals, meal tickets, board, and lodging while away from home and engaged in the line of their employment; that arrangements were made whereby employees could secure meal tickets, board, and lodging, etc.; and that the contracts set out herein were made with employees, including those making the assignments to the plaintiff. The assignments in question were all made after the contracts with the defendant were entered into by the assignors thereof, and notices of such assignments were left with the defendant's local agent at Perry. Pursuant to its contract with the employees in question, the defendant paid their bills, and deducted the amounts thereof from their wages as long as they continued in its employ. The evidence shows that these employees did not intend that their assignments to the plaintiff should act as a revocation of authority given the defendant in their contracts, because they still relied upon the defendant to secure them board and lodging, and requested that deductions from their wages be made therefor. Whether these contracts be designated assignments of so much of the wages of the employees as was necessary to feed and house the employees when away from home in the service of the company, or whether they be termed contracts under which the defendant had the right to pay the debts of the employee, is not of great importance. In either view of the matter, if it was a valid and enforceable agreement that was acted upon by the defendant, the plaintiff has no right superior to that of the defendant.

In our judgment, the contracts were not unilateral, as claimed by the plaintiff; nor was the employee's agreement a mere license or privilege without consideration. It became effective when the employee entered the service of the defendant, and under its terms the company secured the services of the employee, and the employee secured the credit that was necessary to provide himself with the necessities of life during a period when nothing was due him from the company. It is a matter of common observation that a certain class of railway

employees must be taken care of in this very manner, otherwise they would be unable to engage in such employment, and that railway companies require such arrangement for the purpose of securing and keeping employees, and thus protecting itself.

That the plaintiff had no greater right by reason of the assignment than his assignor had at the time of such assignment is well settled. *Metcalf v. Kincaid*, 87 Iowa, 443, 43 Am. St. Rep. 391, 54 N. W. 867; *Fred Miller Brewing Co. v. Hansen*, 104 Iowa, 307, 73 N. W. 827. The trial court was in error in holding the plaintiff entitled to recover. It is claimed by the appellant that the notices of the assignments to the plaintiff were insufficient to charge it, because they were simply handed to its local agent. We do not determine this matter, because of our conclusion on the merits. Some time before this suit was brought, the defendant was garnished in Illinois as the supposed debtor of one of the plaintiff's assignors. It answered that it had in its hands unpaid wages due the defendant in the attachment proceeding, but alleged the assignment thereof to the plaintiff herein. Thereupon the case was continued, and the court ordered service on this plaintiff, as provided by Hurd's Statutes of Illinois of 1909, chap. 79, §§ 92 and 93, which provide as follows:

"If it appears that any goods, chattels, choses in action, credits and effects in the hands of a garnishee are claimed by any other person, by force of an assignment for the defendant or otherwise, the justice of the peace shall permit such claimant to appear and maintain his right. If he does not voluntarily appear, notice for that purpose shall be issued and served on him in such a manner as the justice shall direct.

"If such claimant appears, he may be admitted as a party to the action, so far as respects his title to the property in question, and may allege and prove any facts necessary to establish his claim to such property; and such allegations shall be tried and determined in the manner hereinbefore provided. If such persons shall fail to appear after having been served with notice in the manner directed, he shall be concluded by the judgment in regard to his claim."

There is sufficient proof that this plaintiff received notice of these proceedings in the Illinois court in ample time to have appeared and protected his interest, if he so desired. He paid no attention to the matter, however, and judgment was rendered against the defendant and paid.

The Illinois statute provides that notice

shall be "issued and served" in "such manner as the justice shall direct." The justice ordered that notice be served on this plaintiff by mail, and this was done. This was sufficient under the statute.

The court in Illinois had jurisdiction in the matter, and its judgment should be recognized, and the defendant as garnishee be protected by the courts of this state. *Harris v. Balk*, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084.

On plaintiff's appeal, the judgment should be affirmed.

Affirmed on plaintiff's appeal, and reversed on the defendant's appeal.

Petition for rehearing denied.

NEW MEXICO SUPREME COURT.

MRS. F. A. FOCKS, Appt.,

v.

MRS. MARY MUNGER.

(— N. M. —, 149 Pac. 300.)

Parent and child — custody — wishes of child.

1. Where habeas corpus proceedings are instituted by a natural mother to recover the custody of her child from the adopted mother, the expressed desire of the child, ten years of age, to be permitted to remain with the adopted mother, should not control, or be determinative of what is to the best interest of such child.

Same — stolen child — right of mother.

2. Where, upon habeas corpus proceedings instituted by the natural mother for the custody of her child, against the foster mother, it appears that the child was stolen from the natural mother when but two or three years of age and placed in the custody of the foster mother, who, however, was without knowledge of theft of the child, or the name or whereabouts of its mother, and such foster mother has given the child the tenderest of care and every attention, and the evidence also shows that the natural mother is a good, responsible, and worthy mother, against whose character and capacity to take care of said child no charge

is made, the natural mother is entitled to the custody of the child.

Evidence — burden of proof — welfare of child.

3. The burden of proving that the best interest of a child will be subserved thereby is not upon the parent seeking to recover its custody, but upon the party denying such restoration of the child to the custody of its parent.

(May 14, 1915.)

A PPEAL by petitioner from a judgment of the District Court for Bernalillo County in defendant's favor, in a habeas corpus proceeding to recover the custody of plaintiff's child. Reversed.

Statement by Roberts, Ch. J.:

In March, 1906, Mary J. Peters, now Mrs. Focks, the petitioner, procured a judgment of divorce from her husband, Elbert Peters, in the state of Missouri, which judgment gave her the care and custody of her three-year-old son, Wallace Peters. A few months after the decree Elbert Peters, the father, surreptitiously took the child away from the mother and disappeared from the state, and though the mother made search thereafter she was unable to locate the child until about the month of April, 1913, when she ascertained that he was in the custody and control of the appellee, at Albuquerque, New Mexico, who had adopted him pursuant to an order of the probate court of Bernalillo county.

When the father removed Wallace Peters from Missouri, he took him to Telluride, in the state of Colorado, where the father had employment in the mines, and placed him in care of the appellee, paying the board and care of the boy for two or three years, when the father, being out of work, ceased thereafter to contribute to the support of the child, who was left helpless and without means in the care of Mrs. Munger. The appellee endeavored to induce the father to care for or support the child, or to consent to his adoption by her; but the father did neither. The appellee likewise made diligent effort, in good faith, to locate the mother or other relatives of the child, but without success; and being greatly attached to the child, and he to her, and she being concededly a proper person to care for and train the child, she applied to the probate court of Bernalillo county and procured an order of adoption of the child upon the ground that he had been abandoned by his parents.

The petitioner herein was not made a party in said adoption proceedings and had no notice of the same. From the time the child was stolen from the mother, in

Headnotes by ROBERTS, Ch. J.

Note.—The welfare of the child as affecting parent's right to its custody is considered in the note to *Re Pryse*, 41 L.R.A. (N.S.) 564. And see later cases *Re Lee*, 45 L.R.A. (N.S.) 91, and *Jamison v. Gilbert*, 47 L.R.A. (N.S.) 1133.

As to validity of contract for transfer of parental responsibility or authority, see note to *Wilkinson v. Lee*, 42 L.R.A. (N.S.) 1013.

L.R.A.1915E.

1906, she continued to make diligent efforts to discover the whereabouts of the child and to regain possession of him; but she never learned of his whereabouts until about the month of April, 1913, and thereafter she came to Albuquerque, New Mexico, and instituted these proceedings for the purpose of recovering the custody of her child. Upon the evidence adduced, the trial court made findings of fact, upon which conclusions of law were stated. The court found the facts herein stated, and that the mother had diligently prosecuted the search for her child, and that she was guilty of no laches; also "that the defendant, Mrs. Mary Munger, is in all respects a suitable and proper person to have the care and custody of the child, has raised other children by adoption, and has given them excellent training and education, is deeply attached to the child, Wallace Munger, and in the judgment of the court the best interests and welfare of the said child require that he be left in the care and custody of the defendant, Mary Munger, and not taken from that care and custody."

The court also found the following: "That said petitioner, Mrs. F. A. Focks, has been and is a good, responsible, and worthy mother, and one against whose character or capacity to take care of said child, Wallace Peters, there are no charges," and "that said petitioner, Mrs. F. A. Focks, is married to a man who is able, ready, and willing to support and educate the child, Wallace Peters."

Upon the facts so found, judgment was entered dismissing the petition and awarding the custody of the child to Mrs. Munger. From this judgment, Mrs. Focks appeals.

Mr. H. B. Jamison, for appellant:

Under the findings of fact made in this cause, the trial court could not properly adjudicate the legal right to the custody of the child, Wallace Peters, to be in the defendant, Mary Munger.

Moore v. Christian, 56 Miss. 408, 51 Am. Rep. 375; *State ex rel. Herrick v. Richardson*, 40 N. H. 272; *Carter v. Brett*, 116 Ga. 114, 42 S. E. 348; *Re Carter*, 77 Kan. 765, 93 Pac. 584; *Com. v. Briggs*, 16 Pick. 203; *Terry v. Johnson*, 73 Neb. 653, 103 N. W. 319; *Sloan v. Jones*, 130 Ga. 836, 62 S. E. 21; *Re Jones*, 153 N. C. 312, 138 Am. St. Rep. 670, 69 S. E. 217; *Hammond v. Hammond*, 90 Ga. 527, 16 S. E. 265; *Wakefield v. Ives*, 35 Iowa, 238.

The mother was not divested of any right by the adoption proceedings, since she was not a party to that proceeding or privy thereto, and had no notice of such proceeding.
L.R.A.1915E.

Allison v. Bryan, 26 Okla. 520, 30 L.R.A. (N.S.) 147, 138 Am. St. Rep. 988, 109 Pac. 934; *Coleman v. Coleman*, 81 Ark. 7, 98 S. W. 733; *Woodward's Appeal*, 81 Conn. 152, 70 Atl. 453; *Sullivan v. People*, 224 Ill. 468, 79 N. E. 695; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Beatty v. Davenport*, 45 Wash. 555, 122 Am. St. Rep. 937, 88 Pac. 1109, 13 Ann. Cas. 585; *Furgeson v. Jones*, 17 Or. 204, 3 L.R.A. 620, 11 Am. St. Rep. 808, 20 Pac. 842; *Willis v. Bell*, 86 Ark. 473, 111 S. W. 808; *Miller v. Higgins*, 14 Cal. App. 156, 111 Pac. 403; *Lee v. Back*, 30 Ind. 148; *Re Carter*, 77 Kan. 765, 93 Pac. 584; *People ex rel. Cornelius v. Callan*, 69 Misc. 187, 124 N. Y. Supp. 1074; *Re Olson*, 3 Ohio N. P. 304, 3 Ohio S. & C. P. Dec. 668; *Booth v. Van Allen*, 7 Phila. 401; *Re Sleep*, 6 Pa. Dist. R. 256; *State ex rel. Le Brook v. Wheeler*, 43 Wash. 183, 86 Pac. 394; *Schiltz v. Roenitz*, 86 Wis. 31, 21 L.R.A. 483, 39 Am. St. Rep. 873, 56 N. W. 194.

The findings of the probate court and the order of adoption are no bar to habeas corpus proceedings brought by a nonresident parent who had no notice of the adoption proceedings.

Nugent v. Powell, 4 Wyo. 173, 20 L.R.A. 199, 62 Am. St. Rep. 17, 33 Pac. 23; *Lee v. Back*, 30 Ind. 148; *Re Carter*, 77 Kan. 765, 93 Pac. 584; *Booth v. Van Allen*, 7 Phila. 401; *Beatty v. Davenport*, 45 Wash. 555, 122 Am. St. Rep. 937, 88 Pac. 1109, 13 Ann. Cas. 585; *Furgeson v. Jones*, 17 Or. 204, 3 L.R.A. 620, 11 Am. St. Rep. 808, 20 Pac. 842; *Allison v. Bryan*, 30 L.R.A. (N.S.) 151, note; *Willis v. Bell*, 86 Ark. 473, 111 S. W. 808; *Miller v. Higgins*, 14 Cal. App. 156, 111 Pac. 403; *People ex rel. Stewart v. Paschal*, 68 Hun, 344, 22 N. Y. Supp. 881.

Messrs. Marron & Wood, for appellee:

An application to the court to take a child from the possession and control of one party and deliver it to another is addressed to the sound judicial discretion of the court, and will be determined largely by what is best for the welfare of the child.

Chapsky v. Wood, 26 Kan. 650, 40 Am. Rep. 321; *Kelsey v. Green*, 69 Conn. 291, 38 L.R.A. 471, 37 Atl. 679; *United States ex rel. Schneider v. Sauvage*, 91 Fed. 490; *Church, Habeas Corpus*, 446; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593; *Anderson v. Young*, 54 S. C. 388, 44 L.R.A. 277, 32 S. E. 448; *Re M'Dowle*, 8 Johns. 328; *Bonnett ex rel. Newmeyer v. Bonnett*, 61 Iowa, 199, 47 Am. Rep. 810, 16 N. W. 91; *Mercein v. People*, 25 Wend. 64, 35 Am. Dec. 653; *Re Waldron*, 13 Johns. 418; *United States v. Green*, 3 Mason,

482, Fed. Cas. No. 15,256; *Re O'Neal*, 3 Am. L. Rev. 578.

The probate court had jurisdiction to make the order of adoption upon the ground that the child had been abandoned by its parents.

Nugent v. Powell, 4 Wyo. 173, 20 L.R.A. 199, 62 Am. St. Rep. 17, 33 Pac. 23; *Re O'Neal*, 3 Am. L. Rev. 578.

Even if we assume that the appellant had an absolute right to the custody of her child by virtue of the judgment of divorce, that right was lost when she married another man.

Bonnett ex rel. Newmeyer v. Bonnett, 61 Iowa, 199, 47 Am. Rep. 810, 16 N. W. 91; *St. Ferdinand Loretto Academy v. Bobb*, 52 Mo. 357; *Worcester v. Marchant*, 14 Pick. 510; *Com. v. Hamilton*, 6 Mass. 273; *State v. Scott*, 30 N. H. 274; *Re Good-enough*, 19 Wis. 274; *Whitehead v. St. Louis, I. M. & S. R. Co.* 22 Mo. App. 60.

Roberts, Ch. J., delivered the opinion of the court:

Appellee concedes that the adoption proceedings are not binding upon appellant, as she was not made a party or served with notice therein. This being true, the only question for determination here is whether, upon the facts as disclosed by the record, and found by the court, judgment was properly rendered for the respondent.

It is true the trial court expressed the conclusion, upon the facts found and after an interview with the child, that "in the judgment of the court the best interests and welfare of the child require that he be left in the care and custody of the defendant, Mary Munger, and not taken from that care and custody;" but, if this conclusion is not supported by the facts, it can have no bearing upon the decision here. There was no dispute as to the facts in the case. Both the mother and Mrs. Munger, the respondent, were shown to be most excellent women, and suitable and proper persons to have the care and custody of children. The moral influence in both homes was apparently above reproach, and, while neither the petitioner nor the respondent was wealthy, yet each was shown to have sufficient resources to enable her to properly care for the child. It is true the child expressed a desire to the trial judge to be allowed to remain with his foster mother; but this was only natural, because he was taken from his own mother when but two or three years of age, and naturally looked upon her as a stranger. He had received from Mrs. Munger the kindest treatment, and returned it with his love and affection. We do not believe, however, that the expressed desire of a child,

ten years of age, should control; for it is a matter of common knowledge that children of this age bestow their affections upon those who are kind to them, and soon forget their parents, when they are taken from them by death or other causes. In the case of *Moore v. Christian*, 56 Miss. 408, 31 Am. Rep. 375, the court said: "The boy, it is true, expresses a preference to remain with the appellee; but, while in doubtful cases the wishes of a child of this age will be sought, and to some extent be observed, we cannot for a moment agree that a boy of thirteen can be allowed, at pleasure, to abandon his filial duties, and select elsewhere a home more agreeable either to his desires or his worldly interests. So to hold would simply be to offer a premium to the children of the poor to shirk the duties to which their station in life has called them, and to permit them, at the sacrifice of all the natural affections, to set about bettering their condition, at a period of life when the law dedicates both their persons and their services to parental control."

This being true, we must eliminate the expressed desire of the child from consideration, unless it appears from the evidence that there is a doubt as to the capability of the natural mother to care for the child in a proper manner. No such doubt exists in this case; therefore we are relegated to the simple question as to which of two women, both shown to be equally capable and worthy, should the custody of the child have been given,—one the natural mother, the other the foster mother, of the child. On this question there can be no doubt but that the natural mother is entitled to its custody. Any other rule would run counter to the law of nature and to every emotion of the human heart. While Mrs. Munger is doubtless deeply attached to the boy and loves him devoutly, yet the mother who gave him birth, and suckled him as a baby, and from whom he was stolen, has the first claim upon him, under both the human and Divine law, unless by her dissolute life, or for other reasons, she has forfeited this claim.

This case is to be distinguished from those cases wherein the parents have surrendered voluntarily the custody of their child or children to others, who have cared for them for years, when the parents seek to recover them. In such cases some of the courts refuse to aid them. Here the child was stolen from the mother, who ever since has expended all the money she could spare in a ceaseless search for him, which was finally rewarded by finding him in the possession of the respondent.

If it be assumed that in this case, un-

der the peculiar facts which exist, the court could properly enter upon an inquiry as to what would be for the best interest of the child, it must likewise be apparent that the burden of showing that the welfare of the child would be best subserved by allowing it to remain with its adopted mother would be upon her, and not upon the natural mother to show that its best interests would be subserved by awarding her its custody. Any other rule would place the parent at a decided disadvantage, and would enable strangers to take and hold possession of children, unless the parents were able to establish that the children would be better cared for and raised by them than by the parents having them in custody. The presumption is that the child will be better cared for by its own parents than by strangers, and therefore it is incumbent upon the stranger to show to the contrary, if he would retain the custody of the child, under this rule. *Weir v. Marley*, 99 Mo. 484, 6 L.R.A. 672, 12 S. W. 798; *State ex rel. Wood v. Deaton*, 93 Tex. 243, 54 S. W. 901. In *State ex rel. Herrick v. Richardson*, 40 N. H. 272, the court said: "The discretion to be exercised is not an arbitrary one; but, in the absence of any positive disqualification of the father for the proper discharge of his parental duties, he has, as it seems to us, a paramount right to the custody of his infant child, which no court is at liberty to disregard. And while we are bound, also, to regard the permanent interests and welfare of the child, it is to be presumed that its interests and welfare will be best promoted by continuing that guardianship which the law has provided, until it is made plainly to appear that the father is no longer worthy of the trust."

A mother of high character, who was well able to take care of her infant daughter, was entitled to her custody, though parties who had attempted to adopt the child under proceedings subsequently declared void were in better pecuniary circumstances than the mother. *Re Carter*, 77 Kan. 765, 93 Pac. 584.

For other cases in which the courts have held similarly, see *Com. v. Briggs*, 16 Pick. 203; *Terry v. Johnson*, 73 Neb. 653, 103 N. W. 319; *Sloan v. Jones*, 130 Ga. 836, 62 S. E. 21; *Re Jones*, 153 N. C. 312, 138 Am. St. Rep. 670, 62 S. E. 217; *Hammond v. Hammond*, 90 Ga. 527, 16 S. E. 265; *Wakefield v. Ives*, 35 Iowa, 238.

In this case the burden was upon the appellee to show that the natural mother, because of some vice, or some other lawful reason, was not the proper person to have the care and custody of her child. This she failed to do, and the court found L.R.A.1915E.

"that said petitioner, Mrs. F. A. Focks, has been a good, responsible, and worthy mother, and one against whose character or capacity to take care of said child, Wallace Peters, there are no charges."

Such being the state of the case, the trial court should have awarded the custody of the child to the appellant.

The judgment of the trial court will be reversed, with instructions to enter judgment awarding the custody of the child, Wallace Peters, to the petitioner, Mrs. F. A. Focks; and it is so ordered.

Hanna and Parker, JJ., concur.

MINNESOTA SUPREME COURT.

MARY B. MANNING, Admr., etc., of
Samuel J. Manning, Deceased, Resp.,
v.

ST. PAUL GASLIGHT COMPANY, Appt.

(129 Minn. 55, 151 N. W. 423.)

Gas — care in handling.

1. Defendant manufactures and distributes illuminating gas. Such gas, when allowed to escape in any considerable quantity, becomes a highly dangerous substance, and the defendant must exercise a commensurate degree of care to prevent the gas from escaping up to the time it is measured and delivered, through its meter, to the consumer.

Evidence — escape of gas — *res ipsa loquitur*.

2. The rule of *res ipsa loquitur* may be applied to a situation which discloses that gas escaped in destructive quantities from a break in the service pipe installed by the gas company upon the consumer's premises, at his cost, and when the evidence further shows that there had been no work or change upon such premises which could have affected the pipe, and no interference there-

Headnotes by HOLT, J.

Note. — Liability of gas company for negligence in escape or explosion of gas.

I. Maintenance and inspection of existing equipment.

- a. Instrumentalities exclusively within company's control, 1023.
- b. Instrumentalities on consumer's premises, 1023.

II. Care in operations on consumer's premises, 1025.

III. Effect of notice of leaks, 1026.

IV. Effect of intervening acts or omissions of others.

- a. Acts or omissions of third persons, 1027.
- b. Acts of persons injured, 1027.

with. Under this rule defendant was not entitled to a directed verdict.

Pleading — sufficiency.

3. The complaint, without the permitted amendment, held sufficiently broad to admit of proof showing improper installation of the service pipe.

Trial — instructions — refusal.

4. No error is found in refusing to give requested instructions, nor is there prejudicial error in the charge as given.

Verdict — correctness.

5. The verdict finds support under the evidence and the law.

(March 12, 1915.)

APPPEAL by defendant from an order of the District Court for Ramsey County,

This note is supplemental to notes to Ohio Gas Fuel Co. v. Andrews, 29 L.R.A. 337, and Consolidated Gas Co. v. Connor, 32 L.R.A.(N.S.) 809, and is limited in scope as are those notes.

As to liability of municipality for tort in connection with its lighting plant, see note to Brantman v. Canby, 43 L.R.A.(N.S.) 862.

As to measure of damages for destruction of timber by gas, see notes to J. F. Ball Lumber Co. v. Simms Lumber Co. 18 L.R.A.(N.S.) 246, and Reynolds v. Great Northern R. Co. 52 L.R.A.(N.S.) 92.

I. Maintenance and inspection of existing equipment.

a. Instrumentalities exclusively within company's control.

Supplementing note in 32 L.R.A.(N.S.) 810.

A company that lays gas pipes along a public highway has the obligation to lay the pipes in such a way that no person will be injured by gas escaping from them. *Murphy v. Ludowici Gas & Oil Co.* 96 Kan. 321, 150 Pac. 581.

So, in *Murphy v. Ludowici Gas & Oil Co.* supra, the owner of a gas pipe line which laid its pipes on the surface of a public highway, where they became hidden by weeds and grass, was held liable for injuries due to explosion as the result of a traction engine driving onto and breaking the pipe line, the existence of which was unknown to the operator of the traction engine, thus permitting gas to escape to the fire box of the engine.

And in *Little Rock Gas & Fuel Co. v. Coppedge*, — Ark. —, 172 S. W. 885, action for injury due to escape of gas into room, it was held that the evidence warranted the conclusion that, owing to the negligence of the company in maintaining a "dead end" in its gas main, the injury was due either to the fact that the pressure of the gas became so low that the fire went out, and in so doing there was an incomplete combustion of natural gas, which caused a

denying a motion for judgment in its favor, notwithstanding the verdict, or for a new trial, in an action brought to recover damages for the alleged wrongful death of plaintiff's intestate, caused by the inhalation of illuminating gas. Affirmed.

The facts are stated in the opinion.

Messrs. Butler & Mitchell, for appellant:

Defendant is entitled to judgment in its favor notwithstanding the verdict herein because the evidence wholly fails to establish a cause of action against it.

Gould v. Winona Gas Co. 100 Minn. 258, 10 L.R.A.(N.S.) 889, 111 N. W. 254; *Thornton Oil & Gas*, 2d ed. § 550; *Morgan v. United States Gas Improv. Co.* 214 Pa. 109, 63 Atl. 417; *Krzywoszynski v. Con-*

poisonous gas to be formed, which escaped into the room, or that when the fire went out, the natural gas itself, when the pressure became greater again, came into the room in such quantities as thereby to cause the injury.

So, also, although a gas company may not be the owner of the main pipe line of another gas company of which it owns the controlling stock, yet it will be liable for injury resulting from a leak therein, if it has charge and full control thereof. *Dialcesantro v. Philadelphia Co.* 47 Pa. Super. Ct. 339. See also *Fleming v. Philadelphia Co.* 234 Pa. 74, 82 Atl. 1095.

But an action for personal injuries from explosion of gas alleged to have escaped from a gas company's main into the basement of a building cannot be sustained where there is no evidence of negligence on the part of the gas company in the maintenance or inspection of its lines. *Karabelas v. Canadian Western Natural Gas Co.* 16 D. L. R. 791, 28 West. L. Rep. (Can.) 669.

b. Instrumentalities on consumer's premises.

Supplementing note in 32 L.R.A.(N.S.) 812.

Whether a gas company should be charged with knowledge of the condition of a pipe in a building through which it allows its gas to be furnished, or whether its knowledge and information are of such a character as to impose on it the duty of ascertaining that such pipes are safe before furnishing or continuing to furnish such gas, depends on the facts and circumstances of each particular case. In other words, the question of negligence in such a case depends on whether the gas company exercised that degree of care and caution that an ordinarily careful and prudent person similarly surrounded and situated would have exercised; and such question ordinarily is one of fact for the jury. *Southern Indiana Gas Co. v. Tyner*, 49 Ind. App. 475, 97 N. E. 580.

A gas company is warranted in assum-

solidated Gas Co. 4 App. Div. 161, 38 N. Y. Supp. 929; Mowers v. Municipal Gas Co. 142 App. Div. 169, 126 N. Y. Supp. 1033.

Messrs. Charles W. Farnham and O'Brien, Young, & Stone, for respondent:

A gas company is held to a degree of care that is commensurate with the dangerous character of the substance handled. If it fails to exercise this degree of care, and injury results from such negligence, it is liable even though there may have been other intervening agencies which have also contributed to the injury.

20 Cyc. 1170-1172; Koelsch v. Philadelphia Co. 152 Pa. 355, 18 L.R.A. 759, 34 Am. St. Rep. 653, 25 Atl. 522; Gould v. Winona Gas Co. 100 Minn. 259, 10 L.R.A.

(N.S.) 889, 111 N. W. 254; Thompson v. Cambridge Gaslight Co. 201 Mass. 77, 87 N. E. 486.

The rule of *res ipsa loquitur* applies.

Gould v. Winona Gas Co. 100 Minn. 259, 10 L.R.A. (N.S.) 889, 111 N. W. 254.

It was competent for the jury, from the mere happening of the accident, to find the defendant guilty of negligence.

Morrison v. Superior Water, Light & P. Co. 134 Wis. 167, 114 N. W. 434; Smith v. Boston Gaslight Co. 129 Mass. 318; Tiehr v. Consolidated Gas Co. 51 App. Div. 446, 65 N. Y. Supp. 10; Carmody v. Boston Gaslight Co. 162 Mass. 539, 39 N. E. 185; Koelsch v. Philadelphia Co. 152 Pa. 355, 18 L.R.A. 759, 34 Am. St. Rep. 653, 25 Atl. 522; Consolidated Gas Co. v. Con-

ing that the interior system of pipes in a house is sufficiently secure to permit gas to be introduced with safety. Greed v. Manufacturers' Light & Heat Co. 238 Pa. 248, 86 Atl. 95; Soles v. People's Natural Gas Co. 48 Pa. Super. Ct. 84.

Therefore, a gas company is not responsible for destruction of property as a result of a gas explosion due to a leaky gas pipe in a house, over which it has no control, and which it was the duty of the property owner to maintain in proper condition. Soles v. People's Natural Gas Co. supra.

And so, where a gas company, in response to a tenant, installs a meter and turns on the gas, and almost immediately discovers that there are gas leaks in the house pipe, and turns the gas off, it is not responsible for loss of property as the result of a subsequent explosion of gas which escaped while the gas was turned on. The court stated that "when the defendant's servant had promptly discovered the existence of a leak and then shut off the gas and given notice to the plaintiff or her tenant, its duty was fully performed. It was not bound to take any steps to discover the location of that leak. That was the manifest duty of the plaintiff, or of such skilled person as she would select for the purpose. Nor was it the duty of the defendant to go through the house, opening windows and doors to free the house from the gas which had escaped from the pipe through the leak referred to;" and added that especially would this be true in the light of the admission made by such plaintiff's tenant herself, that she was familiar with the use of gas, and well acquainted with the fact that it was explosive and dangerous. Ibid.

And in Greed v. Manufacturers' Light & Heat Co. supra, where a tenant, while searching for gas leaks, was killed by an explosion of gas which had escaped from a defective pipe, the gas company was held not to be liable, as it had nothing to do with the installation of the gas pipes, had no control over them, and was in no manner responsible for the condition in which L.R.A.1915E.

they were to be maintained, and there was no evidence—assuming that employees of the gas company knew of the leaks—that they had not notified the proper parties thereof.

A gas company which, in compliance with a request from a consumer that a gas stove be connected with a service pipe, connects such stove thereto with a rubber tubing which is paid for by the consumer, and becomes his property, is under no obligation to inspect such tubing to see whether it has become worn out and is leaking gas. Middleton v. De Kalb County Gas Co. 168 Ill. App. 353.

The court stated that there is no theory upon which the consumer could recover unless the company owed him the duty of inspecting his own property from time to time, or of informing him that the constant pressure of a rubber tube close to the stove would cause it to deteriorate, crack, and allow gas to escape; that when the consumer selected the rubber tube, paid for it, and caused the connection to be made, the company had a right to assume that he had ordinary knowledge concerning the durability of rubber, and would know that it would deteriorate from continual proximity to the heat from the stove; that had he hired some other gas fitter to make this connection, it could hardly be contended that if such other gas fitter had put on a suitable rubber tube connecting the pipe with the stove, and was paid for the material and labor, that he owed a duty to thereafter inspect the same. The company owed a duty of inspecting the pipe and fixtures which it owned in the building, but that duty should not extend beyond the property which it owned.

Where there is no evidence of any defect in the meter, gas regulator, or main of the gas company, and no duty on the part of the gas company to repair a service line from the curb to the house, that, by contract, devolving upon the owner of the property, the gas company will not be liable for damage to a house as a result of the explosion therein of gas, which, owing to

nor, 114 Md. 140, 32 L.R.A.(N.S.) 809, 78 Atl. 725.

Holt, J., delivered the opinion of the court:

While asleep in his home in St. Paul, Minnesota, on August 22, 1913, plaintiff's intestate, Samuel J. Manning, was asphyxiated by illuminating gas which had escaped through a break in the service pipe through which defendant supplied it to the building. Mr. Manning was alone in the house on the night he met death. Immediately upon his body being discovered, defendant made an investigation and ascertained that the gas found entrance to the house from a large break in the service pipe at a joint, or coupling, located in the ground about 5

feet away from where it passed through the foundation of the building. The pipe was laid about 27 inches below the surface. The ground was peaty. It, however, had been in no manner disturbed during the time Mr. Manning had been the owner, some four years. Defendant under its franchise installs the service pipe and connects it with a meter in the building to be supplied with gas; however, the owner of the building pays the cost of installation from the lot line to the meter. The complaint set forth: "That on or about August 22, 1913, the defendant wrongfully, unlawfully, and negligently had permitted its pipes to become damaged, defective, and leaky to such an extent that solely on account of such negligence a large quantity of the defendant's

the rusty condition of the service pipe, escaped therefrom into the cellar. *Windish v. People's Natural Gas Co.* 248 Pa. 236, 93 Atl. 1003; *Smith v. People's Natural Gas Co.* 248 Pa. 246, 93 Atl. 1005; *Pouder v. People's Natural Gas Co.* 248 Pa. 242, 93 Atl. 1005.

And evidence that gas pipes were insecurely fastened in the wall of a building, and that the building was destroyed by fire, is insufficient to hold the gas company responsible for the destruction of the building upon the alleged ground that, because of negligence of the company in insecurely fastening the pipes, one of them fell and broke, permitting the gas to escape and become ignited, where there is nothing in the evidence to warrant the conclusion that it was the breaking of a pipe that caused the building to be burned, rather than that it was the burning of the building that broke the pipe. *Union Invest. Co. v. San Francisco Gas & Electric Co.* 168 Cal. 58, 141 Pac. 807.

And in *Woodburn v. Union Light, Heat & P. Co.* 164 Ky. 29, 174 S. W. 730, action for damages from explosion of gas, it was held that direction of a verdict for defendant was proper, as there was no proof of any break or leak in the gas company's main, and the proof that there ever was a leak in the meter was very unsatisfactory, and such leak as was testified to was only discovered after a two weeks' test, and then by such a change in the condition of the meter as to indicate that the changed condition of the meter caused the leak.

Unless commanded by statute or municipal regulations, there is no legal duty compelling a gas company to maintain and operate a cut-off for the safety of property to which it supplies gas, and as to which the owner has provided the gas appliances. *George v. Tri-State Gas Co.* — W. Va. —, 52 L.R.A.(N.S.) 537, 81 S. E. 722, 8 N. C. C. A. 884.

And so, in an action to recover for damages to property, alleged to have been aggravated by failure of the gas company to shut off the gas during a fire, and so pre-
L.R.A.1915E.

vent a flow of gas from a broken pipe into the burning building, it was held that a company supplying gas to premises wherein the owner has his own gas appliances is not liable for failure to shut off the gas upon the premises when they are on fire, unless it is requested to do so, or in some other way is put on notice that its aid in that particular is necessary for the protection of the property; especially where the owner has the means of shutting off the gas. *Ibid.*

But in *Krom v. Antigo Gas Co.* 154 Wis. 528, 140 N. W. 41, 143 N. W. 163, it was held that a complaint stated a good cause of action for negligence against a gas company where it alleged that a gas company sent a careless and negligent employee to care for a frozen gas pipe, who entered the basement of a store carelessly and negligently, carrying a lighted torch, which ignited the gas, which had escaped from a feed pipe by reason of the negligence of the gas company in failing to provide a stopcock or to shut off the supply of gas elsewhere, and so set fire to the building.

And in *Van Felson v. Quebec R Light, Heat & P. Co.* Rap. Jud. Quebec, 43 C. S. 420, it was held that as gas pipes in a dwelling were under the care of the gas company, the company was liable for an injury resulting from gas escaping from a defective pipe therein.

II. Care in operations on consumer's premises.

Supplementing note in 32 L.R.A.(N.S.) 815.

Where a contractor and employee of a gas company are jointly testing gas pipes in a building under process of construction, and gas escapes through an opening in the main gas line in the building, which they had omitted to plug or cap, and, coming in contact with a fire located in the building, causes an explosion, there is no liability for injuries sustained as a result of the explosion by one who had entered the building in search of employment; the court stating that the injured party was

illuminating gas was permitted to escape and did escape" into the dwelling house of Mr. Manning, causing his death.

Plaintiff had a verdict, and defendant appeals from the order denying its motion, in the alternative, for judgment notwithstanding the verdict, or a new trial.

Defendant is not entitled to judgment

notwithstanding the verdict. There is no doubt the fatal accident was caused by defendant's gas which escaped from the break in the service pipe. Illuminating gas is a highly dangerous and destructive product when allowed to escape or to get beyond control. Defendant is engaged in the manufacture and distribution thereof, and in so

a mere licensee, and the only duty the defendants owed him was to abstain from inflicting on him an intentional, wanton, or wilful injury; and in this case there was no wanton or intentional injury, the negligence, if any, being simply passive, or the mere omission to cap the holes so as to prevent the gas escaping from the pipe, which resulted in the explosion. *Schiffer v. W. N. Sauer Co.* 238 Pa. 550, 86 Atl. 479.

A gas company which uses ordinary care to cap a pipe leading into a dwelling upon the removal of a stove which has been supplied by it, and to maintain it in a safe condition, is not liable for the destruction of the house by fire due to the escape of gas therefrom. *Louisville Gas Co. v. Guelat*, 150 Ky. 583, 42 L.R.A.(N.S.) 703, 150 S. W. 656.

But a prima facie case of negligence on the part of a gas company is shown by evidence that gas leaked in such quantities from a cap which it had placed on a pipe leading into a house that when a light was brought near it, the gas exploded and set fire to the house. *Ibid.*

And where a gas company sends one of its employees or agents to look after a leakage of gas which has been reported to it, the knowledge of such agent as to such leak is the company's knowledge, and his negligence in repairing or remedying the same is the company's negligence, where, as the agent of said company, acting within his authority as such agent, he undertakes to repair or remedy such leak. *Southern Indiana Gas Co. v. Tyner*, 49 Ind. App. 475, 97 N. E. 580.

And in *Denniston v. People's Natural Gas Co.* 61 Pittsb. L. J. 657, it was held that as the evidence warranted the inference that the gas company had installed a defective meter, a verdict for the plaintiff for damages caused by explosion of escaping gas should not be disturbed.

III. Effect of notice of leaks.

Supplementing note in 32 L.R.A.(N.S.) 817.

It is negligence on the part of a gas company to permit its gas to flow into the pipes of a building when it knows that such pipes leak, or when it is chargeable with such knowledge. *Southern Indiana Gas Co. v. Tyner*, 49 Ind. App. 475, 97 N. E. 580.

The court said that "while it is true that a gas company is not, under the law, required to inspect the plumbing or the pipes of the owner of the building to which L.R.A.1915E.

it furnishes gas, and generally speaking would not be liable to the owner of such building for injury done to him or his property on account of a leak of gas from the pipes of such owner, yet it may be negligence on the part of such gas company to turn the gas into or to allow it to flow through such pipes, depending on the circumstances and conditions present and existing at the time it turns on the gas and furnishes it to such building. If such company, at the time it turns on such gas, knows, or, after turning it on, becomes aware of the fact, that such building is one to which the public is invited and which the public frequents, and also knows that the pipes in said building are leaking, or if such gas company obtains information that would suggest to a person of ordinary care and prudence that, by continuing to furnish gas through such pipes, injury would result to the persons frequenting such building, it then becomes its duty, at least, as to such persons, to discontinue furnishing gas to such building until such pipes are repaired and made safe; and if such company, when it turns on such gas into the pipes of such building, is in possession of facts, or, after turning on the gas, comes into possession of facts that would suggest to a person of ordinary care and prudence that the pipes of such building are leaking or otherwise unsafe for transporting such gas, it then becomes the duty of such company to make such inspection or investigation as a person of ordinary care and prudence similarly situated and handling such dangerous agency would make to ascertain the safety of such pipes before it furnishes or continues to furnish such gas through them; and failing so to do, if it furnishes or continues to furnish such gas through such pipes, it does so at its risk, and becomes liable for an injury therefrom to any frequenter of such building who is without fault. And if such gas company, after obtaining information that the pipes in a building through which it furnishes gas are leaking, by its agent undertakes to find and repair such leaks and fails to repair them, or negligently repairs them and continues to furnish gas through such defective pipes, and injury results to a person who is himself without fault, such company is liable. The negligence in such cases consists not in failing to inspect the pipes of the owner of the building, but rather in furnishing the gas through the pipes after obtaining the knowledge or information that would suggest to a person of ordinary care and prudence the danger

doing is required to exercise a degree of care commensurate with the great danger likely to result from its escape. The gas belongs to defendant until sold and delivered through its meter in the consumer's building, and therefore defendant should be responsible for its care until it is so measured and delivered. We are unable to find

any sound basis for making defendant's care and vigilance to prevent the escape of its dangerous product any less between the meter and the lot line, than between the lot line and the retort where manufactured. Whether defendant owns the pipes in which its gas is confined or not is not important, for, the fact remains, such pipes are of its

of allowing the gas to pass through such pipes. The gas company has its option to refuse to allow its gas to pass through such pipes, and failing to exercise this privilege when the facts and circumstances are such as to suggest to a person of ordinary care and prudence that it should, it assumes the risk and consequences that may naturally flow from an undertaking involving such peril and hazard to innocent third persons. This must be so, because the gas is not less dangerous when it flows through defective pipes belonging to another person than when it flows through the company's own pipes, and the dangers to which innocent third persons are exposed are identical in both cases."

A gas company which knows that the service line, which it is under no duty to maintain or repair, is rusted and corroded to such an extent as to permit gas to escape, has the duty either to cause the service line to be repaired by the person whose duty it is to do so, or to have the gas shut off at the street in order to avoid the dangers that might result. *Windish v. People's Natural Gas Co.* 248 Pa. 236, 93 Atl. 1003.

So, a gas company will be liable for injury to a patron of a moving picture show, caused by explosion of its gas, where, having been notified of a leak, it sent one of its employees to remedy the same, and having found a leak and remedied it, he, with knowledge that there is another leak, turns the gas on and permits it to pass through such pipe, at the same time telling the occupant of the building that it is safe to use gas. *Southern Indiana Gas Co. v. Tyler*, 49 Ind. App. 475, 97 N. E. 580.

And a gas company which, through notice and by inspection of its employee, has knowledge that the service pipe in a building is defective and leaking, is guilty of negligence in failing to repair the leak, and is liable for injury to an occupant of the building, resulting from exposure due to being forced to leave it thinly clad in the nighttime, in winter, following an explosion which set fire to the building. *Louisville Gas Co. v. Fry*, 147 Ky. 754, 145 S. W. 748.

So, also, a gas company which has notice that gas is escaping from its main, although the exact locality is not pointed out, owes a duty to take some active measure to ascertain the location and discover the cause. *Luengene v. Consumers' Light, Heat & P. Co.* 86 Kan. 866, 122 Pac. 1032.

And recovery for injury due to explosion of gas negligently permitted to escape L.R.A.1915E.

through a defective service pipe is not precluded because parties injured cannot show the cause of ignition. *Ibid.*

IV. Effect of intervening acts or omissions of others.

a. Acts or omissions of third persons.

Supplementing note in 32 L.R.A.(N.S.) 820.

A gas company is not liable for injuries sustained by reason of the escape of gas from the main in the street into a building, where the escape of gas was due to a break in the main, caused without the knowledge of the gas company by a third party, over whom it had no control, and the consequences of whose act it could not reasonably have anticipated. *Tidy v. Cunningham*, 22 D. L. R. 151.

But a gas company will not be absolved from the consequences of its negligence in permitting the escape of gas from its defective service pipe in the basement of a building merely because gas also escaped and accumulated there from a break in its main, caused by the negligence of a third party. *Luengene v. Consumers' Light, Heat & P. Co.* 86 Kan. 866, 122 Pac. 1032.

b. Acts of persons injured.

Supplementing note in 32 L.R.A.(N.S.) 821.

One who, as a volunteer or licensee, is operating a traction engine on a private road, is guilty of such contributory negligence as will preclude recovery for personal injury and damage to the traction engine caused by the ignition of gas escaping from a gas pipe broken by the traction engine, where the gas pipe was located 3 feet from the traveled portion of the private road, and the operator, at the time of the accident, was endeavoring to take the engine through a gateway placed at right angles with the road, and it was so dark that it was necessary to have a lantern to show the way. *Rousch v. Oblong Gas Co.* 179 Ill. App. 600.

And the fact that one remained in a house and continued to heat the same with fires, with knowledge that the pipes were leaking, and was thereafter injured, was held in *Louisville Gas Co. v. Fry*, 147 Ky. 754, 145 S. W. 748, not to preclude recovery, she not having been previously accustomed to the use of gas, and not realizing that she was endangering her life by so doing.

J. H. B.

choosing as to kind, quality, and method of installation. They are not subject to the care or interference of anyone but defendant. Therefore, when it appears that upon the private premises where defendant has installed its product there has been no change or work done which, in any manner could interfere with the service pipe containing defendant's gas, and nevertheless a break has occurred in such pipe from which death or destruction has come, the doctrine of *res ipsa loquitur* applies. This we deem decided in *Gould v. Winona Gas Co.* 100 Minn. 258, 10 L.R.A. (N.S.) 889, 111 N. W. 254. The intimated possible distinction between the gas escaping from the service pipes upon the consumer's land and that from its defective pipes away from the premises upon which the injury is wrought, found in the last part of opinion, relates to a plaintiff's contributory negligence, and not to the burden of proof on the question of a defendant's negligence. The decision goes to the proposition that the manufacturer and distributor of illuminating gas is held in damages for the escape of gas on the principle of negligence, and not of trespass; and that the escape of this agency in highly destructive quantities is *prima facie* evidence of negligence.

The trial court deemed the doctrine of *res ipsa loquitur* inapplicable and we should ascertain whether defendant is entitled to a new trial because of errors or because of lack of evidence to support the verdict under the charge of the court. The errors assigned depend chiefly on the claim that the complaint was insufficient to admit proof of defects in the installation of the pipe where the break occurred. The court permitted plaintiff to amend, but we think the amendment added nothing of substance to the charge of negligence originally made. Permitting or suffering the pipe to become leaky does not necessarily convey the meaning that such condition was due alone to want of care subsequent to its installation; it may as well have resulted from faulty construction originally. And in its last analysis the actionable wrong was in negligently permitting the destructive gas to escape. We therefore hold evidence properly received as to the character of the soil wherein and the depth at which the pipe was laid, the absence of the usual blocking under the joint, and how the pipe had sagged, and the condition in which the foundation had been left where it passed through.

Construing the complaint as we do, and holding that defendant is not absolved from the duty of care to prevent the escape of its gas, it follows that it was not error L.R.A.1915E.

to refuse defendant's requested instructions to the effect that there was no justification for finding liability on the ground of defective installation, or for failure to maintain in a safe condition, or for not guarding against the action of frost. The court was right in submitting those propositions to the jury.

We think the evidence amply justifies the verdict. The character of the soil around Manning's home was such that it was liable to settle, yet the usual precaution to block the service pipe at the coupling or joint was not taken. That the settling was considerable was shown by the fact that the sag of the pipe at the break was 6 inches. The soil was also of such character that the action of the frost was likely to heave or unsettle it to a great extent, and yet the pipe was placed at a depth of less than 3 feet. The evidence also tended to show no attempt in the original installation to plaster or make tight the foundation where the pipe passed through; thus a ready access to the basement was afforded the escaping gas.

The order is affirmed.

Petition for rehearing denied.

MINNESOTA SUPREME COURT.

RICHARD H. TERRILL, Admr., etc., of
Russell Terrill, Deceased, Resp.,
v.

VIRGINIA BREWING COMPANY, Appt.

(130 Minn. 46, 153 N. W. 136.)

Highway — law of road — coasting.

1. Plaintiff's intestate, a boy of twelve years, was killed while coasting downhill on a street in the city of Eveleth, by his sled coming in collision with a sleigh of defendant which was coming up the hill on the left-hand side of the street. It is held that Laws 1911, chap. 365, § 15 (Gen. Stat. 1913, § 2634), providing, among other things, that "all vehicles . . . must keep to the right

Headnotes by BUNN, J.

Note. — *Applicability of rule of road where highway is being used for other than ordinary purpose of travel.*

While no case has been found precisely in point with *TERRILL v. VIRGINIA BREWING Co.*, which holds that a boy's sled does not come within the purview of a statute regulating motor vehicles, it is stated broadly in *Payne v. Nelson*, 16 Ky. L. Rep. 239, that the provision of the statute that vehicles meeting on any turnpike, gravel, or plank road shall give to each other one half of the road, each bearing to its right, ap-

of the center of the street," applies to the case, and that under the circumstances the violation of this law by defendant was at least evidence of negligence, and justified a finding thereof.

Evidence — negligence.

2. It does not appear from the evidence that plaintiff's intestate was guilty of negligence as a matter of law.

Highway — motor vehicle — sled.

3. A sled is not a "motor vehicle," as that term is used in the statute referred to.

(June 11, 1915.)

APPEAL by defendant from an order of the District Court for St. Louis County denying a motion for judgment notwithstanding a verdict for plaintiff, or for new trial, in an action brought to recover damages for the alleged wrongful death of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Messrs. Austin & Austin, for appellant:

The court erred in submitting the case to the jury upon the theory of law that "defendant was required to keep to the right of the center of the road, and that its failure so to do was negligence."

Plaintiff's decedent was guilty of contributory negligence

Twist v. Winona & St. P. R. Co. 39 Minn. 168, 12 Am. St. Rep. 626, 39 N. W. 402.

Chapter 365 of the Laws of 1911 should be strictly construed.

State v. Bussian, 111 Minn. 488, 31

L.R.A.(N.S.) 682, 127 N. W. 495; Molin v. Wark, 113 Minn. 190, 41 L.R.A.(N.S.) 346, 129 N. W. 383.

Messrs. Andrew Nelson and George B. Sjosellius, for respondent:

Chapter 365 of the General Laws of Minnesota for the year 1911 applies to and governs the facts in this case.

State v. Bussian, 111 Minn. 488, 31 L.R.A.(N.S.) 682, 127 N. W. 495.

The defendant, acting by and through its driver, violated this law in failing to keep to the right of the center of the street, and in so doing was guilty of negligence which was the proximate cause of the injury to plaintiff's decedent.

Coasting in this street, in the absence of a prohibitory ordinance, was not a nuisance and unlawful.

Lynch v. Public Service R. Corp. 82 N. J. L. 712, 42 L.R.A.(N.S.) 865, 83 Atl. 382, 3 N. C. C. A. 514; Hutchinson v. Concord, 41 Vt. 272, 98 Am. Dec. 584; Faulkner v. Aurora, 85 Ind. 130, 44 Am. Rep. 1; Jackson v. Castle, 80 Me. 119, 13 Atl. 49.

Whether a person is guilty of contributory negligence or not is a question for the jury unless the evidence is conclusive.

Erd v. St. Paul, 22 Minn. 443; Donaldson v. Milwaukee & St. P. R. Co. 21 Minn. 293; Brown v. Milwaukee & St. P. R. Co. 22 Minn. 166; Abbett v. Chicago, M. & St. P. R. Co. 30 Minn. 482, 16 N. W. 266; Hermeling v. Chicago, St. P. M. & O. R. Co. 105 Minn. 136, 117 N. W. 341; Bremer v.

plies to vehicles only. This case, however, involved the meeting of a horseman and vehicle.

So it is stated in *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536, that the law of the road as to turning to the right does not apply to a building being moved on a highway, the court stating that *Brooks v. Hart*, 14 N. H. 307, conclusively settles the correctness of the instructions as to the nonapplication of the law of the road to the case of a moving building. By that decision, observed the court, the law referred to is expressly limited to the regulation of the conduct and rights of travelers with vehicles at the time and place of meeting and while passing each other. The doctrine of that decision was reaffirmed in *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546.

It was held in *Ray v. Manchester*, 46 N. H. 59, 88 Am. Dec. 192, where one was thrown from his sleigh and injured in consequence of boys with hand sled sliding in the street for sport, that the misconduct of the boys in so using the highway did not amount to an "obstruction" for which the city could be held liable under the statute, and the fact that such misconduct was known to the city would not enlarge its liability.

Generally, as to what roads and vehicles L.R.A.1915E.

rules of the road are applicable to, see page 324 of note to *Smith v. Barnard*, 41 L.R.A.(N.S.) 322, which treats of rules of the road governing vehicles proceeding in opposite directions.

Rule of the road governing vehicles proceeding in the same direction is treated in the note to *Hackett v. Alamito Sanitary Dairy Co.* 41 L.R.A.(N.S.) 337.

As to law of the road as affecting pedestrians, see notes to *Baker v. Close*, 38 L.R.A.(N.S.) 496; *Minor v. Stevens*, 42 L.R.A.(N.S.) 1178; and *Deputy v. Kimmell*, 51 L.R.A.(N.S.) 1007.

For rule of the road as affecting street cars and vehicles meeting or passing, see note to *Foster v. Curtis*, 42 L.R.A.(N.S.) 1188.

Generally, as to liability of municipality for injury to child playing in street from defects or obstructions therein, see note in 20 L.R.A.(N.S.) 753. As to care required of children in such circumstances, see note in 21 L.R.A.(N.S.) 624.

Generally, as to injury to one while coasting in street, see note to *Lynch v. Public Service R. Co.* 42 L.R.A.(N.S.) 865; and as to liability of municipal corporation for failure to prevent coasting in its streets, see notes to *Van Cleef v. Chicago*, 23 L.R.A.(N.S.) 639, and *Goodwin v. Reidsville*, 42 L.R.A.(N.S.) 862.

J. D. C.

St. Paul City R. Co. 107 Minn. 326, 21 L.R.A.-(N.S.) 887, 120 N. W. 382, 21 Am. Neg. Rep. 172; Schmidt v. Great Northern R. Co. 83 Minn. 105, 85 N. W. 935.

Bunn, J., delivered the opinion of the court:

In the forenoon of December 31, 1912, Russell Terrill, aged twelve, and ten or twelve other boys, were coasting downhill on a street in the city of Eveleth. This street led from the business portion of the city up a hill to a suburb known as the "Adams Location." The boys were "hitching hobs," the operation being thus described by one of them: "One would lay down on his stomach on his sled and put his feet on the other sled, back of the rope on the other sled, and the other boy put his feet against them. One of them lay down, and the other sits up, and they put their feet together in the back of the rope, and go on."

Russell and another boy were sliding down the hill in this fashion, Russell on the rear sled. The hill was quite steep, and the sledding good. The boys were going at a good clip, but not so fast that the sleds could not be steered properly. They followed the right hand side of the street. About halfway down the street curved to the right. As the sleds approached this curve the boys saw through the fence a sleigh coming up the hill on the same side of the street, about 10 feet in front of them, and blocking their path. The sleigh was defendant's. Its driver, when he saw the boys in front of him, turned his horses to the right, which movement effectively prevented plaintiff and his companion from avoiding a collision by turning to the left. They could not stop, and attempted to pass between the rear end of the sleigh and the fence on the right; but this space was quite narrow and near the fence there was a ditch filled with rocks, which prevented the boys from going close to the fence. The boy on the front sled managed to turn to the right and stop in the loose snow, but Russell's sled went on for a few feet and struck the bolster of the rear runner of defendant's sleigh. Russell subsequently died from the injuries he received.

This action was brought by the father before his son's death to recover on his behalf for the injuries sustained. After Russell died, the father was appointed administrator, and the action transformed into one to recover for his alleged wrongful death. The trial resulted in a verdict for plaintiff in the sum of \$2,000. A blended motion for judgment *non obstante* or for a new trial was denied, except that a new trial was granted unless plaintiff should consent to a reduction of the verdict to L.R.A.1915E.

\$1,500. Plaintiff so consented, and defendant appealed from the order denying its motion.

The first contention of defendant is that the court erred in submitting the case to the jury on the theory that the failure of defendant to keep to the right of the center of the street justified a finding of negligence. The claim is that Laws 1911, chap. 365, § 15 (Gen. Stat. 1913, § 2634), does not apply to the facts in this case. The law was in force at the time of the accident. It provides "road rules" for the meeting of persons riding or driving a horse or operating a motor vehicle on a public highway, and has the following language at the end of the section: "All vehicles, however, must keep to the right of the center of the street."

It is urged that this law applies only to streets in the very restricted sense of paved and curbed ways in a city or village, while the street in question was not paved or curbed, and not "platted." We find no merit in this argument. The law applies generally to all streets within cities or villages. This street is within the limits of the city, is largely traveled, and forms the only way leading from the main part of the city to the Adams Location on the hill, where many people have their homes, is lined on both sides with houses, and has a sidewalk for part of the way. Its traveled portion was 26 feet wide at the place of the accident, and varied elsewhere from 19 to 30 feet in width. It was well packed down and smooth for its entire length and width. The point that there is no means of determining with precision where the center of the street was has no force in determining the applicability of the statute, though it might have weight, were there any question here as to what side of the center defendant's team was on. We think it is plain that the statute applied to this street, and that defendant's violation of it was at least evidence of negligence. No reason appears for the driver being on the left side of the street. There were no obstructions to his taking the other side, and he knew that the boys used the hill for coasting. The trial court correctly submitted this question to the jury, and we cannot disturb their finding.

It is claimed that the boy Russell was guilty of contributory negligence as a matter of law. We cannot so hold. This issue was properly submitted to the jury. That there was some danger attendant upon the sport there can be no doubt. But the boys had never before met a team which was on the wrong side of the road, and had frequently met this same driver on the right

side. There was ample room if the law was obeyed.

Defendant argues that the boys violated the statute in approaching a curve where the view was obstructed at a speed in excess of 6 miles an hour. It is sufficient to say that this is the first time we have heard a boy's sled called a motor vehicle. The contention is wholly untenable.

Order affirmed.

OKLAHOMA CRIMINAL COURT OF APPEALS.

TOM CHEADLE, Plff. in Err.,
v.

STATE OF OKLAHOMA.

(— Okla. Crim. Rep. —, 149 Pac. 919.)

Homicide — intoxication — effect.

1. In a prosecution for murder, alcoholic insanity, or mental incapacity produced by voluntary intoxication existing only temporarily at the time of the homicide, is no justification or excuse therefor. To constitute insanity, caused by intoxication, a defense in a trial for murder, it must be insanity caused by chronic alcoholism, and not a mere temporary mental condition.

Same — delirium tremens — effect.

2. Insanity, though superinduced by excessive and long-continued indulgence in alcoholic liquors and known as "delirium tremens," or "mania a potu," renders a person so afflicted irresponsible for his acts, if it be of such a character as to deprive him of the mental capacity to distinguish between right and wrong, as applied to the particular act, whether he be under the influence of liquor at the time of the commission of the act or not; but, to do so, his affliction must be settled or fixed insanity, not a mere fit of drunkenness. A person, not previously laboring under such a disease or affliction, who voluntarily becomes intoxicated to such an extent and for such a period of time as to cause unconsciousness of his acts, is not irresponsible under the law for the acts done by him while in such mental condition.

Same — intoxication — defense.

3. Intoxication, either voluntary or involuntary, is to be considered by the jury in a prosecution for murder in which a premeditated design to effect death is essential, with reference to its effect upon the ability of the defendant at the time to form and entertain such a design, not because,

Headnotes by DOYLE, P. J.

Note. — Drunkenness as a defense to homicide is treated in the notes to *Harris v. United States*, 86 L.R.A. 470; *State v. Kidwell*, 13 L.R.A.(N.S.) 1024; *State v. Rumble*, 25 L.R.A.(N.S.) 376; and *State v. Cooley*, 52 L.R.A.(N.S.) 230. L.R.A.1915E.

per se, it either excuses or mitigates the crime, but because, in connection with other facts, an absence of malice or premeditation may appear.

Evidence — intoxication — homicide.

4. Under Okla. Penal Code (§ 2313, Rev. Laws 1910), homicide is murder "when perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being," and evidence of intoxication is admissible to show an absence of the premeditated design to kill, for the purpose of determining whether the offense was murder or manslaughter, and a state of intoxication which will reduce homicide from murder to manslaughter in the first degree must be of such character and extent as to render the defendant incapable of entertaining or forming a design to effect death. And this question is for the jury to determine.

Homicide — intoxication — degree.

5. A person who commits a homicide while so drunk as to be incapable of forming a premeditated design to kill, if he had formed no purpose to commit the crime prior to the time he became so intoxicated, is not guilty of murder, but is guilty of manslaughter in the first degree.

Criminal law — homicide — trial — questions for jury.

6. In a prosecution for murder, the court should submit the case to the jury for consideration upon every degree of homicide which the evidence, in any reasonable view of it, suggests, and if the evidence tends to prove different degrees, the law of each degree which the evidence tends to prove should be submitted to the jury; and, where there was evidence of the intoxication of the defendant to the extent of being deprived of the mental capacity to deliberate or premeditate at the time of the homicide, it was prejudicial error to refuse to submit to the jury an instruction in reference to manslaughter in the first degree.

(June 29, 1915.)

ERROR to the District Court for Johnston County to review a judgment convicting defendant of murder. Reversed.

The facts are stated in the opinion.

Mr. Cornelius Hardy for plaintiff in error.

Messrs. Charles West, Attorney General, and C. J. Davenport, Assistant Attorney General, for the State:

Defendant must show that he was ready and demanded trial, and objected to the postponement or continuance of the case. Otherwise he will be held to have waived his right to demand a dismissal of the case.

Parker v. State, 7 Okla. Crim. Rep. 238, 122 Pac. 1116; *Head v. State*, 9 Okla. Crim. Rep. 356, 44 L.R.A.(N.S.) 871.

Before a plat or a diagram is admissible,

the witness who prepared the same must be called to prove its correctness from his own knowledge.

Whart. Crim. Ev. p. 537A.

If counsel for defendant is of opinion that additional instructions should be given to the jury, it is his duty to reduce them to writing, submit them to the trial judge, and request that they be given.

Lumpkin v. State, 5 Okla. Crim. Rep. 488, 115 Pac. 478.

Doyle, P. J., delivered the opinion of the court:

The plaintiff in error was convicted of the murder of Tandy Harrell. The information charged the homicide to have been committed by shooting the deceased with a pistol. The court rendered judgment, and the defendant was duly sentenced in accordance with the verdict to imprisonment for life at hard labor. To reverse the judgment the defendant appealed by filing in this court, on March 14, 1913, a petition in error with case-made.

The evidence shows that the defendant and the deceased, Tandy Harrell, were cousins, and were, before the night of the tragedy, good friends. It appears that the defendant's father was drunk in the town of Milburn, and his wife asked Jim Helms to take him home; Tandy Harrell went with them. On the way they stopped at Harrell's home and got a bottle of whisky and a quart of alcohol. The old folks went early to bed. Tandy Harrell and Jim Helms were playing pitch, and they were all drinking whisky. During the night the defendant and Harrell went outside and the defendant fired two or three shots with his pistol; they came back into the house and finished drinking another bottle; Helms threw the empty bottle into the fireplace and the defendant pulled his pistol and shot the bottle.

The only person present when Tandy Harrell was shot that was called as a witness for the state was Jim Helms. He testified: That when they were eating in the kitchen the defendant picked up a table knife and a cup and threw them at his sister Lorena. That he also picked up some of the dishes and threw them against the wall. Later he heard the defendant ask Harrell if he could shoot through the door, and Harrell said, "Yes," and he fired a shot. That a little later the defendant fell across the foot of the bed. That he jumped up, and Harrell grabbed him by the wrists and they were scuffling and fell over on the floor, with Harrell on top, and when they let him up he stood there cursing. Harrell said: "Tom, I don't want you to L.R.A.1915E.

be mad at me, and I hope you will not be; I taken hold of you to keep you from doing the way you were doing."

The defendant said, "That is the second time you have done me that way, and you won't do it again, God damn you," and fired his gun. Harrell opened the door, and the defendant shot again as he was going out of the door.

A. Allen testified that he saw Tandy Harrell after he was shot, and the defendant was there and said, "Tandy, do you think I had anything to do with it," and Tandy said, "Yes, you shot me, but whisky was the cause of it," and the defendant said, "I never shot you, Tandy."

Dr. Guy Clark testified that he was a practising physician at Milburn, and the defendant called him in the early morning and said "that Tandy Harrell had shot himself at their home, and that he had laid out in an outhouse;" that when he reached the Cheadle place "he there found the deceased unconscious with a gunshot wound on the index finger of his right hand and a wound in the arm. Another wound was between the fourth and the fifth rib, about an inch and a half of the sternum and ranged down and came out near the spine."

For the defense Lorena Cheadle testified that she was a sister of the defendant and was sixteen years old; that after supper that night they were all playing cards; that Jim Helms and Cousin Tandy tried to get her brother to drink, and he said, "No, Cousin Tandy, I have quit;" that about 12 o'clock her brother commenced drinking. The men drank whisky a while and then alcohol; they kept playing and drinking until about 2 o'clock in the morning; that when the shooting occurred she and her father and her brother, Cousin Tandy, and Jim Helms were in the room, and her father was asleep; that she did not see the shot fired, and did not know who fired it; that the lamp went out; that Jim Helms took her brother's pistol from him about a half an hour before the shooting occurred, and she did not see him give it back; that after the shooting Jim Helms grabbed her, and they went to Jim Helms's house.

Mrs. M. V. Cheadle testified that she was the mother of the defendant; "that before she went to bed, Tandy Harrell and Jim Helms had both been trying to get him to drink, and he would say, "No, thank you, Cousin Tandy; I have sworn off," and Jim Helms would say, "He thinks he is too stuck up;" that she noticed the defendant take one drink.

As a witness in his own behalf the defendant testified in part as follows:

Q. What time did you commence drinking?

A. Some time between 10 and 11 o'clock.

Q. What were you drinking at that time?

A. We were drinking whisky and alcohol.

Q. What size bottle of whisky were you drinking from?

A. It was a quart bottle.

Q. Now did you drink from that time on every time the others drank?

A. Yes; from the first drink I did.

Q. About how many drinks did you take, if you know?

A. I don't know.

Q. You don't know?

A. No; I don't know.

Q. Who was the first person to induce you to take a drink there that night?

A. Jim Helms was the first to ask me to drink.

Q. Did you drink with him?

A. No; I thanked him and told him that I did not want to drink; that I was trying to quit.

Q. Then what occurred?

A. They went on, and the time come around for me, and they wanted me to take a drink again, and I thanked them and refused, and Tandy said, "Let him alone, Jim; he thinks he is too good to drink."

Q. Then what?

A. I refused that time.

Q. Then did you get to drinking?

A. Yes; I finally did. They kept on insisting on me to drink, and to keep them from thinking I was too good to drink, I drank with them.

Q. Did you drink from any other bottle other than the quart bottle of whisky and alcohol?

A. Yes, I drank out of a half-pint bottle.

Q. Where did you get that?

A. Jim Helms had it.

Q. Did Jim Helms drink from it the same time you did?

A. I think he did the first time.

Q. Well, did you get drunk that night?

A. I did.

Q. Well, do you know what occurred there after you got drunk?

A. No, sir; I do not. Not from 11 o'clock until the next morning, I don't remember.

Q. Why do you not remember what occurred?

A. I was drunk.

Q. Do you remember of having any trouble with Tandy Harrell in the kitchen?

A. No, sir.

Q. Do you remember of having any

trouble with Tandy Harrell in the east room?

A. No; I don't remember of having any trouble with anybody.

Q. Did you know anything about the shooting that occurred there that night?

A. I don't remember anything about any shooting at all.

Q. Do you remember whether or not you had a gun there that night?

A. No, sir.

Q. Up to the time you lost your reason?

A. No, sir.

Q. Do you remember anything about shooting any bottles in the fireplace?

A. No, sir.

Q. What was the first time that you knew Tandy Harrell had been shot?

A. It was the next morning.

Q. How did you find it out the next morning?

A. My father woke me up and told Tandy was shot and wanted me to go help get him in the house.

Q. What effect did it have on you when you heard that Tandy Harrell was shot?

A. I was shocked.

Q. You were shocked?

A. Yes.

Q. What did you do?

A. I got up from the bed and went out to where Tandy was, and a little bit after that Mr. Cantrel and Allen come in, and we carried him into the house and put him on the bed.

Q. Then did you have a conversation there?

A. Yes, I asked him if he thought I did have anything to do with it, and he said, "No."

Q. Why did you ask him what he thought you had anything to do with it for?

A. Well, I was drunk that night, and I did not want him to think I had anything to do with it.

Q. Had you and Tandy Harrell always been good friends?

A. We have been the best of friends.

Q. After you got Tandy in the house, what did you do?

A. I went to Tandy's house and told his folks and then went for the doctor.

Q. Who did you tell at Tandy's house, when you got there?

A. I told Mrs. Harrell, his wife.

Q. Then what did you do?

A. I went on to town for the doctor.

Q. What doctor did you get?

A. I went for Dr. Guy Clark.

Q. Did you tell him Tandy Harrell had shot himself?

A. I told him Tandy was shot, and he asked me how he got shot, and I told him he must have shot himself for all I knew.

We deem it unnecessary to detail further the facts disclosed by the record. The errors assigned are based on exceptions taken to the overruling of a motion to quash and set aside the information and a motion to dismiss, and on exceptions to rulings in receiving and rejecting evidence, and on the refusal of the court to give requested instructions. A careful examination of the record leads to the conclusion that the only error assigned which we cannot disregard as merely technical and without substantial merit is the one that the court erred in refusing to submit to the jury the issue of manslaughter in the first degree.

The defense was based on two theories: One that Jim Helms, the state's chief witness, did the shooting; and the other that the defendant was temporarily insane if in fact he fired the fatal shot, and the homicide was excusable by reason of his insanity. In the instructions given, the court submitted the issue of murder and the defense of insanity. We are of the opinion that on the undisputed facts the issue of insanity was not raised by the evidence. Alcoholic insanity, or mental incapacity produced by voluntary intoxication, existing only temporarily at the time of the commission of the homicide, is no excuse or defense in a prosecution therefor. Drunkenness is one thing, and the diseases of the mind to which drunkenness leads are different things. Temporary insanity, occasioned immediately by drunkenness, does not destroy responsibility for crime, where the defendant, when sane and responsible, voluntarily makes himself drunk. To constitute insanity, caused by intoxication, a defense to an indictment or information for murder, it must be insanity caused by chronic alcoholism, and not a mere temporary mental condition. The distinction between a fit of drunken frenzy or madness, commonly called, "delirium tremens," and temporary delusional insanity, a disease caused by excessive and long-continued indulgence in alcoholic liquors, technically called, "delirium tremens," or "mania a potu," is well defined by the authorities and text writers. See *State v. Kidwell*, 62 W. Va. 466, 13 L.R.A.(N.S.) 1024, 59 S. E. 494; *Wharton & S. Med. Jur.* § 940. The principle is everywhere recognized that voluntary intoxication is no justification or excuse for crime, and is no excuse for homicide, though carried to the extent of producing incapacity to control the mind and will; while intoxication does not excuse homicide, it may produce a state of mind in which one is incapable of forming a design to take life, and evidence of intoxication is admissible only as bearing

upon the existence or nonexistence of malice. *Miller v. State*, 9 Okla. Crim. Rep. 55, 130 Pac. 813.

Under our Penal Code (first subdivision, § 2313, Rev. Laws), homicide is murder "when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of any other human being;" and evidence of intoxication is admissible to show an absence of the premeditated design to kill, for the purpose of determining whether the offense was murder or manslaughter, and a state of intoxication which will reduce homicide from murder to manslaughter in the first degree must be of such character and extent as to render the defendant incapable of entertaining or forming a design to effect death, and the question is for the jury to determine. In *Wharton on Homicide*, 3d ed. it is said (pages 809, 811): "Homicide committed when the accused was so intoxicated that no intent to commit the crime of murder could have existed, however, not being murder in the first degree, is either manslaughter or murder in the second degree. Intoxication cannot operate as an entire exemption from criminal responsibility, and it is not conclusive against the existence of a criminal intent. At the utmost it only extenuates the crime from murder to manslaughter, and it does not do this as matter of law. Whether the accused was so intoxicated as to render him incapable of entertaining the specific intent necessary to constitute the crime is a question of fact for the jury. And it will be presumed, in the absence of proof to the contrary, that the accused, though intoxicated, intended the actual consequences of his acts. And the burden rests with the accused to show that he was so intoxicated as to be incapable of forming any intent. . . . Intoxication, though involuntary, is to be considered by the jury in a prosecution for murder in the first degree, in which a premeditated design to effect death is essential, with reference to its effect upon the ability of the accused at the time to form and entertain such a design; not because, *per se*, it either excuses or mitigates the crime, but because, in connection with other facts, an absence of malice or premeditation may appear. Drunkenness as evidence of want of premeditation or deliberation is not within the rule which excludes it as an excuse for crime. And a person who commits a crime while so drunk as to be incapable of forming a deliberate and premeditated design to kill is not guilty of murder in the first degree."

The precise question involved here was decided in the case of *Aazman v. State*, 123

Ind. 347, 8 L.R.A. 33, 24 N. E. 123, Mitchell, Ch. J., delivering the opinion of the court said:

"It is sufficient to say that, in order that there may be such premeditated malice as will make a homicide murder in the first degree, the thought of taking life must have been consciously conceived in the mind, the conception must have been meditated upon, and a deliberate determination formed to do the act. Where a homicide has been preceded by a concurrence of will, with an intention to kill, and these are followed by a deliberate thought or premeditation, although they follow as instantaneously as successive thoughts can follow each other, the perpetrator may be guilty of murder in the first degree. But as it is of the very essence of the crime that there should have been time and opportunity for deliberation or premeditation after the mind has consciously formed the design to take life, it follows as a necessary corollary that there must have been the mental capacity to think deliberately upon and determine rationally in respect to the nature and consequences of the act which follows. It would be a legal as well as a logical incongruity to hold that the crime of murder in the first degree could only be committed after deliberate thought or premeditated malice, and yet that it might be committed by one who was without mental capacity to think deliberately or determine rationally. As a matter of course the rule is universal and voluntary intoxication is no excuse for crime, nor does it, in any degree, mitigate or palliate an offense actually committed. To hold otherwise would unbridle crime and subvert public order. On the contrary, where there is reason to believe that one has conceived the design to commit a crime, and, while harboring the unlawful purpose, voluntarily becomes intoxicated in order to blunt his moral sensibilities and nerve himself up to the execution of his preconceived design, the offense is thereby greatly aggravated. *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799. Where, however, the essence of a crime depends upon the intent with which an act was done, or where an essential ingredient of the crime consists in the doing of an unlawful act, with a deliberate and premeditated purpose, the mental condition of the accused, whether that condition be occasioned by voluntary intoxication or otherwise, is an important factor to be considered. *Smith v. Com.* 1 Duv. 227; *State v. Garvey*, 11 Minn. 163, Gil. 95.

"Thus, in *Cline v. State*, 43 Ohio St. 332, 1 N. E. 22, 5 Am. Crim. Rep. 57, the learned judge, delivering the judgment of L.R.A.1915E.

the court, said: 'Where a person, having a desire to do to another an unlawful injury, drinks intoxicating liquors to nerve himself to the commission of the crime, intoxication is held, and properly, to aggravate the offense; but at present the rule that intoxication aggravates crime is confined to cases of that class. . . . But in many cases evidence of intoxication is admissible with a view to the question whether a crime has been committed, or, where a crime consisting of degrees has been committed, such evidence may be important in determining the degree.' *Pigman v. State*, 14 Ohio, 555, 45 Am. Dec. 558; *Lytle v. State*, 31 Ohio St. 196; *Davis v. State*, 25 Ohio St. 369; *Roberts v. People*, 19 Mich. 401; *State v. Welch*, 21 Minn. 22.

"In the application of this principle the Supreme Court of the United States reversed a judgment of conviction of murder in the first degree, in *Hopt v. Utah*, 104 U. S. 631, 26 L. ed. 873, 4 Am. Crim. Rep. 365. The court below instructed the jury to the effect that 'a man who voluntarily puts himself in a condition to have no control of his actions must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and when real is so often resorted to as a means of nerving a person up to the commission of some desperate act, and is withal so inexcusable in itself, that the law has never recognized it as an excuse for crime.' The accused requested the court to give an instruction similar to that requested and refused in the present case. After asserting the general rule of the common law, that voluntary intoxication affords no excuse, justification, or extenuation of a crime committed under its influence, Mr. Justice Gray, delivering the judgment of the court, said: 'But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury.' *Com. v. Dorsey*, 103 Mass. 412; *Pirtle v. State*, 9 Humph. 663; *Haile v. State*, 11 Humph. 154; *Jones v. Com.* 75 Pa. 403, 1 Am. Crim. Rep. 262; *Keenan v. Com.* 44 Pa. 55, 84 Am. Dec. 414; *People v. Belencia*, 21 Cal. 544; *State v. Johnson*, 40 Conn. 136; *Maxwell*, Crim. Proc. pp. 227-299.

"So, in *Buckhannon v. Com.* 86 Ky. 110, 5 S. W. 358, the court said: 'A deliberate intent to take life is an essential element of murder. Drunkenness as a fact may,

therefore, be proven as bearing upon its existence or nonexistence. It is not admissible upon the ground that in and of itself it excuses or mitigates the crime, because one offense cannot justify or palliate another, but because, under the circumstances of the case, it may tend to show that the less, and not the greater, offense, was committed.' See also *State v. Sopher*, 70 Iowa, 494, 30 N. W. 917.

"In *State v. Johnson*, 40 Conn. 136, the supreme court of Connecticut, in reversing a judgment of conviction of murder in the first degree, the court below having given and refused instructions similar to those involved in the present case, used the following language: 'A deliberate intent to take life is an essential element of that offense. The existence of such an intent must be shown as a fact. Implied malice is sufficient, at common law, to make the offense murder; and, under our statute, to make it murder in the second degree, . . . actual malice must be proved. Upon this question the state of the prisoner's mind is material. In behalf of the defense, insanity, intoxication, or any other fact which tends to prove that the prisoner was incapable of deliberation was competent evidence for the jury to weigh. Intoxication is admissible in such cases, not as an excuse for crime, nor in mitigation of punishment, but as tending to show that the less, and not the greater, offense, was in fact committed.' *State v. Johnson*, 41 Conn. 585; *Jones v. State*, 29 Ga. 594.

"'In those states,' says a learned author, 'in which murder has been divided by statute into degrees, it has been held that if the accused was intoxicated to such an extent as to deprive him of the power to form a design, the offense could be no more than murder in the second degree.' *Lawson, Insanity*, p. 74; 1 *Whart. Crim. Law*, ¶¶ 51, 52.

"'Drunkenness, we have seen, does not incapacitate one to commit either murder or manslaughter at the common law,' says Mr. Bishop, 'because, to constitute either, the specific intent to take life need not exist, but general malevolence is sufficient. But where murder is divided by statute into two degrees, and to constitute it in the first degree there must be the specific intent to take life, the specific intent does not, in fact, exist, and the murder is not in this degree, where one, not meaning to commit homicide, becomes so drunk as to be incapable of intending to do it, and then . . . kills a man.' *Bishop, Crim. Law*, ¶ 404.

"This court, although not always enunciating it with entire accuracy, has con-

stantly recognized the rule declared in the above cases."

And Elliott, J., in a concurring opinion said: "I concur in the conclusion that the judgment should be reversed, for I think that the very able opinion of the court, prepared by the chief justice, unanswerably proves that where the element of premeditation is essential to create the crime of murder in the first degree, the accused cannot be found guilty of that crime if, at the time of the killing, he was so completely overcome by intoxication as to be incapable of premeditation."

In *Morris v. Territory*, 1 Okla. Crim. Rep. 617, 99 Pac. 760, 101 Pac. 111, it is said: "If from any cause, at the time of the homicide, the mind of the defendant was in such a condition as to be incapable of forming a premeditated design to effect the death of the person slain, or of any other human being, he cannot be guilty of murder, unless it be proven that this state of mind, at the time of the killing, grew out of his intentional and wrongful conduct, of such character as to show that the killing was the result of previous premeditation and formed design."

In *Miller v. State*, 9 Okla. Crim. Rep. 55, 130 Pac. 813, it is said: "At most, a state of intoxication rendering the defendant incapable of forming a criminal intent would only reduce murder to manslaughter."

There is no intention here to give the least intimation of opinion as to the weight of this evidence, as establishing one conclusion or another in reference to the degree of homicide. The testimony is detailed simply to show that there was evidence tending to show the want of mental capacity to form a premeditated design to kill.

The brief filed by the state concedes error and concludes as follows: "The evidence of the defendant presented the issue as to whether or not he was, by reason of the immediate use of intoxicating liquors, unable to form a design to effect the death of Tandy Harrell. Under the first subdivision of § 2320, Rev. Laws, homicide is not murder unless the accused entertained a design to effect death, and if the design exists, it is immaterial whether the accused is in a state of voluntary intoxication, and, although being in a state of voluntary intoxication, yet the character of the act, when the offense is divided into degrees, and where, as in homicide, the intent is material, will be determined by the state of mind of the accused. So that where the evidence showed that the accused was drunk at the time of the commission of the homicide, evidence thereof is ad-

missible as bearing upon whether the accused entertained a design to kill; and, under the evidence in the case, we believe that the court should have instructed the jury upon manslaughter in the first degree."

Our Procedure Criminal provides that "when it appears that a defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only." Rev. Laws, § 5877.

And that "the jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." Rev. Laws, § 5923.

In the case of *Ryan v. State*, 8 Okla. Crim. Rep. 623, 129 Pac. 685, it is said: "It is always the duty of the trial court to instruct on the law of manslaughter if there is any evidence that the alleged crime might have been done under circumstances that would reduce the crime from murder to manslaughter. In other words, where there may be the slightest doubt in the mind of the trial court whether the crime was murder, then that doubt should be resolved in favor of the accused and a manslaughter instruction given."

After carefully considering the evidence we are of opinion that the refusal of the trial judge to instruct the jury in reference to manslaughter in the first degree constitutes prejudicial error. The judgment must therefore be reversed, and the cause remanded for a new trial.

The warden of the penitentiary at McAlester on presentation of a certified copy of this opinion by the sheriff of Johnston county, Oklahoma, is hereby directed to deliver the defendant, Tom Cheadle, to such sheriff, who shall confine the defendant in the common jail of Johnston county, there to await another trial, or until discharged according to law.

Furman and Armstrong, JJ., concur.

RHODE ISLAND SUPREME COURT.

RHODES BROTHERS COMPANY
v.

MUSICIANS' PROTECTIVE UNION, LOCAL NO. 198, A. F. OF M. OF PROVIDENCE, Appt.

(— R. I. —, 92 Atl. 641.)

Injunction — to prevent enforcement of by-law of labor union.

Injunction will not lie in favor of the proprietor of a dance hall against a musician's union, to prevent the enforcement of a by-law forbidding members of the union to serve one who has broken a contract with its members, upon its determination after hearing that his discharge of an orchestra employed by him for incompetency was a breach of his contract, although the effect will be to prevent him from employing union musicians.

(January 4, 1915.)

APPEAL by respondent from a decree of the Superior Court for Providence and Bristol Counties granting a preliminary injunction restraining it from interfering with its members in the employ of the complainant company, and from imposing any fine or penalty upon such members by reason of their continued employment by it. Reversed.

The facts are stated in the opinion.

Mr. Harold B. Tanner, with Messrs. Fitzgerald & Higgins, Thomas A. Carroll, and James C. Collins, for appellant:

The situation is not a proper one for the granting of equitable relief.

Brown v. Stoerkel, 74 Mich. 269, 3 L.R.A. 430, 41 N. W. 921; *Hyde v. Woods*, 94 U. S. 523, 24 L. ed. 284.

The members of the respondent association had a legal right to peacefully enforce their contract, although the complainant might be injured thereby.

Note. — Right of labor union to forbid its members serving a certain person.

A question very similar to that under consideration is presented in the notes in 12 L.R.A.(N.S.) 642; 32 L.R.A.(N.S.) 792; and 51 L.R.A.(N.S.) 778, as to the right of a labor union to forbid its members to handle one's product. The following notes are also of value on this question: Note in 23 L.R.A.(N.S.) 1236, as to the right of a labor union to impose a fine on its members as a means of inducing them to join in a strike; note in 42 L.R.A.(N.S.) 1050, as to right of workmen to combine to refuse to work with another; note in 41 L.R.A.(N.S.) 445, as to the right, in aid of a strike, to employ peaceable persuasion to induce persons not under a contract to quit or not accept employment; note in 41 L.R.A.(N.S.) 453, as to right, in aid of strike, to use money to induce persons not under contract to quit or not accept employment.

With the exception of *L. D. Willcutt & Sons Co. v. Driscoll*, 200 Mass. 110, 23 L.R.A.(N.S.) 1236, 85 N. E. 897, which holds that a labor union cannot impose fines upon its members in order to prevent them from working for or accepting employment from a person with whom a labor union is having an industrial war, since the employer's right of a free labor market is thereby interfered with, the cases are in

Mayer v. Journeymen Stonecutters' Asso. 47 N. J. Eq. 519, 20 Atl. 492; State v. Stockford, 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769; National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; Vege-lahn v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077.

Messrs. Henry Marsh, Jr., and John S. Murdock for appellee.

Vincent, J., delivered the opinion of the court:

This is an appeal by the respondents from a decree of the superior court granting to the Rhodes Brothers Company a preliminary injunction restraining the respondents from interfering with the members of

harmony in holding that it is within the power of a labor union, and it is lawful for them, to instruct or order their members not to accept employment with an individual, or to continue in such person's employment, where the action of the union is justifiable in the sense that it is to promote the welfare of the members of the union.—

—Arthur v. Oakes, 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 327, 9 Am. Crim. Rep. 169, holding that a combination of employees having for its object their orderly withdrawal in large numbers or in a body from the service of their employer is not unlawful if for a legitimate object;

—Jetton-Dekle Lumber Co. v. Mather, 53 Fla. 969, 43 So. 590, holding that an injunction restraining a labor union from using any methods or devices to intimidate or prevent by threats, violence, or coercion any person or persons from accepting employment with the complainant, or to prevent the complainant from employing any person or persons whomsoever, is properly modified by a provision that the restraining provisions are not intended to interfere with the several defendants, as unions or societies, in imposing on their members such fines and penalties as may be prescribed by their respective constitutions, by-laws, rules, or regulations, as a means of inducing them to leave their employment;

—Scott-Stafford Opera House Co. v. Minneapolis Musicians' Asso. 118 Minn. 410, 136 N. W. 1092, holding to be valid a rule of an association of musicians, that none of its members shall accept employment except upon certain terms and conditions;

—Gray v. Building Trades Council, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172, holding that it is not unlawful for the members of a labor union to refuse to work with persons not members of their union;

—Erdman v. Mitchell, 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327, declaring that members of a labor organization, under their constitution and rules, may resolve that they will not work with members of another organization: L.R.A.1915F.

said union employed by the complainant company, and from imposing any fine or penalty upon such members by reason of their continued employment by the complainant.

It appears that the complainant, the Rhodes Brothers Company, has for a number of years maintained a place of entertainment in Cranston, in the state of Rhode Island, known as "Rhodes on the Pawtuxet;" one of the principal features of such place of entertainment being a dance hall or pavilion where those desiring to dance might indulge in that pastime under agreeable and suitable conditions and surroundings upon the payment of a small entrance or other fee. To carry on this business successfully, it was necessary for the

—Curran v. Treleven [1891] 2 Q. B. 560, holding that notice by officers of a trade union that if an employer of union men continued to employ nonunion men, the union men in his employ would quit work, and when the employer offended in this regard, the act of the officers in telling the union men to cease work and go home, did not constitute intimidation within the trade union statute.

And see Longshore Printing Co. v. Howell, 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 547, holding the fact that officers of a labor union went upon the employer's premises and ordered members of the labor union in his employ to cease working for him does not entitle the employer to injunctive relief, since if the act constituted trespass, there exists an adequate remedy at law.

While, as pointed out, the Willcutt Case holds it unlawful for labor unions to interfere with the manufacturer's right to a free labor market by imposing fines or penalties upon its members who accept employment with such manufacturer, this holding, in principle, seems inconsistent with former holdings of that court.

See Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346, holding to be lawful an agreement among the members of a labor union not to work for a person who should employ any person not a member of the association.

And Bowen v. Matheson, 14 Allen, 499, holding the act of a combination of ship-masters in preventing seamen from serving ships with seamen not members of the association is not unlawful, and the members of the association are not guilty of a conspiracy.

These Massachusetts cases may perhaps be reconciled on the theory that, although it is lawful for members of a labor organization mutually to agree not to work for a manufacturer except under certain conditions, nevertheless they cannot be coerced into putting into effect such an agreement by the imposition of fines or penalties. On this point, see note in 23 L.R.A.(N.S.) 1236.

A. G. S.

complainant to furnish music of a suitable character, and which should be reasonably satisfactory to the patrons of the place. For several years the complainant has exclusively employed members of the respondent union, which is a voluntary unincorporated association composed of persons in the musical profession residing or located in the city of Providence and in other towns and cities in the state of Rhode Island. In the spring of 1914, the complainant entered into the following contract with Edward M. Fay, a musician engaged in leading and furnishing orchestras, and also a member of the respondent union:

Musicians' Protective Union, Providence, R.
I. Local No. 198 A. F. of M.

Contract Blank

March 5, 1914.

The undersigned party of the first part and second part, respectively agree as follows:

The party of the first part hereby agrees to furnish twelve musicians, members of Local No. 198, A. F. of M. as their agent, to party of the second part, for \$280, to play at Rhodes on the Pawtuxet six evenings per week, from 8 P. M. until 11 P. M., and to play Saturday afternoons from 3 P. M. to 6 P. M. (The party of the first part also hereby agrees to play six afternoons and six evenings, each week, three hours each session for the sum of \$329.50 per week.) (This engagement to start on or about April 15, 1914, and to continue until balance of the season of 1914.)

It is further agreed that if there are any bands or orchestras employed for this engagement who are unfair to the American Federation of Musicians, this contract shall be considered null and void, as far as party of the first part is concerned, but does not relieve party of the second part.

As the musicians engaged under the stipulations of this contract are members of the American Federation of Musicians, nothing in this contract shall ever be so construed as to interfere with any obligation which the musicians owe to the American Federation of Musicians by reason of their prior obligations to the American Federation of Musicians as members thereof.

The party of the second part agrees to fulfil provisions of above.

E. M. Fay,

Party of the First Part.

Rhodes Bros. Co.,

A. A. Rhodes, Treas.,

Party of the Second Part.

Under this contract, Mr. Fay selected from the members of the respondent union L.R.A.1915E.

an orchestra which furnished the music at "Rhodes on the Pawtuxet" from April 11, 1914, to June 6, 1914.

Mr. Fay, with the exception of the opening night, did not lead the orchestra himself, but intrusted the performance of that duty to his brother. The contract does not by its terms secure to the complainant the personal services of Mr. Fay as a leader or otherwise. The complainant claims that the music was so unsatisfactory in character that it provoked frequent complaints from the patrons of the place, and fully justified the complainant's action in canceling the contract. After the cancelation of this contract, the complainant employed another orchestra, also composed of members of the respondent union, whereupon the union, through its board of directors, passed a vote forbidding its members to enter or to continue in the employment of the complainant as musicians.

In this situation of affairs, the complainant filed its bill of complaint against the Musicians' Protective Union, Local No. 198, A. F. of M., Providence, R. I., and certain individuals composing its board of directors. The complainant sets forth in its bill, as amended, that it had been for years past engaged in carrying on a place of entertainment and amusement in Cranston, which had been and was being patronized by a large number of people from Providence, Pawtucket, Cranston, and other places, for the purpose of dancing, and that it was necessary for the complainant to employ an orchestra capable of furnishing music suitable for such purpose; that the complainant is informed and believes that the respondent association comprises in its membership all the available musicians in the state of Rhode Island; that the complainant has never employed at its place of amusement any musicians outside of the membership of the respondent association, and that it does not desire so to do; that the quality and character of the music has not been and is not satisfactory to the patrons of the place, but has, on the contrary, provoked repeated complaints, making it necessary for the complainant to employ other professional musicians; that it has endeavored to employ other musicians also members of the respondent association, who could and would furnish music of a quality and character satisfactory to its patrons, but that the respondents have undertaken to prevent other members of the union from furnishing music at the complainant's place of amusement, and in pursuance thereof its board of directors, on June 4, 1914, passed a vote prohibiting professional musicians, members of the respondent association, from entering into any engagement with the

Rhodes Brothers Company to play at "Rhodes on the Pawtuxet" during the season of 1914. The complainant's bill prays for a temporary and permanent injunction restraining the respondents from interfering with the complainant in the exercise of its right and privilege of engaging members of the respondent association, or in any manner preventing anyone now or who may hereafter be employed by the complainant as a musician, or may be desirous of such employment, from entering into or continuing in any contract relations with the complainant, or from depriving the complainant of the services of any such person through the imposition, enforcement, or collection of, or any threat or attempt to impose, enforce, or collect, any fine or penalty, or expel or attempt or threaten to expel any member of the respondent union on account of his employment or engagement or any contract with the complainant in relation to musical services growing out of the same, and from contriving by threats or intimidation or in any way hindering any person from entering into any contract relations as a musician with the complainant, and that the notice to members forbidding them to enter into the employ of the complainant may be declared null and void and of no effect.

The case came on for hearing in the superior court upon the question of the temporary injunction upon bill, answer, affidavits, and oral testimony. The superior court rendered a decision, in the first instance, that the complainant, while having made out a case in other respects, had failed to show that the action of the respondents, if not interfered with, would result in an irreparable injury to the complainant. Later the case was reopened before another justice of the superior court for the purpose of permitting the complainant to offer testimony bearing upon the question of irreparable injury. Upon this hearing the court decided in favor of the complainant, and the following decree enjoining the respondent association was entered: "That the respondents, the Musicians' Protective Union, Local No. 198, A. F. of M. of Providence, R. I., a voluntary unincorporated association, its officers, directors, agents, and servants, are hereby restrained and enjoined from interfering with the business of the complainant by reason of any matter or thing growing out of a certain contract heretofore entered into between the Rhodes Brothers Company and said association, or any member of said association, offered in evidence at the hearing and marked 'Respondents' Exhibit A,' or by reason of any matter or thing growing out of said contract, from imposing, enforcing, or

collecting, or attempting to impose, enforce, or collect, any fine or penalty by reason of any matter or thing growing out of said contract, upon any member of said Musicians' Protective Union, Local No. 198, A. F. of M. of Providence, R. I., on account of the employment or engagement of any such member as musician by said complainant, until further order of the court."

From this decree the respondents have taken an appeal, alleging: (1) That said decree is against the law; (2) that said decree is against the evidence and the weight of the evidence; (3) that the complainant has not shown any probable right to final relief; (4) that the granting of the preliminary injunction is equivalent to final relief; (5) that the complainant has not shown that it would be irreparably injured if the injunction were not granted; and (6) that the finding of fact by Mr. Justice Brown that complainant could engage a competent orchestra outside of the union is conclusive that complainant would not be irreparably injured if the injunction were not granted, and, the question of irreparable injury being the only question opened to Judge Brown for rehearing, his said finding of fact is conclusive that the preliminary injunction should not be granted.

The novelty of the question presented resides in the fact that the complainant, feeling that its interests would be better served through the employment of union men, desires to employ the members of this union, and certain members of the union desire to enter the employment of the complainant, provided they can do so without imperiling their membership in the union or subjecting themselves to any fines or disciplinary measures which the by-laws of the union authorize. The desires of both the complainant and of the men whom it desires to employ are therefore conditional.

The contract between the complainant and Mr. Fay is in the form prescribed by the union and upon one of the blanks provided by the union. The representatives of the complainant, in executing this contract, must have been aware that they were dealing with Mr. Fay as a member and under the rules and regulations of the union. This is further evidenced by the fact that when the difficulty arose between the complainant and the union, and the contract was rescinded by the former, the complainant appealed to the directors of the union for a settlement of the question, and appeared, through its representatives, and presented its side of the controversy. Upon this hearing the directors of the union found that the contract was binding upon both parties, and a vote was subsequently passed forbid-

ding members of the union from entering the employment of the complainant without permission of the said directors.

The by-law of the union under which this action was taken is as follows (§ 13, art. 7): "Members shall not play for the proprietor of a hall, concert saloon, theater, or any person, club, company, or organization who has broken a contract with a member or members of this union. In case of doubt as to which party has broken the contract, it must be referred to the board of directors."

The complainant does not claim that the members of the respondent association are deterred from accepting employment at its place of business through any acts of violence or any acts or threats producing a fear of violence, but it does claim that any disciplinary action under this by-law, based upon such employment, would be unlawful, and would amount to a combination or conspiracy having for its purpose the exclusion of the complainant from the open labor market, and resulting in irreparable injury.

We cannot say that this by-law is in itself unlawful, or that its enforcement upon the members of the union who have voluntarily subjected themselves to its provisions amounts to an intimidation or to a threat which would justify the interference of a court of equity. It left the members of the union free, in one sense, to enter the employment of the complainant, although it practically compelled them to choose between the benefits of such an engagement and membership in the union.

As the court said in *Jetton-Dekle Lumber Co. v. Mather*, 53 Fla. 969, 43 So. 590: "The risk of fines and expulsion is one 'voluntarily assumed by the members entering the unions, and if no longer willing to pay the price, if the advantages derived are not equal to the burdens assumed, each member has a perfect right to withdraw from the union.'"

The law as to the duties of members to obey the rules and regulations of the association to which they belong is well set forth in the opinion of Sheldon, J., in *L. D. Willcutt & Sons Co. v. Driscoll*, 200 Mass. 110, 23 L.R.A. (N.S.) 1236, 85 N. E. 897, as follows: "When one chooses voluntarily to unite with others of the same craft in forming an organization for the purpose of bringing about by the united action of all its members more favorable conditions of employment, he is bound, so long as he desires to remain a member of that organization, to submit within certain limits his own freedom alike of judgment and of action to the judgment of his associates, and to conform his conduct to that standard which they shall have agreed to be for the L.R.A. 1915E.

best interest of all and of each. Unity of action would be impossible upon any other terms."

Martin, in his work on *The Modern Law of Labor Unions*, says in this connection (§ 150, p. 207): "This general right of a union to make and enforce by penalties rules and by-laws for the government of its members has never been denied where the rights of the union and its members only are involved. Can it be held unlawful, then, as between a union and its members, for the union to impose penalties in accordance with its rules and by-laws? . . . The lawfulness of such action by the union, as between itself and its members, is amply sustained by many well-considered decisions, and denied by none; nor could any valid reason be assigned for such denial. . . . Nor can any sound reason be advanced why this right should be restricted or denied, merely because the employer may suffer incidental damage thereby."

The complainant urges that the vote of the directors of the union forbidding its members to enter the employment of the complainant was in the nature of a threat, and operated to intimidate them, and brings the respondents within the rule laid down in the adjudicated cases that all acts of violence, threats of violence, or acts calculated to intimidate, may be restrained by injunction. It seems to us, however, that this vote amounts to nothing more than a notice to the members of the union that the complainant has brought itself within the scope of the by-law, and that if they should enter the employment of the complainant they would be dealt with in accordance therewith. We do not think that such vote amounts to intimidation as defined by the adjudicated cases, bearing in mind that such vote was passed after a hearing in which the complainant had participated and after the board of directors had found the contract binding upon both parties thereto.

The complainant states that the case presents three questions for the determination of the court upon the motion for a preliminary injunction: (1) Has the complainant shown probable cause for relief? (2) Has the complainant shown that it would suffer irreparable injury unless a preliminary injunction was granted? And (3) has the complainant a constitutional right to a free market and to employ any person willing to enter its employment?

The complainant has also presented in its brief some argument and cited some authority as to the general scope and purpose of a preliminary injunction. As to this there seems to be no contention between the parties, and we see no reason for doubt-

ing the general rule laid down in Kerr on Injunctions, 3d ed. pp. 61, 62, cited by complainant in its brief. Under the rule, the complainant, in order to get a preliminary injunction, must sustain the burden of satisfying the court that there is a substantial question to be tried. The question whether or not the complainant would suffer an irreparable injury largely depends for its solution upon the character of the act or acts alleged to be injurious. It is not every injurious act which renders the party committing it subject to injunction. The act must not only be injurious, but it must also be unlawful. If an injury follows from a proper and lawful act, it is *damnum absque injuria*. We therefore come back to the act of the respondent in passing a vote, by its board of directors, forbidding its members to enter or continue in the employment of the complainant. That the respondent union might lawfully do so we have already concluded.

This is not simply a case where the complainant desires to employ certain musicians who are desirous of entering its employment. The attitude of both the complainant and the musicians is, as we have already seen, conditioned upon the continued membership of the musicians in the union. To say that the musicians, after subjecting themselves to the laws and regulations of the union, which provide for a finding as to the validity of a contract between its members and outside parties, and that in case of a broken contract members shall not enter the employment of the party breaking it, were willing to enter such employment, is not correctly expressive of the situation in the present case. While they may signify their desire to enter the employment of the complainant, they only desire to do so upon the condition that they can at the same time retain their membership in the union. It is quite apparent that the interest of these musicians in the union is paramount to that of their employment by the complainant, and that, on the other hand, the desirability of these particular musicians and their value to the complainant over other musicians reside in the fact that they are members of the union. These men are not ready to enter, or continue in, the employment of the complainant, nor does the complainant care for their services except they be retained as members of the union. This being the situation, it seems to follow that the further dealings between the complainant and these musicians must depend on the willingness of the union to waive its by-law before mentioned, and to consent that its members may continue in the employ of the complainant without penalty, discipline, L.R.A.1915E.

or expulsion, or that the musicians accept such employment in disregard of the union and its regulations, assuming the responsibility of its discipline. The case of *Shine v. Fox Bros. Mfg. Co.* 86 C. C. A. 311, 156 Fed. 357, upon which the complainant seems to place reliance, would, from the quotation therefrom in its brief, seem to have some important bearing upon the case at bar; but from a closer and more extended examination that case does not appear at all decisive of the question which is controlling here. In that case the judgment of the court was based upon the fact that the defendants in combination and by concert of action were undertaking to compel independent shops to unionize, and to enforce their demands in that particular by forbidding union men to work upon building materials which were not the product of a union shop, and by threatening to and calling strikes of union workmen when their requests were not complied with.

If we eliminate from the consideration of this case the authorities based upon violence, threats of violence, conspiracies, and unlawful combinations, little remains in the way of authority which could be usefully applied to the determination of the particular question before us. All that the respondent union is attempting to do or contemplates doing, so far as appears, is to enforce against its own members the provisions of a by-law under the terms of which they have voluntarily brought themselves and promised to abide. The union is not acting with others either by way of conspiracy or combination. It is, at most, only claiming the right to act for itself in the enforcement of its by-laws governing the conduct of its own members, and this we think it has a right to do. *Bohn Mfg. Co. v. Hollis* (*Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.*) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; *Thomas v. Cincinnati, N. O. & T. P. R. Co.* (C. C.) 4 Inters. Com. Rep. 788, 62 Fed. 803.

In *Bohn Mfg. Co. v. Hollis* it was held that an agreement between the members of a retail lumber dealers' association not to deal with any wholesale dealer who sells directly to customers not dealers at a point where a member of the association is doing business, and containing provisions for notification to all members when the wholesale dealer makes such a sale, and for the expulsion of members who dealt with him, is not unlawful, and such wholesale dealers cannot enjoin the sending out of such notices; that the infliction of the penalty of expulsion was not coercion; and that it was wholly a matter of their own free

choice whether they preferred to trade with plaintiff or the association.

In the case of *Vegehn v. Guntner*, 167 Mass. 98, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077, it is held in the majority opinion that "a combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be indirectly affected thereby."

In *Wabash R. Co. v. Hannahan* (C. C.) 121 Fed. 563, the court said: "An employee has an unquestionable right to place a price and impose conditions upon his labor at the outset of his employment, or, unless restrained by contract obligations, upon the continuance of his labor at any time thereafter; and if the terms and conditions are not complied with by the employer, he has a clear right either not to engage or, having engaged, in his service, to cease from work. What one may do all may do, . . . and persons interested in their welfare may advise, aid, and assist them in securing such terms and conditions of service as will best subserve their interests, and what they may lawfully do singly or together, they may organize and combine to accomplish."

We do not think that the case which the complainant presents is one for the exercise of the authority of a court of equity by way of injunction.

The decree of the Superior Court granting to the complainant a preliminary injunction is reversed, and the case is remanded to that court for further proceedings.

GEORGIA SUPREME COURT.

SOUTHERN RAILWAY COMPANY, Plff.
in Err.,

v.

MARY J. BAILEY.

(— Ga. —, 85 S. E. 847.)

Carrier — train schedule — reasonableness.

1. A railway company may make reasonable regulations in the conduct of its business. In the absence of a statute to the

Headnotes by HILL, J.

Note. — The question as to the duty and liability of a carrier to a passenger who boards a train that does not stop at his destination, including the reasonableness of rule for the nonstoppage of trains at particular places, and the duty of passenger to ascertain whether the train stops at his station, is treated in the note to *Louisville & N. R. Co. v. Gaddie*, L.R.A.1915D, 705. L.R.A.1915E.

contrary, a schedule which provides for the nonstoppage of a certain train at a particular place will not be considered unreasonable, where it appears that other trains are scheduled to stop at such place, and it is not alleged that they do not afford adequate service.

Same — duty to ascertain stops.

2. It is the duty of the purchaser of a ticket, or one who desires to become a passenger on a train, to ascertain before boarding it that it stops at the station to which he desires to be transported; and where he fails to do so, the proper agent of the railway company may compel him to leave the train at the last place at which the train is scheduled by the company's published regulations to stop before reaching the point of destination desired by the passenger.

Appeal — pleading — sufficiency.

3. The court erred in overruling the general demurrer to the petition.

(June 30, 1915.)

ERROR to the Superior Court for Henry County to review a judgment in plaintiff's favor in an action brought to recover damages for alleged wrongful expulsion from defendant's train. Reversed.

Statement by HILL, J.:

The petition and the amendment thereto alleged that on the 6th of December, 1912, the plaintiff purchased of the ticket agent of the Cincinnati, New Orleans, & Texas Pacific Railway Company, at Danville, Kentucky, a ticket entitling her to first-class passage from that place over the lines of that company to Chattanooga, Tennessee, and from there over the line of the Southern Railway Company to Jenkinsburg, Georgia. "After purchasing said ticket, petitioner boarded a train at Danville, Kentucky, at about 11 o'clock P. M., on said date." This was a through train operating over the lines of the said railway companies from Cincinnati, Ohio, to Macon, Georgia, and, according to the published regulations of the defendant and connecting carriers, was not scheduled to stop at Jenkinsburg, McDonough being the last place of stoppage before reaching Jenkinsburg. After the train had left Chattanooga, Tennessee, her ticket was demanded of her by the ticket collector of the defendant's train, who "inspected" and punched it and returned it to her. After the train left Atlanta, Georgia, "a ticket collector or conductor, who was collecting tickets on said train," again demanded of her her ticket, who, when exhibited to him, looked at it and punched it and returned it to her with the statement that she would have to leave the train at McDonough, as

the train she was on was a through train and did not stop at Jenkinsburg. To this she objected, but the collector, upon arrival at McDonough, over her protest, demanded that she leave the train, which she did, and she was compelled to wait in the waiting room of the depot at McDonough for six hours. She did not know that the train which she boarded at Danville was a through train and was not scheduled to stop at Jenkinsburg, and she was not informed, either by the ticket agent from whom she purchased the ticket, or the ticket collector to whom she exhibited it, until after she had left Atlanta, that it would not do so; nor did she inquire of any one as to whether it would stop at Jenkinsburg. The defendant has local trains scheduled to stop at Jenkinsburg. Damages were claimed for alleged physical discomfort and mental agony experienced in the waiting room at McDonough on account of the expulsion from defendant's train, and punitive damages sought for the expulsion. The defendant demurred generally and specially to the petition, and, the demurrer having been overruled, it excepted.

Messrs. Harris & Harris, for plaintiff in error:

It is the duty of one who is about to take passage on a railroad train to inform himself when, where, and how he can go or stop according to the regulations of the railroad company.

4 Elliott, Railroads, § 1593, p. 419; 2 Hutchinson, Carr. § 1060, p. 1227; 3 Thomp. Neg. § 2562; St. Louis, I. M. & S. R. Co. v. Atchison, 47 Ark. 74, 14 S. W. 468, 2 Am. Neg. Cas. 136; Chicago, R. I. & P. R. Co. v. Claunts, 99 Ark. 248, 138 S. W. 333; Chicago & A. R. Co. v. Randolph, 53 Ill. 510, 5 Am. Rep. 60, 2 Am. Neg. Cas. 574; Pittsburgh, C. & St. L. R. Co. v. Nuzum, 50 Ind. 141, 19 Am. Rep. 703; Ohio & M. R. Co. v. Applewhite, 52 Ind. 540; Conner v. Citizens' Street R. Co. 146 Ind. 430, 45 N. E. 662; Evansville & T. H. R. Co. v. Wilson, 20 Ind. App. 5, 50 N. E. 90, 4 Am. Neg. Rep. 141; Ohio & M. R. Co. v. Swarthout, 67 Ind. 567, 33 Am. Rep. 104; Chicago, St. L. & P. R. Co. v. Bills, 104 Ind. 13, 3 N. E. 611; Atchison, T. & S. F. R. Co. v. Gants, 38 Kan. 608, 5 Am. St. Rep. 780, 17 Pac. 54; Usher v. Chicago, R. I. & P. R. Co. 71 Kan. 375, 80 Pac. 956; Louisville & N. R. Co. v. Miles, 100 Ky. 84, 37 S. W. 486; Hancock v. Louisville & N. R. Co. 27 Ky. L. Rep. 434, 85 S. W. 210; Louisville & N. R. Co. v. Scott, 141 Ky. 538, 34 L.R.A.(N.S.) 206, 133 S. W. 800, Ann. Cas. 1912C, 547; Duling v. Philadelphia, W. & B. R. Co. 66 Md. 120, 6 Atl. 592; New York & N. E. R. Co. v. L.R.A.1915E.

Feely, 163 Mass. 205, 40 N. E. 20; Lake Shore & M. S. R. Co. v. Pierce, 47 Mich. 277, 11 N. W. 157; Wells v. Alabama G. S. R. Co. 67 Miss. 24, 6 So. 737; Wilson v. New Orleans & N. E. R. Co. 63 Miss. 352; Martindale v. Kansas City, St. J. & C. B. R. Co. 60 Mo. 508; Logan v. Hannibal & St. J. R. Co. 77 Mo. 663; Claybrook v. Hannibal & St. J. R. Co. 19 Mo. App. 432; Sira v. Wabash R. Co. 115 Mo. 127, 37 Am. St. Rep. 386, 21 S. W. 905; Fink v. Albany & S. R. Co. 4 Lans. 147; Noble v. Atchison, T. & S. F. R. Co. 4 Okla. 534, 46 Pac. 483; Dietrich v. Pennsylvania R. Co. 71 Pa. 432, 10 Am. Rep. 711; Caldwell v. Lake Shore & M. S. R. Co. 8 Pa. Co. Ct. 467; Black v. Atlantic Coast Line R. Co. 82 S. C. 478, 64 S. E. 418; Trotlinger v. East Tennessee, V. & G. R. Co. 11 Lea, 533; St. Louis Southwestern R. Co. v. Campbell, 30 Tex. Civ. App. 35, 69 S. W. 451; Texas & P. R. Co. v. Bell, 39 Tex. Civ. App. 412, 87 S. W. 730; Missouri, K. & T. R. Co. v. Walden, — Tex. Civ. App. —, 46 S. W. 37; Gulf, C. & S. F. R. Co. v. Moore, 98 Tex. 302, 83 S. W. 362, 4 Ann. Cas. 770; Richmond F. & P. R. Co. v. Ashby, 79 Va. 130, 52 Am. Rep. 620; Plott v. Chicago & N. W. R. Co. 63 Wis. 511, 23 N. W. 412; Boehm v. Duluth, S. S. & A. R. Co. 91 Wis. 592, 65 N. W. 506; Schiffer v. Chicago & N. W. R. Co. 96 Wis. 141, 65 Am. St. Rep. 35, 71 N. W. 97; Texas & P. R. Co. v. Ludlam, 6 C. C. A. 454, 13 U. S. App. 540, 57 Fed. 481; Ohage v. Northern P. R. Co. 118 C. C. A. 302, 200 Fed. 128; Kyle v. Chicago, R. I. & P. R. Co. 105 C. C. A. 151, 182 Fed. 613; Atchison, T. & S. F. R. Co. v. Cameron, 14 C. C. A. 358, 32 U. S. App. 67, 66 Fed. 709; Atchison v. Southern R. Co. 114 Ga. 146, 55 L.R.A. 223, 39 S. E. 888, 11 Am. Neg. Rep. 32.

A regulation that a through train shall not stop at a way station is reasonable. This rule entered into the contract of carriage.

Central of Georgia R. Co. v. Ricks, 109 Ga. 339, 34 S. E. 570; Southern R. Co. v. Watson, 110 Ga. 681, 36 S. E. 209, 8 Am. Neg. Rep. 367; Southern R. Co. v. Howard, 111 Ga. 842, 36 S. E. 213.

It is the passenger's duty either to get off at the station preceding the one to which his ticket reads, or pay fare to one just beyond.

Lake Shore & M. S. R. Co. v. Pierce, 47 Mich. 277, 11 N. W. 157.

The proper place to carry plaintiff was McDonough.

Logan v. Hannibal & St. J. R. Co. 77 Mo. 663.

At this place, as there is no allegation of offer to pay fare, the conductor was justified in ejecting her.

Ibid.; *Fink v. Albany & S. R. Co.* 4 Lans. 147; *Caldwell v. Lake Shore & M. S. R. Co.* 8 Pa. Co. Ct. 467.

Even where the passenger is misinformed, the railway has the right to correct the mistake by making her take another train.

St. Louis Southwestern R. Co. v. Wallace, 32 Tex. Civ. App. 312, 74 S. W. 581; *International & G. N. R. Co. v. Hassell*, 62 Tex. 256, 50 Am. Rep. 525, 6 Am. Neg. Cas. 514.

No mistake of the agent, or failure to inform plaintiff, could bind the company to stop this train.

Savannah, F. & W. R. Co. v. Bundick, 94 Ga. 775, 5 Inters. Com. Rep. 289, 21 S. E. 995.

It is not the duty of a ticket agent to volunteer information as to schedules or what train to take, without a request for such information.

Johnson v. Seaboard Air Line R. Co. 13 Ga. App. 298, 79 S. E. 91.

Messrs. Smith & Turner also for plaintiff in error.

Mr. J. T. Moore for defendant in error.

HILL, J., delivered the opinion of the court:

This is an action *ex delicto* for an alleged breach of duty owed by defendant to plaintiff, who was a passenger on defendant's train, occasioned by the wrongful expulsion of plaintiff from defendant's car by one of its agents. Under the view we take of the case, we shall only deal with the question raised by the petition and the general demurrer. The plaintiff boarded as a passenger a through train of a connecting carrier of defendant at a place in another state, for transportation to a point of destination situate within this state on defendant's line of railway, at which the train was not scheduled to stop, in ignorance on her part of this fact; and the question presented is whether the ticket agent of the connecting carrier from whom she purchased the ticket, or the ticket collector of the defendant when the ticket was exhibited to him, was under a duty to volunteer the information to her that the train would not stop at the place of destination called for by her ticket, without any inquiry from her. As there is no allegation in the petition that the contract of carriage between plaintiff and defendant bound itself to stop this train at Jenkinsburg contrary to its published rules, if such a duty existed at all, it must be considered as having arisen by virtue of the relation of carrier and passenger, as created by the presence of plaintiff on defendant's cars in possession of an ordinary first-class ticket. It is alleged in the petition that the regulation of this train of nonstoppage at Jenkinsburg was a published rule of the defendant, promulgated by itself and connecting carriers, and that the defendant had other trains scheduled to stop at this place.

A railway company may make reasonable rules and regulations for the conduct of its business, which are binding on the public in transactions with it. Civil Code 1910, § 2729; *Southern R. Co. v. Watson*, 110 Ga. 681, 36 S. E. 209, 8 Am. Neg. Rep. 367; *Southern R. Co. v. Howard*, 111 Ga. 842, 36 S. E. 213; *Central of Georgia R. Co. v. Motes*, 117 Ga. 923, 62 L.R.A. 507, 97 Am. St. Rep. 223, 43 S. E. 990, 14 Am. Neg. Rep. 13. And in the absence of statutory prohibition, a regulation of a railway company forbidding the stoppage of a through train at a specified place cannot be considered an unreasonable regulation, whether other trains are scheduled to stop at that place. See *Southern R. Co. v. Flanigan*, 10 Ga. App. 745, 74 S. E. 85; *Hutchinson*, Carr. 3d ed. § 1060; 1 *Elliott, Railroads*, 302, § 200; *Sira v. Wabash R. Co.* 115 Mo. 127, 21 S. W. 905, 37 Am. St. Rep. 386, and cases cited in note, page 392; *Louisville & N. R. Co. v. Miles*, 100 Ky. 84, 37 S. W. 486. See also cases cited in note to *International G. N. R. Co. v. Hassell*, in 50 Am. Rep. 527. Therefore, when the plaintiff purchased a ticket at Danville, Kentucky, for transportation to Jenkinsburg, Georgia, the reasonable regulation that the train upon which she afterwards took passage would not stop at Jenkinsburg, by implication, entered into the contract of carriage, and no duty devolved upon defendant to stop the train there. Furthermore, the contract of carriage, as evidenced by the plaintiff's possession of an ordinary ticket, was not one for transportation on any particular train; but the undertaking on the part of the railway companies was to transport the plaintiff from Danville to Jenkinsburg over their lines of railway according to the reasonable rules promulgated by them. Assuming then that the agent at Danville was the agent of the defendant when he sold this ticket (as to this see *Head v. Georgia P. R. Co.* 79 Ga. 358, 11 Am. St. Rep. 434, 8 Am. Neg. Cas. 135, 7 S. E. 217; 4 *Elliott, Railroads*, § 1596, and cases cited), under a strict construction of the pleadings, the mere allegation of the purchase of a ticket on the same date as that upon which plaintiff boarded the train would not create, in this case, the relation of carrier and passenger from the time of purchase, so that any duty could arise therefrom. For instance, it is alleged that plaintiff boarded the train at 11 P. M. on the day of the purchase of

the ticket. She may have purchased the ticket at 7 o'clock in the morning, and then returned to her abode in the city until the time of the departure of this train. In doing so, she may have taken passage to and from the depot on a street car. Were she to be considered a passenger of the railway company from the time of the purchase of the ticket, and by virtue of her being the holder thereof, under the foregoing facts she would, while in the street car, be a passenger of two carriers at the same time, the street car company and the railway company. Hence, under the allegations of the petition, any duty to inform her being founded on the relation of carrier and passenger, and this relation not being established by an averment of the purchase of a ticket alone, it must follow that the duty could not be held to have existed at the time of the purchase from the agent of the ticket.

Nor do we think it was the duty of the ticket collector to so inform her. It might be urged that the exhibition by a passenger to the ticket collector on a through train, of a ticket calling for destination at a place at which the train was not scheduled to stop, was sufficient to excite the attention of, or notify, the ticket collector that the passenger expected or intended to ride on that train to the place of destination, and to place the duty upon him of informing her that the train did not stop at that place; that she might leave the train at some intermediate point; and that his failure to do so amounted to an acceptance of her by the defendant as a passenger on that train to the place of destination called for by her ticket, so that her subsequent expulsion from defendant's car, short of arrival thereat, would amount to a breach of duty to her. The answer to this is that the published schedule that this train did not stop at the place of destination called for by the ticket having by implication, under the right to make reasonable regulations under the statute, entered into and become a part of the contract of carriage (there being nothing alleged in the petition to negative this regulation of this train), and hence binding on the plaintiff, she had no right to expect or intend to be transported to this place, but the ticket collector had the right to act on the assumption that she was only taking advantage of the quick schedule afforded by the through train as far as the reasonable rules of the company permitted her to be carried on that train, or to some intermediate station at which that train was scheduled to stop. In the case of *Richmond, F. & P. R. Co. v. Ashby*, 79 Va. 130, 52 Am. Rep. 620, it was held: "A railway passenger, with a

ticket for a station at which the train does not stop, has the right to ride to an intermediate station at which it does stop."

Schedules of railway companies of their trains are made by them with reference to the convenience of the public, and anyone who wishes to enjoy as a passenger the privileges afforded the public by a railway company as a carrier of passengers must bring himself within the requirements placed upon the public in the enjoyment of that relationship. "Reasonable regulations," as contained in the statute, would become meaningless, if a carrier of passengers were compelled to conduct its business and arrange its schedules to suit the convenience of each individual passenger, and not base its regulations upon the public good and convenience; for, under such circumstances, the number of regulations would be coextensive with the patronage of the road. If, on the other hand, it were considered, as an original proposition, the duty of a carrier of passengers to inform a passenger of the schedules and stopping places of its trains in this state, it may do so either by publishing, under the statute, such regulations to the public, or verbally through its agents; and when a passenger is informed thereof in the one way, this duty has been executed, and the carrier need not also inform him in the other manner, where no inquiry is made by the passenger.

It has been held that when one presents himself for transportation on a particular train, the duty is upon him to inquire whether it stops at the place of destination called for by his ticket. In the case of *Pittsburgh, C. & St. L. R. Co. v. Nuzum*, 50 Ind. 141, 19 Am. Rep. 703, it was said: "It was the duty of the appellee to inform himself when, where, and how he could go or stop according to the regulations of the appellant's trains, and if he made a mistake which was not induced by the appellant, he has no remedy." *Cheney v. Boston & M. R. Co.* 11 Met. 121, 45 Am. Dec. 190; *Boston & L. R. Co. v. Proctor*, 1 Allen, 267, 79 Am. Dec. 729; *Johnson v. Concord R. Corp.* 46 N. H. 213, 88 Am. Dec. 199; *Cleveland, C. C. & St. L. R. Co. v. Bartram*, 11 Ohio St. 457."

And to the same effect, see *Chicago, St. L. & P. R. Co. v. Bills*, 104 Ind. 13, 3 N. E. 611; 4 Elliott, Railroads, § 1593, and cases cited in note; 2 Hutchinson, Carr. § 1060.

There being no duty owing to the plaintiff in this particular, the defendant was concerned only with its duty to the public of maintaining its published schedule, and the plaintiff's right under her ticket was to be transported in compliance therewith to

the last place before reaching Jenkinsburg, at which this train was scheduled to stop, and the defendant's agent had the right to demand that she leave the train and to eject her at this point. 2 Moore, Carr. 2d ed. § 7; International, & G. N. R. Co. v. Hassell, 62 Tex. 256, 50 Am. Rep. 525, 6 Am. Neg. Cas. 514; Duling v. Philadelphia, W. & B. R. Co. 66 Md. 120, 6 Atl. 592; Allen v. Wilmington & W. R. Co. 119 N. C. 710, 25 S. E. 787, 8 Am. & Eng. R. Cas. N. S. 257; Richmond, F. & P. R. Co. v. Ashby, supra; 2 Hutchinson, Carr. § 1060, and cases cited in the note.

We hold, therefore, that the ejection by defendant of plaintiff from this train at McDonough, the last stopping place scheduled for this train before reaching Jenkinsburg, the place of destination called for by her ticket, did not give plaintiff a right of action for breach of duty owed by defendant to her.

The court erred in overruling the general demurrer.

Judgment reversed.

All the Justices concur.

OKLAHOMA SUPREME COURT.

W. M. DENMAN, Plff. in Err.,
v.

A. A. BRENNEMAN et al.

(— Okla. —, 149 Pac. 1105.)

Evidence — to show intent of signature to note.

1. A promissory note, the body of which is in the usual, simple form, and signed, F. U. S. Co., By W. M. D. Direct., J. A. Z. Direct., R. M. Direct., J. W. Mc. Direct., H. C. C. Direct., D. E. A. Pres., the first name being that of a corporation, is not necessarily the independent obligation of the corporation, but is ambiguous in the sense that it was not error to admit parol evidence to show the intention of the parties was to obligate themselves for its payment.

Pleading — reply — necessity.

2. A reply need not be filed when the answer does not really set up new matter, but rather evidential facts in the way of a denial to the plaintiff's petition.

Headnotes by WATTS, C.

Note. — As to personal liability of one who signs a contract, adding words indicating representative capacity, see note to Gavazza v. Plummer, 42 L.R.A. (N.S.) 1. As to admissibility of parol evidence to show intention of the parties in this respect, see pages 5 and 6 of that note.
L.R.A.1915E.

Trial — reopening case — absent witness.

3. A party to a lawsuit, who voluntarily remains away from the trial of his case until the jury has retired and before they return a verdict, cannot complain because the court declines to recall the jury on his appearance for the purpose of permitting him to testify; the court's action, being discretionary, is never error, unless abused.

(April 20, 1915.)

ERROR to the District Court for Jefferson County to review a judgment in plaintiffs' favor in an action brought to recover the amount alleged to be due on a promissory note. Affirmed.

Statement by Watts, C.:

This action was brought in the district court, Jefferson county, by defendant in error Brenneman against W. M. Denman, plaintiff in error, J. A. Zackary, Roy Martin, J. S. McKnight, H. C. Cutler, and D. E. Ackerman, upon the following written instrument:

\$337. Waurika, Okla., Sept. 25, 1906.

One day after date we promise to pay to the order of A. A. Brenneman three hundred and thirty seven and no/100 dollars at the Bank of Waurika, Waurika, Oklahoma, value received with interest at 10 per cent per annum from date until paid.

Farmers' Union Stock Co.,

By W. M. Denman, Direct.

J. A. Zackary, Direct.

Roy Martin, Direct.

J. W. McKnight, Direct.

H. C. Cutler, Direct.

D. E. Ackerman, Pres.

Indorsed:

January 25, '08, received on within note \$25.

The petition alleges, in addition to the usual allegations, that defendants promised and agreed with plaintiff to be individually liable and bound, and that the note was signed with such understanding. On May 10, 1911, defendants Denman, Zackary, Martin, and McKnight filed a joint demurrer stating: First, the petition did not set up sufficient facts to constitute a cause of action; second, because the petition on its face shows that if plaintiff has a cause of action, same was against Farmers' Union Stock Company, and not against them; which on September 19, 1911, was heard, overruled, exception saved, and leave to answer. Default was entered against defendants Cutler and Ackerman for want of plea. Other defendants on November 28, 1911, filed joint answer verified by defend-

ant Zackary, consisting of a general denial, and alleging that the note sued on was the debt of the "Farmers Union Stock Company," a corporation, and signed by them as agents, and not in their individual capacity; that defendant in error knew their authority in the premises, and that the note was the debt of the corporation, and not the individuals, to which answer no reply was filed. The cause was tried December 7, 1911, to a jury. At the conclusion of the defendant in error's evidence the answering defendants entered a demurrer, which was sustained, except as to Denman. Some immaterial testimony was taken on behalf of Denman, after which his attorney stated that it was then 11 o'clock and his client (Denman) would arrive on the 11:40 A. M. train, and moved the court to recess until such time, which was denied and exception taken. Upon motion of the defendant in error, the court instructed a verdict against Denman and Ackerman, to which Denman excepted. It further appears that the court then gave written instructions to which no exception appears to have been taken or saved, and after argument the jury retired; that soon thereafter attorney for Denman stated to the court that his client was then in court and had a good and valid defense to the action; that the jury was still deliberating, and moved the recall of the jury, to permit him to testify in his own behalf, which was denied and exception taken. The jury returned the verdict for defendant in error, and in due course motion for new trial was filed, heard, overruled, exception taken, and judgment rendered for defendant in error, from which Denman alone appeals and assigns as error the following:

"First. The court erred in overruling the demurrer to plaintiff's petition.

"Second. In admitting evidence offered on the part of plaintiff and objected to by defendant.

"Third. In the admission of evidence disputing the allegations of defendant's answer, when same had not been denied by any pleading on the part of the plaintiff.

"Fourth. In refusing and ruling out competent evidence offered on the part of the defendants.

"Fifth. In refusing to postpone the further hearing of the cause for forty-five minutes and enable defendant Denman to testify.

"Sixth. In peremptorily instructing the jury to return the verdict against Denman, when there was evidence before the jury for which reasonable minds could have based a verdict in his favor.

"Seventh. In refusing the request of the defendant Denman that the jury be recalled L.R.A.1915E.

and he be permitted to testify in his own behalf, he being present in court long prior to the time that the verdict was rendered.

"Eighth. In overruling the defendant's motion for new trial.

"Ninth. Because the verdict and judgment is contrary to law and the evidence introduced in said cause."

Messrs. Jones & Green, for plaintiff in error:

There being no ambiguity in the terms, conditions, or parties to the instrument sued on, and it showing upon its face to be the obligation of a party not before the court, the demurrer should have been sustained.

Falk v. Moebs, 127 U. S. 597, 32 L. ed. 266, 8 Sup. Ct. Rep. 1319; Latham v. Houston Flour Mills, 68 Tex. 127, 3 S. W. 462; Topeka Paper Co. v. Oklahoma Pub. Co. 7 Okla. 220, 54 Pac. 455; Wiers v. Treese, 27 Okla. 774, 117 Pac. 182; 10 Cyc. 1027; English & S. A. Mortg. & Invest. Co. v. Globe Loan & T. Co. 70 Neb. 435, 97 N. W. 612, 6 Ann. Cas. 999.

Suit having been brought on a written contract, evidence of prior oral agreements was inadmissible.

Stat. 1909, § 1090.

Every material allegation of new matter in the answer not controverted by the reply shall, for the purposes of the action, be taken as true.

Baker v. Van Ness, 25 Okla. 34, 105 Pac. 660.

Messrs. Bridges & Vertrees, for defendants in error:

Parol evidence is admissible to establish the intention of the parties at the time the note was made.

Wiers v. Treese, 27 Okla. 774, 117 Pac. 182; English & S. A. Mortg. & Invest. Co. v. Globe Loan & T. Co. 70 Neb. 435, 97 N. W. 612, 6 Ann. Cas. 999.

It was not error to admit evidence disputing the allegation of defendant's answer, when the same had not been denied by any pleading upon the part of the plaintiff.

Baker v. Van Ness, 25 Okla. 34, 105 Pac. 660; Holt v. Holt, 23 Okla. 639, 102 Pac. 187; Allison v. Bryan, 26 Okla. 520, 30 L.R.A.(N.S.) 146, 138 Am. St. Rep. 988, 109 Pac. 934.

Watts, C., filed the following opinion:

I. Assignments 1, 2, 4, 6, 8, and 9 may be considered together as embracing but one question.

On the face of the note as herein set out, is it ambiguous in the sense that it was error to admit parol evidence to show that the intention of the parties was to obligate

themselves to its payment? Upon this proposition we think the courts have discussed and differed in their views beyond all hope of immediate reconciliation, and if the supreme court of this state had not heretofore chosen the affirmative, we would find much difficulty in our alignment. Justice Dunn (*Wiers v. Treese*, 27 Okla. 774, 117 Pac. 182) very carefully considered the question, involving a note equally as difficult as the one under consideration, to wit:

\$40.00 Cleveland, O. T., Sept. 6th, 1901. .

January 1st, 1904, after date, the Greenwood Gin Company promise to pay to S. N. Treese & Son or bearer, \$40 at the Triangle Bank of Cleveland, O. T., value received with interest at 10 per cent per annum. No. 3. Due Jan. 1st, 1901.

M. A. Wiers, Pres. of Company.
W. A. Moore, Sec.

We call special attention to the reading and signing of the note last referred to:

The Greenwood Gin Co. promise to pay.
[Signed] M. A. Wiers, Pres. of Company.
W. A. Moore, Sec.

We quote Judge Dunn as follows: "It appears that on the trial of the action the court admitted, over the objection of plaintiffs in error, evidence showing that the note was signed by them in their personal capacity, and that it was intended to bind them, and not the Greenwood Gin Company. Courts in which this proposition had been presented and passed on have left no field for original research or expression, and, in passing on the same, we content ourselves with a quotation from two well-considered cases which disclose the state of the law and which express our views. The supreme court of Maryland, in the case of *Laffin & R. Powder Co. v. Sinsheimer*, 48 Md. 411, 30 Am. Rep. 472, 2 Mor. Min. Rep. 167, in holding parol evidence admissible in such case, said: 'The construction of written instruments signed by persons describing themselves as agents, or as officers of corporations, has been a fruitful source of litigation, and the decisions are conflicting and in many cases unsatisfactory. Not that there seems to be any difficulty in regard to the rules of law which ought to govern in the interpretation of contracts, but in the application of such rules to each particular case. The subject is fully considered by Parsons on Notes & Bills, Story on Promissory Notes, Byles on Bills of Exchange; and we do not propose to examine in detail the many cases referred to by these writers, nor attempt the fruitless task of

reconciling conflicting decisions. After all, the question whether one signing a note or accepting a bill as an officer of a corporation means to bind himself personally is a question of intention between the parties to the instrument; and this intention, we admit, as a general rule, must be determined by the face of the paper itself. Where one having authority accepts a bill in such a manner as manifests an intention not to bind himself, but to bind a corporation of which he is an officer, and to be paid out of the funds of the corporation, it is clear in such a case the acceptance will not bind him personally. But cases frequently occur, owing to the almost infinite variety in forms of expression and in the use of words, in which it is difficult to determine from the face of the paper itself whether the party signing means to bind himself, and adds his official character merely for the purpose of indicating the character in which he acts, or whether the official character is added for the purpose of showing he does a mere ministerial act, and that the promise is made and the obligation incurred for and in behalf of the corporation. In other words, does he, in the language of the court in *Bradlee v. Boston Glass Manufactory*, 16 Pick. 347, "apply the executing hand as the instrument of another, or the promising and engaging mind of a contracting party?" In such cases, where there is such ambiguity on the face of the paper as to be consistent with either construction, whether one means to bind himself personally, or acts only in an official capacity, parol evidence is clearly admissible to prove the circumstances under which the contract was made, or, in other words, to prove the true nature of the transaction. *Haile v. Pierce*, 32 Md. 330, 3 Am. Rep. 139; 1 Am. Lead. Cas. *633, Har. & W's notes to *Rathbon v. Budling* and *Pentz v. Stanton*. Parol evidence in such cases does not contradict, alter, or add to the written instrument, but explains the intention of the parties, and which could not be ascertained with any degree of certainty from the face of the instrument itself."

Again, in *Heffner v. Brownell*, 70 Iowa, 591, 31 N. W. 947:

We promise to pay Daniel Heffner, etc.
[Signed] Independence Mfg. Co.,
D. I. Brownell, Pres.
D. B. Sanford, Sec.

Quoting: "In the case at bar it may be considered that the Independence Manufacturing Company is bound, and still the question remains whether the defendant is not also. The note purports on its face to be

the note of all the persons, including the corporation, who executed it. There is nothing on the face of the note which indicates that the defendant signed it as president of the manufacturing company, and for it. . . . The courts have been called on to determine who is bound on notes similar in some respects, and yet all to which our attention has been called are different from the instrument sued on. Some of these do not disclose the name of any principal except the persons who have signed the note, or claim to have done so in a representative capacity. In this case, as the note purports to bind both the corporation and the defendant, and there is nothing to indicate that the defendant was president of the corporation, or had signed the note for it, or in its behalf, we think he is bound personally, and that the letters 'Pres.' must be regarded simply as descriptive of the person to whose signature they are appended. It follows that the court erred in sustaining the demurrer."

In *McCandless v. Belle Plaine Canning Co.* 78 Iowa, 161, 4 L.R.A. 396, 16 Am. St. Rep. 429, 42 N. W. 635, the note in question reads:

We promise to pay to Eliza J. McCandless, etc. Belle Plaine Canning Co.,
A. J. Hartman, President.
H. Wessell, Secretary.

In this case the facts were that the Belle Plaine Canning Company, defendant, was a corporation. No defense was made in its behalf, and judgment rendered against it by default. The defendants Wessell and Hartman claimed they were not liable upon the note because they signed same, not as individuals, but for and in behalf of, the Belle Plaine Canning Company. A number of witnesses were introduced upon the trial, and the testimony was taken as to what occurred when the note was given in the way of explanation of the signatures of Wessell and Hartman, and which testimony tended to show that said defendants signed the note in their official capacity, and not otherwise. And there was evidence tending to show that the plaintiff believed, when she received the note, that the said defendants were makers thereof as individuals. The plaintiff's testimony was that before the note was executed she asked Wessell what security he would give, and he replied that he would give his own name and Hartman's name on the note. After the evidence was all introduced, the court, on motion of the plaintiff, directed the jury to return a verdict against the defendants for the amount of the note, and upon appeal the cause was affirmed.
L.R.A.1915E.

In *Kline v. Bank of Tescott*, 50 Kan. 91, 18 L.R.A. 533, 34 Am. St. Rep. 107, 31 Pac. 688, the note in controversy was as follows:

\$950.00 Kanopolis, Kans., June 1st, 1888.

Nine months after date we promise to pay to the order of Western Creamery Building and Supply Company \$950 at the Kanopolis State Bank, Kanopolis, Kansas, with interest at the rate of 12 per cent per annum from date until paid.

[Signed] Kanopolis Creamery Co.,

H. C. Waite, President.

W. B. Wooley, Secretary.

No. 1120. Due March 1st, 1889.

On the back of the note is:

W. F. Kline, Wm. Van Deventer, H. B. Farris, D. H. Funk, Board of Directors.

And the court said: "Where individuals subscribe their proper names to a promissory note, prima facie they are personally liable, though they add a description of the character in which the note is given; but such presumption of liability may be rebutted as between the original parties, by proof that the note was in fact given by the makers as agents with the payee's knowledge' (citing *Byles*, *Bills of Exchange*, 27, note 1; *Haile v. Peirce*, 32 Md. 327, 3 Am. Rep. 139; *McWhirt v. McKee*, 6 Kan. 412; *Talley v. Burtis*, 45 Kan. 147, 25 Pac. 603)."

The court further says: "There is one principle upon the subject almost universally admitted, . . . and that is the interpretation of the contract ought, in every case, to be such as will carry into effect the intention of the parties; and in most cases it is admitted that proof of the facts and circumstances which took place at the time of the transaction is admissible to aid in the interpretation of the language employed. . . . We think that the parties who signed as directors had the right, at the trial, to give in evidence to the jury that the note in question was not their note as guarantors, but that it was the note of the Kanopolis Creamery Company only."

In the following cases somewhat similar writings have been construed supporting our view of the law: 8 Cyc. 269; *Fiske v. Eldridge*, 12 Gray, 474; *Frankland v. Johnson*, 147 Ill. 520, 37 Am. St. Rep. 234, 35 N. E. 480; *Day v. Ramsdell*, 90 Iowa, 731, 52 N. W. 208, 57 N. W. 630; *Rendell v. Harriman*, 75 Me. 497, 46 Am. Rep. 421; *White v. Miners' Nat. Bank*, 102 U. S. 658, 26 L. ed. 250; *McCandless v. Belle Plaine Canning Co.* 78 Iowa, 161, 4 L.R.A. 396, 16 Am. St. Rep. 429, 42 N. W. 635; *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409; *Kean v. Davis*, 21 N. J. L. 683, 47 Am. Dec. 182; *Wetumpka & C. R. Co. v. Bing-*

ham, 5 Ala. 657; Gillig v. Lake Bigler Road Co. 2 Nev. 214; Southern P. Co. v. Von Schmidt Dredge Co. 118 Cal. 368, 50 Pac. 650; De Witt v. Walton, 9 N. Y. 571; Keidan v. Winegar, 95 Mich. 430, 20 L.R.A. 705, 54 N. W. 901.

In Janes v. Citizens' Bank, 9 Okla. 540, 60 Pac. 290, can be found a very complete discussion of the subject.

As a *dictum*, in the case at bar, we are led to believe that if the notes had been signed, "Farmers' Union Stock Company, by W. N. Denman, Pres." "Secy.," "Treas.," or such like, and not followed by other names with the suffixes added, then it unquestionably would have been the note of the corporation, and not susceptible of parol, but by the addition of their names with the suffixes added, as in the case at bar, it leaves the situation in doubt as to the real intent of the parties. Most all of the authorities hold that a suffix is merely descriptive of the person, and some of the authorities go to the extent, where the name is followed by a suffix, of holding that it is not even proper to admit evidence to show that it was the intention of the parties to sign in the capacity of an agent. We are not unmindful that various and reputable authorities hold contrary to the views we have taken. See Carpenter v. Farnsworth, 106 Mass. 561, 8 Am. Rep. 360; Heffron v. Pollard, 73 Tex. 96, 15 Am. St. Rep. 764, 11 S. W. 165; Falk v. Moebis, 127 U. S. 597, 32 L. ed. 266, 8 Sup. Ct. Rep. 1319; Matthews v. Dubuque Mattress Co. 87 Iowa, 246, 19 L.R.A. 676, 54 N. W. 225; McClellan v. Reynolds, 49 Mo. 312; Latham v. Houston Flour Mills, 68 Tex. 127, 3 S. W. 462; Liebscher v. Kraus, 74 Wis. 387, 5 L.R.A. 490, 17 Am. St. Rep. 171, 43 N. W. 166; English & S. A. Mortg. & Invest. Co. v. Globe Loan & T. Co. 70 Neb. 435, 97 N. W. 612, 6 Ann. Cas. 999; 10 Cyc. pp. 1026, 1027, notes.

II. We cannot agree with counsel in the third assignment. It seems to us the answer does not set up new matter, but rather states evidential facts constituting an answer to the petition, to which a reply need not be filed. See Terrapin v. Barker, 26 Okla. 93, 109 Pac. 931. However, as defendants went to trial without objection, it is now too late to raise the question. Holt v. Holt, 23 Okla. 639, 102 Pac. 187.

III. The fifth and seventh assignments were addressed to the sound discretion of the trial court, and it is never error, unless abused. The plaintiff in error, Denman, was a party to the suit, and should have been present to give evidence, if necessary. However, as no written motion under oath, or other substantial showing at the time of the request, as to what he would testify, if present, was made, we do not think error was committed.

ent, was made, we do not think error was committed.

Therefore, finding no errors of the trial court, we recommend that the judgment of the lower court be affirmed.

Per Curiam:

Adopted in whole.

Petition for rehearing denied July 6, 1915.

WASHINGTON SUPREME COURT. (Department No. 1.)

GEORGE L. HOUGHTON, Appt.,

v.

JOHN E. HUMPHRIES, Respt.

(— Wash. —, 147 Pac. 641.)

Slander — by judge at trial.

No action lies for slanderous words spoken by a judge in the course of a judicial proceeding over which he is presiding, such words being absolutely privileged.

(April 12, 1915.)

APPEAL by plaintiff from a judgment of the Superior Court for King County dismissing an action brought to recover damages for alleged slander. Affirmed.

The facts are stated in the opinion.

Note. — Libel and slander: by judicial officer or juror.

It seems fitting and proper that judges and jurors should be absolutely privileged in what they speak or write in the course of their judicial duties. Sound public policy and rightful administration of justice would be seriously impaired if such officers might be held responsible for what they might deem proper to utter in the due course of their deliberations. The chances of abuse of this privilege are so small as compared with the evil that might result from its removal that the correctness of it has been, comparatively speaking, but seldom seriously questioned. Most judicial officers and jurors, as a rule, are fair-minded enough, and sufficiently regardful of their oath of office, not to allow petty personal enmities to dethrone their better qualities of reason and justice. And for these reasons it is well established, as a general rule, that judicial officers and jurors are not liable in damages for words spoken or written in the course of their judicial duties, even though it is alleged that such words were prompted by malicious and improper motives.

Judges, etc.

Concerning the meaning of "absolute privilege," Channell, J., in Bottomley v.

Mr. George L. Houghton, for appellant:

Whether the court had jurisdiction of the subject-matter and of the parties in the action wherein alleged libelous pleadings were filed is purely a legal question, to be determined from an inspection of the pleadings themselves.

Abbott v. National Bank, 20 Wash. 552, 56 Pac. 376; Hoar v. Wood. 3 Met. 193.

The question, therefore, is not whether the words spoken are true, not whether they are actionable in themselves, but whether they were spoken in the course of judicial proceedings, and whether they were relevant and pertinent to the cause or subject of inquiry.

Ash v. Zwietusch, 159 Ill. 455, 42 N. E.

Brougham [1908] 1 K. B. 584, said: "I do not think that it is a very accurate expression, and I am sure that calling it a 'privilege' is sometimes misleading. Privilege means, in the ordinary way, a private right. Now there is no private right of a judge or a witness or an advocate to be malicious. It would be wrong of him, and if it could be proved I am by no means sure that it would not be actionable. The real doctrine of what is called 'absolute privilege' is that in the public interest it is not desirable to inquire whether the words or acts of certain persons are malicious or not. It is not that there is any privilege to be malicious, but that, so far as it is a privilege of the individual,—I should call it rather a right of the public,—the privilege is to be exempt from all inquiry as to malice; that he should not be liable to have his conduct inquired into, to see whether it is malicious or not,—the reason being that it is desirable that persons who occupy certain positions as judges, as advocates, or as litigants, should be perfectly free and independent, and, to secure their independence, that their acts and words should not be brought before tribunals for inquiry into them merely on the allegation that they are malicious. I think there is something more in that distinction than mere words, and the reason that this peculiar doctrine of 'absolute privilege' is sometimes complained of is that it is not thoroughly understood."

A judge, whether of the supreme court or of an inferior court, has, with respect to words uttered by him in the course of judicial proceedings with reference to the case before him, an absolute privilege. *Primrose v. Waterston*, 4 F. 783, Ct. of Sess. cited in 5 *Mews*, Eng. Case Law Dig. Supp. 1659.

The opinions of judges of superior courts are absolutely privileged. *Allen v. Earnest*, — Tex. Civ. App. —, 145 S. W. 1101 (*dictum*).

A judge is not liable in damages for a censure passed by him while acting in his judicial capacity, on an attorney practising at the bar and engaged in the cause then L.R.A.1915E.

854; *Hollis v. Meux*, 69 Cal. 625, 58 Am. Rep. 574, 11 Pac. 248; *Vogel v. Gruaz*, 110 U. S. 311, 28 L. ed. 158, 4 Sup. Ct. Rep. 12; *Link v. Moore*, 84 Hun, 118, 32 N. Y. Supp. 461; *Wilson v. Sullivan*, 81 Ga. 253, 7 S. E. 274; *Moore v. Manufacturer's Nat. Bank*, 123 N. Y. 420, 11 L.R.A. 753, 25 N. E. 1048; *Rainbow v. Benson*, 71 Iowa, 301, 32 N. W. 352.

Mr. Edward Judd, for respondent:

The statements complained of are absolutely privileged, and no action lies against defendant.

Rice v. Coolidge, 121 Mass. 393, 23 Am. Rep. 279; *Dunham v. Powers*, 42 Vt. 1; *Yates v. Lansing*, 5 Johns. 282; *Randall v. Brigham*, 7 Wall. 523-535, 19 L. ed. 285-291; *Spalding v. Vilas*, 161 U. S. 483-495,

before the court, although it is alleged that the censure had been made injuriously, and from motives of private malice. *Miller v. Hope*, 2 Shaw, 134. It was said per Lord Robertson: "If judges in any court were liable to be called to account for words spoken in their judicial capacity, it may be said in the words of Lord Stair, 'No man but a beggar or a fool would be a judge.'"

In *Trimble v. Morrish*, 152 Mich. 624, 16 L.R.A.(N.S.) 1017, 116 N. W. 451, the court said: "In the law of slander there are two classes of privileged communications. There are communications which are absolutely privileged; and there are communications which have a qualified privilege. A communication absolutely privileged, as, for instance, words spoken by a judge in his judicial capacity in a court of justice, is not actionable even though spoken maliciously. Where the privilege is qualified, the communication is not actionable if made in good faith. It is actionable if made maliciously, that is with actual malice."

The court in *Law v. Llewellyn* [1906] 1 K. B. 487, 4 Ann. Cas. 431, deciding that defamatory remarks made by a justice of the peace in the course of his judicial duties are not actionable, said: "In opening the appeal Mr. S. T. Evans said, and in my opinion said rightly, that it was hopeless to contend at the present day that a justice of the peace, sitting in petty sessions to dispose of a criminal case which comes before him, is not acting judicially. Consequently a defamatory statement made by him in the course of the proceedings before him cannot be actionable as against that justice. That has been, to my mind, clearly settled beyond controversy by the two cases which have been referred to,—*Munster v. Lamb*, L. R. 11 Q. B. Div. 588, 52 L. J. Q. B. N. S. 726, 49 L. T. N. S. 252, 32 Week. Rep. 248, 47 J. P. 805, 7 Eng. Rul. Cas. 714, and *Hodson v. Pare* [1899] 1 Q. B. 455, 68 L. J. Q. B. N. S. 309, 47 Week. Rep. 241, 80 L. T. N. S. 13, 15 Times L. R. 171. Both cases are to the same effect, and show that a magistrate is a 'judge' within the

40 L. ed. 780-785, 16 Sup. Ct. Rep. 631; *Miller v. Gust*, 71 Wash. 139, 127 Pac. 845.

Parker, J., delivered the opinion of the court:

The plaintiff, George L. Houghton, seeks recovery of damages which he alleges resulted to him from slanderous and defamatory words spoken of him by the defendant, John E. Humphries, a judge of the superior court for King county. The defendant demurred to the plaintiff's complaint upon the ground, among others, that it does not state facts constituting a cause of action. This demurrer was sustained by the trial court, and, the plaintiff electing to stand upon his complaint and not plead further, judgment of dismissal was rendered against

him. From this disposition of the cause the plaintiff has appealed.

It appears from the allegations of the complaint that the words upon which appellant rests his right of recovery were spoken by respondent in the course of a judicial proceeding in a department of the superior court for King county while he was presiding therein as judge. We are inclined to the view that the words complained of are not actionable in any event, and also that the allegations of the complaint fail to negative their relevancy to the proceeding during the course of which they were spoken. However, whatever our conclusion might be upon a critical examination of these questions, we are clearly of the opinion that respondent, by reason

meaning of the rule that defamatory observations made by a judge in the course of his judicial duties, that is, when sitting as a judge, are not actionable, even though it is alleged or suggested that the observations were made without reasonable or provable cause, and maliciously." And see *Allardice v. Robertson*, 1 Dow. & C. 495, considered in this case.

The question was raised in *Scott v. Stansfield*, L. R. 3 Exch. 220, 15 Eng. Rul. Cas. 42, whether an action is maintainable against the judge of a county court, which is a court of record, for words spoken by him in his judicial character, and in the exercise of his functions as judge in the court over which he presides, where such words would, as against an ordinary individual, constitute a cause of action, and where they are alleged to have been spoken maliciously and without probable cause, and to have been irrelevant to the matter before him. Answering this question in the negative (all the judges being of the same opinion), *Kelly, C. B.*, said: "The question arises, perhaps, for the first time with reference to a county court judge, but a series of decisions uniformly to the same effect, extending from the time of Lord Coke to the present time, establish the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice. This doctrine has been applied not only to the superior courts, but to the court of a coroner and to a court-martial, which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favor and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought L.R.A.1915E.

against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him? Again, if a question arose as to the bona fides of the judge, it would have, if the analogy of similar cases is to be followed, to be submitted to the jury. Thus, if we were to hold that an action is maintainable against a judge for words spoken by him in his judicial capacity, under such circumstances as those appearing on these pleadings, we should expose him to constant danger of having questions such as that of good faith or relevancy raised against him before a jury, and of having the mode in which he might administer justice in his court submitted to their determination. It is impossible to overestimate the inconvenience of such a result. For these reasons I am most strongly of opinion that no such action as this can, under any circumstances, be maintainable." This case is referred to in *Munster v. Lamb*, *supra*, and quoted from in *Spalding v. Vilas*, 101 U. S. 483, 40 L. ed. 780, 16 Sup. Ct. Rep. 631, cases not otherwise in point in this note.

An action for slander cannot be maintained for anything said or otherwise published by a judge in due course of a judicial proceeding, whether civil or criminal. *Kennedy v. Hilliard*, 10 Ir. C. L. Rep. 209, 1 L. T. N. S. 578. The rule seems to be founded, not on the absence of malice in the party sued, but on public policy, which requires that a judge, in dealing with the matter before him, shall do so with his mind uninfluenced by fear of an action for defamation or a prosecution for libel. *Ibid*.

In *Kendillon v. Maltby*, Car. & M. 402, Lord Denman, Ch. J., said: "I have no doubt on my mind that a magistrate, be he the highest judge in the land, is answerable in damages for slanderous language, either not relevant to the cause before him or uttered after the cause is at an end; but for words uttered in the course of his duty, no magistrate is answerable, either civilly or criminally, unless express malice and the absence of reasonable or probable cause be established."

of his official position as judge, is absolutely exempt from liability for damages at the suit of any person claiming to be injured by such words. This court has recognized the general rule that, when exemption from liability for the use of slanderous words is sought to be invoked by a private person or an attorney in the course of a judicial proceeding, such exemption is qualified, in that the words must be relevant to the proceeding in which they are spoken, in order to exempt the one using them from liability to damages flowing from their slanderous effect. *Abbott v. National Bank*, 20 Wash. 552, 56 Pac. 376; *Miller v. Gust*, 71 Wash. 139, 127 Pac. 845. But it does not follow that such qualification in the least curtails the absolute character of the exemp-

tion accorded to judges of courts of general jurisdiction, jurors, legislators, and possibly other public servants, as to words written or spoken by them in the course of their official duties.

In *Yates v. Lansing*, 5 Johns. 282, at page 291, Chief Justice Kent, speaking for the New York supreme court of judicature in 1810, relative to the exemption of judges, said: "We meet with the principle here stated as early as the Book of Assize, 27 Edw. III. pl. 18. The case there was that A was indicted for that, being a judge of oyer and terminer, certain persons were indicted before him of trespass, and he had entered upon the record that they were indicted of felony, and judgment was demanded, if he should answer for falsifying

And in *Dawkins v. Rokeby*, L. R. 8 Q. B. 255, it is stated that "the authorities are clear, uniform, and conclusive that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law."

The language of a judge of the court of common pleas in the discharge of his judicial duty in a matter over which he has jurisdiction is absolutely privileged, and the motives with which the words are spoken cannot be inquired into in a judicial proceeding. *Childs v. Voris*, 6 Ohio S. & C. P. Dec. 75, 4 Ohio N. P. 67. So it is said in *O'Donaghue v. McGovern*, 23 Wend. 26, judges are absolutely privileged in what they say or write in the course of their judicial duties.

According to *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279, *obiter dictum*, it seems to be settled by the English authorities that judges are absolutely exempt from liability to an action for defamatory words published in the course of judicial proceedings; and the same doctrine is held in this country. *McLaughlin v. Cowley*, 127 Mass. 316, cites the above case to the same effect.

In *Rex v. Skinner*, Loft, 55, Lord Mansfield said: "Neither party, witness, counsel, jury, nor judge can be put to answer, civilly or criminally, for words spoken in office."

A communication addressed to the county court, and added to matter returned thereto by a justice of the peace on an appeal from his judgment, and signed in his official capacity, is privileged if material and pertinent, irrespective of motive. *Aylesworth v. St. John*, 25 Hun, 156. And it seems that if the justice believed in good faith that it was pertinent and material, then it is privileged, although he was mistaken in his belief. *Ibid*. And whether the justice in good faith believed the matter pertinent and material or not is a question of fact. *Ibid*.

Where the defendant in an action for slander, a justice of the peace, voluntarily stated before the grand jury that the L.R.A.1915E.

charge against the plaintiff had repeatedly come to him as a rumor, the occasion on which the words were spoken furnished a prima facie excuse for their having been spoken, and it was upon the plaintiff to show that the occasion was used only as a colorable pretense, and to establish express malice in the defendant. *Sands v. Robison*, 12 Smedes & M. 704, 51 Am. Dec. 132.

In *Hodson v. Pare* [1899] 1 Q. B. 455, 68 L. J. Q. B. N. S. 309, 47 Week. Rep. 241, 80 L. T. N. S. 13, 15 Times L. R. 171, referred to in *Law v. Llewellyn* [1906] 1 K. B. 487, 75 L. J. K. B. N. S. 320, 70 J. P. 220, 54 Week. Rep. 368, 94 L. T. N. S. 359, 4 Ann. Cas. 431, in terms which would indicate that it was in point in this note, the defamatory statements complained of were not made by the justice of the peace, but by an applicant for order of detention of his wife as a lunatic.

In *Thomas v. Churton*, 2 Best & S. 475, 8 Jur. N. S. 795, 31 L. J. Q. B. N. S. 139, 6 L. T. N. S. 320, it was held that an action would not lie against a coroner for false and defamatory words spoken by him while holding an inquest.

The report of a military court inquiry into the conduct of a commissioned officer is a privileged communication, and is properly rejected as evidence in the trial of an action for the libel stated to be contained therein. *Home v. Bentinck*, 2 Brod. & B. 130, 4 J. B. Moore, 563, 22 Revised Rep. 748.

An action for libel will not lie against a member of a court-martial for speaking of the conduct of the prosecutor as malicious and injurious to the service, and making such observations a part of the sentence acquitting the officer tried by such court. *Jekyll v. Moore*, 6 Esp. 63, 2 Bos. & P. N. R. 341. Members of such courts cannot step out of their way to slander another officer, but they can censure an officer connected with the case before them. *Ibid*.

The report of an official receiver made to the court under § 8, subsec. 2, of the companies (winding up) act, 1890, is absolutely privileged. *Bottomley v. Brougham* [1908] 1 K. B. 584, 77 L. J. K. B. N. S.

the record, since he was a judge by commission; and all the judges were of opinion that the presentment was void."

In *Dunham v. Powers*, 42 Vt. 1, there was involved a charge of slander against a juror for words spoken in the jury room by him of the plaintiff. In holding the juror absolutely exempt from liability therefor, Judge Prout, speaking for the court, at page 8 of 42 Vt., said: "As to members of a legislative body, the rule, as held in all the cases, is that, in the performance of their official duties, they are absolutely protected. No action of slander will lie against them, however false and malicious may be the charge they make against the reputation of another, if made in the exercise of the functions of their office, or within the line of

their business or duty; and so of grand jurors and magistrates, charging others with the commission of crime. Of judges and jurors, it is said in *Sutton v. Johnstone*, 1 T. R. 493, 1 Eng. Rul. Cas. 785, although a point not decided, that 'the law gives faith and credence to what they do, and therefore there must always in and what they do be cause for it, and there never can be malice in what they do.' To subject either to a prosecution for slander for what they may say in the course of the proceeding, as it is expressed, would affect their independence and degrade the administration of the law. Counselors and parties conducting their own cases are privileged, when they confine themselves to what was pertinent to the question before the court.' *Hastings v.*

311, 99 L. T. N. S. 111, 24 Times L. R. 262, 52 Sol. Jo. 225. The official receiver has a statutory duty to inquire in a judicial way into certain matters by the act, and in performing that duty he acts in a judicial capacity. *Ibid.* The fact that the report is made *ex parte* makes no difference. *Ibid.*

And the observations of an official receiver concerning the affairs of a company in liquidation, published by him to the creditors and contributories of the company in the performance of his duty, as provided by the companies (winding up) act, 1890, first schedule, § 3, are absolutely privileged. *Burr v. Smith* [1909] 2 K. B. 306. *Fletcher Moulton, L. J.*, said: "I have no doubt that official receivers are officers of the court which has to deal with the liquidation of companies, that is to say, of this court, and that, in cases of the compulsory liquidation of a company, as these were, the official receiver is acting as an officer of the court in performing the statutory duty imposed upon him by § 3 of the first schedule. It would be a perilous duty if the contention for the plaintiff were well founded, because it necessitates his stating with the greatest frankness all the matters which he may have ascertained of the kind referred to by the section. In doing that he is performing his duty as an officer of the court in connection with an inquiry which may, in my opinion, rightly be termed a judicial inquiry for the purposes of the law of libel. I have no doubt that the performance of such a duty is a matter which is absolutely privileged. Where an officer of the court is placed, in the performance of his official duty, in the difficult position of having to draw up and circulate such a report as is provided for in § 3, it appears to me clear that he is entitled to the same amount of protection as is extended to a judge, who, after a judicial inquiry, performs his duty by fearlessly pronouncing his judgment as to the matters brought before him, and therefore his report is absolutely privileged. The results would be most unfortunate if the same privilege did not apply to such a report as to all other judicial proceedings, and if L.R.A.1915E.

the official receiver could only perform his duty under the section at the peril of having an action brought against him."

Jurors.

A jury participate in the trial of a cause in obedience to the requirement of the law, and may be coerced to perform that service. It is a public duty; and if sometimes in the discussions of the jury room they do not indulge in the same pertinency of remark and comment concerning the cause submitted to them as the court, they are presumed to act as conscientiously, and with reference to the evidence before them. Within the limits of their functions, and for the purpose of deciding a disputed question of fact, they possess peculiar powers adapted to that end, which are of a judicial nature, requiring the exercise of deliberation and judgment. Whenever duties of this nature are imposed by law upon a party, the due execution of which depends upon belief and the exercise of the judgment, there is an exemption from responsibility by civil action for the manner in which those duties are performed, or even the motives which influence it. This is the general rule applicable to cases which concern the administration of justice between party and party; and upon principle, a juror, while acting as part of the court, is entitled to the benefit of this rule of impunity, in respect to what he says in the jury room concerning the cause, which also applies to the judge or to a grand juror or a member of a legislative body,—and he should be subject to no greater risk or hazard. *Dunham v. Powers*, 42 Vt. 1.

There is a distinction, according to *Dunham v. Powers*, *supra*, as to the extent of the privilege growing out of the legal duty of a juror to act in that capacity and the duty of counsel arising from his employment and consequent interest which induces him to participate in the proceeding. The former acts in obedience to the requirement of law and on oath; the other from motives of interest and pecuniary gain. One is a part or a branch of the court, and within

Lusk, 22 Wend. 410, 34 Am. Dec. 330; Mower v. Watson, 11 Vt. 536, 34 Am. Dec. 704. In the last case cited it is remarked that 'the privilege of all whose duty or interest calls them to participate in the proceedings of courts of justice is not to be made liable to an action of slander or libel for anything spoken or written therein, provided it be in the ordinary course of proceeding, or bona fide.' But there is a distinction, we think, as to the extent of the privilege growing out of the legal duty of a juror to act in that capacity and the duty of counsel arising from his employment and consequent interest which induces him to participate in the proceeding. The former acts in obedience to the requirement of law and on oath; the other from motives of interest and pecuniary gain. One is a part or branch of the court, and within the absolute rule of impunity, while the other is only prima facie privileged for what he may say in the course of the proceeding, and in which he participates. In *O'Donaghue v. M'Govern*, 23 Wend. 26, Cowen, J., observes: 'Sometimes the person complained of is absolutely protected. This would be so where the libel was published by him in the course of his business or duty as a member of the legislature. The place protects him. So of judges, jurors, and witnesses,' while and when they are acting in the line of their business or duty. These principles we think not only in entire harmony with the law, but fitting and necessary, the jurors may discharge their duties without fear or apprehension of a prosecution at the suit of parties feeling aggrieved by their verdict. *Coffin v. Coffin*, 4 Mass. 1, 3 Am. Dec. 189; *Harris v. Huntington*, 2 Tyler (Vt.) 120, 4 Am. Dec. 728;

the absolute rule of impunity, while the other is only prima facie privileged for what he may say in the course of the proceeding, and in which he participates.

These principles are not only in entire harmony with the law, but fitting and necessary, that jurors may discharge their duties without fear and apprehension of a prosecution at the suit of parties feeling aggrieved by their verdict. *Ibid.* And see *dictum* in *O'Donaghue v. M'Govern*, 23 Wend. 26, to the effect that what jurors say in the line of their duty is absolutely privileged.

In *Little v. Pomeroy*, Ir. Rep. 7 C. L. 50, in an action for slander in imputing to the plaintiff want of means in his business as a road contractor, the defendant pleaded that, at the time the words were spoken by him, he was a grand juror, and acting in that capacity, and that a portion of the fiscal business before the grand jury of which he was a member was the consideration of applications for the execution of county works, to which the presentments,

Henderson v. Broomhead, 4 Hurlst. & N. 569, 28 L. J. Exch. N. S. 360, 5 Jur. N. S. 1175, 7 Week. Rep. 492; *Thomas v. Churton*, 2 Best & S. 475, 31 L. J. Q. B. N. S. 139, 8 Jur. N. S. 795, 6 L. T. N. S. 320; *Townshend, Slander & Libel*, § 227, and note 1113."

In *Rice v. Coolidge*, 121 Mass. 393, 395, 23 Am. Rep. 279, Justice Morton said: "It seems to be settled by the English authorities that judges, counsel, parties, and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings. *Henderson v. Broomhead*, 4 Hurlst. & N. 569, 28 L. J. Exch. N. S. 360, 5 Jur. N. S. 1175, 7 Week. Rep. 492; *Revis v. Smith*, 18 C. B. 126, 25 L. J. C. P. N. S. 195, 2 Jur. N. S. 614, 4 Week. Rep. 506; *Dawkins v. Rokeby*, L. R. 8 Q. B. 225, and cases cited affirmed in L. R. 7 H. L. 744, 45 L. J. Q. B. N. S. 8, 33 L. T. N. S. 196, 23 Week. Rep. 931, 9 Eng. Rul. Cas. 39; *Seaman v. Netherclift*, L. R. 1 C. P. Div. 540, 35 L. T. N. S. 784, 25 Week. Rep. 159. The same doctrine is generally held in the American courts, with the qualification as to parties, counsel, and witnesses, that, in order to be privileged, their statements made in the course of an action must be pertinent and material to the case. *White v. Carroll*, 42 N. Y. 161, 1 Am. Rep. 503; *Smith v. Howard*, 28 Iowa, 51; *Barnes v. McCrate*, 32 Me. 442; *Kidder v. Parkhurst*, 3 Allen, 393; *Hoar v. Wood*, 3 Met. 193."

In *Spalding v. Vilas*, 161 U. S. 483, 494, 16 Sup. Ct. Rep. 631, 636, 40 L. ed. 780, 784, Justice Harlan, speaking for the court, said: "The same principle was announced in England in the case of *Fray v. Blackburn*, 3 Best & S. 576, in which Mr. Justice

under their consideration related, and in which the plaintiff was concerned as a proposed contractor, and as a proposed surety of other contractors, and it was held that the occasion was privileged, although the proposals for the several contracts had been accepted at presentment sessions under 6 and 7 Wm. IV. chap. 116, § 23.

A report of the grand jury to a district court on the misconduct of a public official is not privileged, the grand jury having no power to present any person for a criminal offense otherwise than by indictment. *Rector v. Smith*, 11 Iowa, 302.

But such report, when made in good faith and in the belief that it comes within the discharge of the duty of the grand jury, is not actionable. *Ibid.*

Charges of dishonesty against a parish attorney made in good faith and in the discharge of their official duties by members of a police jury are privileged. *Fisk v. Soniat*, 33 La. Ann. 1400.

And see *supra*, "Judges." W. W. A.

Crompton said: 'It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges and prevent them from being harassed by vexatious actions.' The principle was applied in one case for the protection of a county court judge who was sued for slander; the words complained of having been spoken by him in his capacity as judge, while sitting in court engaged in the trial of a cause in which the plaintiff was defendant. Chief Baron Kelly observed that a series of decisions uniformly to the same effect, extending from the time Lord Coke to the present time, established the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice, and that the doctrine had been applied to the court of a coroner and to a court-martial, as well as to the superior courts. He said: 'It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him?' *Scott v. Stansfield*, L. R. 3 Exch. 220, 223, 15 Eng. Rul. Cas. 42."

These observations render plain the necessity of the rule of public policy which prevents inquiry into the question of relevancy of the words spoken to the public matter in hand. The exemption is absolute if they are spoken in the performance of an official act. No decision has come to our notice out of harmony with this view. A judge, for any such wrong, is answerable only to the public, through such process of law, impeachment or otherwise, as may be provided.

The judgment is affirmed.

Morris, Ch. J., and Holcomb, Mount, and Chadwick, JJ., concur.

Petition for rehearing denied.

L.R.A.1915E.

WEST VIRGINIA SUPREME COURT OF APPEALS.

JOHN M. GRASS et al.,
v.

BIG CREEK DEVELOPMENT COMPANY,
Plff. in Err.

(— W. Va. —, 84 S. E. 750.)

Pleading — declaration — indefiniteness — effect.

1. A declaration, though indefinite and uncertain, is not demurrable, if with reasonable certainty it states one or more good, and not inconsistent, causes of action. A demurrer does not lie for mere indefiniteness or duplicity. Such defects are curable under chap. 130, Code 1913, § 4903.

Same — effect of verdict.

2. A defect in a declaration which cannot be regarded on demurrer is, by chap. 134, Code 1913, § 4977, cured after verdict.

Verdict — control by special interrogatories.

3. Answers to special interrogatories inconsistent with the general verdict will control.

Same — not supported by evidence.

4. A verdict on evidence furnishing no reasonably accurate foundation for computation of damages resulting from breach of contract cannot serve as a basis for a judgment thereon.

Evidence — oil and gas lease — breach of covenants — damages.

5. Where no definite basis is available for the ascertainment of damages for breach of the implied covenants of an oil and gas lease, the best evidence which the circumstances will permit is all the law requires.

Mines — oil and gas — duty of lessee.

6. The owner of a lease for the production of oil and gas, containing the usual terms and conditions, must, if either mineral is found in paying quantities on the lands, exercise due and reasonable diligence in prosecuting operations thereunder for the mutual benefit of himself and his lessor; and if he unreasonably fails or refuses so to do, damages therefor are recoverable against him in an appropriate action at law.

Same — judgment of lessee.

7. The judgment of an operator of such lease, as to the diligence with which and extent to which wells should be drilled there-

Headnotes by LYNCH, J.

Note. — Right of lessee in oil or gas lease to determine the extent of development thereunder.

Where a lessee in an oil and gas lease has developed producing wells, his rights in the leased premises are different from the rights of a lessee before producing wells are developed. *Kellar v. Craig*, 61 C. C. A. 366,

under, upon discovery of either mineral in paying quantities, will control, if exercised in good faith, and not unreasonably or arbitrarily to promote his own peculiar benefit, to the manifest prejudice of the lessor. Both are bound by that degree of diligence which, surrounding circumstances and conditions being considered, would reasonably be expected of operators of ordinary prudence, experienced and engaged in the same business, having due regard for the interests and advantage of themselves and their lessors.

Evidence — breach of covenant in gas lease — burden of proof.

8. To entitle him to damages for unreasonable or arbitrary evasion of implied covenants of an oil and gas lease, nothing therein preventing, for diligent prosecution of operations, either mineral being found in paying quantities on the premises, plaintiff assumes the burden of showing, and by clear and convincing proof must to avail him show, by witnesses having experience and skill and engaged in similar operations, that the lessee, having due regard for the advantage and profit of himself and lessor, has

not, surrounding circumstances and conditions being considered, exercised ordinary diligence in conducting such operations. If he has, plaintiff cannot recover.

Same — what considered.

9. Among such circumstances and conditions are the situation of the parties; the character of the mineral products; the nature of the oil-bearing sand, whether dense or soft and porous; developments on contiguous lands, whether by same or different operators; cost of drilling; proximity to market, and facilities for marketing; current prices, whether high or low; location of the lands; and such other conditions attendant upon the operations as may explain necessity for prompt, or excuse for delayed, action in prosecuting such developments. And if, considering these, the operator has exercised that reasonable diligence and sound practical judgment common to and exercised by operators of ordinary prudence and experience in the same business under the same or similar circumstances and conditions, plaintiff cannot recover.

(March 2, 1915.)

126 Fed. 630. Upon this question see notes in 11 L.R.A.(N.S.) 417, and 30 L.R.A.(N.S.) 176, as to forfeiture of mining leases for failure to develop and mine the leased premises, where the lease contained a provision for the payment of a minimum royalty in case of delay; and the notes in 28 L.R.A.(N.S.) 959, and 38 L.R.A.(N.S.) 134, as to the right to declare a forfeiture of an oil and gas lease for failure of the lessee to market the product after completing a well or wells; and note in 34 L.R.A.(N.S.) 34, as to equity jurisdiction to cancel oil or gas lease for failure to develop the premises; and note in L.R.A. 1915B, 561, as to implied duty to develop premises under mining lease reserving a royalty on product, where lease contains no provision for payment of a minimum royalty or forfeiture for delay; and particularly see page 564, as to the extent of development necessary wherein the rule is stated in effect as it is in *GRASS v. BIG CREEK DEVELOPMENT Co.*, that "the advisability of drilling additional wells involves the business judgment of the lessee, for he is not bound to work unprofitably to himself for the benefit of the lessor, and it is sufficient if he acts in good faith and makes no manifestly fraudulent use of his opportunities;" and this is the doctrine of *Brewster v. Lanyon Zinc Co.* 72 C. C. A. 213, 140 Fed. 801; *J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co.* 48 Tex. Civ. App. 555, 107 S. W. 609; *Jennings v. Southern Carbon Co.* 73 W. Va. 215, 80 S. E. 308.

And see *Summerville v. Apollo Gas Co.* 207 Pa. 334, 56 Atl. 876, holding that the question as to whether or not the quantity of gas produced from wells was profitable was for the decision of the lessee.

Under a lease of this character, which contains general covenants to "protect the L.R.A.1915E.

lines" or "well develop" the leased lands, or where such covenants are implied, the lessee or his assigns are permitted to determine the character of the work to be done, and their judgment in this regard, in the absence of fraud, disposes of the question. *Kellar v. Craig*, supra.

Where the lessor seeks the aid of equity to forfeit an oil and gas lease, on the ground that the lessee has been guilty of fraud in failing sufficiently to put down additional wells, and it appears that the lessee has sunk several wells, one of which proved dry, and the number of wells on the property compares favorably with the number on adjoining property, considering the acreage, the lessee may use his own judgment as to whether or not he should sink further wells, and if he exercises that judgment in good faith, differences of opinion in regard thereto by the lessor or experts or the court, or all combined, are of no consequence, and will not authorize a decree interfering with him. *Young v. Forest Oil Co.* 194 Pa. 243, 45 Atl. 121, 20 Mor. Min. Rep. 345.

There is no relation of special confidence between the lessor or lessee in a gas or oil lease, and where the extent of development is one of business judgment and management, the lessee is not bound to work unprofitably to himself for the profit of the lessor, and it is only when manifestly fraudulent use of opportunities is shown that the courts are authorized to interfere, for where the lessee has bound himself by covenant to develop the tract, and has entered and produced oil, he has a vested estate in the land which cannot be taken away on a mere difference of judgment. *Colgan v. Forest Oil Co.* 194 Pa. 234, 75 Am. St. Rep. 695, 45 Atl. 119, 20 Mor. Min. Rep. 338.

But under this rule, in the absence of a stipulation in a lease, neither the lessor nor the lessee is the ultimate arbiter of

ERROR to the Circuit Court for Lincoln County to review a judgment in plaintiffs' favor in an action brought to recover damages for breach of implied covenants of an oil and gas lease. Reversed.

The facts are stated in the opinion.

Messrs. Vinson & Thompson and F. C. Leftwich, for plaintiff in error:

The plaintiffs' original and amended declarations are fatally defective.

White v. Romans, 29 W. Va. 571, 3 S. E. 14; Hall v. South Penn Oil Co. 71 W. Va. 82, 76 S. E. 124; Jennings v. Southern Carbon Co. 73 W. Va. 215, 80 S. E. 368; Brewster v. Lanyon Zinc Co. 72 C. C. A. 213, 140 Fed. 801; American Window Glass Co. v. Indiana Natural Gas & Oil Co. 37 Ind. App. 439, 76 N. E. 1006; Puritan Oil Co. v. Myers, 39 Ind. App. 695, 80 N. E. 851; Hancock v. Diamond Plate Glass Co. 37 Ind. App. 351, 75 N. E. 659; Consumers' Gas Trust Co. v. Littler, 162 Ind. 320, 70 N. E. 363; Perry v. Acme Oil Co. 44 Ind. App. 207, 88 N. E. 859; Edmonds v. Moun-

sey, 15 Ind. App. 399, 44 N. E. 196, 18 Mor. Min. Rep. 384; Woodland Oil Co. v. Crawford, 55 Ohio St. 161, 34 L.R.A. 62, 44 N. E. 1093; Archer, Oil & Gas, 161, 274.

Evidence tending to show that the defendant had failed to drill sufficient wells to properly develop plaintiffs' land could not be properly introduced under either of the plaintiffs' declarations.

Whitehill v. Shickle, 43 Mo. 537; Seely v. Hills, 44 Wis. 484; 3 Robinson, Pr. p. 596; Lynch v. Murry, 21 How. Pr. 154; 9 Cyc. 729, 730; Rees v. Buckner, 5 Litt. (Ky.) 328; 1 Greenl. Ev. 951a; Watts v. State, 5 W. Va. 532; Bird v. United States, 180 U. S. 356, 45 L. ed. 570, 21 Sup. Ct. Rep. 403; Tilley v. Cook County (Tilley v. Chicago) 103 U. S. 155, 164, 26 L. ed. 374, 377.

The instruction given for the plaintiffs was erroneous.

Watts v. Norfolk & W. R. Co. 39 W. Va. 196, 23 L.R.A. 674, 45 Am. St. Rep. 894, 19 S. E. 521; Douglass v. Ohio River R. Co. 51 W. Va. 523, 41 S. E. 911; Jennings

the extent of development required, but both are bound by what would be reasonably expected of operators of ordinary prudence having a regard to the interests of both. Brewster v. Lanyon Zinc Co. 72 C. C. A. 213, 140 Fed. 801; Indiana Oil, Gas & Development Co. v. McCroy, 42 Okla. 136, 140 Pac. 610.

Thus, where, by the terms of a lease, the lessee is to put down a test well, and afterwards others if oil or gas is found in paying quantities, the question of putting down additional wells rests in the lessee, acting honestly and in good faith; his judgment, however, must not be arbitrary or spring from some ulterior purpose to secure a dishonest advantage, but it cannot be attacked except on the ground of fraud. Manhattan Oil Co. v. Carrell, 164 Ind. 526, 73 N. E. 1084.

And under a lease containing no express stipulation as to the extent of development or diligence with reference thereto after the development of one well, while the lessee has a right to exercise his honest judgment in respect to the extent and manner of development, yet his determination is not final, but it is subject to investigation and review. Daughette v. Ohio Oil Co. 263 Ill. 518, 105 N. E. 308.

In Caddo Oil & Min. Co. v. Producers' Oil Co. 134 La. 701, 64 So. 684, in referring to the rule that so long as the lessee acts in good faith in determining the extent of development, he is not bound to take the judgment of the lessor or of anyone else in preference to his own upon the question of the expediency of a further development of the leased property by the drilling of additional wells, it is said that what is meant is that this question is to be determined primarily by the lessee, but the ultimate determination of the question rests with L.R.A.1915E.

the court. The right of the lessee, however, cannot be divested merely because of differences of opinion upon that subject between the defendant and the plaintiff, in the absence of allegation or proof of fraud or bad faith.

While expressed in different language, it is believed that the true rule, as established by the foregoing cases, is that where the extent of development, after the lessee has become vested with an interest in the land by the development of at least one well, is not expressly provided by the terms of the lease, the extent of such development is a matter for the determination of the lessee, and his judgment in this regard is not subject to review by the courts merely by showing that it does not coincide with the judgment of the lessor or third persons, but the judgment of the lessee in this regard can be reviewed only by proving that he has not exercised his honest judgment in the matter, but was actuated by bad faith.

It would appear, however, that where the lessee has developed several wells on the leased premises, he cannot abandon them for a long period of time, about five years, on the ground that, owing to the fall in the price of oil, it is not profitable to operate them, although fluctuations in the price of oil might justify ceasing operations for a reasonable time. Collins v. Mt. Pleasant Oil & Gas Co. 85 Kan. 483, 38 L.R.A. (N.S.) 134, 118 Pac. 54.

Of course, where the parties to the lease agree as to what shall constitute due diligence in the matter of further development, they are bound by the agreement without reference to whether or not the diligence contracted for in fact constitutes due diligence. Bartley v. Phillips, 179 Pa. 175, 36 Atl. 217, 18 Mor. Min. Rep. 542.

A. G. S.

v. Southern Carbon Co. 73 W. Va. 215, 80 S. E. 370; Core v. New York Petroleum Co. 52 W. Va. 283, 43 S. E. 128.

The special findings of the jury are not only inconsistent with the general verdict, but show that the jury could not find from the evidence facts essential to a general verdict for the plaintiffs.

Bess v. Chesapeake & O. R. Co. 35 W. Va. 492, 29 Am. St. Rep. 820, 14 S. E. 234, 7 Am. Neg. Cas. 126; Peninsular Land Transp. & Mfg. Co. v. Franklin Ins. Co. 35 W. Va. 666, 14 S. E. 237; Tunnell v. Watson, 2 Munf. 283; Robinson v. Brock, 1 Hen. & M. 213.

Damages cannot be measured by mere speculation or conjecture; and they must not be uncertain.

Burruss v. Hines, 94 Va. 413, 26 S. E. 875; Kendall Bank Note Co. v. Sinking Fund Comrs. 79 Va. 573; Trigg v. Clay, 88 Va. 330, 29 Am. St. Rep. 723, 13 S. E. 434; James v. Adams, 8 W. Va. 568.

Damages must flow directly and immediately from the breach of the contract, and must be certain.

Slaughter v. Denmead, 88 Va. 1019, 14 S. E. 833; Alleghany Iron Co. v. Teaford, 96 Va. 372, 31 S. E. 525; Western U. Teleg. Co. v. Reynolds, 77 Va. 186, 46 Am. Rep. 716.

Messrs. Neal & Strickling, D. E. Wilkinson, and Campbell, Brown, & Davis, for defendants in error:

If the amended declaration would at common law have been open to the objection of duplicity, the point could have been raised only by special demurrer, abolished by our statute, and the remedy was by motion for more definite specification, which motion was not made.

Jacobs v. Williams, 67 W. Va. 378, 67 S. E. 1113; West Virginia Transp. Co. v. Standard Oil Co. 50 W. Va. 611, 56 L.R.A. 804, 88 Am. St. Rep. 895, 40 S. E. 591; Clarke v. Ohio River R. Co. 39 W. Va. 732, 20 S. E. 696; Gartin v. Draper Coal & Coke Co. 72 W. Va. 408, 78 S. E. 673; 9 Cyc. 730.

It was unnecessary to allege or prove notice to defendant that it was violating the covenant to properly develop the property. The law requires allegation and proof of notice only when the matter is not equally within the knowledge of the defendant, or when a party cannot perform the covenant without the notice.

10 Enc. Dig. Va. & W. Va. p. 492; Austin v. Richardson, 3 Call. (Va.) 201, 2 Am. Dec. 543; 9 Cyc. 726; Union Stopper Co. v. McGara, 66 W. Va. 403, 66 S. E. 698; Hogg, Pl. & Forms, § 96; Jennings v. Southern Carbon Co. 73 W. Va. 215, 80 S. E. 368.
L.R.A.1915E.

Instruction number one, given at the instance of the plaintiffs, properly states the implied covenant of the lease regarding development of the property to be, "to develop said property by drilling wells thereon sufficient to obtain therefrom all the oil that was marketable and fairly profitable; to extract and market it within a reasonable time, to be determined from the circumstances surrounding said land, and the recognized practices and methods adopted and used in the practical development of oil lands.

Hall v. South Penn Oil Co. 71 W. Va. 82, 76 S. E. 124; Jennings v. Southern Carbon Co. 73 W. Va. 215, 80 S. E. 368; Archer, Oil & Gas, § 393; Knotts v. McGregor, 47 W. Va. 566, 35 S. E. 899, 20 Mor. Min. Rep. 432; Steelsmith v. Gartlan, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 315; McGraw Oil & Gas Co. v. Kennedy, 65 W. Va. 595, 28 L.R.A.(N.S.) 959, 64 S. E. 1027; Smith v. Root, 66 W. Va. 633, 30 L.R.A.(N.S.) 176, 66 S. E. 1005; McKnight v. Manufacturers' Natural Gas Co. 146 Pa. 185, 28 Am. St. Rep. 790, 23 Atl. 164, 17 Mor. Min. Rep. 429; Iams v. Carnegie Natural Gas Co. 194 Pa. 72, 45 Atl. 54, 20 Mor. Min. Rep. 335.

Instruction number one, given at the instance of the plaintiffs, correctly sets forth the measure of damage for the breach of the implied covenant to develop.

Bradford Oil Co. v. Blair, 113 Pa. 83, 57 Am. Rep. 442, 4 Atl. 218; Archer, Oil & Gas, p. 454; Ammons v. South Penn Oil Co. 47 W. Va. 610, 35 S. E. 1004; Thornton, Oil & Gas, 2d ed. p. 149; Harris v. Ohio Oil Co. 57 Ohio St. 118, 48 N. E. 502, 19 Mor. Min. Rep. 157; White, Mines & Min. Remedies, p. 235; Wilmore Coal Co. v. Brown, 147 Fed. 931.

The jury, by its verdict, arrived at the damages with reasonable certainty.

United Fuel Gas Co. v. West Virginia Paving & Pressed Brick Co. — W. Va. —, 82 S. E. 329; Peninsular Land Transp. & Mfg. Co. v. Franklin Ins. Co. 35 W. Va. 666, 14 S. E. 237; Thomp. Trials, §§ 2691, 2693.

Lynch, J., delivered the opinion of the court:

Of a judgment for \$7,000, rendered upon the verdict of a jury in an action of assumpsit brought by John M. Grass, defendant Big Creek Development Company complains on writ of error.

In July, 1907, Grass as owner leased 100 acres of land to C. H. Freeman for the sole purpose of mining and operating for oil and gas, the consideration being a cash payment of \$100, one eighth of the oil produced, and \$200 annually for each gas well the prod-

uct from which should be marketed and used off the premises. As Freeman's assignee, defendant soon thereafter entered upon the premises and drilled four wells producing oil in paying quantities, locating them so as to operate as offsets to wells previously drilled on contiguous lands producing oil in like quantities. Deeming the four wells insufficient, under the implied covenants of the lease, for the full development of the lands for oil, and ample protection from drainage through wells operated on neighboring lands, defendant operating both tracts under similar leases, plaintiffs instituted this proceeding, averring, or attempting to aver, in an original and amended declaration of one count each, two causes of action; one the breach of an implied covenant to protect against drainage, and one the breach of a like covenant for the exercise of reasonable diligence in prosecuting developments necessary for extraction of all oil contained within plaintiffs' lands. To these declarations defendant tendered its demurrer, assigning as grounds therefor indefiniteness and uncertainty in the statement of the causes of action, and the joinder of two causes in the same count; and of the court's action thereon it complains.

The sufficiency of a declaration indefinitely stating a good cause of action cannot, with us, be tested by demurrer, but only by a demand for a bill of particulars containing a more specific statement of the cause imperfectly averred as the basis for recovery. Chap. 130, Code, § 4903; *Clarke v. Ohio River R. Co.* 39 W. Va. 733, 742, 20 S. E. 696; *West Virginia Transp. Co. v. Standard Oil Co.* 50 W. Va. 612, 56 L.R.A. 804, 88 Am. St. Rep. 895, 40 S. E. 591; *Jacobs v. Williams*, 67 W. Va. 377, 380, 67 S. E. 1113; *Gartin v. Draper Coal & Coke Co.* 72 W. Va. 405, 78 S. E. 673. Defendant, however, made no motion for an order requiring a specification of the particulars in which plaintiffs claimed defendant had failed to comply with the duties alleged to be so imperfectly assigned. It relied solely on its general demurrer.

Neither declaration definitely distinguishes between the breaches averred or the damages severally attributed to them. The most each pleading attempted was merely a statement of the implied covenants of the lease, and defendant's failure to perform them, whereby plaintiffs suffered damage in the amount stated in the *ad damnum* clauses. Nevertheless it cannot reasonably be said they are insufficient to impart adequate notice of the causes assigned as the basis of the action; for, while the rules of good pleading require certainty in the averment of the material

facts relied on, only such circumstantial accuracy is necessary as will reasonably afford notice of what is intended to be proved. Certainty to a common intent is all that is required. If intelligible to a person of ordinary understanding, and sufficient to afford him, the court, and the jury the means of determining what is intended, the pleading is sufficient. Moreover, in respect of matters peculiarly within the knowledge of defendant, he cannot be heard to complain, unless the averments are so uncertain as not to disclose the essential elements of the cause of action he is required to answer, or are so vague and indefinite that they cannot be said to state any cause of action sufficient to warrant a recovery. 31 Cyc. 72, 282; *Chicago & E. R. Co. v. Lawrence*, 169 Ind. 319, 79 N. E. 363, 82 N. E. 768; *Interstate R. Co. v. Tyree*, 110 Va. 38, 65 S. E. 500; *West Virginia Transp. Co. v. Standard Oil Co.* 50 W. Va. 612, 56 L.R.A. 804, 88 Am. St. Rep. 895, 40 S. E. 591; *Clarke v. Ohio River R. Co.* 39 W. Va. 733, 742, 20 S. E. 696.

Nor can duplicity in a pleading, that being defendant's second ground of demurrer, be reached in any manner except as provided by chap. 130, Code, § 4903, unless, as in *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 899, 20 Mor. Min. Rep. 432, there is a misjoinder of two inconsistent causes of action. There plaintiff sued for damages occasioned by breaches of the implied covenant for quiet enjoyment of leased premises,—one by the testator, one by his executrix after his death. That case holds that, unless plaintiff amends his pleading by striking one or more counts from his declaration, or elects to proceed only on one assignment of the breaches averred in one count, a demurrer will lie to such declaration as a whole or to any of its counts. Generally, however, duplicity is a defect in form only, and could be taken advantage of at the common law only by special demurrer, now abolished with us by chap. 125, Code, § 4783. *Coyle v. Baltimore & O. R. Co.* 11 W. Va. 94; *Sweeney v. Baker*, 13 W. Va. 158, 200, 31 Am. Rep. 757; *Poling v. Maddox*, 41 W. Va. 780, 786, 24 S. E. 999; *Martin v. Monongahela R. Co.* 48 W. Va. 542, 37 S. E. 563; *Gartin v. Draper Coal & Coke Co.* 72 W. Va. 405, 78 S. E. 673.

Evidently, in the original, and to some extent in the amended, declaration, the pleader's main object was recovery for drainage; and the trial of the case seems to have proceeded as if that were the sole purpose of the action. Both do aver existence of the two implied covenants for diligent operation and for protection from drainage, and defendant's breach of each

of them. But in the original declaration, the duty requiring diligence in development is merely incidentally stated. The charge made in it is that "there has been drawn from under the lands of these plaintiffs" their royalty, "at least \$15,000 worth," which royalty oil has been "delivered to the respective owners of said adjoining tract, whereby plaintiffs have lost and been deprived of great gains which might and otherwise would have arisen and accrued to them from the sale and delivery of" such royalty, "had defendant drilled offset wells or sufficient wells upon the said premises to develop the same and to protect them from drainage against the said four wells" operated on adjoining farms. The theory as to drainage seems to permeate the amended declaration also. After specifying the wells drilled on the several tracts, including those on plaintiffs' land, it avers "no wells other than the three mentioned were drilled by defendant to develop the said farm and protect it from drainage," pursuant to the implied covenants of the lease, of the breach of which complaint is made, "but that on the side of said premises next to the said four wells" on adjoining tracts, "no drilling was done by the defendant, nor was any well drilled as an offset against any one of the aforesaid wells, and the said four wells have been operated continuously since they were drilled, through which plaintiffs' oil is being taken by drainage, notwithstanding" defendant "has been in possession of the said premises under the assignment from the said Freeman during all the time" the four wells on the adjoining tracts "have been producing oil and draining plaintiffs' land." And, after averring failure by defendant to perform its covenants by properly developing said lands for oil, and properly protecting them from drainage of oil through the wells aforesaid on adjoining lands, by offset wells to each and every of said wells, the declaration concludes, "whereby and by means whereof the plaintiffs have been damaged in a large sum, to wit, \$15,000," and they "say that by reason of the location of the aforesaid wells near the line of these plaintiffs as aforesaid, there has been drawn from under the lands of these plaintiffs their" share of the royalty in the oil, "at least \$15,000 worth as aforesaid, which said royalty oil has been drawn from under their land, and been delivered to the respective owners of said adjoining tracts, whereby plaintiffs have lost and been deprived of great gains which might and otherwise would have arisen and accrued to them from the sale and delivery of said royalty to them, had the said defendant drilled offset wells or sufficient

L.R.A.1915E.

wells upon said premises to develop the same and to protect them from drainage against the said four wells."

Thus, it will appear, as suggested, that the chief purpose of this proceeding is a recovery of the value of the oil extracted from the leased premises through wells operated on contiguous lands, although by indefinite and uncertain averments the declaration does charge a breach of the implied covenant for developments sufficient to extract all oil discoverable upon the premises demised. As against this indefiniteness, defendant directed its objection under color of a general demurrer, which, as we have seen, is not available to it. And, even if the defect were so obvious as reasonably to justify allowance of a motion, if made in due time, and none was made, for a more definite specification of the cause or causes of action, no advantage can now be taken of it, under the statute of jeofails, after judgment; because, for reasons stated, the defects urged against the declarations in this action could not be regarded on demurrer. Chap. 134, Code, § 4977; *Holliday v. Myers*, 11 W. Va. 276; *Fulgham v. Lightfoot*, 1 Call (Va.) 250; *Roanoke Land & Improv. Co. v. Karn*, 80 Va. 589; *Taylor v. Stewart*, 5 Call (Va.) 520; *Spengler v. Davy*, 15 Gratt, 381.

The disposition of these defects leads to the inquiry as to the other assignments of error. We will first consider the effect of the special findings of the jury upon its general verdict. The statute authorizing this method of procedure (chap. 131, Code, § 4909) says: "Where any such separate verdict or special finding shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."

By its negative reply to the interrogatory whether defendant failed "to drill wells upon the plaintiffs' land to properly protect" it from drainage of oil into specified wells on other lands, "and if so, how many barrels of oil" plaintiffs lost "by reason of such failure," the jury eliminated any further inquiry as to damage suffered by plaintiffs from drainage. Virtually, they said there was no loss from that source. Nor does any question now arise as to the correctness of the jury's response to that inquiry. The evidence did not warrant a different answer.

Although to the question, "Did the defendant fail to properly drill and develop the land of the plaintiffs, and if so, how many barrels of oil did it fail to deliver to them by reason of such failure?" the jury replied, "Yes," evidently as to the first proposition, and, as to the second, "The number of barrels we cannot determine,"

they nevertheless did fix the sum of \$7,000 as compensation in damages for such failure, although in effect they conceded the insufficiency of the proof upon which to base their judgment as to the quantity of oil which defendant ought to have produced from wells not drilled which it should have drilled. Evidently, the court deemed a reasonably accurate ascertainment of the quantity of oil defendant ought to have produced, but did not produce, as an essential element for recovery in the action; for, by an instruction propounded on plaintiffs' motion, the jury was required to ascertain: "(1) The number of additional wells, if any, the defendant should have drilled on plaintiffs' land to sufficiently develop it, and the time when such wells should have been completed; (2) how much oil such additional wells would have produced from commencement of production to the bringing of this suit; and (3) the value of that oil in the Griffithsville field at the various times it would have been sold if it had been produced."

One of these elements, so deemed essential, the jury said, it could not determine from the evidence before it; and we find no data from which a different conclusion could have been reached. Without such data, it is difficult to perceive the existence of any substantial basis for the award of damages fixed as compensation for delay in productive operations on the leased premises. A jury cannot mulct a suitor in damages where the evidence furnishes no reasonably accurate or substantial basis for the ascertainment and computation of the loss sustained by the breach of duty complained of. Otherwise, their verdict must be deemed to have resulted from the exercise of a mere arbitrary conclusion, one based on no substantial foundation, or, as in this case, upon proof insufficient to show breach of any duty due from defendant to plaintiffs. Construing the two responses to the dual interrogatory mentioned in the light most favorable to plaintiffs, we cannot understand how or why they were entitled, in any aspect of the case as presented, to a verdict for more than merely nominal damages. Because, although by the first answer the jury said defendant had failed to drill as many wells on plaintiffs' land as it ought to have drilled under the implied covenants of the lease, by the second it virtually said plaintiffs had failed to furnish any proper basis for estimating the damages arising out of such breach. We reversed the judgments reviewed in *Bess v. Chesapeake & O. R. Co.* 35 W. Va. 492, 29 Am. St. Rep. 820, 14 S. E. 234, 7 Am. Neg. Cas. 126, and *Douglass v. Ohio River R. Co.* 51 W. Va. 524, 41 S. E. 911, the first because of the L.R.A.1915E.

jury's negative response to the inquiry as to the name and official relation to defendant of the agent to whose assault the injury sued for was attributed, the second because the jury could not properly ascertain damages under the proof submitted to them. To avoid any misconception, in this connection, it may be observed, we do not express the opinion that, to entitle plaintiffs to recover, they must definitely prove the extent of the injury, if any, sustained by them by reason of unduly delayed developments on their lands; for only such proof as the case will reasonably admit of is required.

Evidently, plaintiffs have misconceived the theory on which they ought to have prosecuted their case to final determination. The course pursued by them apparently was based on the idea that the number of wells necessary for the extraction of all the oil from their land, and the quantity of oil that ought to have been, but was not, produced by defendant therefrom prior to institution of this action, constituted the real ground on which they had the right to predicate their claim for damages; for to this end they directed such evidence as tends to support such recovery. Whereas they are entitled only to such damages as they sustained by defendant's failure, if any, to exercise an honest judgment in proceeding with the necessary explorations on the lands and the extraction of oil therefrom, taking into consideration the subject-matter of the lease, the character of the mineral products, the nature of the oil-bearing sand in that territory, the situation of the parties, the cost of drilling, the current prices of oil produced, the location of the land, and all the surrounding circumstances and conditions attendant upon operations necessary for the extraction of such mineral products. In other words, the authorities hold that if, under such circumstances, the operator exercises a sound and honest judgment, and not unreasonable or arbitrary one, in continuing operations for mineral oils, he has faithfully discharged the duties implied devolving upon him by virtue of the lease, although he may not exercise that high degree of diligence which the exaggerated expectations of the landowner may demand. Even when charged with undue delays, the proof must be clear, positive, and convincing, in order to warrant recovery.

Brewster v. Lanyon Zinc Co. 72 C. C. A. 213, 140 Fed. 801, states the reasonable rule to be: "Where the object of the operations contemplated by an oil and gas lease is to obtain a benefit or profit for both lessor and lessee, neither is, in the absence of a stipulation to that effect, the arbiter of the extent to which or the diligence with which

the operations shall proceed; but both are bound by the standard of what, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both."

And on the same subject we said, in *Jennings v. Southern Carbon Co.* 73 W. Va. 215, 80 S. E. 368: "To the judgment of the operator, when, and where, and how many wells he shall drill, deference is justly due. But the judgment must be an honest, not an arbitrary, judgment. He must deal with the leased premises, not exclusively to serve his own peculiar and selfish interests, unmindful of his obligations to the source from which his authority is derived, but so as to promote the mutual advantage and profit of himself and the lessor;" and, to excuse the operator, his judgment "must conform to that judgment generally exercised by other operators under similar circumstances and conditions, and in view of the real purpose and intention of the parties when entering into the agreement," and not merely the opinion of those not so engaged.

This statement of the general and reasonable rule finds material support in *Harris v. Ohio Oil Co.* 57 Ohio St. 118, 48 N. E. 502, 19 Mor. Min. Rep. 157, wherein it is said: "The development and protection of lines, which is . . . implied when the lease is silent, is such as is usually found in the same business of an ordinarily prudent man, neither the highest nor lowest, but about the medium or average."

To the same effect is *J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co.* 48 Tex. Civ. App. 555, 107 S. W. 609. Of like import, also, is the language of the trial court approved in *Bradford Oil Co. v. Blair*, 113 Pa. 83, 57 Am. Rep. 442, 4 Atl. 218, saying: "If the knowledge and skill of persons engaged in the oil producing business, and the machinery and appliances then known, and the prices of the product, were such that the business could not then be carried on with a profit to the defendant after giving to the plaintiff the agreed royalty, then we think the defendant was not bound to prosecute the same to any greater diligence than was done." *Core v. New York Petroleum Co.* 52 W. Va. 276, 43 S. E. 128; *Ammons v. South Penn Oil Co.* 47 W. Va. 610, 628, 35 S. E. 1004.

So that, in these particulars, the verdict rendered was based upon evidence wholly insufficient to sustain it; because, as clearly appears, the proof was directed solely to the number of wells necessary, in the opinion of the witnesses testifying, for the full development of the leased premises for oil and gas, and not to the degree of diligence defendant ought to have exercised. The L.R.A.1915E.

only exception to this character of proof was the testimony of one or two witnesses who did express the opinion that the drilling of each additional well by them deemed essential should have followed within sixty days after the completion of the preceding one. As they fixed no basis therefor, the opinion was wholly arbitrary. But, if not arbitrary, it does not measure up to the standard deemed material and requisite by the authorities cited. Has the operator been duly diligent under all the circumstances requiring him to exercise a reasonable judgment as to the proper course to pursue in regard to continuity and extent of developments? is the vital question. Not, how many wells are necessary to withdraw all the oil from any particular tract of land? Or, differently stated, has the operator exercised that degree of diligence reasonably and ordinarily exercised by prudent operators engaged in the same line of business under the same or similar circumstances and conditions, keeping in view the covenants of the lease and the mutual benefit and advantage of the parties to the contract? If he has been thus diligent, plaintiffs cannot recover; otherwise, they can recover for the loss sustained by them as the result of the unreasonable delay in the drilling of wells and the production of oil on their lands.

There are cases prescribing the measure of damages for failure faithfully to prosecute developments on leased premises, not in accord with the views we have expressed. These are *Bradford Oil Co. v. Blair*, supra, and *Daughette v. Ohio Oil Co.* 151 Ill. App. 102, affirmed in 263 Ill. 518, 105 N. E. 308. These cases state the measure of damages to be as prescribed in plaintiffs' instruction. See also *White, Mines & Min. Remedies*, 235. The lease involved in *Bradford Oil Co. v. Blair* expressly required the lessee, after discovery of oil, "to continue, with due diligence and without delay, to prosecute the business to success or abandonment; and, if successful, to prosecute the same without interruption, for the common benefit of the parties." And it presented to the jury the question as to whether defendant had been duly diligent. The measure of damages there prescribed was approved in the Illinois case. Without citing any authority therefor, *White* says only: "The measure of damages which the lessor would be entitled to recover for the violation of a covenant to drill sufficient wells to properly test the land for oil would ordinarily be the rent or royalty which would have resulted to such lessor had the lessee complied with such covenant, and upon this question expert evidence would be compe-

tent as to the probable amount of, or whether any, recovery should be allowed."

In effect, he concedes that mere delay in drilling is not *per se* actionable. So *Howerton v. Kansas Natural Gas Co.* 81 Kan. 553, 34 L.R.A. (N.S.) 34, 106 Pac. 47, holds that "the contract contemplated . . . other wells should be drilled and operated with reasonable diligence to utilize the lease," and that "four years' delay under the circumstances shown was unreasonable." That was an equitable proceeding to cancel the lease for failure to exercise diligence in the production and marketing of gas. The case prescribes no measure of damages for delay in development.

Indeed, the very absence of reported cases, prescribing such measure or standard for the ascertainment of damages readily leads to the conclusion that persons interested in the result of operations for mineral oils are disposed to accede to the judgment of the lessee exercised as to the diligence and extent with and to which such operations should be prosecuted. While there are many such leases and many developments under them, few actions based on delay in development have reached appellate courts of the different states. It is therefore reasonable to infer that lessors willingly defer to the judgment reasonably exercised by the lessee. The cases involving rights under such leases are ordinarily limited to inquiries as to forfeiture, abandonment, drainage, or fraudulent conduct on the part of the lessee resulting in delay of developments. Excepting the cases cited, we find none prescribing the measure of damages the lessor is entitled to recover for nondevelopment, and think the measure they prescribe is not the proper one in cases of this character. We are not now speaking of what is the measure of damages recoverable for drainage through wells operated on other lands near plaintiffs' boundary line. That question, as heretofore observed, is not before us; the jury having said no such drainage had occurred.

But, surely, it would be grossly unfair to permit recovery of damages to the extent allowed by the jury in this case. It scarcely is conceivable that plaintiffs have suffered such loss from lack of wells on a tract of land containing only 100 acres. To have that effect, the tract must indeed be richly productive of minerals. At the rate ascertained for one sixteenth, the production from it would reach \$112,000. Conceding that result remotely probable, or as in any event possible, are not plaintiffs still entitled to another sixteenth from that quantity when produced? If so, they will receive twice the sum fixed by the contract as compensation for right of exploration on L.R.A.1915E.

their land. The verdict is not for the share of oil produced; it is damages for failure to produce. Clearly, then, plaintiffs' share of the production is not the true measure of the injury suffered. To allow double damages for the same breach of a contract silent on the subject of compensation therefor is wholly irreconcilable with and disproportionate to a due regard for justice and right. We cannot conceive such result as reasonably possible under any circumstances. The proof shows no foundation for it. Indeed, no testimony justifies any such finding. Plaintiffs may not have suffered any loss. None is shown, none proved.

The jury arbitrarily fixed the amount named. It had not the slightest evidence to support it. How plaintiffs were injured they do not tell us. As said before, they limited the inquiry to an ascertainment of the number of wells not drilled which witnesses say they think defendant ought to have drilled, a mere arbitrary conclusion. Plaintiffs assumed the burden of showing, by competent proof, the extent of the injury to them resulting from delay in drilling wells under the implied provisions of the lease. Yet they made no effort to produce any evidence on that feature of their case. Not a word spoken by them, or by any other witness, tends in the slightest degree to show they suffered any damage from operations deferred. So far as disclosed, they have lost nothing more than interest on the value of productions obtainable had defendant exercised that degree of diligence we have suggested as due under certain conditions and circumstances.

Moreover, additional wells may not produce an ounce of oil, or they may produce great quantities of it. If none, the lessee loses the cost and expense incident to the operation; if in paying quantities, the lessor obtains his share without expense. But, as the operator assumes all the risk and burdens of a hazardous business, and the lessor no risk, no burden, a verdict without merit, because based on evidence wholly insufficient under any view of the case, cannot and ought not to be permitted to stand as a foundation for the judgment rendered thereon.

We have said nothing regarding defendant's instructions, the admission of evidence, or the existence of the implied covenants in oil and gas leases; because what has been said virtually disposes of the first two, and no question is raised as to the other. The authorities uniformly concede the existence in oil and gas leases of covenants for protection against drainage and for the exercise of reasonable diligence in promoting production on the lands leased. *Brewster v. Lanyon Zinc Co.* 72 C. C. A.

213, 140 Fed. 801; Jennings v. Southern Carbon Co. 73 W. Va. 215, 80 S. E. 368.

Being based on a wrong theory, the judgment is reversed, the verdict set aside, and a new trial awarded, to be governed by the principles herein announced.

Poffenbarger, J., concurring:

The claim for damages on account of alleged drainage wholly fails for want of proof. The opinion of the court concedes that, under circumstances not established by the evidence in this case, the lessor under a lease such as the one involved here, containing no express covenant to drill additional wells or to operate the land diligently for oil, might recover damages for nondrilling of additional wells. Though some of our decisions contain *dicta* in agreement with this theory (Hall v. South Penn Oil Co. 71 W. Va. 82, 76 S. E. 124, and other cases there cited), I am of the opinion, after mature consideration, that there is no such right of action. It is not affirmed, as matter of decision, by any of our cases. What was actually decided is that the lessor has no remedy in equity, under such circumstances, and the observation that there is remedy at law must be taken subject to a very important qualification, namely, if the plaintiff has any right to relief at all. Though these observations read as if the court has said there was such a right, they do not amount to decisions affirming it. Accurately expressed, the view was that, if the plaintiff had any right, his remedy for violation thereof was in a court of law.

The implied covenant on the part of the lessee to operate the lease and make it mutually beneficial to himself and the lessor has been affirmed, as matter of actual decision, only in cases involving the doctrine of abandonment. These cases say the lessee cannot hold onto the lease after he has ceased operations thereon. He is under an implied covenant to make the lease productive and so beneficial to the lessor as well as himself. None of them undertake to say the implied covenant imposes duty to do more than make the lease produce oil or gas in paying quantities. Not one of them undertakes to say the lessee must make it beneficial in any certain degree. The degree of benefit or extent of production did not arise in any of them. In each there had been an actual, legal abandonment, or such an abandonment was asserted, and the issue was whether or not the lessee had abandoned the lease and thus reinvested the lessor with possession and control of the leased premises for oil and gas purposes. Parish Fork Oil Co. v. Bridgewater Gas Co. 51 W. Va. 583, 59 L.R.A. 566, 42 L.R.A.1915E.

S. E. 655, 22 Mor. Min. Rep. 145; Steel-smith v. Gartlan, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 315; Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 613, 20 Mor. Min. Rep. 377; Munroe v. Armstrong, 96 Pa. 307; Conrad v. Morehead, 89 N. C. 31; Petroleum Co. v. Coal, Coke & Mfg. Co. 89 Tenn. 381, 18 S. W. 65.

Extension of this covenant, raised by necessary implication, for the purpose of testing the question of abandonment, was a natural error on the part of the lessors and their attorneys, due to the generality of the terms in which it was expressed. The lessor, desiring something more than had ever been legally accorded him, readily and naturally seized upon it as justification for his claim, and the court, having no occasion either to affirm or deny its validity in the equity suits in which it was presented, rather conceded it as mere matter of opinion, not decision, without inquiry as to the soundness of the claim. Extension of the covenant cannot be justified upon the ground of necessity, arising out of the terms of the lease. In cases of abandonment, there is such necessity; or there must be such a covenant, else the lessee gets from the lessor something for nothing. There can be no such result as long as the lessee produces oil or gas in paying quantities. Such production makes the lease mutually beneficial.

Implied covenants can only be justified upon the ground of legal necessity. Such a necessity may arise out of the terms of the contract or out of the substance thereof. One absolutely necessary to the operation of the contract and the effectuation of its purpose is necessarily implied, whether inferable from any particular words or not. It is not enough to say it is necessary to make the contract fair, or that it ought to have contained a stipulation which is not found in it, or that, without such covenant, it would be improvident or unwise or would operate unjustly; for men have the right to make such contracts. Accordingly, courts hesitate to read into contracts anything by way of implication, and never do it except upon grounds of obvious necessity.

"All authority opposes construction, or the reading in of matter not expressed, when it is not rendered necessary in some way or for some reason." White v. Bailey, 65 W. Va. 573, 576, 23 L.R.A.(N.S.) 232, 64 S. E. 1019; United States v. Fisher, 2 Cranch, 358, 2 L. ed. 304; Jackson ex rel. Boyd v. Lewis, 17 Johns. 475; Waterford & W. Turnp. v. People, 9 Barb. 161; Morgan v. Chicago & A. R. Co. 96 U. S. 716, 24 L. ed. 743.

In Hamlyn v. Wood, [1891] 2 Q. B. 488,

Lord Esher said: "I have for a long time understood that rule to be that the court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned."

In *The Moorcock*, L. R. 14 Prob. Div. 64, Bowen, L. J., said: "The implication which the law draws, from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction, and preventing such a failure of consideration as cannot have been within the contemplation of either side."

In *Stirling v. Maitland*, 5 Best & S. 840, Chief Justice Cockburn stated the rule as follows. "I look on the law to be that, if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative."

This was quoted and approved by Kay, L. J., in *Hamlyn v. Wood*, supra. Bowen, L. J., said in *Oriental S. S. Co. v. Tylor* [1893] 2 Q. B. 518: "The case comes within the well-known rule that where the contract as expressed in writing would be futile, and would not carry out the intention of the parties, the law will imply any term obviously intended by the parties which is necessary to make the contract effectual."

In *Mackay v. Dick* [1881] L. R. 6 App. Cas. 251, Lord Blackburn said: "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances."

The limitations upon the rule have been expressed in terms no less clear. Lord Esher said in *Butler v. Manchester, S. & L. R. Co.* L. R. 21 Q. B. Div. 207: "No court has a right to imply any term as between parties which was not clearly and obviously within the contemplation of both the parties."

In *Hamlyn v. Wood*, Kay, L. J., said: L.R.A.1915E

"The court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question, that the court is necessarily driven to the conclusion that it must be implied. To state the rule in any wider terms would be going, I think, beyond what is justifiable on principle."

This rule amply justifies recognition of an implied covenant to operate the lease and make it produce oil or gas in paying quantities. Otherwise the lessee would hold the lessor's land for nothing, a thing the parties could not possibly have contemplated. It is born of necessity that something be done under the lease. No such necessity underlies the claim of a covenant to take out the oil as fast as it is practicable or possible to extract it, for, as long as oil or gas is produced in paying quantities, the expectation of the lessor is measurably fulfilled. In the other case, it is not. This marks the distinction very clearly. As long as oil is flowing in paying quantities, the lessor derives a benefit. If the lessee leaves the premises and oil ceases to flow, the lessor gets nothing, and his land is held to no purpose, except the mere hope of speculative profit on the part of the lessee. While the oil flows in paying quantities, the letter of the contract is fulfilled. It provides that the lessee shall have the use of the premises for oil and gas purposes, for a fixed term, and as long thereafter as oil and gas is produced in paying quantities. That condition, production of oil or gas in paying quantities, is all the landowner expressly stipulated for. For all that anybody can see or know, he has relied, for further benefits and profits, upon the inducement which the land itself, as oil or gas territory, holds out to the lessee, assuming the sufficiency thereof to secure the drilling of as many wells as are profitable. Who can say with any degree of certainty he did not? How does it conclusively appear that he reserved the right to require more wells than the lessee should see fit to put down, or faster drilling than the lessee cares to do? Nothing in the terms of the lease or circumstances of the parties drives or forces the court to say he did either. The assertion thereof is mere speculation.

That such inducement is ordinarily sufficient is evidenced by the fact that the great oil fields of this state and of the country generally have been developed and completely operated, to the satisfaction of lessors, under provisions of this kind, construed as leaving to the lessee the determination of the number of wells and the time

and place of drilling. Under the thousands of leases taken in this form, complaints of lack of diligence on the part of the lessees have been rare. In only three or four instances have lessors come to this court with complaints on grounds of refusal of the lessees to drill additional wells, and, in almost every such case, an effort was made to establish drainage as the real ground of relief. Such was the complaint in *Hall v. South Penn Oil Co.* 71 W. Va. 82, 78 S. E. 124; *Ammons v. South Penn Oil Co.* 47 W. Va. 610, 35 S. E. 1004; *Harness v. Eastern Oil Co.* 49 W. Va. 232, 38 S. E. 662; *Core v. New York Petroleum Co.* 52 W. Va. 276, 43 S. E. 128. And, in this case the principal grievance set forth in the declaration is the unsustained allegation of drainage. The meagerness of complaints of this kind strongly argues the sufficiency of the hope of profit to the lessee as an inducement to the drilling of additional wells. In most of these complaints, the territory was apparently worthless, and the efforts were to compel the lessees to spend vast amounts of money on the mere hope of returns, and contrary to their judgment. The hundreds of leases that have come into this court in the course of litigation are nearly all in the form of the one here involved, and this signifies the inability of landowners to secure such stipulations for development according to any prescribed standard. In a few rare cases, stipulations for additional wells to the extent of two or three or four have been found; but such instances have very seldom occurred. The hazard, the risk, is all on the part of the lessee. The landowner risks nothing except the use of his land. The oil business is extremely hazardous to the operator, wherefore it is not an easy matter to obtain a contract for additional wells. Such contracts are decidedly exceptional. Very few of them have ever been seen. The following observation of Mr. Justice Mitchell, dissenting in *Kleppner v. Lemon*, 176 Pa. 502, 35 Atl. 109, 18 Mor. Min. Rep. 404, quoted with approval in *Core v. New York Petroleum Co.* 52 W. Va. 276, 43 S. E. 128, accords with the incontrovertible facts: "The lessee has to bear the cost of putting down wells, and his interest is to proceed carefully, with due regard to expense and probable returns, while the lessor's interest is to have search and experiment without regard to present cost. The decision in regard to such matters belongs primarily to the lessee. It is a proper subject for agreement, and when the parties have agreed what shall be done, their rights are not subject to the judgment of any court to fix a different standard. If the parties to the present controversy had expressly stipulated that one well should

be sufficient for the whole tract, no court would venture to enlarge the test by directing another to be put down at the lessee's expense, yet the covenant of the lease amounts to just that, as I understand the learned court below to admit. I would reverse this judgment as a flagrant violation of the liberty and sanctity of contracts by raising a purely factitious equity to enable the complainant now to make a better bargain at the defendant's expense than he chose or was able to make for himself at the time."

Having demonstrated inhibition of the proposed extension of the implied covenant by the limitations of the rule governing such covenants, I now apply two other familiar rules of interpretation, giving effect to the words of the contract and force to establish customs and usages. By the terms of the agreement, it is to continue as long as oil or gas is produced from the land in paying quantities. This clearly negatives any implication of right in the lessor to require production in any greater quantity. Compliance with that condition continues the estate in the lessee. As long as it is complied with, the lessor cannot forfeit the lease. *McGraw Oil & Gas Co. v. Kennedy*, 65 W. Va. 595, 28 L.R.A.(N.S.) 959, 64 S. E. 1027. For the same reason, we must say, to be consistent, he cannot require more than compliance with the prescribed condition, unless there is danger of loss by drainage.

This contract was made with full knowledge of the usage and custom of lessors under such agreements, to leave the locations and number of wells and times of drilling to the determination of the lessees. It is a usage so general as to require judicial notice thereof. Practically all of the tens of thousands of leases under which the vast oil and gas fields of this state have been developed have been made in the form of this one. The lessors never so much as thought of the alleged right here asserted. They left it all to the lessees, and, so interpreted and executed, these leases have adequately and fully protected the lessors and effectuated full, complete, and diligent development of their lands. The interest of the lessee has been a sufficient inducement in almost every case. It has been in this case. This court so finds and decides.

An established usage known to the parties to a contract is a part of the contract, unless excluded by its terms. *Anderson v. Lewis*, 64 W. Va. 297, 61 S. E. 160; *Cobb v. Dunlevie*, 63 W. Va. 398, 60 S. E. 384; *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686; *Governor v. Withers*, 5 Gratt. 24, 50 Am. Dec. 95; *Hansbrough v. Neal*, 94 Va.

722, 27 S. E. 593; Richlands Flint Glass Co. v. Hiltbeitel, 92 Va. 91, 22 S. E. 806; Anson, Contr. 246 et seq., 2d ed. 322 et seq.

SOUTH DAKOTA SUPREME COURT.

JESSIE ROWE, Resp't.,
v.

O. H. RICHARDS et al.
and
CITY OF WATERTOWN, Appt.

(32 S. D. 66, 142 N. W. 664.)

Statute — title — sufficiency — personal injury — death.

1. A title and act concerning liability of cities for personal injuries is not sufficiently broad to cover a provision requiring notice before bringing an action for death.

Death — right of action — repealing statute — parties.

2. A statute providing that whenever the death of a person shall be caused by wrongful act such as would, if death had not ensued, have entitled the person injured to maintain an action, such action may be brought in the name of his personal representative, is not limited to actions which survive the death of the person injured, but includes rights of action which arise because of the death, and repeals former statutes which permit the latter actions to be brought by the widow or next of kin.

Action — for injuries and death — conflict.

3. A cause of action growing out of injuries to the person and one based on death by negligence do not conflict, and do not merge upon the occurrence of the death, and the prosecution or satisfaction of one is not a bar to the other.

Pleading — complaint — duplicity.

4. A complaint charging that the owner of a building negligently constructed it, and the city negligently permitted it to be constructed, and that it fell and killed plaintiff's intestate, states but one cause of action.

Parties — surplus — effect.

5. A defendant cannot complain because unnecessary persons are made parties defendant, upon the ground that there is a defect of parties.

Municipal corporation — duty to protect sidewalk from building under construction.

6. A municipal corporation which grants a permit to construct a walk so near a side-

walk that, if it falls or materials or tools fall from it, persons on the walk are likely to be injured, is bound to place barriers or other contrivances to prevent injury to passersby.

(June 6, 1913.)

APPEAL by the defendant city from an order of the Circuit Court for Codington County overruling a demurrer to the complaint in an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendants' negligence. Reversed.

The facts are stated in the opinion.

Mr. J. G. McFarland, for appellant:

Actions for damages resulting from the death of a person by the negligence of another are purely creatures of the statute.

Smith v. Chicago, M. & St. P. R. Co. 6 S. D. 583, 28 L.R.A. 573, 62 N. W. 967; Belding v. Black Hills & Ft. P. R. Co. 3 S. D. 369, 53 N. W. 750; 8 Am. & Eng. Enc. Law, 2d ed. 854; Major v. Burlington, C. R. & N. R. Co. 115 Iowa, 309, 88 N. W. 815; Harshman v. Northern P. R. Co. 14 N. D. 69, 103 N. W. 412; Tiffany, Death by Wrongful Act, § 616; Aho v. Jesmore, 101 Minn. 449, 10 L.R.A. (N.S.) 998, 112 N. W. 538; Morgan v. Southern P. Co. 95 Cal. 510, 17 L.R.A. 71, 29 Am. St. Rep. 143, 30 Pac. 603; Nash v. Tousley, 28 Minn. 5, 8 N. W. 875; Scheffler v. Minneapolis & St. L. R. Co. 32 Minn. 125, 19 N. W. 656; Whiton v. Chicago & N. W. R. Co. 21 Wis. 310; Carey v. Berkshire R. Co. 48 Am. Dec. 616, note.

Where the statute provides for notice to a city of any injury for which damages are or may be claimed, this requirement must be complied with as a prerequisite to suit, and the giving of such notice must be averred in the complaint. Without such averment the complaint does not state a cause of action against the municipality.

Wentworth v. Summit, 60 Wis. 281, 19 N. W. 97; Dorsey v. Racine, 60 Wis. 292, 18 N. W. 928; 20 Am. & Eng. Enc. Law, 2d ed. 1234; Plum v. Fond du Lac, 51 Wis. 393, 8 N. W. 283; Trost v. Casselton, 8 N. D. 534, 79 N. W. 1071; Sowle v. To-mah, 81 Wis. 349, 51 N. W. 571; Benware v. Pine Valley, 53 Wis. 527, 10 N. W. 695; Susenguth v. Rantoul, 48 Wis. 334, 4 N. W. 328; Bausher v. St. Paul, 72 Minn. 539, 75 N. W. 745; Nichols v. Minneapolis, 30 Minn. 545, 16 N. W. 410; Harder v. Minneapolis, 40 Minn. 446, 42 N. W. 350; New Orleans v. Abagnatto, 26 L.R.A. 329, 10 C. C. A. 361, 23 U. S. App. 533, 62 Fed. 240, 8 Am. & Eng. Enc. Law, 2d ed. 907.

The city of Watertown cannot be sued jointly with the abutting property owners, the Richards Brothers, to recover damages

Note. — The above case came before the court upon a subsequent appeal, the decision in which is reported under the same title, post, 1075. Following that case is a note on the general subject. Several actions for death, or injury causing death. And see numerous notes on collateral subjects referred to in that note.
L.R.A.1915E.

for injuries caused by improper guarding of the sidewalk, which resulted in the death of plaintiff's husband.

Dutton v. Lansdowne, 198 Pa. 563, 53 L.R.A. 469, 82 Am. St. Rep. 814, 48 Atl. 494; *Brookville v. Arthurs*, 130 Pa. 501, 18 Atl. 1076; *Wiest v. Electric Traction Co.* (*Weist v. Philadelphia*) 200 Pa. 148, 58 L.R.A. 666, 49 Atl. 891; *Mintzer v. Greenough*, 192 Pa. 137, 43 Atl. 465; *Trowbridge v. Forepaugh*, 14 Minn. 133, Gil. 100; *Little Schuykill Nav. R. & Coal Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209, 10 Mor. Min. Rep. 661.

Where the statute gives the right of action to a particular person, the appointment and qualification of such person as personal representative, and the existence of the beneficiaries, become a material and necessary obligation to make the complaint good, and a condition precedent to the maintenance of the action.

Harshman v. Northern P. R. Co. 14 N. D. 69, 103 N. W. 412; *Whiton v. Chicago & N. W. R. Co.* 21 Wis. 305; *Nash v. Tousley*, 28 Minn. 5, 8 N. W. 875; *Scheffler v. Minneapolis & St. L. R. Co.* 32 Minn. 125, 19 N. W. 656; *Weidner v. Rankin*, 28 Ohio St. 522; *Wilson v. Brumstead*, 12 Neb. 1, 10 N. W. 411; *Mowry v. Chaney*, 43 Iowa, 609; *Kramer v. San Francisco Market Street R. Co.* 25 Cal. 434; *Major v. Burlington, C. R. & N. R. Co.* 115 Iowa, 309, 88 N. W. 815; *Barker v. Hannibal & St. J. R. Co.* 91 Mo. 86, 14 S. W. 281; *Hyde v. Wabash, St. L. & P. R. Co.* 61 Iowa, 441, 47 Am. Rep. 820, 16 N. W. 351; *Aho v. Republic Iron & Steel Co.* 104 Minn. 322, 116 N. W. 591; *Aho v. Jesmore*, 101 Minn. 449, 10 L.R.A.(N.S.) 998, 112 N. W. 538.

Messrs. *Sherin & Sherin* for respondent.

Polley, J., delivered the opinion of the court:

This action is brought against O. H. and E. R. Richards and the city of Watertown for the recovery of damages resulting from the death of the plaintiff's husband. The defendant city of Watertown, hereinafter to be designated as the city, appeared separately and demurred to plaintiff's complaint on the grounds: "(1) That there is a defect of parties plaintiff; (2) that there is a defect of parties defendant; (3) that there are several causes of action improperly united; (4) that the complaint does not state facts sufficient to constitute a cause of action; (5) that the plaintiff has no legal capacity to sue defendant; and (6) that the court has no jurisdiction of the subject of the action." This demurrer was overruled by the order of the trial court, and the case is brought L.R.A.1915E.

here upon an appeal by the city from this order.

So far as the record before us shows, the defendants O. H. and E. R. Richards, hereinafter to be designated as the Richards, have made no appearance. In order to understand the questions presented by the demurrer, it will be necessary to set out the facts alleged in plaintiff's complaint with greater detail than is ordinarily necessary.

It appears from the complaint, the truth of which is admitted by the demurrer: That on and for some time prior to the 20th day of July, 1907, plaintiff and one William D. Rowe were husband and wife, living in the city of Watertown. That at that time the Richards were the owners of a certain lot or tract of ground fronting on Kemp avenue, one of the main thoroughfares in the business part of the city, and that on the date above mentioned they were engaged in the construction of a certain one-story brick building upon said premises. That at that time the city was a municipal corporation, with complete control over all the streets and sidewalks in the city. That it had power to establish, and by ordinance had established, certain fire limits, within which limits it had power to designate the character of the buildings that should be erected and the thickness and strength of the walls to be used in the construction thereof. That the city had a building inspector, whose duty it was to inspect buildings in course of erection, and to enforce the city ordinance relative to the thickness of walls, strength of materials, etc. That the city had issued a permit to the Richards to erect the said building. That, while the said building was in course of erection, it was dangerous for people to pass along the street in front of the said property, and that it was the duty of all of the defendants to maintain warnings and guards in front of said property to keep people out of danger; but that there was a sidewalk along said Kemp avenue in front of said property, and this defendants allowed people to use in the usual manner without putting up any guards or giving any warning of the dangerous condition of the place. That the front wall of the said building, which abutted upon the said sidewalk, was composed of such weak materials and was so poorly constructed that it was unable to sustain its own weight, and that by reason of the inefficiency of the materials used in the said wall and the faulty construction thereof, the same became, and was, a nuisance and a menace to the safety of people using the said sidewalk, and that, in their failure to erect and maintain proper

guards and warnings to prevent people from using the said sidewalk, the defendants were guilty of carelessness and negligence in the performance of their duties to the public. That on the said 20th day of July, 1907, while the said William D. Rowe was passing along the sidewalk in front of the said wall, in the exercise of due and proper care and without any knowledge or warning of the weak and dangerous condition of the said wall, the said wall collapsed and fell over upon him, causing injuries which afterwards, on the 8th day of February, 1912, resulted in his death. That the defendants knew, or by the exercise of ordinary care might have known, of the weak and dangerous condition of the said wall, and that therefore the death of the said William D. Rowe was the result of their negligence in failing to erect and maintain guards, and give warning to travelers along the said sidewalk of the danger existing at that point.

The complaint further alleged that at the time of the said injury plaintiff and her said husband had one child, a son, of tender age, and that plaintiff and said child were supported by and were dependent upon the said William D. Rowe for their support and maintenance, and that, by his death, they had been deprived of the said means of support and maintenance, and thereby suffered damage.

Appellant in support of its demurrer first contends that the complaint is fatally defective, because of its failure to allege a compliance with the provisions of chapter 90, Laws of 1907. This chapter, so far as it pertains to this action, reads as follows: "No action for the recovery of damages for personal injury or death against any city or . . . town on account of its negligence shall be maintained unless written notice of the time, place and cause of injury is given to the clerk of the city or . . . town, by the person injured, his or her agent or attorney, within sixty days after the injury, and any action for such recovery must be commenced within two years from the occurrence of the accident causing the injury or death," etc.

This presents a question of some difficulty. It is conceded that this action can be maintained only by virtue of the statute. Therefore it must be prosecuted in the manner and under the conditions specified by the statute. It is contended by respondent, however, that the provision of this act, so far as it attempts to control the procedure in this action, is unconstitutional and void, and therefore a compliance with the terms thereof is not required. The title of the act is as follows: "An Act Entitled an Act Concerning Liability of Cities

and Towns for Personal Injuries, and Repealing All Acts and Parts of Acts in Conflict Herewith." It will be noted that the title of the act relates only to liability for "personal injuries," while the act itself attempts to include liability for "personal injury or death." The question for determination then becomes whether or not liability for personal injury also necessarily includes liability for death. Or, rather, whether or not the title pertaining to liability for personal injury is broad enough in its scope to include liability for death. After a careful consideration of the subject and an examination of the authorities relating thereto, we are forced to the conclusion that there is a broad distinction between the two classes of liability, and that the title of the statute in question is not broad enough in its scope to include the liability or cause of action set up in plaintiff's complaint. In the first place, the framers of the law themselves recognized the distinction; for, by the use of the term "or death" in the body of the act, they recognized that the term "personal injuries," as used in the title and in the body of the act, was not broad enough to include liability for death. It further appears from an examination of the body of the law that its authors did not intend nor contemplate that the law should apply to liability for death; because, in addition to providing for the giving of the notice mentioned, it also provided by whom the notice was to be given. It must be given "by the person injured, his or her agent or attorney, within sixty days after the injury." From this it is clear that the act applies only to liability for personal injury as distinguished from death, because it is only during the lifetime of the person injured that he could give the notice or that he could have an agent or attorney for that purpose. Of course, it is probable that in case of the death of the injured party the notice required could be given by the executor or administrator, if one were appointed in time, but no provision is made for such a contingency, and it is apparent from the law that its authors had no such contingency in mind. Again, the law requires that the action must be brought within "two years from the occurrence of the accident causing the injury or death." If this provision were applied in a case like the one at bar, where the death did not occur for more than two years after the injury, this law, if given the interpretation contended for by appellant, would be a complete bar to an action for the recovery of damages caused by death. Such an interpretation would lead to an absurdity, and the words "or death," where they ap-

pear in this act, must be held to be mere surplusage.

But, aside from anything appearing upon the face of the act, there is such a broad distinction between the cause of action growing out of a personal injury, as the term is used by the courts, and a cause of action growing out of death by negligence, that they constitute two different subjects, and an act, the title of which mentioned but one subject, could not be made to include the other; and an attempt to do so would violate § 21 of article 3 of the Constitution, and the same would therefore be void, so far as the act pertained to the subject not mentioned in the title. The elements that enter into the measure of damages in either case are entirely different from the elements that enter into the measure of damages in the other case. The cause of action growing out of a personal injury is one that results directly from the injury and in favor of the person who received the injury. The cause of action accrues during his lifetime, and he may recover for physical and mental suffering, for loss of time and loss of wages, and for such sums as he may have paid or become liable for medical and surgical attendance, nursing, etc., while, on the other hand, the cause of action accruing from death by negligence does not accrue until after the death, and is therefore in favor of some other party, usually the husband or wife and next of kin, and is limited to loss of means of support, loss of society, comfort, and care suffered by the plaintiff in the death of the decedent. While it is the duty of the court to uphold an act of the legislature wherever it can legally be done, the court cannot go to the extent of holding an act, or part of an act, to be valid, the subject of which is not mentioned in nor is within the scope of the title. *Metropolitan Casualty Ins. Co. v. Basford*, 31 S. D. 149, 139 N. W. 795. We are therefore of the opinion that the respondent is right in this contention.

It is further contended by the appellant that plaintiff cannot maintain this action in the capacity in which she is suing; that this action is governed by the provisions of chapter 301, Laws of 1909, and that it can be maintained only in the name of decedent's personal representative. The action is brought by plaintiff in her own name as the widow of the decedent, to recover for the loss of the "earnings, care, and support of the said William D. Rowe, her husband." The provisions of chapter 301, so far as it pertains to this case, read as follows:

"Section 1. Whenever the death of a person shall be caused by wrongful act, neglect L.R.A.1915E.

or default, and the act, neglect or default is such as would (if death had not ensued), have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the corporation which, or the person who, would have been liable, if death had not ensued, or the administrator or executor of the estate of such person as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony; and when the action is against such administrator or executor, the damages recovered shall be a valid claim against the estate of such deceased person."

"Section 3. Every such action shall be for the exclusive benefit of the wife or husband and children, or if there be neither of them, then of the parents and next of kin of the person whose death shall be so caused; and it shall be brought in the name of the personal representative of the deceased person; and in every action the jury may give such damages, not exceeding in any case ten thousand dollars (\$10,000), as they may think proportionate to the pecuniary injury resulting from such death to the persons respectively for whose benefit such action shall be brought. Every such action shall be commenced within three years after the death of such deceased person. . . ."

It is the contention of appellant that this chapter repeals and takes the place of § 746 of the Revised Code of Civil Procedure. While, on the other hand, it is contended by the respondent that said chapter does not repeal § 746; that said section is still in full force and effect and authorizes the maintenance of this action just as it is brought by the plaintiff; that chapter 301 and § 746 do not relate to the same subject, and that there is no conflict between the provisions of the two acts. With this contention we are unable to agree. While it is not true, as claimed by appellant, that chapter 301 expressly repeals § 746, both acts do relate to the same subject, and the provisions of the two acts relating to that subject are so different as to be inconsistent with each other; and therefore, by implication, the later act repeals the earlier. Respondent's contention is based upon the wording of the first part of § 1 of the act of 1909: "Whenever the death of a person shall be caused by wrongful act, . . . such as would (if death had not ensued), have entitled the party injured to maintain an action and recover damages in respect thereof, then . . . the person who would have

been liable, if death had not ensued, . . . shall be liable to an action for damages, notwithstanding the death of the person injured." It is contended that this language has reference to the cause of action that accrued in favor of the injured party before death, and that the effect of the act is merely to revive this right of action in the name of the personal representative of the injured party after his death. This contention is wrong. The language above quoted has reference to the negligent act that caused the death; not the cause of action that resulted from the negligent act.

There is the same difference between these two subjects that there is between the subjects mentioned in chapter 90 of the Laws of 1907. One relates to the cause of action growing out of the "personal injury" in favor of the person injured; while the other relates to the cause of action growing out of the death of the injured person in favor of someone who has suffered pecuniary loss because of the death. The distinction between these two causes of action is one that has been the cause of no little trouble to lawyers and to the courts as well. It was the subject of careful discussion by this court in the case of *Belding v. Black Hills & Ft. P. R. Co.* 3 S. D. 369, 53 N. W. 750, where the difference is made plain, and nothing would be gained by a repetition of the discussion here. It is clear that the cause of action referred to in § 1 of the act of 1909 is the same as the one provided for in § 746, Code Civ. Proc. This also is the action referred to in § 3 of the act of 1909, and it must be brought in the name of the personal representative of the decedent,—i. e., the executor or administrator of his estate,—and it must appear by affirmative allegation in the complaint that the plaintiff is suing in that capacity. The complaint contains no such allegation; and, for that reason, it fails to show that Jessie Rowe has capacity to maintain the action, and the demurrer should have been sustained on the ground that there is a "defect of parties plaintiff." The action, being one of purely statutory origin, can be maintained only in the manner and under the conditions named in the statute. *Weidner v. Rankin*, 26 Ohio St. 522; *Wilson v. Bumstead*, 12 Neb. 1, 10 N. W. 411; *Mowry v. Chaney*, 43 Iowa, 609; *Kramer v. San Francisco Market Street R. Co.* 25 Cal. 434; *Major v. Burlington, C. R. & N. R. Co.* 115 Iowa, 309, 88 N. W. 815; *Barker v. Hannibal & St. J. R. Co.* 91 Mo. 86, 14 S. W. 281; *Hyde v. Wabash, St. L. & P. R. Co.* 61 Iowa, 441, 47 Am. Rep. 820, 16 N. W. 351; *Aho v. Republic Iron & Steel Co.* 104 Minn. 322, 116 N. W. 591; L.R.A.1915E.

Aho v. Jesmore, 101 Minn. 449, 10 L.R.A. (N.S.) 998, 112 N. W. 538. And the amount of recovery is limited to \$10,000.

While not necessary to a decision in this case; in order to prevent confusion in the future relative to the cause of action growing out of injuries to the person and the cause of action based upon death by negligence, it might be well to state that these two causes of action do not conflict with each other; nor do they merge upon the death of the injured party; neither is the prosecution or satisfaction of either a bar to the prosecution and recovery on the other. Where a person has been injured by the negligent act of another, he may maintain an action for such damage as he has suffered. If, pending the action, death should occur, the action may be revived after his death by his personal representative. If the action were not commenced during the lifetime of the injured party, his personal representative could bring the action and recover the injuries decedent suffered during his lifetime, and the amount so recovered would become a part of the general assets of his estate and would be disbursed and distributed in the same manner as other assets of the estate. The maintenance of and recovery in this action would in no wise interfere with the right of recovery by the dependents or heirs of the decedent, though, under the law as it now exists, the action for the recovery of such damages could be maintained only in the name of the personal representative. The proceeds of such a judgment, however, when collected, would not become a part of the assets of the estate nor be subject to any claims against the estate, but would be paid to said personal representative merely as a trustee, for the benefit of the dependents entitled thereto, under the order of the court in which the judgment was recovered. This doctrine has been criticized on the ground that it allows a double recovery for the same injury. The criticism is not warranted, however; for, while the injury in both cases is caused primarily by the same negligent act, two distinct classes of damages result therefrom, one in favor of the injured party for loss of time, for mental and physical pain and suffering, expenses incurred for medical and surgical attendance, nursing, etc., and the other in favor of some third party, such as husband, wife, or heir, for such pecuniary loss as they may have suffered (*Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L.R.A. 283, 13 S. W. 801); and for an extensive discussion of this entire branch of the case see *Hulbert v. Topeka* (C. C.) 34 Fed. 510; *Needham v. Grand Trunk R. Co.* 38 Vt. 294; *Brown v. Chicago & N. W.*

R. Co. 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255.

It is also urged by appellant that there are several causes of action improperly joined; that there is a defect of parties defendant, and that the complaint does not state a cause of action.

There is but one cause of action stated, to wit, the negligent killing of plaintiff's intestate. Neither is there a defect of parties defendant. If the complaint states a cause of action against the appellant, that is sufficient. It is immaterial to it how many other defendants may be joined with it, as a "surplus of parties" does not constitute a "defect of parties." *Mader v. Plano Mfg. Co.* 17 S. D. 553, 97 N. W. 843. If the complaint alleges a liability against some party not made a defendant, then there would be a defect of parties defendant, under the provisions of § 120, Code of Civil Procedure.

Whether the complaint states a cause of action against the appellant or not depends upon the amount of care that must be exercised by the officers of a city to keep its streets and sidewalks in such condition that they can be used by people in the ordinary and proper manner without danger of being injured. In this case, after a very careful examination of the question, we are inclined to take the view that the complaint states facts sufficient to show a liability against the appellant, though the action can be maintained only in the name of decedent's personal representative. It is alleged in the complaint, and it is a matter of law in this state, of which the court will take judicial notice, that the city has practically unlimited control over its streets and sidewalks, subject, of course, to the use for which they are created. It is given all necessary power to exercise this control, as well as the right to prescribe its own rules and regulations for the exercise of said power. No other person, body, or public agency has any jurisdiction in regard to them, and "this power conferred upon it by the legislature, together with the necessary means for the proper execution of the same, carries with it the corresponding duty. . . . It is incumbent on the city having full control of the streets therein and of the improvement thereof to keep them in a reasonably safe condition; and, if it neglects to do so, it will be liable for injuries happening by reason of its negligence." *Larson v. Grand Forks*, 3 Dak. 307, 19 N. W. 414. "A municipal corporation owes a duty to those who use its streets to exercise ordinary care to make them safe for passage." *Anderson v. East*, 117 Ind. 126, 2 L.R.A. 712, L.R.A.1915E.

10 Am. St. Rep. 35, 19 N. E. 726. In this case, it is true, the wall causing the injury was on private property. It did not encroach upon nor overhang the sidewalk, but it was in such proximity to the sidewalk that, if it fell and fell in that direction, it was bound to fall upon the sidewalk, and to injure any person who might be passing at the time. The city had granted a permit to the owners of the property to erect the wall, and therefore must be charged with knowledge that it was in course of construction. *Indianapolis v. Doherty*, 71 Ind. 5. This imposed upon the city the duty of placing proper guards or obstructions across the sidewalk, at either extremity of the wall, that would prevent people from passing along the sidewalk at that place while the wall was in course of construction. In this case the complaint alleges that the wall was so poorly and unskillfully constructed that it was unable to carry its own weight, and that by reason thereof it was a public nuisance and a menace to all people using the sidewalk at that particular place, and that it was the duty of the city to have caused the removal thereof before the injury was caused. But, regardless of the efficiency or inefficiency of the wall, it was the duty of the city to erect and maintain such warnings and obstructions across the sidewalk as would prevent people from using it at that particular place for the time being. In addition to the danger that a wall will fall of its own weight, which, in most cases, would be very remote, there is always more or less danger of objects, such as tools, materials, etc., falling from the top of the wall while work is being done thereon, and inflicting injury on whomsoever may be passing by at that particular time.

The fact that the wall did not project into the street nor upon the sidewalk does not in any wise change the rule, nor reduce the degree of care imposed upon the city to keep its streets and sidewalks in a reasonably safe condition. In *Langan v. Atchison*, 35 Kan. 318, 57 Am. Rep. 165, 11 Pac. 38, the plaintiff was injured by the falling of a billboard that blew over and struck him while passing along one of the sidewalks in the city. The billboard had been erected on private property adjacent to the sidewalk, and without permission from the city. The court held that the city was negligent in permitting the billboard constructed as it was to remain near enough to the sidewalk to injure a person passing along when it fell. In *Kiley v. Kansas City*, 69 Mo. 102, 33 Am. Rep. 491, a wall standing on private property adjacent to a city street fell over and killed a child who was standing some dis-

tance from the street. The wall was known to be in a dangerous condition, and the city had the power to declare the wall a nuisance and to demolish the same. The court held that in permitting the wall to remain in its unsafe condition the city was negligent, and was liable for the damages caused by the falling of the wall. In *Grove v. Ft. Wayne*, 45 Ind. 429, 15 Am. Rep. 262, the plaintiff was injured by the falling of the cornice of a wall, so built as to overhang the sidewalk. The court held that the city was negligent in permitting the cornice to be so constructed as to endanger persons using the sidewalk, and by reason of such negligence the city was liable for the injury so caused. In its opinion the court quotes with approval the following from *Parker v. Macon*, 39 Ga. 725, 99 Am. Dec. 486: "As the charter of the city of Macon confers upon the mayor and council full power and authority to keep the streets, lanes, alleys, sidewalks, and public squares of the city in good order, and to remove any buildings, posts, steps, fences, or other obstructions or nuisance, which is a power conferred upon public officers for the public good, it is their duty to exercise it, and to keep the streets, lanes, alleys, and sidewalks in such condition that persons passing over or along them may do so with safety and convenience. To this end it is the duty of the city authorities to remove any nuisance from the streets or sidewalks; and anything that endangers the life of a person passing along the sidewalk is a nuisance which they are bound to abate. As, for instance, a deep pit dug by the sidewalk so near it that a person passing along the street at night is in danger, by a misstep, of falling into it; anything hanging over the street in such a manner that it may fall upon a person passing and do him a serious injury. But it is insisted in this case that the wall, being private property, at the edge of the sidewalk, was not embraced within the objects which the charter gives the city authorities power to remove, as it was not in the street or sidewalk. We think this too narrow a view of the subject. If the city is bound to fill up a pit dug by the edge of the sidewalk, or to fence it off, so that no one may be injured by it, or to remove anything hanging over the sidewalk, which may work injury to those passing by, why is it not bound to remove a crumbling wall standing so near the sidewalk as to fall upon it? In this case the wall was two stories high, and had stood exposed to the weather for several months after the house was burnt. It was immediately upon the edge of the sidewalk, and could not fall in that direction without falling upon it. L.R.A.1915E.

And the declaration alleges that it was from its character and position insecure, and endangered the lives of passengers upon the street. If so, it was a nuisance, which it was the duty of the mayor and council to take the necessary steps to abate, and having failed to do so they are liable for the damages." We agree with the views expressed in these cases and others on the same subject, but space forbids a review of them all. For a general discussion of the whole subject relating to the liability of a municipal corporation for injuries caused by their failure to keep their streets and sidewalks in a reasonably safe condition for people who wish to use them, see *Waller v. Ross*, 100 Minn. 7. 12 L.R.A.(N.S.) 721, 117 Am. St. Rep. 661. 110 N. W. 252, 10 Ann. Cas. 715, 21 Am. Neg. Rep. 166; and notes appended to *McKim v. Philadelphia*, 19 L.R.A.(N.S.) 506-525, and *Elam v. Mt. Sterling*, 20 L.R.A.(N.S.) 512 to 769, inclusive.

For the failure to show that plaintiff has capacity to sue, the demurrer should have been sustained, and the order overruling the same is reversed.

SOUTH DAKOTA SUPREME COURT.

JESSIE ROWE, Resp't.,

v.

O. H. RICHARDS et al., Appts.

(— S. D. —, 151 N. W. 1001.)

Death — release by person injured — action for next of kin.

A release by a person injured by another's negligence of all damages occasioned by the negligent act does not prevent an action after his death for the benefit of his widow and children under a statute providing that whenever the death of a person shall be caused by wrongful act such as would, if death had not ensued, have entitled the injured person to recover damages, the one who would have been liable if death had not ensued shall be liable, notwithstanding the death, in an action for the benefit of the next of kin for damages such as the jury may think proportionate to the pecuniary injury resulting to the

Note. — The general question as to several actions for death, or injury causing death, is treated in the note following this case, post, 1095. The specific question as to the effect of a release by the injured person upon the right to recover under the statute for his death is treated in the notes to *Louisville R. Co. v. Taylor*, 27 L.R.A.(N.S.) 176, and *State use of Melitch v. United R. & Electric Co.* post, 1163.

persons for whose benefit the action is brought.

(Smith and Gates, JJ., dissent.)

(March 27, 1915.)

APPEAL by defendants from an order of the Circuit Court for Codington County sustaining a demurrer to the answer in an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendants' negligent acts. Affirmed.

The facts are stated in the opinion.

Messrs. McFarland & Johnson, for appellants:

This action of plaintiff is purely statutory, based on chapter 301, Laws of 1909.

Belding v. Black Hills & Ft. P. R. Co. 3 S. D. 369, 53 N. W. 750; Aho v. Jesmore, 101 Minn. 449, 10 L.R.A.(N.S.) 998, 112 N. W. 538; Aho v. Republic Iron & S. Co. 104 Minn. 322, 116 N. W. 591; Nash v. Tousley, 28 Minn. 5, 8 N. W. 875; Schefler v. Minneapolis & St. L. R. Co. 32 Minn. 125, 19 N. W. 656; Harshman v. Northern P. R. Co. 14 N. D. 69, 103 N. W. 412; Whiton v. Chicago & N. W. R. Co. 21 Wis. 310; Rowe v. Richards, 32 S. D. 66, ante, 1069, 142 N. W. 664.

A settlement by the injured person of his claim against a tortfeasor for damages caused thereby is a bar to any subsequent action by his personal representative for his death because of such injuries.

Cooley, Torts, 2d ed. p. 309; 8 Am. & Eng. Enc. Law, 2d ed. 870; Littlewood v. New York, 89 N. Y. 24, 42 Am. Rep. 271; Sawyer v. Perry, 88 Me. 42, 33 Atl. 660, 15 Am. Neg. Cas. 291; Lubrano v. Atlantic Mills, 19 R. I. 129, 34 L.R.A. 797, 32 Atl. 207; Whitford v. Panama R. Co. 23 N. Y. 465; Legg v. Britton, 64 Vt. 652, 24 Atl. 1016; Pink v. Garman, 40 Pa. 103; Hill v. Pennsylvania R. Co. 178 Pa. 223, 35 L.R.A. 196, 56 Am. St. Rep. 754, 35 Atl. 997; Hecht v. Ohio & M. R. Co. 132 Ind. 507, 32 N. E. 302; Fowlkes v. Nashville & D. R. Co. 9 Heisk. 829; Holton v. Daly, 106 Ill. 131; Walkerton v. Erdman, 23 Can. S. C. 352; Price v. Richmond & D. R. Co. 33 S. C. 556, 26 Am. St. Rep. 700, 12 S. E. 414; Sweetland v. Chicago & G. T. R. Co. 117 Mich. 329, 43 L.R.A. 568, 75 N. W. 1066, 4 Am. Neg. Rep. 648; Brown v. Chicago & N. W. R. Co. 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 773, 5 Am. Neg. Rep. 255; Southern Bell Teleph. & Teleg. Co. v. Cassin, 111 Ga. 575, 50 L.R.A. 694, 36 S. E. 881; Louisville R. Co. v. Raymond (Louisville R. Co. v. Taylor), 135 Ky. 738, 27 L.R.A.(N.S.) 176, 123 S. W. 281.

Messrs. Sherin & Sherin, for respondent:
L.R.A.1915E.

Under the so-called death act and the so-called survival act, two separate causes of action are given,—one to the representative for the benefit of the estate for either the death of the decedent, or for the pain and suffering endured by him, and for expenses occasioned by his injury before it resulted in his death, and one for the death, by the representative or next of kin, for the benefit of the next of kin, rather than for the estate of the decedent.

Mahoning Valley R. Co. v. Van Alstine, 77 Ohio St. 395, 14 L.R.A.(N.S.) 893, 83 N. E. 601; Leggett v. Great Northern R. Co. L. R. 1 Q. B. Div. 599, 45 L. J. Q. B. N. S. 557, 35 L. T. N. S. 334, 24 Week. Rep. 784; Bradshaw v. Lancashire & Y. R. Co. L. R. 10 C. P. 189, 44 L. J. C. P. N. S. 148, 31 L. T. N. S. 847, 23 Week. Rep. 310; Robinson v. Canadian P. R. Co. [1892] A. C. 481, 61 L. J. P. C. N. S. 79, 67 L. T. N. S. 505; Whitford v. Panama R. Co. 23 N. Y. 465; Vicksburg & M. R. Co. v. Phillips, 64 Miss. 693, 2 So. 537; Putman v. Southern P. Co. 21 Or. 230, 27 Pac. 1033; Davis v. St. Louis, I. M. & S. R. Co. 53 Ark. 117, 7 L.R.A. 283, 13 S. W. 801; Belding v. Black Hills & Ft. P. R. Co. 3 S. D. 369, 53 N. W. 750; Hedrick v. Ilwaco R. & Nav. Co. 4 Wash. 400, 30 Pac. 714; Bowes v. Boston, 155 Mass. 344, 15 L.R.A. 365, 29 N. E. 633; Brown v. Chicago & N. W. R. Co. 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255; Hulbert v. Topeka, 34 Fed. 510; Needham v. Grand Trunk R. Co. 38 Vt. 294; Stewart v. United Electric Light & P. Co. 8 L.R.A. 385, and note, 104 Md. 332, 118 Am. St. Rep. 410, 65 Atl. 49; Louisville & N. R. Co. v. McElwain, 34 L.R.A. 788, and note, 98 Ky. 700, 56 Am. St. Rep. 385, 34 S. W. 236; Mageau v. Great Northern R. Co. 102 Minn. 290, 15 L.R.A.(N.S.) 511, 115 N. W. 651, 946, 14 Ann. Cas. 551.

Whiting, J., delivered the opinion of the court:

Plaintiff, the widow of one Wm. D. Rowe, and the administratrix of his estate, brought this action, under the provisions of chapter 301, Laws 1909, and sought to recover damages which she and her child, as widow and surviving child, suffered through the death of the husband and father, which death was alleged to have been occasioned by the negligent acts of defendants. Defendants alleged that the deceased, after receiving the injury from which he afterwards died, settled for such injury with one of the defendants, and executed a full release of all damages occasioned by the alleged negligent acts. This allegation of the answer was demurred to; the demurrer was sustained; and it is from

the order sustaining same that this appeal was taken. The sole question presented to us is: Does such settlement with, and release by, the deceased, bar the right to bring this action?

This cause has been before us upon a former appeal; our opinion upon the questions then raised being found in *Rowe v. Richards*, 32 S. D. 66, ante, 1069, 142 N. W. 664. In such opinion will be found the following statement without the present italicizing: "*While not necessary to a decision in this case*, in order to prevent confusion in the future relative to the cause of action growing out of injuries to the person and the cause of action based upon death by negligence, it might be well to state that these two causes of action do not conflict with each other, nor do they merge upon the death of the injured parties; *neither is the prosecution or satisfaction of either a bar to the prosecution and recovery on the other.*"

Appellants contend that, owing to the fact that it was unnecessary for this court to make the above statement and adopt the rule therein announced in order to determine the questions then before us, what was so stated did not become the law of this case, and they urge upon us a further consideration of the question now presented. We welcome this opportunity of giving to this question that full consideration and discussion which its importance demands, not, however, conceding that it did not receive a very full and careful consideration at the time this cause was before us upon the former appeal.

Chapter 301, Laws 1909, is almost identical in language with statutes to be found in most of the states, which statutes are commonly designated as Lord Campbell Acts, in recognition of the fact that they are all copied more or less closely after the original English statute known as the Lord Campbell act. Out statute, so far as material to our present discussion, is as follows:

"Section 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued), have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the corporation which, or the person who, would have been liable, if death had not ensued, . . . shall be liable to an action for damages, notwithstanding the death of the person injured. . . .

"Section 3. Every such action shall be for the exclusive benefit of the wife or husband and children, or if there be neither of them, then of the parents and next of kin of the person whose death shall be so L.R.A.1915E.

caused; and it shall be brought in the name of the personal representative of the deceased person; and in every action the jury may give such damages, not exceeding in any case ten thousand dollars (\$10,000), as they may think proportionate to the pecuniary injury resulting from such death to the persons respectively for whose benefit such action shall be brought."

Appellants quote from the note found in 27 L.R.A.(N.S.) 176, in support of the claim that their contention is "supported . . . by all the cases that we have been able to find, where the precise question was raised under a statute similar to our chapter 301." It must be acknowledged that a large number, and perhaps a majority, of the cases wherein this precise question was under consideration, have held in accord with appellants' view, but to so acknowledge comes far short of conceding that the weight of authority supports such view; one holding, backed by reasoning that is cogent, may be sufficient to outweigh any number of opinions wherein the argument, even though forcible, lacks that convincing power that forces conviction. To our minds, in every case wherein the court, construing a statute similar to ours, has held that an injured party could release the wrongdoer from any liability for damages that might result to his next of kin from his death, the reasoning of the court, so far, at least, as it bore upon this particular question, lacks both in cogency and logic. It will be our endeavor herein, not to take up each case so holding and point out wherein the reasoning is open to criticism, but, starting as a premise from one proposition upon which the vast majority of the courts and law writers are agreed, to demonstrate, not only the correctness of such premise, but, through a course of reasoning which it seems to us possesses at least the elements of cogency, to demonstrate the correctness of the statement quoted from our former opinion.

Preliminary to such discussion, and to throw some light upon the intent of the legislative bodies when passing these statutes, it may be of interest to inquire into the conditions that gave rise to such statutes. Why was it found necessary, either in this country or England, to enact any statute such as the one before us? It was because of the fact that during the evolution of that great and, in most respects, grand body of established law evolved by the early jurists of these countries, such jurists were obsessed with the idea that a money value could not be placed upon human life; and it followed that, inasmuch as there can be no legal injury where there is no recognizable damage therefor, the courts held, as

stated by Lord Ellenborough in *Baker v. Bolton*, 1 Campb. 493: "In a civil court the death of a human being cannot be complained of as an injury." While it would be the limit of absurdity to say that any person could have a right of action for his own death, yet it was just as absurd to say that damages flowing from an injury which a wife or child may suffer through the loss of the husband's or father's support was incapable of proof in a court of justice merely because such loss of support resulted from the death of such husband or father. As is well said in *Cooley on Torts*, 26: "It . . . [is] remarkable that the common law . . . should not have allowed the damages suffered by others from an unlawful killing to be recovered. The interest which husband and wife possess in each other's life must usually have a pecuniary value which would be estimated for many purposes at a large sum in the dealings with others. . . . Why should not the money value of his life, when it has been taken away by unlawful act or negligence, be a right of action in the hands of his representatives?"

With the evolution of modern industry, resulting, as it did, in frequent deaths from negligence, the injustice of the rule of the common law became impressed upon the leaders of thought, and, from a realization of its injustice to a recognition of the utter unsoundness of the reasons urged in support thereof was but a short and natural step. The thinking mind could not help but recognize that the then established rule presented "a glaring absurdity in allowing a husband and father, if injured, but not killed, a right of action for the recovery of the damages thus sustained, and denying to his widow and children any compensation for the damages inflicted upon them should the injury be greater and result in his death." *Maney v. Chicago, B. & Q. R. Co.* 49 Ill. App. 105.

In discussing this situation, the court, in *Van Amburg v. Vicksburg, S. & P. R. Co.* 37 La. Ann. 650, 55 Am. Rep. 517, well said: "Legislation and jurisprudence have combined to perpetuate the extraordinary doctrine that the life of a free man cannot be made the subject of valuation, and under the domination of that dogmatic utterance, made earlier than the Roman Digest, reproduced therein, and echoed by the courts of all countries from then till now, the singular spectacle has been witnessed of courts sanctioning damages for shortlived pains, and refusing them for a life-long sorrow and the pecuniary losses consequent upon the death of one from whom was derived support, comfort, and even the necessary

stays of life. Legislation has at last come to the relief of future sufferers."

In speaking of such legislation, the court, in *Maney v. Chicago, B. & Q. R. Co.* supra, said: "The enactment of the statute under consideration established the doctrine that the wife and next of kin and each of them had a property right and financial interest in the life of the husband and relative. Prior to its enactment this property or financial interest was not recognized by the law, and no award of compensation for its loss was permitted. Thus a new right of action was created in favor of persons who before had neither right, cause of action, or remedy. If we are right thus far, the wife and children of Daniel Maney, by the operation and effect of the statute, had a financial property interest in the continuation of his life. It did not flow from, nor was it based upon, the desire or consent of Daniel Maney. As husband and father, the law charged him, while living, with the performance of certain duties in their behalf and for their benefit. The duties arose out of marital and parental relations, were created by law, out of consideration of public policy, existed wholly without regard to the will of the husband, and were legally enforceable in his lifetime against him and his property. It was a substantial, subsisting right in favor of his wife and children, available to them during the continuation of his life. Prior to this enactment it ceased at his death. By the enactment the right was kept alive, if his death be occasioned by the wrongful act, neglect, or default of another, and a remedy provided for its enforcement against the party so causing his death. Neither argument nor authority would seem to be necessary to sustain the view that the widow and next of kin cannot be deprived of the property right so created and vested in them at the will or pleasure or by the contract of another, though he be the party charged with the performance of duties out of which the right grew."

Regardless of their views upon other questions arising in actions based upon statutes such as the one before us, the courts almost uniformly hold that the statutes which give, on behalf of the next of kin, an action for an injury occasioned by the death of one killed, create a new cause of action separate and distinct from, and not a continuation of, the common-law cause of action given a party for his own physical injury. Judge Denio, in his opinion in *Whitford v. Panama R. Co.* 23 N. Y. 465, said of this statutory action: "But the suggestion that the present action is brought to enforce the right which the common law gave to the deceased, and that the provisions of our statute should be consid-

ered as affecting only the remedy, . . . is not, in my opinion, sound; for it is not a simple devolution of a cause of action which the deceased would have had which the statute effects, but it is an entirely new cause of action which is here sought to be enforced. The system of the statute, as well as of the common law, is that the right of action for damages on account of his bodily injuries which belonged to the deceased while he lived was extinguished by his death. The statute does not profess to revive his cause of action in favor of the executor or administrator. The compensation for the bodily injuries remains extinct, but a new grievance of a distinct nature, namely, the deprivation suffered by the wife and children, or other relatives, of their natural support and protection, arises upon his death, and is made by the statute the subject of a new cause of action in favor of these surviving relatives, but to be prosecuted in point of form by the executor or administrator."

In *Pittsburgh, C. C. & St. L. R. Co. v. Hosea*, 152 Ind. 412, 53 N. E. 419, the court said: "The statute expressly recognizes that, when death ensues from a wrongful act, the next of kin are the persons damaged, and the action is given to compensate them for the damages sustained thereby. In no sense can the action given by statute be said to be the same as that resting in the intestate before his death, further than that the source is the same. In the former the right comes by the common law; in the latter by statute. In the former the elements of damage that were recoverable were for bodily pain and suffering, loss of time and health, and expenses incurred in providing medical attendance and nursing; in the latter the damages are confined to pecuniary loss. To the widow is allowed, for example, the amount of damages sustained by her in the loss of such support as she was receiving, and was likely to receive, from her husband, to be measured by his present and prospective earnings, less the sum required for his personal support and other family obligations. To his child is allowed, not only for the loss of his support during infancy, but also for the loss of parental care and training."

In *Mahoning Valley R. Co. v. Van Alstine*, 77 Ohio St. 395, 14 L.R.A. (N.S.) 893, 83 N. E. 801, the court said: "It is manifest from the foregoing that the revived action and the later action are not the same. They rest primarily upon the same alleged negligence of the defendant and the same absence of contributory negligence of the injured person; but in the revived action the damages are for personal injuries to the injured person for which an

action would lie if death had not ensued, and such damages to inure when recovered to the benefit of the estate, while in the later action the suit is prosecuted in the interest of other parties, and the measure of damages is the pecuniary loss they have sustained by the death. In the later case death gives the right of action under the statute, while, had the pending action not been susceptible of being revived, the death would have terminated the right to recover in the interest of the estate."

In *Brown v. Chicago & N. W. R. Co.* 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 5 Am. Neg. Rep. 255, the court said: "But, . . . as before observed, the language of the two provisions is plain. They refer to entirely distinct losses recoverable in different rights: the one in the right of the deceased for the loss occasioned to him; the other in the right of the surviving relatives for the loss to them. Both are dependent on the injury, but only one dependent on the death with surviving relatives to take under the statute."

To the same effect are the opinions in the following cases: *Putman v. Southern P. Co.* 21 Or. 230, 27 Pac. 1033; *Missouri P. R. Co. v. Bennett*, 5 Kan. App. 231, 47 Pac. 183; *Maney v. Chicago, B. & Q. R. Co.* 49 Ill. App. 105; *Hurst v. Detroit City R. Co.* 84 Mich. 539, 48 N. W. 44; *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693, 2 So. 537; *Bowes v. Boston*, 155 Mass. 344, 15 L.R.A. 365, 29 N. E. 633. See also 1 C. J. 198, and the numerous cases cited in notes 98 and 99.

But we are reminded that our statute and that of various other states are almost verbatim copies of the original Lord Campbell's act; and we are especially reminded that such statutes have retained the phrase "notwithstanding the death of the party injured," and that they omit to specifically declare that the action which can be brought thereunder is one "for the death" of such injured party. It seems to be contended that, where the first only of these phrases is used, there is shown an intent to create a survival statute under which the cause of action which the common law gave to a party suffering an injury through the wrong or negligence of another would survive, and a right of action therefor be given for the benefit of certain survivors; but that, where the second or some equivalent phrase is used in the statute, there is shown an intent to create an entirely new cause of action on behalf of such survivors. No such distinction, based upon the use or the failure to use the first of such phrases, has ever been recognized by any court so far as we have been able to learn, and certainly none is justified.

We may well stop to inquire why it is that anyone should fail to recognize that statutes like ours create a new cause of action. We may also well ask why it is that the various courts of our land, while not making the mistake of holding that such a statute does not create a new cause of action, yet differ so radically in their views relative to matters merely incident to the causes of action. We are constrained to believe that the explanation is to be found in the failure to keep carefully in mind the various elements going to make up the particular cause of action contemplated by the statute, and therefore a failure to recognize that, in the cause of action contemplated by the statute, there are one or more elements which, in their very nature, distinguish such cause of action and its incidents from that cause of action which the common law gave to the party who suffered the physical injury. While the phrase "cause of action" is often used as synonymous with "right of action," and is even used when it is the "subject-matter" in litigation that is referred to, yet we think its true meaning is clear. It has been frequently stated that a "cause of action" consists of the right belonging to one person and some wrongful act or omission by another by which that right has been violated. *Veeder v. Baker*, 83 N. Y. 156; *Goodrich v. Alfred*, 72 Conn. 257, 43 Atl. 1041; *Kennerly v. Etiwan Phosphate Co.* 21 S. C. 226, 53 Am. Rep. 669; *Mercantile Trust & D. Co. v. Roanoke & S. R. Co.* (C. C.) 109 Fed. 3; *Atchison, T. & S. F. R. Co. v. Rice*, 36 Kan. 593, 14 Pac. 229; *McKee v. Dodd*, 152 Cal. 637, 14 L.R.A. (N.S.) 780, 125 Am. St. Rep. 82, 93 Pac. 854. *Pomeroy*, in his *Code Remedies*, 4th ed. § 347, and in his *Remedies & Remedial Rights*, 2d ed. § 453, with his usual clearness and exactness, says (the italicizing being ours): "Every remedial right arises out of an antecedent primary right and corresponding duty and a delict or breach of such primary right and duty by the person on whom the duty rests. Every judicial action must therefore involve the following elements: A *primary right* possessed by the plaintiff, and a corresponding *primary duty* devolving upon the defendant; a *delict or wrong* done by the defendant which consisted in a *breach* of such *primary right and duty*; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict; and, finally, the remedy or relief itself. Every action, however complicated, or however simple, must contain these essential elements. Of these elements the *primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term, and* L.R.A.1915E.

as it is used in the Codes of the several states. They are the legal cause or foundation whence the right of action springs; this right of action being identical with the 'remedial right' as designated in my analysis. In accordance with the principles of pleading adopted in the new American system the existence of a legal right in an abstract form is never alleged by the plaintiff; but, instead thereof, the facts from which that right arises are set forth, and the right itself is inferred therefrom. The cause of action, as it appears in the complaint when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong."

Judge Cooley, in the case of *Post v. Campau*, 42 Mich. 96, 3 N. W. 275, said: "The elements of a cause of action are: First, a breach of duty owing by one person to another; and, second, a damage resulting to the other from the breach. Damage, where no duty is violated, is *damnum absque injuria*. A neglect of duty, where no loss occurs, is equally incapable of giving a right of action."

There can be no breach of duty by one person except there be a corresponding right belonging to some other person; so that there is in reality no difference between the several definitions. Judge Cooley calls attention to damage as a necessary element in a "cause of action," but, as the violation of a legal right produces a legal injury from which damage is presumed to flow, the difference between such definitions is more apparent than real. One thing that should never be lost sight of is that "The *cause of the injury* upon which the right of action is founded is not the 'cause of action' itself, but is only one element in the cause of action." *Parris v. Atlanta, K. & N. R. Co.* 128 Ga. 434, 57 S. E. 692.

This fact seems to have been lost sight of by those courts which have held that there could be but one recovery for one wrong,—"one wrongful act." Just as it is a law of physics that, when one of the elements which go to make up a compound is changed for another, a new compound is created, so it is true that, whenever one of the elements going to make up a given cause of action is replaced by a new element, the original cause of action ceases to exist, and another, a separate and distinct, cause of action, comes into existence. Keeping this fundamental truth in view, let us separate into their elements the two "causes of action,"—one the cause of action recognized at common law; the other the one given by chapter 301, Laws 1909, *supra*.

Every person has an inherent right to personal, physical safety; upon every other person rests the duty to respect such inherent right; a person may be guilty of any number of negligent or unlawful acts, either of commission or omission, yet, if by the same he does not violate someone's right to personal safety, he has not violated his duty toward that other person, and his acts do not enter into, or become an element of, any "cause of action;" but whenever, by any such act, he does violate that duty which he owes to some other person, and the right of such other is infringed, he brings into existence the third element, which, uniting with the other elements,—the right and the duty,—creates the "cause of action" one recognized by the common law.

What of the elements going to make up a "cause of action" under said chapter 301? There cannot be found in § 1 thereof a single word which indicates or points out what "damages" the defendant shall be liable for in the "action for damages" therein mentioned—whether it shall be for some damages known to the common law or for some damages for the first time recognized by such statute itself; § 1 provides certain things in relation to the "cause of the injury" that must be established as a condition precedent to any recovery under such statute, but it is to § 3 of our statute and to § 2 of the original Lord Campbell act that one must look to determine whether the statute merely gives a right of action for a cause of action known to the common law, and is therefore a survival statute, or whether it creates a new cause of action separate and distinct from any known to the common law, thus rendering such statute in no sense a survival statute. As stated by Judge Cooley, "damage" is one of the necessary elements in a cause of action; from the "damage" which is recoverable one can always determine whose "primary right" it is the breach of which gives rise to a "cause of action." Thus, in § 3 of our statute we find that the damages which § 1 says the wrongdoer shall be liable to an action for are damages "proportionate to the pecuniary injury resulting from such death to the persons respectively for whose benefit such action shall be brought." What plainer language could be used to show that it is the damages suffered by the survivors through the violation of their "primary right" that are to be recovered? In other words, that the "cause of action" for which recovery is to be had is one based upon the breach of the duty the wrongdoer owed such survivors,—a cause of action distinct and separate from that which the injured party could have main-

tained, having but one thing in common with the other cause of action,—the cause of the injury, the wrongful act, being the same in each case; a cause of action as clearly "for the death" of the party who received the physical injury as though such phrase was contained in our statute; the "primary right" violated is entirely distinct and different from the primary right of the party receiving the physical injury, whose primary right was also violated by the same wrongful act; the damages resulting from the violation of the survivors' primary right are not even composed of the same elements as those found in the cause of action resulting from the violation of the primary right of the deceased; in the one case the damage recoverable is that suffered or yet to be suffered by the party receiving the physical injury, and is therefore restricted to a time which must terminate at his death; in the other case the damage recoverable is limited to that suffered after, but owing to, the death of the one receiving the physical injury. What primary right of the survivor has been violated? Take the case of the surviving wife. One of the recognized legal rights of a wife—a right flowing from, and incident to, the marital relation—is the right to support and maintenance by her husband; to such support and maintenance she is entitled until death shall sever such marital relation; the corresponding duty of the husband to support and maintain his wife is dependent upon the continuance of his life; hence it is the further right of the wife that such duty shall not be terminated by the wrongful act of another; it follows that there is a legal duty resting upon every person not to deprive such wife of the support and maintenance of her husband by any wrongful act—by the abduction of such husband, by the alienation of his affections, resulting in estrangement and separation from his wife, or by an act that deprives him of his life. Whenever this right of the wife to the support of her husband is violated through the death of the husband, occasioned by some wrongful act of a third party, there exist the several necessary elements—the right, the duty, the infringement of one by the wrongful violation of the other—which, uniting, create a cause of action; one, however, unknown to the law, except where by statute the law recognized that there could be a legal damage,—one measurable in money, resulting from the death of a human being. It therefore follows that, under the definitions of "cause of action" as given by Cooley and Pomeroy, and universally accepted by the courts of our land, this "cause of action" recognized and given by § 3 of our statute.

is a new cause of action. The cause of the two injuries—that to the husband and that to the wife—is, as hereinbefore noted, the same,—the one wrongful or negligent act; but the right violated in the one case is entirely different from the right violated in the other case.

There are, however, states having statutes containing § 1 of the Lord Campbell act, some having, and others not having, sections similar to our § 3, which have provisions therein giving a right to the personal representatives of the party who received the physical injury to recover the very damages which the deceased might have recovered; in other words, provisions giving a right of action where one was unknown to the common law for a cause of action which was known to the common law; wherever such provisions are found, the statutes are, to the extent of the cause of action covered by such provisions, survival statutes, though, if they also contain provisions such as are found in our § 3, they also create a new cause of action in addition to giving a new right of action for an old cause of action.

We must confess our inability to grasp the logic of any course of so-called reasoning through which the conclusion is drawn that the husband, simply because he may live to suffer from a physical injury and thus become vested with a cause of action for the violation of his own personal right, has an implied power to release a cause of action, one which has not then accrued; one which may never accrue; one which, from its very nature, cannot accrue until his death; and one which, if it ever does accrue, will accrue in favor of his wife, and be based solely upon a violation of a right vested solely in the wife. The unsoundness of such reasoning rests not only upon the fact that this cause of action so held to be released is not in existence during the life of the husband, but it rests even more upon the fact that the legal right the existence of which is the fundamental element in every cause of action upon which the other elements all rest is not a right that, in the remotest manner, directly or indirectly, belongs to the husband; it is, in fact, a right which the wife, by virtue of the marital relation, holds against her husband,—a right giving rise to a duty upon his part; it is that marital right in lieu of which a court grants alimony when terminating that bond upon which such right and its corresponding duty have theretofore rested. *Maney v. Chicago, B. & Q. R. Co.* 49 Ill. App. 105. We apprehend that no one would deny but that it would be the limit of absurdity for one to contend that a wife who had been forcibly abducted

could, when settling with the wrongdoer for the wrong done her, the violation of her right of personal liberty, also bind her husband by settling for the wrong done him, the violation of his right to her services, and thus bar his right of action therefor. Yet such a case would, in its underlying principles, be on all fours with the case before us; we would have the inherent right to personal safety vested in the wife, which, with its violation, gives to her a cause of action; we would have the marital right of the husband, the corresponding marital duty of the wife, the violation of the husband's marital right resulting in a cause of action in the husband; and the two causes of action would, just as in the case of injury to, and resulting death of, a husband, result from one wrongful act.

We think that what we have said above shows the absurdity of the contention that to allow a recovery for the injury suffered by the deceased and for that suffered by the next of kin is to allow the recovery of double damages for one wrong—it being axiomatic that there can be no wrong without a corresponding right, and that where there are two rights violated, the wrongs are separate and distinct. Of course, it is a recovery of two items of damages resulting from one wrongful act, but it is not the recovery of two items of damage for one injury. A, in negligent disregard of the rights of others, fires a bullet from his rifle, the shot neither disturbs nor physically injures any person or property, hence there is no cause of action; he fires another bullet, it injures B, immediately there arises a cause of action; the shot also kills B's cow, one element of the cause of action is changed and another cause of action arises; the shot kills B's child, again a new element and a new cause of action. No one would contend that the recovery of damages on all the causes of action was the recovery of triple damages for one wrong, though it is the recovery of three items of damage flowing from three separate injuries occasioned by one wrongful act. The bullet shot by A also kills a cow belonging to B's wife—again there is a change in elements, and a new cause of action arises; the wrongdoer is not mulcted in even double damages when he is compelled to settle for the wife's cause of action after having settled the husband's three causes of action; how, then, can it be claimed, with any semblance of reason, that A is being mulcted in double damages if, after he has settled for all the above causes of action, it turns out that the injury to B proves fatal, and A is compelled to respond to B's wife in settlement of the new cause of action that comes into existence upon B's death,—a cause of ac-

tion having in it an element not to be found in either of the other causes of action, but chancing to have one element in common with the others, the wrongful act? In what respect is her loss less real, or her rights entitled to less consideration, than they would have been if the shot fired by A had resulted in the instantaneous death of B?

But we find at least two courts (Littlewood v. New York, 89 N. Y. 24, 42 Am. Rep. 271; Southern Bell Teleph. & Teleg. Co. v. Cassin, 111 Ga. 575, 50 L.R.A. 694, 36 S. E. 881) questioning the wisdom of a policy that would allow a recovery for an injury resulting from the death of, after settlement with, the husband. These courts, and especially the Georgia court, lay great stress upon the wrongs, even to the injured party and his next of kin, that must flow from holding as we held in our former opinion. If it were clear that great wrong and injustice would flow from so construing this law, of which we are far from convinced, such fact could only be considered when seeking to arrive at the intent of the law-makers, such intent being doubtful on account of lack of clearness in the language used. We think the following from the opinion in Brown v. Chicago & N. W. R. Co. 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 5 Am. Neg. Rep. 255, is very pertinent to the reasoning of such courts, and we would note that it was used in speaking of a Lord Campbell act: "The language of the statutes, when viewed in the light of the evident legislative purpose, is too plain to justify courts in interpolating into them language not there by necessary implication from the context, in order to make them accord with the ideas of judges as to the best legislative policy. The judicial function, we need not say here, does not extend so far. It calls for a firm adherence to the law as written, if valid, without regard to individual opinions as to its being good or bad. In this we do not intend to suggest that the law in question, as construed here, is a bad law. On the contrary, there appears to be much wisdom in providing that a person who wrongfully causes a personal injury to another shall not profit by that other's death, so far as actual damages go, either to the deceased person or to the wife, husband, or lineal descendants or ancestors of such person."

If, however, the question of public policy were at all pertinent to this discussion, we would suggest that it is clearly against, rather than in accord with, sound public policy to allow a person, especially when his own selfish interests may be affected thereby, to settle either an accrued or anticipated cause of action to which he is

not and cannot, from the very nature of such cause of action, be a party. .

All courts and law writers, when announcing the rule contended for by appellant, refer, as an authority, to the case of Read v. Great Eastern R. Co. L. R. 3 Q. B. 555, a case wherein the real "Lord Campbell's act" was under consideration. A reading of the opinions therein reveals that two grounds for the decision of the court are suggested: That the lawmakers did not intend "to make the wrongdoer pay damages twice for the same wrongful act;" and that, "taking the plea [of settlement] to be true, the party injured could not 'maintain an action in respect thereof,' because he had already received satisfaction." The unsoundness of the first ground we believe we have shown; the second appears to be based upon the peculiar wording of the statute, and its correctness depends upon whether the statute, taken as a whole, will permit such an effect to be given the words "have entitled the party injured to maintain an action." The second ground, which is indorsed by several American courts, is thus stated in 6 Thomp. Neg. § 7028: "The right of action in the personal representatives, it has been held, depends not only upon the character of the act from which death ensued, but also upon the condition of the decedent's claim at the time of his death. If the claim was in such a shape that he could not have enforced it had death not ensued, the statute gives the executors no right of action, and creates no liability whatever on the part of the person inflicting the injury."

Speaking of this rule,—that a release by the injured party bars a right of action on behalf of the next of kin,—the learned author of Elliott on Railroads, at § 1376, says: "This is certainly true where the statute, is a mere survival statute, and it is also generally held to be the rule under most statutes of the other class, but in the case of statutes of the latter class, where they give a new right of action not dependent upon the right of the deceased to maintain an action if he had lived, it is somewhat difficult to support the rule by logical reasoning, and some judges deny it in such cases."

It is in regard to this particular ground for holding a release or settlement a bar to an action on behalf of the next of kin that the learned author of the note to the American State Reports said in 70 Am. St. Rep. 684 (the italicizing being ours): "It is somewhat difficult to combat the logic which leads to such a conclusion. The rule, however, that no action for wrongful death is maintainable, except where deceased himself could have sued had he survived, ap-

plies to, as indeed it grew out of, matters pertaining to the nature and cause of the injury which resulted in death. Was the negligence or wrongful act of defendant the proximate cause of the injury? If not, deceased could not have recovered against him, nor can his successors under the statute. Did deceased's contributory negligence cause the injury? If so, any action for such injury is similarly barred. If the relation of master and servant subsisted between deceased and defendant, was the injury resultant from the act or neglect of a fellow servant, or was it, for any reason arising out of the rules of master and servant, such an injury as gave rise to no liability on the part of the defendant? If this is answered affirmatively, . . . no cause of action ever arose which was susceptible of release or compromise. Where, however, a cause of action does arise, and the injured person has a period of suffering and expense, there seems no reason that he should not be able, while living, to make an adjustment of his claim with defendant which would bar a recovery by his beneficiaries after his death upon the same claim. But the action given under other than survival statutes is entirely distinct from the action which deceased had at the moment prior to his death. It is an action for damages arising from the mere fact of death, not damages to the deceased, but damages to his successors under the statute. Therefore we cannot comprehend the reasoning which enables an injured person to release a cause of action which has not accrued, and cannot accrue until his death, and which then accrues to third persons. It would be necessary, to support such a conclusion, that we admit that a person has a right of action for his own death. A greater degree of absurdity would not be attained in the enactment of a statute making suicide punishable as murder in the first degree."

In line with the above, we are firmly of the opinion that the first half of § 1 of our act has sole reference to the question of whether or not the party receiving the physical injury ever had a cause of action therefor, and has no reference to the condition of such party's claim at the time of his death. Did the English court in the Read Case construe the Lord Campbell act as creating a new cause of action, or did it consider such statute to be in the nature of a survival statute? If the first, their conclusion that a release by the injured party bars any claim by next of kin is inconsistent therewith; if the second, their conclusion is consistent therewith, but such conclusion should have no weight in any court that holds that the act creates a new

cause of action. Fourteen years after the decision in the Read Case the case of Griffiths v. Dudley was decided, the opinion being found in L. R. 9 Q. B. Div. 357. An examination of that case shows that, in order to reach the decision therein, it became necessary to carefully consider the Read Case. Two judges wrote opinions, and in speaking of the Read Case said (using the language of Judge Field, the language of Judge Cave being almost identical therewith): "Read v. Great Eastern R. Co. is a clear decision that Lord Campbell's act did not give any new cause of action, but only substituted the right of the representative to sue in the place of the right which the deceased himself would have had if he had survived."

Was this statement regarding the holding in the Read Case justified by the language used by the two judges who wrote the opinions in that case? It certainly was. Judge Philbrick, in writing the main opinion, said, after the words hereinbefore quoted: "Then comes § 2, which regulates the amount of damages, and provides for its apportionment in a manner different to that which would have been awarded to a man in his lifetime. This section may provide a new principle as to the assessment of damages, but it does not give any new right of action."

And Judge Lush said: "It is true that § 2 provides a different mode of assessing the damages, but that does not give a fresh cause of action."

Thus it is seen that the English court was consistent in its views; it held that the statute did not create a new cause of action; so holding it logically held that the settlement of the cause of action by the injured party barred any action by or on behalf of his next of kin. It is also worthy of note that the syllabus prepared and printed with the opinion in the Read Case, and published the same year in which the opinion was written, and which we should certainly expect would point out the chief points in the opinion, whether prepared by the judges or not, gives the following as the holding of the court upon the demurrer to the plea of settlement by deceased: "Held, that the cause of action was the defendant's negligence, which had been satisfied in the deceased's lifetime, and that the death of D. Read did not create a fresh cause of action."

In the light of the above, it is certainly strange that courts holding that a statute such as the one before us does create a new cause of action should cite the Read Case as an authority in support of a proposition that is inconsistent with such holding.

Perhaps the most comprehensive discus-

sion of the question before us found in any decision is that in the majority and minority opinions in *Southern Bell Teleph. & Teleg. Co. v. Cassin*, 111 Ga. 575, 50 L.R.A. 694, 36 S. E. 881,—the majority opinion holding a settlement such as in the present case to be a bar, the minority holding that it is not a bar. It is worthy of note that the statute before that court provided that, in the action based upon the death of a husband or father, the jury's verdict is for the "full value of the life of the deceased, without deduction for his necessary and personal expenses,"—a provision radically different from that in our statute. Repeatedly, throughout the majority opinion, are to be found references to this provision, and we feel that a reading of such opinion cannot but impress one that this peculiar provision had much to do in shaping the views of the majority upon the question of the public policy of allowing a recovery on behalf of next of kin after a settlement with the injured party; and it is very clear, from the reading of such majority opinion, that the majority's views on the question of public policy largely controlled its decision. We would note a few of what we deem weak positions taken in the majority opinion. The court says: "If a release wipes out the wrong done by the defendant, and makes it as though no injury had been suffered, then upon the death of the injured party there would be no cause of action, just as though there had been no injury, and it would not be a question as to the right to maintain two concurrent suits, but as to the right to maintain any suit at all."

As indicated in the above quotation, the court took the view that the release by the injured party entirely removed the wrong done to the next of kin; and in another part of the opinion, when discussing the opinion of the same court in *Georgia R. & Bkg. Co. v. Fitzgerald*, 108 Ga. 507, 49 L.R.A. 175, 34 S. E. 316, which was a case which did not in any manner involve the question now before us, but did involve the question of the right of plaintiff to introduce in evidence the admission of deceased in relation to the cause of the injury received by him, it noted that in the *Fitzgerald Case* it was held that the surviving wife "is to be considered in privity with the husband, in so far as her right to complain of the homicide is concerned." The court then held that, owing to this privity, the wife was bound, not only by any defense which the defendant might have interposed to the original claim of injury,—that is, by anything in the nature of a defense which was precedent in time to or accompanying the claimed wrongful act, and which was the

real point decided in the *Fitzgerald Case*,—but it also held that, owing to such "privity," she was bound by what her husband did after the injury, and in this connection said: "To hold otherwise would be to say that the wife could be barred by what her husband said, but not by what he did; that she might be concluded by words, but not by money; that the evidence of her husband, given in the suit for his personal injuries, might be used against her in a suit for his death, but that the more solemn judgment against him would not conclude her."

A mere reading of the above quotation shows the weakness of the position taken by the court wherein the court fails to distinguish between that which went to prove whether or not there ever existed a cause of action in favor of the husband and that which merely went to prove whether a cause of action once existing had been released. The wife's cause of action certainly rested upon proof that the husband once had a cause of action,—that question was vital to her claim. An examination of the opinion in the *Fitzgerald Case* discloses that therein the wife was held bound by anything done by her husband owing to which a cause of action never arose; while in the *Cassin Case* the court extended the "privity" entirely beyond the rule of the *Fitzgerald Case*, by holding the wife bound by what her husband did after his cause of action had accrued in settling, not hers, but his, cause of action. In the minority opinion, after exhaustively reviewing all the earlier decisions construing the statutes of such state, and among them the *Fitzgerald Case*, it is said (the italicizing being ours): "In other words, the right of a widow to recover is not because the death of her husband has been brought about by the act of some person, but his death must be the result of some act of commission or omission on the part of the defendant which the law would declare to be negligent, and under such circumstances that, had death not resulted, he would have been entitled to demand compensation. It is therefore clearly right that the widow should be deprived of her right to bring a suit if the deceased could have avoided the consequences of the defendant's negligence by the exercise of ordinary care, as well as in the case where the deceased had entered into a contract which had the effect of making the act of the defendant lawful as to him, and also in all of those cases where the facts and circumstances surrounding the killing, as well as those leading up to and preceding it, were such as to show either that the defendant had been guilty of no wrongful act, or that the deceased was the victim of his

own folly in matter of contract, or of his carelessness in matter of conduct. All of the cases which we have cited above, being all we have been able to find in our reports dealing with the question under consideration, relate to some act done by the deceased prior to, or concurrent with, the injury which he received. When a person is injured by the wrongful act of another, a foundation is at once laid for a cause of action in favor of those entitled under the law to demand compensation for his death; and the moment that his death results from such wrongful act the cause of action is full and complete. *Nothing the person injured can say or do between the date of the wrongful act and his death can defeat the cause of action for the homicide.*"

Again the majority say: "To begin with, the English courts have held that Lord Campbell's act created a new cause of action, and yet in the Read Case, the first decision as to the effect of a release, it was pointedly held 'that a plea of accord and satisfaction with the deceased in his lifetime was a good bar to an action by his legal representatives.'"

While we think the court in the Read Case should have held that the statute created a new cause of action, yet we have seen that it was held therein, and so understood by the court that decided the Griffith Case, that the Lord Campbell act did not create a new cause of action. If the court in the Read Case had held that the statute created a new cause of action, it is quite probable that they would have reached a different conclusion,—one consistent with the idea that a separate and distinct cause of action had been created. We frankly admit our inability to comprehend the force of reasoning in the following, found in the majority opinion in the Cassin Case: "If his negligence in the act is imputed to her, should not also his conduct after the injury be imputed to her? In spite of all the recent statutes, 'the husband is still the head of the family,' his life is his own, his body is his own, and whatever right in that life the law gives to his wife must be subject to the superior right of the husband."

We apprehend no rule is sound that will not work both ways. The above words would read quite different if you substitute, as the party receiving the physical injury and settling therefor, the wife or the child, and, as the party suing for the injury caused by the death of such wife or child, the husband or father; we are inclined to the view that the learned judges would not have overlooked the weakness of this statement. The majority sums up its views in this remarkable statement: "The substan-

tial grounds on which the courts must hold that the husband's settlement bars the wife are based upon the fact that the wife's right in the life of the husband is subordinate to what he himself has done with his life; that, as his negligence is imputable to her, so his ratification and condonation of the wrong done him estops her; that his acceptance of payment ratifies the act, and admits that he has been made whole of his injury; that thereafter the defendant can say he has not harmed the husband, but that payment, like pardon, relates back to the original act, and makes it as though it had not been."

Let us substitute the word "wife" for "husband" and "husband" for "wife" in the above statement and then apply it either to the case of injury and death or to the supposed case, hereinbefore mentioned, of abduction of a wife; if the statement is good law it is properly applicable thereto. Suppose in the abduction case the wife has settled for the wrong done her, and the husband is suing the wrongdoer for the violation of his right to his wife's services; imagine a court saying: "The ground upon which we hold the husband barred is based on the fact that the husband's right in the life of his wife is subordinate to what she herself has done with her life; as her conduct would be imputable to him, her ratification and condonation of the wrong done her estops him; her acceptance of payment ratifies the act, and admits that she has been made whole of her injury; that thereafter the wrongdoer can say he has not harmed the wife, but that payment, like pardon, relates back to the original act, and makes it as though it had not been."

This certainly would be remarkable law. A reading of the majority opinion in the Cassin Case can but convince one of the correctness of Elliott's statement, hereinbefore quoted, that "it is somewhat difficult to support the rule by logical reasoning;" and such a reading, we think, is sufficient to convince any person that such opinion is really based upon the majority's views as to what was and was not sound public policy.

In *Hecht v. Ohio & M. R. Co.* 132 Ind. 507, 32 N. E. 302, the court said: "It was certainly not the intention of the legislature that, when the person guilty of the wrong has been once subjected to a suit by the injured party in his lifetime, and compelled to pay all of the damages resulting from the injuries sustained by the wrongful act, he should again be liable to an action in favor of the personal representatives of the injured party after his

death, and be again compelled to respond in damages for the same act."

Sufficient comment on the above is to call attention to the fact that the "injured party" therein mentioned could not, in his action, recover for those damages sustained by the next of kin through the death of the injured party, and therefore the wrongdoer could not be "compelled (by such action) to pay all the damages resulting from the injuries sustained by the wrongful act." The bare statement of the proposition—that the injured party could sue and recover for damages which might result to third parties through the death of plaintiff—demonstrates the weakness, not to say absurdity, thereof. In *Strode v. St. Louis Transit Co.* 197 Mo. 616, 95 S. W. 851, 7 Ann. Cas. 1084, the court said: "The general consensus of opinion seems to be that the gist and foundation of the right in all cases is the wrongful act, and that for such wrongful act but one recovery should be had, and that, if the deceased had received satisfaction in his lifetime, either by settlement and adjustment or by adjudication in the courts, no further right of action existed."

The unsoundness of the foregoing is apparent. Why not more than one recovery for such "wrongful act?" Why this refusal to follow the ordinary rule that there may be recoveries for every legal injury occasioned by a wrongful act? In *Louisville R. Co. v. Raymond* (Louisville R. Co. v. Taylor) 135 Ky. 738, 27 L.R.A.(N.S.) 176, 123 S. W. 281, the court said: "The rule that a personal representative cannot sue upon both causes of action is based upon the ground that the defendant committed a single wrong, the negligence or wrongful act which caused the injury, and that, while the law gives two remedies for the wrong, it was not contemplated that two recoveries should be had for one wrong."

There are not "two remedies for one wrong;" there is one remedy for each of two wrongs,—one a wrong to the party who afterward dies, the other a wrong to those who survive. In *Holton v. Daly*, 106 Ill. 131, the court, in speaking of the right of personal representatives to bring two actions,—one based upon a statute providing for the survival of the common-law action, the other based on a Lord Campbell act,—said: "It is not to be presumed that it was intended there should be two causes of action, in distinct and different rights, by the same party plaintiff, for the same wrongful act, neglect, or default. . . . It is true the measure of recovery in the different cases is not the same, but the cause of action is, viz., the wrongful act, neglect, or default."

L.R.A.1915E.

Here, again, we see a court failing to distinguish between a "cause of action" and one single element of such cause of action.

The above quotations are fairly representative of the statements found in all those opinions wherein conclusions are reached which are inconsistent with our views. How much more consonant with reason is the following from the opinion in *Mahoning Valley R. Co. v. Van Alstine*, 77 Ohio St. 395, 14 L.R.A.(N.S.) 893, 83 N. E. 601: "It is insisted, further, that the theory of two causes of action will necessarily result in the assessment of double damages, at least in part, and this is emphasized by the learned judge who delivered the opinion in *Holton v. Daly*, supra. We are not able to perceive that this, in practice, would prove a very serious situation. At least the eminent jurist who presided in the common pleas at the trial of the revived action seems to have no difficulty in giving to the jury a rule as to damages which, as it seems to us, would not embarrass the question of a proper rule of damages to be given the jury upon the trial of the second action. The objection is a plausible one. We are not impressed that it is sound. At least it cannot avail if the right to a second action where death results from the injuries is given by the statute."

In *Burk v. Arcata & M. River R. Co.* 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065, it was said: "Under our statute, the injured person might survive long enough to sue and recover damages or to settle with the wrongdoer, and then by his death a new cause of action would accrue to his heirs."

In *Brown v. Chicago & N. W. R. Co.* 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 5 Am. Neg. Rep. 255, it was said: "The action for a death loss to a surviving relative is not a right by survivorship to the claim which existed in favor of the injured person in his lifetime."

The following words of Justice Brewer found in *Hulbert v. Topeka* (C. C.) 34 Fed. 510, are worthy of careful consideration: "Section 422 [the homicide section (Comp. Laws 1879)] gives a new right of action—one not existing before; an action which is not founded on survivorship; an action which takes no account of the wrong done to the decedent, but one which gives to the widow or next of kin damages which have been sustained by reason of the wrongful taking away of the life of the decedent. It makes no difference whether the injured party was killed instantly, or lived months; whether he suffered lingering pain or not; whether or not he was put to any expense for medical attendance and nursing. None of these matters are to be considered in an

action under § 422; and the single question is: How much has the wrongful taking away of his life injured his widow or next of kin? It is an action to recover damages for the death, and in no sense a survival of an action which . . . the decedent himself had in his lifetime."

In *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271, the court said: "There can be no doubt that the legislature had power to create the double liability contended for, nor would it necessarily involve any inconsistency. The damages of the party injured are different and distinguishable from those which his next of kin sustain by his death, and no double recovery of the same damages would result."

In *Pittsburgh, C. C. & St. L. R. Co. v. Hosea*, 152 Ind. 412, 53 N. E. 419, it is said (the italics being ours): "Whatever may be said with respect to the power of the intestate to contract away his right of action against the appellant, *he surely had no power to bargain away his family's right of action given by statute* against the one wrongfully causing his death."

We close in the words of the court in *Maney v. Chicago, B. & Q. R. Co.* 49 Ill. App. 105: "Neither argument nor authority would seem to be necessary to sustain the view that the widow and next of kin cannot be deprived of the property right so created and vested in them at the will or pleasure or by the contract of another, though he be the party charged with the performance of duties out of which the right grew."

The order appealed from is affirmed.

Smith, J., dissenting:

The majority opinion frankly concedes "that a large number, and perhaps a majority, of the cases wherein this precise question was under consideration," have held contrary to the conclusions announced in that opinion. With equal frankness it affirms that "one holding backed by reasoning that is cogent may be sufficient to outweigh any number of opinions wherein the argument, even though forcible, lacks that convincing power that forces conviction."

We are to assume, therefore, that the majority opinion presents such cogent reasoning. It seems to me, however, that it affords an illuminating example of an argument to show what a court thinks the law ought to be, rather than a satisfactory demonstration of what it is. The reasoning intended to show two distinct "causes of action" under our statute is founded on an assumed elementary principle,—the right of the wife to the husband's support. It is said to be a duty resting upon every person

not to deprive the wife of the husband's support, and upon this is based the legal conclusion that, whenever the right of the wife to the husband's support is violated by the wrongful act of a third person, such act should create a right of action in the wife. The assumption in the reasoning is that any negligent and wrongful injury to the husband which lessens the support of the wife should give her a cause of action, and that we must presume it was the legislative intent, in changing the common-law rules, to confirm in her a separate right of action for every diminution of her means of support arising from a wrongful injury to the husband. The fallacy lies in the assumption that the legislation under discussion was intended to create such a right of action in the wife. Neither at common law nor by legislation does such right exist, nor ever has existed in this state, except for injury to support caused by unlawful sales of intoxicating liquors. For all personal injuries the right of action for any injury which affects the ability of the husband to support the wife exists only in the injured husband himself, so long as he is living, and the wrongdoer who compensates the husband places in his hands the means of support of which the wife is potentially deprived by the wrongful act, and no legal liability to her has ever existed. The marital obligation for her support creates a conclusive legal presumption that he will apply such damages received by him, as he will his earnings and other property, for her support, and that she is thus compensated. These statutes were never intended in any degree to affect the legal rights of the wife or to limit the control of the husband over his property or his choices in action while living, and no act of his while living which was valid when done, no matter in what degree it may be thought to affect the support of the wife, was ever intended to be invalidated or rendered ineffective by these enactments. To assume the contrary as a legislative intent would be to presume that a legislature would intend or undertake to say that every transfer or loss of property by the husband is his lifetime which would affect the future support of his wife should be declared ineffective.

It seems to me that a good many decisions of other courts, as well as the majority opinion in this case, present a somewhat confused interpretation of these statutes, which were enacted only for one distinct purpose, *viz.*, that of abrogating two rules which became incorporated in the ancient common law: First, "that the death of a human being cannot be complained of as a civil injury for which damages are

recoverable in a court of law;" and, second, "that a right or cause of action which belonged to an injured person while living is extinguished by his death." Denunciation of these ancient rules may add somewhat to our appreciation of our own modern wisdom, but it serves no real purpose in the discussion of these statutes. Those rules, however, must necessarily be considered in the interpretation of these statutes, and the objects sought to be accomplished by their enactment. The character and effect of particular statutory changes in the common-law rules referred to in our own state and in other states should be our guide in the interpretation of such statutes. It seems to me that nearly all the fallacies of reasoning and conflicting views found in the decided cases arise from a total or partial misconception of the real purpose of this class of legislation. It was not its purpose to enlarge or change any existing law which made it the duty of the husband to support the wife, nor to change the law which gave her the legal right to demand support from him. It was not intended in any degree to change or limit the husband's control during his lifetime of property or choses in action which might ultimately be devoted to her support. It was intended only to secure to her that which, under common-law rules, she would have lost upon the happening of his death. The statutes, I think, should be construed, as many courts have construed them, merely as intended to authorize a recovery of damages after the death of the husband for a previously uncompensated injury to the husband's earning capacity. It must be conceded that the reasoning and logic in many of the decided cases is unsatisfactory, and subject to criticism. This, I think, is due largely to a misconception of what constitutes the cause of action, and because, as said by Justice Whiting, some courts have failed "to distinguish between a cause of action and one single element of such cause of action." All of these statutes, however, no matter what their phraseology, were primarily intended to accomplish a single purpose,—the abrogation of the common-law rules which inhibited a civil remedy in damages for a wrongful death, or for personal injuries which later result in death. They all deal with conditions which arise after the death of the person injured. The right of action, under all the statutes, must therefore necessarily be vested in a third person, either the personal representative for the benefit of the estate or for the benefit of particular persons named in the statute, or given to particular beneficiaries, such as the wife or children.

The statutes, when carefully analyzed,
L.R.A.1915E.

differ chiefly as to the person who may bring the action and the date when the damages accrue or from which they are computed, or the kind of damages recoverable. Some statutes permit recovery of the identical damages the deceased himself might have recovered, with added pecuniary damages to the wife or family resulting from the death. Others permit a recovery by the personal representative for the benefit of the estate of such damages as the deceased himself might have recovered, and also permit a further recovery by the wife or personal representative of damages to her support which follow and are the result of the death. Other statutes ignore the intervening damages, and permit a recovery only for the damages to the wife's means of support which result from the death itself. The various statutes differ essentially only as to the persons in whom the right of action is vested after death and the kind and measure of damages which are recoverable. In every instance and under all the statutes, "the cause of action" is the wrongful personal injury. No one doubts a single wrongful act may result in separate and distinct injuries to two or more separate and distinct persons or rights, and that either of such injured persons may maintain an action for his own distinct damage. Nor will anyone deny the power of the legislature to split the total aggregate damages resulting from a wrongful injury to the husband by giving a part to the estate and a part to the wife. But I think no one will assert that legislative power exists to require the wrongdoer, first, to pay the total aggregate damages to the estate, and, again, to pay the total aggregate damages to the wife. The controlling principle is that, when the wrongdoer has once paid the agreed, or legally ascertained, total damages, to the person entitled to receive the same, at the time such payment is made the original wrongful act is fully satisfied and the right of action therefor extinguished. The husband, during his lifetime, is and must be deemed competent to place a valuation upon his own services as a means of support for his wife and family, and this, not because, as suggested in certain decisions, the wife is privy to his acts, but because the law deems him competent in his lifetime to safeguard and protect all her rights, in the exercise of his duty of support. Some of these statutes which permit a recovery of the same damages the deceased would have had in his own favor had he survived his injuries go no further than to abrogate one rule of the common law, viz., that a right of action for personal injuries is extinguished by the death of the injured person. Under these

statutes, the damages to the estate or beneficiaries which result from the death itself are not recoverable. Another class of statutes ignore certain elements of damage which the deceased in his lifetime might have recovered, such as expenses of nursing, medical attention, and solatium, and permit only a recovery equal to the pecuniary loss of support sustained by the beneficiaries by reason of the death alone. Some courts have construed the latter class of statutes as creating a new cause of action for the death. This is wholly wrong. The common-law rule was that, although a criminal or negligent act which caused death was tortious and wrongful, yet the damage which might flow therefrom was not recoverable in a civil action.

The origin of this rule and the reasoning upon which it was founded are both obscure, though the rule itself comes down from ancient times. Some law writers have surmised that it had its origin in the idea that a man could not have damages for his own death. The justice of this rule however, came to be questioned later, when it was recognized that a wrongful act which caused death might occasion injury, through the death itself, to the estate of the decedent, or to those dependent upon him for support. It thus became apparent that the common-law rule should be changed, and a rule for estimating damage flowing from the wrong, either to the estate or to third persons, should be established and fixed by law. This was done by the Lord Campbell act, about seventy years ago, and this act was followed in almost every jurisdiction where the English common law prevailed, by statutes similar in their purpose to the original act, but varying as to the rule of damages and the persons who might maintain an action therefor. But the wrongful act which caused the death has always been recognized as the cause of action, though the damages are to be measured by the consequences flowing from the act, or the death itself. In some jurisdictions where a period of time intervened between the injury and the death, the damages which the injured person might have recovered in his lifetime are added to the damages flowing from his subsequent death, and the total damages may be recovered in a single action. In other jurisdictions the intervening damage is given to the estate, and the damage flowing from the death to specific beneficiaries; while in still others the common-law rule that the right of action is extinguished by death is modified only to the extent of allowing a recovery of the damage flowing directly from the death itself. The Lord Campbell act has been so construed by the Illinois courts L.R.A.1915E.

(*Prouty v. Chicago*, 250 Ill. 222, 95 N. E. 147), although, under other statutes of that state, it is held that, where the injured person dies from another cause than the injury, the cause of action for damages which accrued prior to the death survives to the administrator (*Holton v. Daly*, 106 Ill. 131; *Devine v. Healy*, 241 Ill. 34, 89 N. E. 251; *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263).

There is no rule of law, statutory or otherwise, based on the theory that the wife is entitled to the benefit of the whole, and not a part, of the husband's earning capacity, which gives the wife a separate right of action against the wrongdoer, where the husband, in his lifetime, chooses to accept in settlement of his personal injuries an amount less than the full actual damages to his earning capacity. There may be those who think this ought to be the law, but it is not at the present time. The only safe judicial method is to follow the law as it is until such time as some "cogent reasoning" shall move the legislative wisdom to enact other laws. If the husband has the absolute right, during his lifetime, to settle and accept compensation for personal injuries to himself, the extent of such injuries is wholly immaterial. He may know that the injuries he has received will totally disable him for life, and that he may become utterly useless to himself and family,—a condition worse than death, in so far as it affects the wife's right to his support, but so long as he lives his legal right to settle with the wrongdoer will not be denied. He may even know that he will die as a result of such injuries, and yet no law exists which deprives him of the legal right to estimate the damages, and to make settlement for the injury, even if it be conceded that such settlement involves the wife's means of support. The law gives him the absolute right to do that which he deems wisest and best, both for himself and his wife or his estate, so long as he lives, and is mentally capable of exercising the right. So long as he lives, the law does not consider her right of support and his right to settle for an injury to himself as two distinct things. They are so correlated as to be inseparable. It would be idle to discuss the wisdom or justice of legislation which might require the wife's right to future support to be taken into account when settlements are made in his lifetime for personal injuries to the husband. We need only observe that at the present time the law does not require it, no matter what may be the extent of the injury. But a wholly different situation is presented when the husband has been wrongfully injured, and death ensues as the result of

such injuries, the husband not having been compensated in his lifetime. In such cases, the ancient rules of the common law left the wife helpless indeed. She could not sue for the loss of support by reason of his death, nor on the right of action the husband himself had against the wrongdoer, for that was extinguished by his death. It was precisely this situation which the Lord Campbell act sought to remedy, by changing the common-law rules, and, when properly interpreted, it goes no further. It was intended to allow her that which, prior to his death, she had not, but might have received through her husband had he lived, for the total loss of his earning power, viz., damages. To accomplish this no change in existing common law was necessary, save only a change in the two rules which would become operative by reason of the death, and would render the wrongdoer immune from an action in the law courts. The measure of damages recoverable may be defined with reasonable certainty when the Lord Campbell act is thus construed. It was intended to secure to her that which the husband had neglected or failed to obtain for her in his lifetime. When the husband had not himself in his lifetime estimated and accepted, or caused to be liquidated, the damages, the act gave her the right to maintain an action for complete liquidation of the damages which he had not received, and which upon his death, of right, ought to belong to her, and the act carefully provides that the total pecuniary injury to her means of support by reason of his death shall be her rule of damages. But endless difficulties arose when an attempt was made to determine a rule of damages to be applied where the deceased had made settlement or recovery in his lifetime. It is just at this point that all the conflicting views of courts arise. The numerous quotations from decisions found in the majority opinion show how diverse and irreconcilable are the views of courts as to the purposes and effect of this legislation, and I venture the suggestion that it arises from an unnecessary assumption either that these statutes create a new cause of action, or that they are survival statutes. The truth seems to be that a conviction arose in the minds of men, first, that a right to damages for a personal injury which caused death should exist, and that it ought not to become unenforceable because of the death of the injured person. Then, viewing the situation after death, the question would arise: "If the right to recover damages for an uncompensated fatal injury is to be given to the wife, children, or estate, what should be the measure of damages?"

L.R.A.1915E.

The answer seems to have been that the wife or children should be given damage equal to both the loss of support which the deceased husband himself might have recovered and devoted to their use had he lived and also the additional pecuniary loss they sustained by reason of his death, and which he might have contributed to them had he survived the injury. The thought was that the "cause of action" already existed, and that it was only necessary to define the damages, both in extent and character, which were to be saved from extinction by reason of the husband's death. This rule of damages could be made applicable as well where death was instantaneous, because it was intended to cover the whole pecuniary value of his earning capacity, as a means of support to his wife, or as an increment to the estate. This is described in the statute as the "pecuniary" loss or injury by reason of the death. Some courts have viewed this rule of damages as a "new cause of action" created by statute. No wonder, when one court insists that these acts are survival statutes, and another that a rule of damages creates a new "cause of action" never heard of before, that there should be conflict of decision, lame reasoning, hair-splitting distinctions, profound and abstruse definitions of terms, and almost hopeless confusion. And this in face of the fact quite universally conceded by the courts that the Lord Campbell act was conceived and enacted only because of, and to abrogate, the two common-law rules referred to above, as is shown by the criticism of those ancient rules in the majority opinion, and in the elaborate quotations from certain courts. The fact is that these statutes were enacted for only one purpose, and were not intended or designed to change any right of the husband to deal in his lifetime with his property or choses in action, no matter in what way or to what extent his exercise of that right might affect the wife's means of support or the value of his estate. It must follow, therefore, that when, in his lifetime, he has estimated and received compensation for the injury, the cause of action is extinguished, and no right of action remains to be exercised by his dependents or personal representative.

The law in force in this state (chapter 301, Laws 1909) provides that the wrongdoer "shall be liable to an action for damages, notwithstanding the death of the person injured," and that the damages may be "proportionate to the pecuniary injury resulting from such death to the persons respectively for whose benefit such action shall be brought." The statutes of twenty-one other states are similar to our own in

that damages are recoverable "notwithstanding the death." See memoranda at close of Judge Gates's opinion. In some of these states coexisting statutes are deemed to affect the interpretation of the clause of the statute above referred to. In this state no such statutes exist. Our statute is the original Lord Campbell act, and so eminent a jurist as Mr. Justice Cooley, speaking of that act, says: "It is seen on a perusal of this statute that it gives an action only when the deceased himself, if the injury had not resulted in his death, might have maintained one. In other words, it continues for the benefit of the wife, husband, etc., a right of action which at the common law would have terminated at the death, and enlarges its scope to embrace the injury resulting from the death. . . . If, therefore, the party injured had compromised for the injury and accepted satisfaction, previously to the death, there could have been no further right of action, and consequently no suit under the statute." [1 Cooley, Torts, 2d ed. p. 309.]

This is exactly the interpretation given the Lord Campbell act in the first case arising under it in the English courts. In the case of *Read v. Great Eastern R. Co.* L. R. 3 Q. B. 555, the surviving widow sued the railway company for negligence whereby her husband was injured, of which injuries he died. The defendant pleaded that in the deceased's lifetime he had been paid, and had accepted, a sum of money in full satisfaction and discharge of all premises and causes of action against the defendants. The court held that the cause of action was the defendant's negligence, which had been satisfied in the deceased's lifetime, and that the death of the husband did not create a fresh cause of action. Commenting on § 2 of the act, which prescribes the damages, the court said: "This section may provide a new principle as to the assessment of damages, but it does not give any new right of action."

In *Louisville R. Co. v. Raymond* (Louisville R. Co. v. Taylor), 135 Ky. 738, 27 L.R.A.(N.S.) 176, 123 S. W. 281, under a similar statute, the ruling of the English court in the *Read Case* was followed. The court said: "The plain purpose of the act of 1854 [Acts 1853-54, chap. 964] was simply to do away with the common-law holding that no recovery could be had when death resulted immediately. . . . If, notwithstanding his settlement, the representative of the decedent may recover in this action, he might equally recover if the decedent had brought a suit and recovered a large sum for his injury before his death. The amount of the settlement is not material, except as the amount paid may throw

light on the good faith of the settlement,"—citing a large number of decisions sustaining the rule.

In the note in the latter case, found in 27 L.R.A.(N.S.), the learned annotator, at page 176, says: "Without reference to the question of the construction placed upon statutes in substance similar to Lord Campbell's act, as to whether such statutes give an independent cause of action, the general rule is that such action can only be maintained under circumstances such as would entitle the injured person in his lifetime to have maintained it; and he may, subsequent to the injury, settle with the tortfeasor for the damages caused him thereby, and such settlement is a bar to any subsequent action by his widow, next of kin, or personal representative for his death because of such injuries, unless there is fraud or duress in procuring the settlement."

In *Strode v. St. Louis Transit Co.* 197 Mo. 616, 95 S. W. 851, 7 Ann. Cas. 1084, the court said: "The general consensus of opinion seems to be that the gist and foundation of the right in all cases is the wrongful act, and that for such wrongful act but one recovery should be had, and that, if the deceased had received satisfaction in his lifetime, either by settlement and adjustment or by adjudication in the courts, no further right of action existed."

In *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271, under a statute identical with our own, *Rapallo, J.*, said: "I can find nothing in the act of 1847, or the amendments of 1849 and 1870 manifesting an intention to impose the liability in question, where the deceased has in his lifetime recovered compensation for his injuries. The act has made an important change in the common law, in affording a remedy in cases where the death would have protected the wrongdoer against any recovery whatever; and in holding it applicable to such cases only we think that all is accomplished that the legislature intended. The argument in favor of the construction contended for on the part of the plaintiff is based largely upon the provisions relating to the damages to be recovered and the disposition to be made of them. Some provisions on those subjects were necessary by reason of the novelty of the action, and such have been adopted as were deemed most appropriate, but they should not control the construction of that part of the statute which imposes the liability, or extends it beyond the fair import of its terms."

In *Re Meekin*, 164 N. Y. 153, 51 L.R.A. 235, 79 Am. St. Rep. 635, 58 N. E. 50, 8 Am. Neg. Rep. 490, that court held that the measure of damages is the pecuniary

loss of the beneficiaries designated by the statute, and that the suffering of the deceased cannot be considered. This ruling was approved in *Michigan C. R. Co. v. Vreeland*, 227 U. S. 70, 57 L. ed. 421, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; *Lindstrom v. International Nav. Co.* (C. C.) 117 Fed. 173; *Titman v. New York*, 57 Hun, 473, 10 N. Y. Supp. 689.

The relationship between alimony in a divorce action and damages recoverable under the Lord Campbell act, I think, may be considered an original discovery, and as having been first announced in the majority opinion. The principle might be stated thus: The court compels the husband to pay alimony to the wife for her support while the husband is still living. The Lord Campbell act requires the wrongdoer to pay the wife alimony in the form of damages after the husband is dead. But what would be the situation if the wrongdoer, prior to the husband's death, had paid to the husband the entire alimony or damages, thus passing over to the husband the means of support or of alimony due from the wrongdoer? Would the court deny the wrongdoer the right to place such money in the husband's hands, lest, perchance, it should be dissipated or be insufficient in amount, and the wife thus lose her alimony or support? If the court so holds, it is easy to see that the Lord Campbell act should have gone directly to the point and declared that, when a wrongful act resulted in the death of the husband, the wrongdoer should thereafter be required to support the wife. If this is the principle underlying the act, it must be conceded it was badly framed to accomplish that purpose. The majority opinion, however, goes further, and asserts that the husband cannot release a "cause of action" which has not then accrued, which may never accrue, which from its very nature cannot accrue until his death, which, if it ever does accrue, is in favor of the wife, and is based solely upon the violation of a right vested in the wife. This statement is an epitome of all the false premises assumed in the minority decisions. It ignores the fundamental distinction plainly pointed out in the majority opinion itself between the "cause of action" and the "right of action." The "cause of action" accrues when the wrongful injury is inflicted upon the husband; the "right of action" becomes vested in the wife upon the happening of his death; and the measure of her damages is the pecuniary value of the loss of support resulting from the death. But where, during the lifetime of the husband, he has received damages in full satisfaction of the "cause of action,"—the wrongful injury,—no "right of action"

can, or ever does, accrue in favor of the wife. In short, the Lord Campbell act gives the wife a "right of action" to recover pecuniary damages for a wrongful injury to the husband resulting in his death, and not compensated during his lifetime.

The majority opinion rests upon its own special reasoning, and admits that its conclusion is contrary to the views of "a large number, and perhaps a majority, of the cases." But the learned annotator in the *Taylor Case*, 27 L.R.A.(N.S.) 176, goes still further, and unqualifiedly states that "the cases, however, are substantially in accord as to the effect of a settlement by an injured party for injuries which thereafter cause death on the right of his personal representative or widow or next of kin to maintain an action for his wrongful death caused by such injury."

This statement by so careful and eminent an authority would seem to render a further citation or discussion of decided cases unnecessary. Very "cogent reasoning," indeed, is required to overturn the practically unanimous decisions of all the courts that the settlement or recovery of damages in the lifetime of the injured person satisfies the wrongful injury.

Gates, J., dissenting:

The minority decisions which Judge Whiting relies upon as containing the more cogent reasoning are: (a) Either from states whose statutes differ fundamentally from the real Lord Campbell act; or (b) if from states having substantially that act, the courts base their arguments upon decisions from states where the cause of action is assumed to be for death, or upon the effect which other more or less related statutes have upon the proper solution of the issue. It is not logical to call to one's aid the decisions of courts of those states, where undoubtedly a new and independent right of action is given, such as Indiana and California, for instance, to support one's argument that the real Lord Campbell act gave a new and independent cause of action for death. It is true, as pointed out in the majority opinion, that § 3 of our act authorizes the jury to "give such damages, not exceeding in any case \$10,000, as they may think proportionate to the pecuniary injury resulting from such death." It is also true that the real Lord Campbell act contained the following similar language: "The jury may give such damages as they may think proportioned to the injury resulting from such death." But the distinction I desire to emphasize is that in our statute, as in the original Lord Campbell act, the cause of action that accrued to the husband is continued notwith-

standing his death, and no new cause of action is given. It is not the death which is the cause of action, but it is the negligence which caused the death that is the cause of action, and the death is material only as it relates to the damages which may be recovered. Cooley, Torts, 2d ed. 309.

In the majority opinion the following decisions are cited and sometimes quoted from in support of the conclusion arrived at: *Maney v. Chicago, B. & Q. R. Co.* 49 Ill. App. 105, is a decision by the intermediate appellate court of Illinois. It conflicts with *Holton v. Daly*, 106 Ill. 131, which decision was reaffirmed in *Mooney v. Chicago*, 239 Ill. 414, 88 N. E. 194, seventeen years after the *Maney* decision. *Whitford v. Panama R. Co.* 23 N. Y. 465, was overruled so far as the question at issue in the present case is concerned by *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271.

The majority opinion quotes from *Mahoning Valley R. Co. v. Van Alstine*, 77 Ohio St. 395, 14 L.R.A.(N.S.) 893, 83 N. E. 601, and *Brown v. Chicago & N. W. R. Co.* 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255. In both of these the decision in *Robinson v. Canadian P. R. Co.* [1892] A. C. 481, 81 L. J. P. C. N. S. 69, 67 L. T. N. S. 505, was given great weight. The fact is that decision, although a House of Lords decision, arose under the Quebec statute hereinafter cited, and which, as their lordships pointed out, is not the Lord Campbell act. The Wisconsin decision strongly intimated that a settlement with the injured person would be a bar to the later action. *Putnam v. Southern P. Co.* 21 Or. 230, 27 Pac. 1033, is an Oregon decision based upon a statute unlike ours. *Missouri P. R. Co. v. Bennett*, 5 Kan. App. 231, 47 Pac. 183, and *Hulbert v. Topeka (C. C.)* 34 Fed. 510, arose under the Kansas statute, which is not the Lord Campbell act. *Hurst v. Detroit City R. Co.* 84 Mich. 539, 48 N. W. 44, is a Michigan decision. In *Sweetland v. Chicago & G. T. R. Co.* 117 Mich. 329, 43 L.R.A. 568, 75 N. W. 1066, 4 Am. Neg. Rep. 648, the court said the language in the *Hurst* Case about there being two rights of action was *dictum*. *Bowes v. Boston*, 155 Mass. 344, 15 L.R.A. 365, 29 N. E. 633, did not arise under the Lord Campbell act. The decision in that case was to the effect that the right of action under § 18, chap. 52, Mass. Pub. Stat. 1882, was independent of the right of action under § 17 of said act. *Burk v. Arcata & M. River R. Co.* 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065, and *Pittsburgh, C. C. & St. L. R. Co. v. Hosea*, 152 Ind. 412, 53 N. E. 419, arose under statutes L.R.A.1915E.

that are similar to the Oregon and Kansas statutes.

What seems to me to be the fundamental fallacy of the majority opinion is demonstrated by the illustration of the bullet. I do not apprehend that, if the collapse of the wall which caused the injury to plaintiff's husband had also physically injured the plaintiff, appellants would for a moment contend that the settlement with the husband would have been a settlement of the plaintiff's cause of action for her own physical injuries. The injury to plaintiff in this case arises from the same act of negligence, but it accrues to plaintiff by reason of, and through, the injury to the husband for which a full and complete settlement was made.

I think we erred in the former decision in this case (32 S. D. 66, 142 N. W. 664) when we said that there were two causes of action, and that "neither is the prosecution or satisfaction of either a bar to the prosecution and recovery on the other." That error ought now to be corrected.

I concur fully with the views so ably expressed by Judge Smith.

Statutes which are the same, in substance, as the Lord Campbell act, in that they preserve the right of action notwithstanding death: Ark. § 5225, Mansfield, Colo. Mill's Anno. Stat. 1912, § 2178; Fla. Gen. Stat. 1906, § 3145; Ill. § 1, chap. 70, Rev. Stat. 1885; Me. Rev. Stat. 1903, chap. 89, § 9, p. 784; Md. Pub. Gen. Laws 1888, p. 1020, art. 67, § 1; Mich. Howell's Anno. Stat. 1882, § 8313; Miss. Code 1880, § 1510; Mo. Rev. Stat. 1909, § 5426; Neb. Cobby's Anno. Stat. 1911, § 5199; N. J. Comp. Stat. 1910, p. 1907, § 7; N. M. Comp. Laws 1897, § 3214; N. C. Revisal of 1905, § 59; N. D. Rev. Codes 1905, § 7686; Ohio, Rev. Stat. 1890, § 6134; R. I. Gen. Laws 1909, chap. 283, § 14, p. 998; S. C. Civ. Code 1912, § 3955; Vt. Stat. 1894, § 2451; Va. Code 1887, § 2902; W. Va. Code 1899, chap. 103, p. 774, § 5; Wis. Rev. Stat. 1878, § 4255; Wyo. Comp. Stat. 1910, § 4291.

Statutes which in terms provide for an action for death, or otherwise differ from the Lord Campbell act: Ala. Code 1907, § 2486; Cal. C. C. P. § 377; Conn. Gen. Stat. 1902, § 1094; Del. Rev. Code 1852, amended to 1893, p. 788 (13 Del. Laws, chap. 31); D. C. Comp. Stat. 1887-89, p. 397; Ga. C. C. 1895, § 3828; Idaho, Rev. Codes, § 4100; Ind. Burns's Anno. Stat. 1894, § 284; Kan. C. C. § 422 (Gen. Stat. 1909, § 6017); Ky. Stat. § 6; Minn. Gen. Stat. 1913, § 8175; Mont. Anno. Code Civ. Proc. § 579 (Rev. Codes, § 6486); Nev. Rev. Laws 1912, § 4997; N. H. Pub. Stat. 1891, §§ 8-13, chap. 91, p. 535; N. Y. § 1902, C. C. P. (1 Birdseye's Stat. p. 859);

Okla. Comp. Laws 1909, § 5945; Or. L. O. L. § 380; Tenn. Code 1884, § 3130; Tex. Vernon's Sayles' Civ. Stat. 1914, §§ 4694-4704; Utah, Comp. Laws 1907, § 2912;

Wash. 2 Hill's Anno. Stat. § 138; Quebec, C. C. Lower Canada, § 1056.

Petition for rehearing denied.

Note. — Several actions for death, or injury causing death.

This note is supplemental to the note in § L.R.A.(N.S.) 384.

Whether statutes similar to Lord Campbell's act and general survival statutes existing in the same jurisdiction create separate and distinct causes of action which coexist, or separate and distinct remedies which coexist, or whether they create separate and distinct causes of action or remedies which are mutually exclusive, is a question as to which much confusion and conflict of authority exists.

This fact indicates the inadvisability of attaching too great importance to the general remarks of the court on this point, and the necessity of limiting the language with reference to the actual holding of the court on the specific point involved.

With this purpose in view the question when presented with reference to the abatement and revival of actions is considered in a note on that subject immediately following this note, and appended to *Lhota v. Oppenheimer*, post, 1102; the question of the effect of a pending action under one statute as a bar or abatement of an action under the other statute, in the note appended to *Nashville, C. & St. L. R. Co. v. Hubble*, post, 1132; and the effect of a judgment rendered in the lifetime of the deceased or subsequently to his death as a bar to any further action in the note to *St. Louis & S. F. R. Co. v. Goode*, post, 1141.

The effect of a release by the injured person in his lifetime of all claim for the injuries as a bar to an action after his death is treated in a note to *State use of Melitch v. United R. & Electric Co.* post, 1163.

A somewhat similar question is as to the effect on any right of action after the death of the decedent of the fact that all right of action by him to recover for the injuries was barred in his lifetime. This is covered in a note to *Kelliher v. New York C. & H. R. R. Co.* post, 1178, and in this connection a note of interest is that appended to *Sharrow v. Inland Lines Co.*, covering the question as to the necessity of alleging that action for death was brought within the statutory period.

The following notes are also of interest in connection with this general subject: Note to *Brahham v. Baltimore & O. R. Co.* post, 1201, as to the effect of receipt of the proceeds of life insurance policies as affecting the measure of damages recoverable. L.R.A.1915E.

able for the death of the insured; note appended to *McLaughlin v. United R. Co.* post, 1205, as to the effect of the receipt of property of the deceased by inheritance or distribution on the measure of damages recoverable by or in behalf of the statutory beneficiaries; note appended to *Radley v. Le Ray Paper Co.* post, 1199, as to the effect on the damages recoverable by or in behalf of the widow of the deceased of the fact, that she married him subsequently to the injury resulting in his death.

The question as to the right to maintain more than one action for an injury resulting in death is of great importance as affecting the damages recoverable in the different actions where they are held to coexist, or in a single action, where one action is held to be the exclusive remedy. These questions are covered in the following notes, which will appear in a subsequent volume: Note to *Murray v. Omaha Transfer Co.* L.R.A. —, —, as to measure of damages recoverable in actions for personal injuries revived by a personal representative of the plaintiff; note to *Florida East Coast R. Co. v. Hayes*, L.R.A. —, —, as to the measure of damages recoverable by personal representative for injury to or death of his decedent; and note to *St. Louis, I. M. & S. R. Co. v. Craft*, L.R.A. —, —, as to excessive damages for injury to person under survival or death act.

The consideration of the question whether one or more actions are maintainable for an injury to the person resulting in his death, in connection with the more specific questions heretofore referred to, suggests the desirability, when disposing of any specific question involving the point, of construing the statutes with reference to the reasonable and natural purpose sought to be obtained thereby rather than by any test based upon refinement of reasoning as to whether the statute creates a new cause of action which coexists with the right of action surviving the death of the deceased, or whether the cause of action is exclusive.

For it is believed that the better rule will be found to be that based upon the theory that the cause of action is the injury to the person of the deceased for which coexistent remedies, or an exclusive remedy is given. But the cause of action must be existing at the time of his death in order that any remedy may be invoked by or in behalf of decedent's estate or statutory beneficiaries.

The doctrine that the cause of action re-

mains the same, and that the effect of Lord Campbell's act is merely to give a new remedy for the enforcement thereof in whole or partial substitution for that existing in the deceased, has much to commend it.

First: It is in harmony with the express terms of both the survival statute and Lord Campbell's act, and requires no strained construction of either. Neither does it require any "reading in" to either statute of any exceptions; judicial legislation is thereby avoided.

Second: It works complete justice both to the wrongdoer, the injured person, and his statutory beneficiaries. A few illustrations of the result of the two rules will illustrate this point.

Thus, in some jurisdictions where it has been held that Lord Campbell's act creates a new cause of action, in order to avoid the natural and logical result of the rule and prevent the hardship and injustice resulting from a doctrine similar to that established by *ROWE v. RICHARDS*, which requires the defendant to pay twice for the destruction of the decedent's earning capacity, the courts have "read in" to the general survival statute an exception that it shall not apply where death is instantaneous, and into Lord Campbell's act an exception that it shall apply only where the injury results in instant death.

The ill effects of making the instantaneous character of death the test of the applicability of the statutes are demonstrated in a note on that subject, which will appear in a subsequent volume. In general, however, it may be said that in addition to the burden of establishing an injury through the negligence of the defendant, and the damages naturally flowing therefrom, it imposes upon the plaintiff the burden of proving when his decedent died with reference to the injury, resulting in much refinement of reasoning, and the distraction of the attention of the jury from what should be the real issues in the case. Moreover, death instantaneous with the injury is a physical impossibility; some period of time, however infinitesimal, must elapse between the two.

A more serious evil arising from this doctrine is the injustice and hardship which have resulted therefrom in many jurisdictions by making the question of a substantial recovery depend upon what should be the subordinate question as to whether or not the deceased survived his injury for an appreciable period of time. And then again, by limiting the application of Lord Campbell's act to cases of instant death, the purpose of that statute to provide a fund for the benefit of those dependent upon the

decedent, free from his debts, is defeated except in the comparatively few cases where no appreciable length of time intervenes between the injury and death. There is no language in Lord Campbell's act or in a general survival statute which in any way justifies the construction that those dependent upon a person killed through the negligence of another should receive compensation for their pecuniary loss from his death where death was instantaneous, while the beneficiaries of a person who survived an injury for a short period of time should receive nothing unless by way of the general distribution statutes.

Even a greater evil resulting from this rule is that which defeats all recovery of substantial damages where the deceased survived his injury for a short period of time, during which, however, he was unconscious. According to this doctrine, although the earning capacity of two individuals may be the same, and although they may each have the same number of persons dependent upon them, yet where both are killed in the same accident, the mere fact that the death of one of them was instantaneous, while the other although unconscious, survived his injuries a brief time, is sufficient to deprive those dependent upon the latter person of all compensation for their pecuniary loss, while full compensation is given to the dependents of the former. In some jurisdictions this hardship is entirely or partially avoided, as shown in a note covering the subject of instantaneous death which will appear in a subsequent volume.

In other jurisdictions the instantaneous death test to determine the applicability of these statutes has been denied, but another test has been adopted which also results in considerable injustice. In these jurisdictions there is read into general survival statutes the exception that they shall apply only where a personal injury does not result in the death of the injured person, and he dies from some other cause. According to this construction, where a person receives a serious injury which finally causes his death, no matter how much he may have suffered, how long he may have lingered, or to what expense he may have been subjected, nothing can be recovered therefor, since his cause of action abates and a new cause of action under Lord Campbell's act is the only remedy, and by this act the recovery is limited to the pecuniary loss sustained by the statutory beneficiaries. And on the theory that the causes of action under these statutes are separate and distinct, it is frequently held that the damages under the survival statute are limited to the compensation for the pain and suffer-

ing endured by the decedent, and his destroyed and impaired earning power cannot be considered. In other words, although an injury results in the total destruction of the earning power of the person injured, if he dies from some other cause, no compensation can be recovered therefor for any period beyond his death.

Other courts recognizing this injustice, while holding that the causes of action are separate and distinct, nevertheless hold that they are coexistent and may be joined and prosecuted *pari passu* (see note to Nashville, C. & St. L. R. Co. v. Hubble, post, 1132), the damages recoverable under the survival statute being limited to compensation for the pain and suffering of the deceased, while those recoverable under Lord Campbell's act are compensation for the pecuniary loss to the statutory beneficiaries. This doctrine results in substantial justice, but it is more consistent with the theory that one cause of action arises under these statutes from a personal injury resulting in death, and that to redress this injury two remedies exist: one in behalf of the estate of the injured person to recover loss to the decedent up to the time of his death; the other in substitution for his destroyed earning power, to recover the pecuniary loss to his statutory beneficiaries.

One of the logical results of the doctrine that these statutes authorize separate and distinct causes of action is the case of ROWE v. RICHARDS, which in effect sustains a double recovery for the decedent's destroyed earning power, and prevents the wrongdoer from settling with the injured person for the injury, and thereby absolving himself from further liability; but, under the doctrine of this case, like the sword of Damocles there constantly hangs over a person through whose negligence is caused an injury to the person of another, the danger of being hauled into court years after the injury, to answer to the statutory beneficiaries, on the ground that the injury was the cause of the death.

As pointed out in the notes heretofore referred to, some cases sustaining the doctrine that Lord Campbell's act creates a new cause of action escape the result reached in ROWE v. RICHARDS by construing the provision that the action may be maintained for damages where the injury was such that the injured person might have maintained an action therefor had he lived, as referring not only to the character of the injury, but also as constituting a condition to the right of action thereby given. The fallacy of this construction is quite conclusively demonstrated in ROWE v. RICHARDS. Under the theory that there is but one cause of action, it is not necessary to invoke the condition

referred to in order to make the settlement with the injured person a defense to the claim of the statutory beneficiaries, as that result flows logically from the extinguishment of the single cause of action.

Under the rule that for an injury to the person resulting in death there arises but one cause of action, but there exists by virtue of the general survival statute and Lord Campbell's act two remedies for the enforcement thereof, one for the loss of the injured person during life, not including compensation for destroyed earning power beyond his death, the other for compensation to the statutory beneficiaries for their pecuniary loss by his death, including contributions they might reasonably expect from his earnings, the measure of damages is reached without any strained construction of the statutes, for it is based upon the results naturally flowing from the injury to the deceased; and since one element of damages under Lord Campbell's act is based upon the earning power of the deceased, this element of damage is not to be included in assessing the damages accruing under the general survival statute.

Under Lord Campbell's act, while the right of statutory beneficiaries to recover substantial damages is dependent upon showing a reasonable expectation of receiving an equivalent advantage from the continued life of the decedent with unimpaired earning capacity, yet that showing is not for the purpose of establishing a new cause of action, but merely to establish their right to all or part of the damages resulting from the destruction of the earning capacity of the deceased.

And it naturally and logically follows that if both these statutes merely provide different remedies to enforce the cause of action existing in the injured person, these remedies are ineffective and without force unless his cause of action is actually existing in him at the moment of dissolution. Hence the doctrine overcomes all the inconsistencies presented with reference to such specific questions as the abatement and revival of a pending action or cause of action, the effect of a release by the injured person in his lifetime, or a judgment for or against him in an action to recover for the injury, or the effect of the fact that his cause of action was barred at the time of his death, all of which are considered in the notes heretofore referred to.

And the doctrine of a single cause of action is not inconsistent with any settled rules or principles of law. Taking up the question from this standpoint, it may properly be considered in comparison with the doctrine of ROWE v. RICHARDS, for this is a valuable case on the questions both of

whether a general survival statute and the so-called death statutes create different causes of action for the wrongful death, concurrent or exclusive, and also as to the effect of a release by the injured person in his lifetime on the right of action of the statutory beneficiaries to recover for his wrongful death. It is believed, however, that the doctrine of this case is based upon a confusion of the cause of action for the injury with the remedy for its enforcement.¹

As applied to the question under consideration it is to be noted that at common law, there was no cause of action for the death of a human being. There was, however, a cause of action for personal injuries, but no remedy therefor where death ensued. Under these circumstances, and to prevent the injustice arising from this situation, Lord Campbell's act was enacted.² The language of the first section of this act giving an action for damages notwithstanding the death of the injured person seems clearly to indicate that the lawmaking power intended to preserve an existing cause of action, notwithstanding the death which theretofore had defeated all remedy. Not only was this cause of action preserved, but a new and distinct remedy was created, to secure redress for the injury. This remedy was by suit generally in the name of the personal representative, but for the benefit of certain designated beneficiaries of the decedent, and the damages were to be based upon their pecuniary loss from his death. Thus while a new remedy was substituted for the remedy which the injured person would have had had he lived, no new cause of action was created; that remained the same: *viz.*, the injury to the person of the deceased, resulting in the destruction or impairment of his earning power, although of course the two actions are distinct.

The destroyed earning power is the chief element of damage flowing from the injury, whether the action was in behalf of the injured person or in behalf of his statutory beneficiaries; other elements of damage, such as loss of parental training, are also based upon the injury, and are recoverable because construed to be an element of pecuniary loss.

Hence, the primary ground under either statute is the cause of action in the injured person to recover damages for the injury, the injury itself giving to no one a right of action except to the person injured. Neither the husband, wife, parent, child, nor next of kin, is legally damaged or injured thereby, excepting, of course, where the husband or parent loses the services of the wife or child, or there are necessary expenses occasioned by the injury for which the husband or parent is legally liable.

In a restricted sense, however, no one is legally injured except the injured person himself, and hence no right of action existed in anyone to recover for the injury except the injured person, and his action sounding in tort to recover for the injury did not survive his death; hence it frequently happened that all right of recovery for an injury was lost where it was so serious as to cause the death of the injured person.

Indeed, the evident intent in limiting damages to the pecuniary loss of the designated beneficiaries was to limit them within a scope making them in amount less than the injured person himself might have recovered had he lived. Construing Lord Campbell's act alone without reference to a general survival statute and it is clear that the purpose was to permit the action of the injured person to abate with his death, and to substitute in place of this action an action for the benefit of certain designated beneficiaries

¹ See *Anderson v. Wetter*, 103 Me. 257, 15 L.R.A. (N.S.) 1003, 69 Atl. 105, holding that the cause of action and remedy are entirely different matters; while the former precedes and gives rise to the latter, yet they are separate and distinct from each other, and are governed by different rules and principles. The cause of action is neither the circumstance that occasioned the suit, nor the remedy employed, but it is the legal right of action.

It has been said that a negligent act causing death is an invasion of the right to life,—the first and highest of all rights, on which all others are based. *Broughel v. South New England Teleph. Co.* 73 Conn. 614, 84 Am. St. Rep. 178, 48 Atl. 751.

² *Oldfield v. New York & H. R. Co.* 14 N. Y. 310, holding that at common law the right to maintain an action for personal injuries died with the person, and the leading object of a statute similar in principle to Lord L.R.A.1915E.

Campbell's act was to authorize the maintenance of such an action in cases where death had ensued from the wrongful act, neglect, or default of another, and the statute does not only create a liability in these cases where the relation to the decedent of the person to be indemnified was such that the latter had legal right to some pecuniary benefit which would result from the continuance in life of the decedent, and which was lost by his death, but it is applicable to all cases where, if death had not ensued, the injured person himself, if living, might have maintained the action.

Lord Campbell's act recites in its preamble the failure of the common law to furnish an action for injuries resulting in death, and states that the purpose thereof is to provide a remedy. *Seward v. Vera Cruz*, L. R. 10 App. Cas. 59, 54 L. J. Prob. N. S. 9, 52 L. T. N. S. 474, 33 Week. Rep. 477, 5 Asp. Mar. L. Cas. 386, 49 J. P. 324.

who were pecuniarily injured by the taking away of the decedent, and to the extent of their injury the personal representative of the decedent, as the nominal plaintiff, is given a right to recover such damages, notwithstanding the death of the injured person.

That the action given the personal representative for the benefit of the statutory beneficiaries was intended as a substitute for the action which vested in the decedent is made clear by the use of the phrase that the action may be brought "notwithstanding the death." Had the action thereby been in every sense a real and distinct cause of action for the death, such language would have been entirely unnecessary and superfluous; and its use indicates that the law-

making power had the primary action in mind, and intended in substitution thereof to give a right of recovery for the benefit of the beneficiaries designated therein.

Moreover, this phrase, "notwithstanding death," is very inapt language to use in creating a new cause of action, since upon that hypothesis the action would lie because of the death, not in spite of it.

As heretofore noted, the courts are divided upon the question as to whether, under general survival statutes and statutes embodying in principle Lord Campbell's act, one or more actions may be maintained. In many jurisdictions it is held that but one action may be maintained,³ the form of the action to be determined by such questions as the character or cause of the death of

³ Under a statute similar to Lord Campbell's act, providing that an action for damages may be maintained notwithstanding the death of the injured person, but one cause of action is recognized, and that is the wrong done the injured person, irrespective of its consequences. An injury resulting from the wrongful act, neglect, or default of another gives the injured person, if he survives, a right of action. If he dies, the right of action survives to his personal representative. In either case the cause of action is the same, but the question in whose name and for whose benefit the action should be brought depends upon whether the injury resulted in death, as may also the amount of recovery. *Crane v. Chicago & W. I. R. Co.* 233 Ill. 259, 84 N. E. 222.

The Illinois statutes, the 1st section of which is identical with Lord Campbell's act, and subsequent sections, making actions to recover damages for personal injuries survive, do not create separate and distinct causes of action, but the cause of action is the same,—the wrongful act, neglect, or default complained of, and the only difference between them is that the measure of damages is not the same. *Devine v. Healy*, 241 Ill. 34, 89 N. E. 251. And see Illinois cases cited in notes 1 and 3 in the note appended to *Lhota v. Oppenheimer*, post, 1102.

In *Louisville & N. R. Co. v. Simrall*, on petition for rehearing, 32 Ky. L. Rep. 240, 104 S. W. 1199, it is pointed out that nothing in the principal opinion in that case as reported in 127 Ky. 55, 104 S. W. 1011, was intended to intimate that there could be two actions maintained for a single wrong,—one to recover for pain, suffering, etc., and another for the death of the person injured where he afterwards died; and it is said that it has been often held that two such actions cannot be maintained for one wrong,—the personal injury.

The Connecticut employers' liability act is, held not to create a separate, distinct right, but merely causes to survive the right of action of the deceased; and the amount of damages recoverable is the value of his life to him, and not the damage to the beneficiary. *Farley v. New York, N. H. & L.R.A.* 1915E.

H. R. Co. 87 Conn. 328, 87 Atl. 990; *Cling v. Torello*, 87 Conn. 301, 46 L.R.A. (N.S.) 930, 87 Atl. 987.

Goodsell v. Hartford & N. H. R. Co. 33 Conn. 51, holding that a statutory provision authorizing a recovery against railroad companies for wrongful death under designated circumstances, by the personal representative of the decedent, and for the benefit of designated parties, is not inconsistent with the statute providing for the survival of actions for personal injuries; the effect of the two statutes, construed together, is not to give the personal representative two suits for the same act, one for the injury to the deceased and the other for the value of his life to his relatives, but the damages recoverable in either case are for the injuries to the deceased.

In Delaware it is held that statutes similar to Lord Campbell's act, together with an earlier provision in effect a general survival act, do not provide for two separate and distinct actions for the same injury, but only one action may be maintained for the same negligent act or injury, and the chief difference between an action brought by a person designated in the statute for the death, and an action to recover for loss in consequence of such injuries, is in the measure of damages. *Perry v. Philadelphia, B. & W. R. Co.* 1 Boyce (Del.) 399, 77 Atl. 725.

In *Lubrano v. Atlantic Mills*, 19 R. I. 129, 34 L.R.A. 797, 32 Atl. 205, construing together a general survival statute and a statute similar to Lord Campbell's act, the court said that "a further consideration in favor of a single action is the confusion of damages which would result from the maintenance of two actions. Although they might be theoretically separate, a practical separation would be quite impossible. The measure of pain and suffering or estimated damage to one's estate cannot be so definitely marked as to limit liberality of a sympathetic jury."

Koloff v. Chicago, M. & P. S. R. Co. 71 Wash. 543, 129 Pac. 398, holding that § 183, Rem. & Bal. Code, grants but one cause of action, to be prosecuted in a single suit by

the injured person,⁴ or the form of the action is optional with the plaintiff.⁵ And in some jurisdictions, while the remedy is limited to one action, in this action damages may be recovered for such loss to the injured person as pain and suffering, loss of time between his injury and death, medical expenses, etc.⁶ And in proper cases there

may be included as an additional element of damages, the pecuniary loss to the statutory beneficiaries.⁷

In other jurisdictions, as heretofore pointed out, the actions under the two statutes are regarded as concurrent or coexistent, and both may be maintained,⁸ although, as shown in the note to Nashville, C. & St. L.

the heirs or personal representative of the deceased. To the same effect is *Riggs v. Northern P. R. Co.* 60 Wash. 292, 111 Pac. 162.

⁴ *Storie v. Grand Trunk Elevator Co.* 134 Mich. 297, 96 N. W. 569, holding that where the injured person survives his injuries for a time, the only right of action his personal representative has is now under the survival act. To the same effect is *Dolson v. Lake Shore & M. S. R. Co.* 128 Mich. 444, 87 N. W. 629; *Jones v. McMillan*, 129 Mich. 86, 88 N. W. 206.

Where the injured person survives his injury for a time, and then dies as a result of the injury, the action must be under the survival act to recover damages for the injury to the decedent, and his personal representative is entitled to recover the same measure of damages which he could have recovered if he had lived to bring his suit to a successful issue. *Kyes v. Valley Teleph. Co.* 132 Mich. 281, 23 N. W. 623, 13 Am. Neg. Rep. 340; *Rouse v. Michigan United R. Co.* 164 Mich. 475, 129 N. W. 719.

And see note on instantaneous death to be published in a subsequent volume.

⁵ A personal representative of a deceased person who dies as a result of his injuries may elect to bring an action to recover damages for the pain and suffering of the deceased from time of his injury until his death, or to recover such damages as will compensate his estate for the destruction of his power to earn money. *Bowling Green Gaslight Co. v. Dean*, 142 Ky. 678, 134 S. W. 1115; *Chesapeake & O. R. Co. v. Bank*, 142 Ky. 746, 135 S. W. 285.

Chesapeake & O. R. Co. v. Bank, supra, holding that where a person is injured through the negligent act of another, and death does not immediately ensue, the representative of the deceased, at his election, may sue either for the pain and suffering of the deceased as the result of his injury, or for damages for his death, but cannot sue for both, and it is erroneous to instruct the jury that they may include both elements in the recovery.

⁶ Notes to *Murray v. Omaha Transfer Co.* and to *Florida East Coast R. Co. v. Hayes*, which will appear in a subsequent volume.

⁷ In *McClagherty v. Rogue River Electric Co.* 73 Or. 135, 140 Pac. 64, it is said that the employers' liability act contemplates but one action for an injury to a person resulting in his death, and the amount is not confined to the pecuniary loss suffered by the beneficiaries, but such beneficiaries may recover for the wrong causing the death.

And see *Kling v. Torello*, 87 Conn. 301, 46 L.R.A. (N.S.) 903, 87 Atl. 987, declaring L.R.A. 1915E.

that under the Connecticut statutes, which are distinguished from Lord Campbell's act, where a person, as the result of personal injuries, suffers during life, and death later results, there are not two independent rights of action, but there is only one liability, and that is for all the consequences of the wrongful act, including the death.

Mobile, J. & K. C. R. Co. v. Hicks, 91 Miss. 273, 124 Am. St. Rep. 679, 46 So. 360, holding that only one action can be maintained to recover damages to the decedent's estate from injuries subsequently resulting in his death, and also for loss to the beneficiaries of their support, and hence it is not error for the court to consolidate an action by a widow and children to recover for loss of support from the death of the husband, and father and an action by the widow as administratrix of the estate of her deceased husband to recover the damages sustained by the decedent.

⁸ Under the Federal Employers Liability act the fact that the injured employee survived his injury for several hours does not operate to extinguish the liability of the railway company for both the wrongful injury and the death which ensued, for the act declares two distinct and independent liabilities, resting, of course, upon the common foundation of the wrongful injury, but based upon altogether different principles. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176.

In *Fulgham v. Midland Valley R. Co.* 167 Fed. 660, reversed on other grounds in L.R.A. —, —, 104 C. C. A. 151, 181 Fed. 91, following *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L.R.A. 283, 13 S. W. 801, it was held that the Arkansas death statutes give two causes of action for wrongful death; one for the benefit of the estate, the other for the benefit of the widow and the next of kin, and these causes of action are not in conflict; both vest in the personal representative of the decedent and may proceed *pari passu* in one suit.

The act of Congress as to the loss of contributions on account of the death of an employee creates a right of action for the benefit of his widow and next of kin wholly independent of the right of action given to the injured person for the pain and suffering which he endured on account of the injury. *Kansas City Southern R. Co. v. Leslie*, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915B, 834.

A right of action for a wrong committed upon an injured person, for the pain and suffering, is distinct from a suit for the benefit of the widow and next of kin. St.

R. Co. v. Hubble, post, 1132, as a matter of practice in most jurisdictions the actions may be joined.

Louis, I. M. & S. R. Co. v. Robertson, 103 Ark. 361, 146 S. W. 482.

St. Louis, I. M. & S. R. Co. v. Corman, 92 Ark. 102, 122 S. W. 116, holding that the statutes of Arkansas which embody the principles of Lord Campbell's act create two causes of action: one for the benefit of the estate, to recover damages which the decedent could have recovered had he survived the accident; the other for the benefit of the widow and next of kin for the damages which they sustained by reason of the death.

And in *Murphy v. St. Louis, I. M. & S. R. Co.* 92 Ark. 159, 122 S. W. 636, it is said that "upon the death of a person by a wrongful act of a railroad company, two causes of action arise; one in favor of the administrator, for the benefit of the estate; the other for the benefit of the next of kin; and the actions are prosecuted in different rights, and damages are given upon different principles, to compensate different injuries. The action in favor of the next of kin is based on the theory that such next of kin has a pecuniary interest in the life of the person killed; and the amount of the recovery is limited to the value of that interest; and the administrator is but the trustee of such next of kin."

In *Farley v. New York, N. H. & H. R. Co.* 87 Conn. 328, 87 Atl. 990, the Federal employers' liability act, which, in so far as it provides for the recovery for a wrongful death, follows the lines of Lord Campbell's act, is held to create a right of action where there was none at common law,—one which is entirely independent of any which the deceased might have had in life, and which comes originally to the personal representative by operation of the statute, and not by process of survival. It is for the exclusive benefit of certain persons, and the damages recoverable are such as result to them by reason of their being deprived through the wrongful death of the deceased of a reasonable expectation of pecuniary benefit, attendant upon his continuance in life.

Stephens v. Columbus R. Co. 134 Ga. 818, 68 S. E. 551, holding that where the original plaintiff died pending suit for personal injury caused by the negligence and tortious conduct of defendant's agents and employees, two different causes of action may arise,—the one in favor of the plaintiff, for pain and suffering, the other in favor of her husband, for the loss of his wife's services and expenses incurred, if any, as the consequence of the injuries to her; and these causes of action are separate and distinct in favor of different parties, and cannot properly be joined in one suit.

The Civil Code of Georgia is held to provide for two separate proceedings: First, the carrying forward by the administrator of a pending action by his decedent to recover damages for personal injuries; sec. L.R.A.1915E.

In the foregoing cases the question has been considered with reference to the construction of statutes of the character under

ond, a right to recover for the homicide by the widow or children. And it is said that in the former a recovery can be had for pain and suffering, lost time, physician's bills, etc., accruing prior to the death of the injured person, but no recovery can be had for the full value of his life. In the second action, a recovery cannot be had for any of the damages recoverable in the first action, but for the full value of the life of the deceased,—in other words, for his death. *Spradlin v. Georgia R. & Electric Co.* 139 Ga. 575, 77 S. E. 799.

Dougherty v. New Orleans R. & Light Co. 133 La. 993, 63 So. 493, holding that, by virtue of the statute, providing that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it, the right of this action shall survive in case of death in favor of the children or widow of the deceased, or either of them, and in default of these, in favor of the surviving father and mother, or either of them, and in default of any of the above persons, then in favor of the surviving brothers and sisters, or either of them, for the space of one year from the death; provided, that should the deceased leave a widow, together with minor children, the right of action shall accrue to both the widow and minor children; provided, further, that the right of action shall accrue to the major children only in those cases where there is no surviving widow or minor child or children. The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife or brothers or sisters, as the case may be." On the death of the injured person his right of action to recover damages for personal injuries survives for the benefit of the beneficiaries designated, and a right of action also accrues in favor of the beneficiaries designated to recover compensation for the pecuniary injuries sustained by them from the death.

In *Stewart v. United Electric Light & P. Co.* 104 Md. 332, 8 L.R.A. (N.S.) 384, 118 Am. St. Rep. 410, 65 Atl. 49, it is said that there is nothing incongruous or contrary to fixed legal principles in the assertion that the same wrongful or negligent act may give rise to two separate causes of action, if different injuries have been inflicted by it on different persons. It is the concurrence of the act and injury from it which constitutes the cause of action. It is not the identity of the acts, but the identity of the acts, the damages, and the person who has sustained the damage, which precludes two recoveries. Applying the test here designated, and the remedy by revival of the injured person's right of action and that in favor of the statutory beneficiaries must be regarded as based upon the same act; the nominal

consideration with regard to an injury to the person which has destroyed the earning capacity of the one injured, and hence his power to contribute from his earnings to his statutory beneficiaries. There are cases

where the element of damages is personal to a third person; as, for example, loss to a parent of the services of a child during minority.⁹

A. G. S.

plaintiff is generally the same, and frequently even the real plaintiff in interest is the same in each action, and the injury is the same, at least, so far as concerns the loss to the beneficiaries of contributions from the deceased, which they had reasonable expectations of receiving had he lived out his life expectancy. The only real difference, then, is the measure of damages, and this is largely a difference in computation. This case, however, does not go to the length of supporting *Rowe v. Richards*, for it is said in this action under the survival statute the damages are to be limited to the loss actually caused to the injured person prior to his death, and in the action in behalf of the statutory beneficiaries to the pecuniary loss sustained by them.

In *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693, 2 So. 537, it is said that § 1510 of the Code, which provides that whenever the death of any person shall be caused by any wrongful or negligent act or omission, which, if death had not ensued, would have entitled the injured party to maintain an action and recover damages in respect thereof, and such deceased person shall leave a widow or children, or both, etc., an action may be brought in the name of the beneficiary to recover such damages as the jury may deem fair and just with reference to the injury resulting from the death to the person who sues, and § 2078, authorizing the prosecution of the action which the testator or intestate might have commenced and prosecuted, provide for entirely distinct and separate actions. These actions may coexist, but they have no connection.

In *Causey v. Seaboard Air Line R. Co.* post, 1185, it is said that a recovery in an action for personal injury belongs to the estate of the intestate, but a recovery for death is no part of the assets of the estate, the two rights of action have no common source, one being under the principles of the common law and the other a creature of the statute. The administrator sues not because of any privity between him and the intestate, but for the reason that the statute designates him as a part plaintiff, and he is substantially a statutory trustee.

And see *Rowe v. Richards*, holding that since the two causes of action are independent and do not conflict with each other, and do not merge upon the death of the injured party, the satisfaction of one is not a bar to prosecution and recovery upon the other.

Moyer v. Oshkosh, 151 Wis. 586, 139 N. W. 378, following *Nermeczek v. Filer & S. Co.* 126 Wis. 71, 105 N. W. 225, on the point that where there is any substantial period of suffering between the injury and

death, the causes of action for the injury and for the death may coexist and be joined in the same complaint.

In *St. Louis & S. F. R. Co. v. Goode*, post, 1141, holding that the two causes of action, one in behalf of the estate for personal injuries received by the decedent in his lifetime, the other in behalf of the statutory beneficiaries for loss to them by reason of the death, are coexistent; the damages to the estate begin with the wrong and cease with the death, while those to the beneficiaries begin with the death.

⁹ *Register v. Harrell*, 131 La. 983, 60 So. 638, holding that under the Louisiana Code, the parents of a young unmarried man, wrongfully killed, have two causes of action: one to recover damages to the estate of the decedent from the wrongful injury, and the other to recover compensation from the loss to them from the death of their son, not, however, including exemplary damages.

But a statute providing that when the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action to recover damages from the person causing the death, does not give to the mother and child of a person killed by the wrongful act of another separate causes of action against the wrongdoer. *Riggs v. Northern P. R. Co.* 60 Wash. 292, 111 Pac. 162.

PENNSYLVANIA SUPREME COURT.

ALBERT LHOTA, Exr., etc., of Andy Lhota,
Deceased,
v.

M. OPPENHEIMER et al., Doing Business
as M. Oppenheimer & Company, Appts.

(247 Pa. 280, 93 Atl. 476.)

Abatement — action for personal injury — constitutional provision.

A statutory provision that a common-law action shall not abate by the death of plaintiff, but may be continued by the substitution of his personal representative, is not nullified in respect to its application to actions for personal injuries, by the adoption

Note. — For abatement and revival of actions for personal injury, upon death of plaintiff, see note following this case, post, 1104.

Generally as to several actions for death or injury causing death, see note following *Rowe v. Richards*, ante, 1095; and see also references therein to notes on collateral subjects.

of a constitutional provision that in case of death from personal injuries the right of action shall survive, and the general assembly shall prescribe for whose benefit such action shall be prosecuted, but even after such adoption actions pending at the death of the injured person may be prosecuted by his personal representative.

(January 2, 1915.)

APPEAL by defendants from a judgment of the Court of Common Pleas for Allegheny County, overruling a motion for judgment notwithstanding a verdict for plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

The constitutional and statutory provisions upon which this case depends are as follows:

Constitution, art. 3, § 21. "No act of the general assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to person or property; and, in case of death from such injuries, the right of action shall survive, and the general assembly shall prescribe for whose benefit such actions shall be prosecuted."

Act 1851, § 18. "No action hereafter brought to recover damages for injuries to the person by negligence or default shall abate by reason of the death of the plaintiff, but the personal representatives of the deceased may be substituted as plaintiffs and prosecute the suit to final judgment and satisfaction."

§ 19. "Whenever death shall be occasioned by unlawful violence or negligence and no suit for damages be brought by the party injured, during his or her life, the widow of any such deceased, or if there be no widow the personal representatives, may maintain an action for and recover damages for the death thus occasioned."

The act of 1855 provides that "the persons entitled to recover damages for an injury causing death shall be the husband, widow, children, or parents of the deceased, and no other relative; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors."

Mr. W. S. Dalzell, for appellants:

If a person is injured through the negligence of another, and brings suit, he may prosecute that suit to judgment if he lives; if he dies before a recovery, that particular action is dead, but the right of survivorship granted by the Constitution remains, L.R.A.1915E.

and the right of action is vested in the parties prescribed by the act of 1855.

Pennsylvania R. Co. v. Adams, 55 Pa. 499; Schnatz v. Philadelphia & R. R. Co. 160 Pa. 602, 28 Atl. 952; Stahler v. Philadelphia & R. R. Co. 199 Pa. 383, 85 Am. St. Rep. 791, 49 Atl. 273; Lehigh Iron Co. v. Rupp, 100 Pa. 95; Delahunt v. United Teleph. & Teleg. Co. 215 Pa. 241, 114 Am. St. Rep. 958, 64 Atl. 515, 20 Am. Neg. Rep. 727.

Messrs. John M. Henry and N. R. Daugherty, for appellee:

The executor of a decedent who has entered suit in his lifetime and has died before trial is reached, can prosecute said suit to judgment and recover damages for the benefit of the estate, for personal injuries sustained by decedent through the wrongful act of a third party.

Birch v. Pittsburg, C. C. & St. L. R. Co. 165 Pa. 339, 30 Atl. 826; Maher v. Philadelphia Traction Co. 181 Pa. 393, 37 Atl. 571, 3 Am. Neg. Rep. 85; McCafferty v. Pennsylvania R. Co. 193 Pa. 339, 74 Am. St. Rep. 690, 44 Atl. 435, 6 Am. Neg. Rep. 693; Pennsylvania R. Co. v. Zebe, 33 Pa. 318, 6 Am. Neg. Cas. 232.

Fell, Ch. J., delivered the opinion of the court:

Andrew Lhota, while in the employ of the defendants, was injured by the falling of an elevator, and six months after the accident, and two weeks before his death, he brought this action, which was continued by his executor, who was substituted on the record as plaintiff. The defendants admitted that the accident was caused by negligence, for which they were liable, and the question of fact at the trial was whether the injury sustained by the deceased was the proximate cause of his death. This was decided by the jury in favor of the plaintiff, and the only question now to be considered is raised by an exception taken to the refusal of the court to direct a verdict for the defendants.

The argument of the learned counsel for the defendants is in support of the proposition that, where the plaintiff in an action for personal injuries dies before trial, the right to recover is fixed by article 3, § 21, of the Constitution of 1874, and is vested in the parties prescribed by the act of 1855, that the action brought by the deceased dies with him, and there can be no recovery by his personal representatives for the consequences of the injury, and recovery for death will be by a new action by the persons authorized by the act of 1855 and limited to their loss. It is conceded that this view of the law is not in harmony with our decisions, and we are asked to reconsider

them, and to say that § 18 of the act of April 15, 1851 (P. L. 669), is not in force. We have not been convinced that this should be done.

Section 18 of the act of 1851 provides that a common-law action shall not abate by the death of the plaintiff, but may be continued by the substitution of his personal representatives. The 19th section created a new right unknown to the common law, and limited to cases where death has resulted from violence or negligence, and no suit has been brought by the injured party in his lifetime. The act of April 26, 1855 (P. L. 309), designates the persons who may exercise the right first conferred by § 19 of the act of 1851, which right exists only in the event that an action has not been brought by the person injured. If the action brought by the deceased is continued, it is for the benefit

of his estate, and the measure of damages is the loss sustained by him. If an action is brought after death, as provided by the act of 1855, the measure of damages is the pecuniary loss sustained by reason of the death by the parties entitled to sue. *McCafferty v. Pennsylvania R. Co.* 193 Pa. 339, 74 Am. St. Rep. 690, 44 Atl. 435, 6 Am. Neg. Rep. 693. Section 18 of the act of 1851 was not modified or repealed, expressly or by implication, by the act of 1855. *Birch v. Pittsburg, C. C. & St. L. R. Co.* 165 Pa. 339, 30 Atl. 826; *Taylor's Estate*, 179 Pa. 254, 38 Atl. 230; *Maher v. Philadelphia Traction Co.* 181 Pa. 391, 37 Atl. 571, 3 Am. Neg. Rep. 85. These acts were followed by the constitutional provision, which secured the right conferred by the act of 1851, and did not in any way modify or annul the act.

The judgment is affirmed.

Note.—Abatement and revival of actions for personal injury upon death of plaintiff.

- I. Introductory, 1104.
- II. Lord Campbell's act as survival act.
 - a. In general, 1105.
 - b. Effect of change in measure of damages and beneficiaries, 1113.
 - c. Comparison with statutes clearly death statutes, 1115.
- III. Lord Campbell's act as applicable to pending action.
 - a. In general, 1116.
 - b. Continuing action by amending pleadings, 1117.
- IV. Effect of statute similar to Lord Campbell's act on construction of general survival statute.
 - a. In general, 1118.
 - b. Distinction between Lord Campbell's act and penal statute, 1119.
- V. Construction of survival statute relating to causes of action.
 - a. In general, 1119.
 - b. Instantaneous character of death as the test, 1119.
 - c. Death from injury as a test, 1120.
 - d. Death resulting from some other cause as the test, 1121.
 - e. Where actions coexist under each statute.
 1. In general, 1124.
 2. Federal employers' liability act, 1125.
 - f. Where right of revival is optional, 1126.

VI. Construction of revival statute expressly referring to pending actions, 1126.

VII. Conflict of laws, 1129.

VIII. Who may revive action.

a. Personal representative, 1129.

b. Statutory beneficiary.

1. In general, 1130.

2. Construction of statute as to beneficiary, 1131.

I. Introductory.

The question of the abatement and revival of actions for personal injuries is complicated by confusing actions with causes of action. This failure to distinguish between the remedy and the cause of action is commented on more extensively in the note appended to *Rowe v. Richards*, ante, 1095.

At common law, actions and causes of action for personal injuries abated or died with the death of the injured person, whether he died as a result of the injuries or from some other cause. Hence the question of revival or survival is one of statutory construction.

The statutes relating to the subject, while differing in language and sometimes even in substance, may be grouped under four heads: First, general survival statutes, which in terms apply to actions and causes of actions for personal injuries, and provide in general terms that neither shall abate on the death of the injured person; second, general survival statutes which expressly apply to pending actions for personal injuries; third, general survival statutes which in terms only apply where the death of the injured person is from some cause other than the injury complained of;

fourth, statutes resembling Lord Campbell's act.

For the purpose of comparison with the fourth class, the first three classes of statutes may be considered together. Generally in every jurisdiction there is to be found a statute of one of the three classes mentioned, and a statute of the fourth class. The former statutes are clearly survival statutes, but statutes of the latter class are more indefinite as to their purpose.

II. Lord Campbell's act as survival act.

a. In general.

Lord Campbell's act is not generally regarded as a survival act, and it is not, in the sense that by virtue of it a pending action by an injured person to recover for the injury may be revived, but it is nevertheless based upon the injury to the person which resulted in his death.¹ And as shown

¹ *Martin v. Baltimore & O. R. Co.* (Gering v. Baltimore & O. R. Co.) 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533, construing §§ 5 and 6 of the death act of West Virginia, which followed the English statute of 9 and 10 Vict., commonly called Lord Campbell's act, and holding that the right of action thus given, although for the same act or neglect for which the injured person would have had a right of action in his lifetime, differs from an action brought by him, both in the ground on which it proceeds, and in the award of damages. It is not a common-law action to recover damages for the injuries suffered by the deceased while he lived, but it is an action given by statute for causing his death.

In *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176, the court treated the terms "liability" and "cause of action" as synonymous. It is said that the Federal employers' act declares two distinct and independent liabilities, resting, of course, upon the common foundation of a wrongful injury, but based upon altogether different principles. It plainly declares the liability of the carrier to its servant, and if he survives he may recover such damages as will compensate him for his expense, loss of time, suffering, and diminished earning power; and by the express provision of the statute in case of his death, his employer is made liable to his personal representative for the benefit of his surviving widow and children. This latter cause of action is independent of any cause of action which the decedent had, and includes no damages which he could have recovered for his injury if he had survived; "it is one beyond that which the decedent had, one proceeding on altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent;" hence it is a liability for the pecuniary damage resulting to them, and that only.

In *Garrett v. Louisville & N. R. Co.* 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32, the court refers to its former decisions construing the Federal employers' liability act, and holds that these cases settle the law that the act provides for two distinct and independent liabilities resting upon the common foundation of the wrongful injury.

And see *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 643, 59 L. ed. —, 35 Sup. Ct. Rep. 704, construing the Federal sm-L.R.A.1915E.

employers' liability act as amended, and holding that, although originating in the same wrongful act or neglect, the claims for pecuniary compensation to the beneficiaries and for injuries to the deceased are distinct, no part of either being embraced in the other; and it is said that one is for the wrong to the injured person, and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries, and is confined to their pecuniary loss through his death. One begins where the other ends.

In *Williams v. Alabama G. S. R. Co.* 158 Ala. 396, 48 So. 485, 17 Ann. Cas. 516, it is held that a statutory provision that if personal injury results in the death of the injured person, his personal representative may maintain an action therefor, operates to continue the cause of action which the injured person had, for the benefit of distributees of his estate, and not to create an entirely new and additional right of action, although the mode of estimating the damages may be entirely different from that to be employed had the action been brought by the deceased.

A provision that whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as, if death had not ensued, would have entitled the party injured to maintain an action and recover damages in respect thereof, the guilty person or corporation shall be liable to an action for damages notwithstanding such death, does not create a new cause of action, but simply provides for the survival of a cause of action where death ensues, and authorizes compensatory damages to certain statutory beneficiaries. *St. Louis, I. M. & S. R. Co. v. McNamare*, 91 Ark. 515, 122 S. W. 102.

Denver & R. G. R. Co. v. Frederic, 57 Colo. 90, 140 Pac. 463, declares that the purpose of the act embodying in principle Lord Campbell's act is to keep alive a right of action which otherwise would have perished under the rule of the common law.

Moore v. Pywell, 29 App. D. C. 312, 9 L.R.A.(N.S.) 1078, construing the death statutes of the District of Columbia and of Maryland, both of which are similar to Lord Campbell's act, and holding that these statutes do not create a cause of action, but merely remove the common-law obstacle in the way of recovery based upon the neg-

in many of the cases cited in note 1, it operates to keep alive the cause of action existing in the injured person in his lifetime, although the remedy for its enforcement is changed.

And as pointed out in the note to *Rowe v. Richards*, ante, 1095, while in a sense the action authorized by Lord Campbell's act is a new action, in a broader sense the cause of action is the injury to the person through

the wrongful act of the defendant, and it is caused to survive by these statutes, for the benefit of persons designated therein. According to this broader view, therefore, while the cause of action is the injury to the person, a remedy therefor is given in behalf of certain persons in substitution, either in whole or in part, for the remedy which the injured person had to secure redress for the injury to him. From this

ligent act which caused the death complained of.

Holton v. Daly, 106 Ill. 131, holding that the effect of Lord Campbell's act is to continue for the benefit of the wife, husband, etc., a right of action which commonly would have terminated at the death of the plaintiff, providing the injured person dies as a result of the injury. But the damages recoverable are different from those which might have been recovered by the injured party, and do not include the bodily pain and suffering which he underwent, and are not affected by his inability, after receiving the injury, to attend to his affairs generally. To the same effect are *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263; *Quincy Coal Co. v. Hood*, 77 Ill. 68, 12 Mor. Min. Rep. 148; *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553; *Prouty v. Chicago*, 250 Ill. 222, 95 N. E. 147.

And in *Devine v. Healy*, 241 Ill. 34, 89 N. E. 251, sustaining the survivability of an action for personal injuries, it is said that the cause of action under the general survival statute and under the statute similar to Lord Campbell's act is the same, viz., the wrongful act, neglect, or default which resulted in the injury to the deceased, the only difference being in the measure of recovery.

But in the later case of *Ohnesorge v. Chicago City R. Co.* 259 Ill. 424, 102 N. E. 819, in holding that the contributory negligence of the parent would bar the right of the personal representative of the estate of his deceased child to recover for the death of the child, it is said the Illinois statute similar to Lord Campbell's act is not a survival statute, and does not continue to the personal representative the cause of action the injured person had under the common law, but it creates a new and independent cause of action never before that time recognized as existing. For the reassertion of this doctrine, see *Harkin v. Ferro Concrete Constr. Co.* 185 Ill. App. 239.

Missouri, K. & T. R. Co. v. Elliott, 2 Ind. Terr. 407, 51 S. W. 1067, following *Ardmore Coal Co. v. Bevil*, 10 C. C. A. 41, 27 U. S. App. 96, 61 Fed. 757, holds that under Lord Campbell's act the right of action to recover damages for the wrongful death of a man survives in his wife and children. In both these cases, however, while the measure of damages is not stated, the action was for the death of the decedent, as distinguished from injuries to his person. *Sherman v. Western Stage Co.* 24 Iowa, L.R.A.1915E.

515, construing the statutory provision that when a wrongful act produces death the perpetrator is civilly liable for the injury, and the parties to the action shall be the same as though brought for a claim founded on contract against the wrongdoer in favor of the estate of the deceased, and the sum recovered shall be disposed of in the same manner, except that when the deceased leaves a wife, child, or parent surviving him, it shall not be liable for the payment of debts, and holding that it does not create a new cause of action, but simply removes the common-law bar to a recovery, where the wrongful act produces death, so that a wrongdoer is civilly liable for his wrongful act, whether such act was so moderate that his victim survives, or so immoderate that he dies. In the one case the action is by the person injured by the wrongful act, and in the other it is by the personal representative of the injured person. In either case the basis or cause of action is the wrongful act of the defendant. The damages may be more in the one case than in the other, but in either they are based upon the wrongful act from which they have resulted.

In *Lincoln v. Detroit & M. R. Co.* 179 Mich. 189, 51 L.R.A.(N.S.) 710, 146 N. W. 405, it is asserted that Lord Campbell's act, and the various laws of a similar kind that have been modeled after it, give a new cause of action, unknown to the common law, for the benefit of certain designated classes of surviving relatives. Such relatives do not take the cause of action for damages to the deceased by transfer to them by operation of law, or otherwise, but are enabled by the statute to recover the pecuniary loss to themselves caused by the wrongful taking off of the deceased, a continuation of whose life would have been beneficial to them; the cause accrues to the surviving beneficiaries mentioned in the statute, by reason of the death of the injured person caused by the wrongful act of another. It is, strictly, not proper to say that it is the cause of action which survives. This statute and the survival statute refer to different losses recoverable in different rights, but both are dependent upon the injury. Further on in the opinion, however, the reasoning apparently drives the court to the conclusion that the statute does not say that he must be able to maintain the same action and recover the same damages as the deceased, but "an action and recover damages in respect thereof. Of what? manifestly for the same wrongful

point of view, statutes embodying the principle of Lord Campbell's act are survival statutes. They do not, standing alone, however, operate to prevent the abatement of a pending action to recover damages for personal injuries, nor do they keep alive the remedy which the decedent himself had, but simply keep alive the cause of action, and give to certain beneficiaries a remedy for the enforcement thereof, in substitution in

whole or in part, for that existing in the injured person at the time of his death.

In this view of Lord Campbell's act any danger of permitting the recovery of double damages for the same injury is avoided, without reading into the general survival statute an exception in cases where the former act applies. For the cause of action being the same, the remedy given by Lord Campbell's act is substitutional for the

act, neglect, or default." So we see that, although the measure of damages may differ, the cause of action is the same, that is a wrongful act, neglect, or default.

According to the Missouri doctrine, neither a general survival statute nor an act embodying in principle Lord Campbell's act, creates a new right of action, but the action which is given is solely a preserved transmitted right. *Strode v. St. Louis Transit Co.* 197 Mo. 616, 95 S. W. 851, 7 Ann. Cas. 1084; *Hennessey v. Bavarian Brewing Co.* 145 Mo. 112, 41 L.R.A. 385, 68 Am. St. Rep. 554, 46 S. W. 966; *Miller v. Missouri P. R. Co.* 109 Mo. 360, 32 Am. St. Rep. 673, 19 S. W. 58; *Gray v. McDonald*, 104 Mo. 311, 16 S. W. 398; *White v. Maxcy*, 64 Mo. 552; *Proctor v. Hannibal & St. J. R. Co.* 64 Mo. 120.

Crapo v. Syracuse, 183 N. Y. 395, 76 N. E. 465, 19 Am. Neg. Rep. 429, wherein Judge Cullen, with the concurrence of two other judges, declares that an action by a personal representative to recover damages for the benefit of the next of kin, based upon the death of his decedent, is in reality an action to recover for personal injury to the decedent, although by statute the judgment inures to the benefit of certain designated beneficiaries.

Oldfield v. New York & H. R. Co. 14 N. Y. 310, holding, under a statute similar in principle to Lord Campbell's act, that the right to maintain an action for personal injuries died with the person, but where the death resulted from the injuries an action could be maintained to recover the pecuniary loss thereby resulting to the statutory beneficiaries. See New York cases in note 3.

Doedt v. Wiswall, 15 How. Pr. 128, holding that under a statute similar in effect to Lord Campbell's act, where the injured person dies from the result of the injury, and the wrongdoer also dies, the cause of action survives, in favor of the personal representative, for damages based upon a breach of contract on the part of the wrongdoer safely to carry the decedent, where the wrongdoer, a common carrier, undertook in the line of his duty to carry the plaintiff's decedent.

Compare with *Snedeker v. Snedeker*, 164 N. Y. 58, 58 N. E. 4, declaring that by the New York Code, §§ 1902 et seq., it is clear that the legislature intended to create a new cause of action for the benefit of the husband or wife and next of kin of the decedent, as a class, and the damages are L.R.A.1915E.

supposed to cover the pecuniary loss suffered by every person constituting it.

Murphy v. Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633, holding that the statute requiring compensation for causing death by wrongful act, neglect, or default, gives to the administrator of a deceased person whose death has been thus caused, a right of action on the same grounds that an action might have been maintained by the party injured if death had not ensued.

In *Helman v. Pittsburg, C. C. & St. L. R. Co.* 58 Ohio St. 400, 41 L.R.A. 860, 50 N. E. 986, it is said that the action given by the death statute is not a new action, but it is the same right of action which the deceased had until death. Upon his death, by virtue of this statute the right of action passes to his administrator for the benefit of the next of kin. The liability of the tortfeasor, instead of abating as at common law, is kept alive, but the liability to the administrator is for the same wrongful act. But this language is not in entire harmony with the reasoning of the court in *Mahoning Valley R. Co. v. Van Alstine*, 77 Ohio St. 395, 14 L.R.A. (N.S.) 893, 83 N. E. 601.

Bond Hill v. Atkinson, 16 Ohio C. C. 470, 9 Ohio C. D. 185, declaring that although given by statute the right goes to the personal representative from the deceased person.

Solor Ref. Co. v. Elliott, 15 Ohio C. C. 581, 8 Ohio C. D. 225, holding that a statute substantially similar to Lord Campbell's act is not to be construed to revive, or influence to survive, the cause of action of the deceased person wrongfully killed, nor does it create a double liability for the same wrong, but rather creates a cause of action to succeed an action which abated by the death of the injured person, and to take its place, not in favor of his estate, but in favor of his next of kin.

The court of Pennsylvania, in referring to an act of that state embodying the principles of Lord Campbell's act, said that without these acts a cause of action for a specified act of negligence would die with the person, but that consequence it was desired to avert, and under these acts the action does not die, but survives to certain persons named; it, however, is an action for the same injury and upon the basis of the same negligence. *Hill v. Pennsylvania R. Co.* 178 Pa. 223, 35 L.R.A. 196, 56 Am. St. Rep. 754, 35 Atl. 997.

Grainger v. Greenville, S. & A. R. Co. — S. C. —, 85 S. E. 968, referring to the

remedy existing in the injured person; and hence to this extent the remedy under the survival statute is destroyed, leaving generally the recovery, under the latter statute, of compensation for the pain and suffering of the deceased as a result of the injury, and compensation under the former act for the destroyed earning power.

first section of a statute similar to the first section of Lord Campbell's act, and holding that this section provides only that the liability shall survive, but that it confers a right of action on no one. The second section, however, provides who is to bring the action, and designates the person for whose use it shall be brought.

Bennett v. Spartanburg R. Gas & Electric Co. 97 S. C. 27, 81 S. E. 189, holding that the right of action to recover for personal injuries which survives the death of the person injured, and the right of action given by the statute similar to Lord Campbell's act arise out of the same injury, and the party plaintiff is nominally the same in each action, although his actual relation to and interest therein is entirely separate and distinct.

East Tennessee, V. & G. R. Co. v. Lilly, 90 Tenn. 563, 18 S. W. 243, holding that the statutes of Tennessee, largely a counterpart of Lord Campbell's act, manifestly abrogate the common-law rule that actions for personal injuries abate with the death of the injured person, and keep alive the deceased person's right of action, and virtually create a liability in favor of the widow or next of kin which did not exist at common law, and confer upon the widow and next of kin a right of action which otherwise they would not have had.

And see *Whaley v. Catlett*, 103 Tenn. 347, 53 S. W. 131, construing this statutory provision to provide for the continued existence and passing of the right of action of the deceased, and not for any new and independent cause of action in his widow, children, or next of kin, and holding that hence it accrues at the time of the injury. And see to same effect *Davidson Benedict Co. v. Severson*, 109 Tenn. 572, 72 S. W. 967, disapproving *Chicago, St. L. & N. O. R. Co. v. Pounds*, 11 Lea, 129.

Eames v. Brattleboro, 54 Vt. 471, holding that the purpose of the death act, similar in effect to Lord Campbell's act, was to prevent actions or causes of action for personal injuries from dying with the person, and to provide for the distribution of the amount recovered, which should be limited to the pecuniary loss of the distributees.

Brown v. Chicago & N. W. R. Co. 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255, asserting that by the Wisconsin statute, which in principle embodies Lord Campbell's act, a new cause of action is given, unknown to the common law, for the benefit of certain designated classes of surviving relatives. These relatives do not take the cause of

However, it has been frequently asserted that Lord Campbell's act, and statutes similar thereto, are not survival statutes, but that they create a new cause of action, or action, separate and distinct from that which vested in the injured person in his lifetime,² although it is generally conceded that the injury to the deceased, and not

action for damages to the deceased by transfer to them by operation of law, or otherwise, but are enabled by statute to recover the pecuniary loss to themselves, caused by the wrongful taking off of the decedent, the continuation of whose life would have been beneficial to them. It is, however, further declared that this statute creates no new liability, but prevents the lapse by death of an old one.

In *Read v. Great Eastern R. Co.* L. R. 3 Q. B. 555, 9 Best & S. 714, 37 L. J. Q. B. N. S. 278, 18 L. T. N. S. 82, 16 Week. Rep. 1040, Blackburn, J., said that § 2 of Lord Campbell's act did not give a new right of action, but merely regulated the amount of damages recoverable, and provided for its apportionment in a manner different from that which would have been awarded to the injured person in his lifetime.

In *Griffiths v. Dudley*, L. R. 9 Q. B. Div. 357, 51 L. J. Q. B. N. S. 543, 47 L. T. N. S. 10, 30 Week. Rep. 797, Field, J., remarked that *Read v. Great Eastern R. Co.* is a clear decision that Lord Campbell's act did not give any new cause of action, but only substituted the right of the representative to sue in the place of the right which the deceased himself would have had if he survived.

But in *British Electric R. Co. v. Gentile* [1914] A. C. 1034, 83 L. J. P. C. N. S. 353, 111 L. T. N. S. 682, 30 Times L. R. 594, the language used by the court in *Read v. Great Eastern R. Co.* and *Griffiths v. Dudley*, that the effect of Lord Campbell's act was to cause to survive the cause of action vested in the injured person in his lifetime, is disapproved of, and it is asserted that the effect of this act is to create an entirely new cause of action, which is dependent, however, upon there existing in the injured person at the time of his death a right to recover for the injuries. And see language to a similar effect in *B. C. Electric R. Co. v. Turner*, 18 D. L. R. 430. And see other English cases *infra*, note 2.

² *Thomas v. Chicago & N. W. R. Co.* 202 Fed. 766, holding that the act of Congress gives a right of action to the beneficiaries independent of that given to the decedent, and does not include the damages he might have recovered had he lived. See Federal Supreme Court cases, note 1.

Garrett v. Louisville & N. R. Co. 117 C. C. 109, 197 Fed. 715, 3 N. C. C. A. 769, holding that under the Federal employers' liability act, the right of action in the injured person for suffering occasioned by the injury did not survive his death, but a new cause of action was created in favor of his statutory beneficiary. Affirmed.

in 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32, cited supra, note 1.

Peers v. Nevada Power, Light & Water Co. 119 Fed. 400, holding not to be a survival act in the strict sense of the term, the Nevada statute embodying the principles of Lord Campbell's act.

In *Hulbert v. Topeka*, 34 Fed. 510, Justice Brewer, while following the decisions of the Kansas court on the question, dissented therefrom. On this point he said: "The measure of damages and the basis of recovery under the two sections are entirely distinct. Section 422 gives a new right of action,—one not existing before; an action which is not founded on survivorship, an action which takes no account of the wrong done to the decedent, but one which gives to the widow or next of kin damages which have been sustained by reason of the wrongful taking away of the life of the decedent. It makes no difference whether the injured party was killed instantly, or lived months; whether he suffered lingering pain, or not; whether or not he was put to any expense for medical attendance and nursing. And the single question is, How much has the wrongful taking away of his life injured his widow or next of kin? It is an action to recover damages for the death, and in no sense a survival of an action which accrued to the decedent before his death; whereas, on the other hand, § 420 provides for the survival of an action which the decedent himself had in his lifetime. . . . It is obvious that both of these causes of action may exist against two different parties, and why may they not exist against the same party?" On this point the court with approval quotes from *Needham v. Grand Trunk R. Co.* 38 Vt. 294, which case is disapproved of in *Legg v. Britton*, 64 Vt. 656, 24 Atl. 1016.

Kansas City Southern R. Co. v. Leslie, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915B, 834, holding that the Federal employers' liability act as amended in 1910 creates a right of action for the benefit of the widow and children wholly independent of the right of action to the injured person for pain and suffering endured prior to his death.

Southern P. Co. v. Wilson, 10 Ariz. 162, 85 Pac. 401, holding that an act similar to Lord Campbell's act did not provide for the survival of the right of action which might have been maintained by the injured person had he lived, but it created a new action dependent upon the death of the injured person, when the death was caused by such a wrongful act, neglect, or default as, had death not ensued, would have entitled the party injured to maintain an action, and the action is to recover for the death of the person injured, for the benefit of certain designated beneficiaries; but an amendment to this act, providing that the damages recoverable thereunder shall be distributed according to the law applicable to personal estates, converts the act into a survival act. See note 6.

Farley v. New York, N. H. & H. R. Co. L.R.A.1915E.

87 Conn. 328, 87 Atl. 990, construing the act of Congress of 1908 to create a right of action where there was none at common law, and which is entirely independent of any the deceased may have had in his lifetime.

Maney v. Chicago, B. & Q. R. Co. 49 Ill. App. 105, holding that the enactment of a statute embodying the principles of Lord Campbell's act established the doctrine that the wife and next of kin had a property right and financial interest in the life of the husband and relative, thereby creating a new right of action in favor of the persons who before had neither right, cause of action, nor remedy. See Illinois cases cited in note 1.

Cincinnati, H. & D. R. Co. v. McCullom, — Ind. —, 109 N. E. 206, declaring that the action given by the statute providing for an action, for the benefit of certain statutory beneficiaries, for the death of a relative, is not the continuation of the action existing in favor of the deceased prior to his death, but it is a new action which springs into being at his death. It does not rest upon the basis of the injury to the estate of the deceased, but its foundation is the loss sustained by the statutory beneficiaries. In this regard it is distinguishable from the action based upon the statute providing for the survival of causes of action which existed in the deceased person prior to his death. This latter action is not one created for the exclusive benefit of those who suffer loss by the death, but it is a cause of action which goes to the representative by survival, and the recovery, if any, inures to the benefit of the estate. In this state, however, a judgment in favor of the deceased in his lifetime for injuries resulting in his death is held to be a bar to an action in behalf of the statutory beneficiaries. See note to *St. Louis & S. F. R. Co. v. Goode*, post, 1141.

In *Pittsburgh, C. C. & St. L. R. Co. v. Hosea*, 152 Ind. 412, 53 N. E. 419, holding that a person cannot, prior to an injury, contract away the right of action given his family by a statute against anyone wrongfully causing his death, the court says that whatever cause or right of action there is for wrongful death exists by virtue of the statute embodying Lord Campbell's act. "The right is of legislative origin, and in its creation the legislature had the power to provide for whose benefit it should exist, and the terms and conditions upon which it can be maintained. There appears no warrant in the statute for the assertion that it was the legislative intent to keep alive the cause or right of action vested in the intestate. It is true that the right of action provided by the statute must rest upon the same wrongful act or omission, and be tested and established by the same facts and rules of evidence; . . . But, even if the actions are grounded upon the same wrong, it is more reasonable and logical to hold that the intent of the legislature was to create a new and independent right of action upon the failure of another for

the same wrong; that is, in cases where the damage resulting from the wrong is transferred to others. . . . The statute expressly recognizes that, when death ensues from a wrongful act, the next of kin are the persons damnified, and the action is given to compensate them for the damages sustained thereby. In no sense can the action given by statute be said to be the same as that resting in the intestate before his death, further than that the source is the same."

Burns v. Grand Rapids & I. R. Co. 113 Ind. 169, 15 N. E. 230, asserting that the Michigan statute providing that any person or corporation by whose wrongful act, neglect, or default the death of any person shall be caused shall be liable to an action for damages, notwithstanding the death of the person injured, provided the injury shall have occurred under such circumstances that, if death had not ensued, the injured person would have been entitled to maintain an action, is not essentially dissimilar to the Indiana statute regulating the same subject, and holding that these statutes do not in terms revive the common-law right of action for personal injury, or make it survive the death of the injured person, but create a new right of action in favor of and for the benefit of the next of kin or heirs of the person whose death has been wrongfully caused.

Indianapolis & St. L. R. Co. v. Stout, 53 Ind. 143.

Sherlock v. Alling, 44 Ind. 184, holding that the statutory provision that, when the death of a person is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the injured person might have maintained an action had he lived, the damages to inure to the benefit of the widow and children if any or the next of kin, does not have the effect of transferring to a personal representative the right of action which the injured person had to recover for the injury, but it gives to him a totally new action on different principles.

While the Indiana statute is regarded by the court as similar in principle to Lord Campbell's act, it more nearly resembles the death statutes referred to in note 7.

The statutory provision that when death is caused by the wrongful act or omission of a party, the personal representative of the deceased may maintain an action for the injury if he could have done so had he lived, the damages to be for the exclusive benefit of the widow and next of kin, gives an original statutory action for the benefit of the widow and next of kin of the deceased to recover their pecuniary loss on account of his death. *Anderson v. Fielding*, 92 Minn. 42, 104 Am. St. Rep. 665, 99 N. W. 357, 16 Am. Neg. Rep. 92.

Dillon v. Great Northern R. Co. 38 Mont. 485, 100 Pac. 960, asserting that Lord Campbell's act is not in any sense a survival statute, but creates a new cause of action in favor of the kindred of the deceased. L.R.A.1915E.

Re Brennan, 160 App. Div. 401, 145 N. Y. Supp. 440, asserting that a cause of action to recover damages for the pecuniary injury resulting from the death of another is purely statutory, and is not founded upon a violation of any natural right known to the common law; but it is a new cause of action which is wholly distinct from, and not a revival of, a cause of action which, if he had survived, the decedent would have had for his bodily injury. It, however, arises out of the personal injury to the deceased.

Broadnax v. Broadnax, 160 N. C. 432, 42 L.R.A.(N.S.) 725, 76 S. E. 216, declaring, in proceedings involving the distribution of money received in settlement of a claim for wrongful death, that the action given by the North Carolina statute in no sense ever belonged to deceased, and he never had an interest therein; the beneficiaries under the law do not claim by, through, or under him. And this is true although the personal representative is designated as the person to bring the action.

Mahoning Valley R. Co. v. Van Alstine, 77 Ohio St. 395, 14 L.R.A.(N.S.) 893, 83 N. E. 601, holding that the cause of action in favor of the personal representative under the general survival statutes, and that arising under statutes substantially similar in its terms to Lord Campbell's act, are not the same, although they rest primarily upon the same alleged negligence, for the measure of damages is different. Compare with Ohio cases cited in note 1.

Grotenkemper v. Harris, 25 Ohio St. Rep. 510, construing a statute substantially similar to Lord Campbell's act and declaring that this statute gives and creates a right of action in a class of cases unknown to the common law, and also provides its own rule in giving a remedy to the parties injured. It is, however, pointed out that "if death had not ensued from the injury complained of, there can be no doubt that the party injured, although an infant, could, by his next friend, have maintained an action against the wrongdoers, and have recovered damages commensurate with the injury sustained. Death having ensued, however, the statute gives the right of action to his legal representative, who prosecutes for the benefit of the next of kin."

St. Louis & S. F. R. Co. v. Goode, post, 1141, construing the Oklahoma statute providing that, when death is caused by the wrongful act or omission of another, the personal representative of the deceased can maintain an action therefor if the deceased could have maintained an action to recover for the injury had he lived, the damages to inure to certain beneficiaries, and declaring that this statute is substantially similar to Lord Campbell's act, and that the cause of action thereby given is a new cause of action, and not a continuation of the one vested in the deceased in his lifetime.

Pennsylvania R. Co. v. McCloskey, 23 Pa. 526, 12 Am. Neg. Cas. 548, declaring that in effect an action, under Lord Campbell's act, given the next of kin, is for their

his death, is the basis of the action. As heretofore suggested, these statements in part are due to the confusion by the courts of the cause of action with the remedy; and in many instances such statements were made while considering questions wherein this matter was not of vital importance, and apparently received only passing notice by the court. In most of the jurisdictions wherein such statements have been made,

while not repudiating the statement, the court has nevertheless held that the cause of action in the statutory beneficiaries was so related to the cause of action vesting in the injured person that this cause of action must have existed in him at the moment of dissolution.³

For example: In these jurisdictions it is very generally held that if the cause of action existing in the injured person to re-

own loss, and not a survival of the right of action for the injury to the deceased, but nevertheless the damages are estimated according to the value of the life lost. Compare with Pennsylvania cases cited in note 1.

Osteen v. Southern R. Co. Carolina Div. 76 S. C. 368, 57 S. E. 196, holding that the statutory provision that whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, of a character which if death had not ensued would have entitled the injured person to maintain an action to recover damages in respect thereof, then the wrongdoer shall be liable to an action for damages notwithstanding the death of the person injured, does not cause to survive the action which the deceased had in his lifetime, but creates a new cause of action. See South Carolina cases cited in note 1.

Mason v. Union P. R. Co. 7 Utah, 77, 24 Pac. 796, holding that statutes similar in principle to Lord Campbell's act create a new cause of action in favor of the beneficiaries therein designated, and do not revive or continue decedent's cause of action for the wrongful injury.

Lazelle v. Newfane, 70 Vt. 440, 41 Atl. 511, holding that the action given by a statute very similar to Lord Campbell's act is a new right of recovery arising from an injury to the deceased which gave or would have given him a right of action and recovery if death had not ensued. See Vermont cases in notes 1 and 3.

Beaver v. Putnam, 110 Va. 713, 67 S. E. 353, holding that the Virginia statute very similar to Lord Campbell's act does not operate to keep alive the right of action which existed in the person personally injured to recover for the injury, but it creates an independent right of action for the benefit of the statutory beneficiary.

Stevenson v. W. M. Ritter Lumber Co. 108 Va. 575, 18 L.R.A.(N.S.) 316, 62 S. E. 351, declaring that the Virginia statute, like Lord Campbell's act after which it is modeled, creates a right of action where none existed before, and has no application to any right of action by a parent in his individual capacity to recover for the death of a minor child.

In *Johnson v. Eau Claire*, 149 Wis. 194, 135 N. W. 481, it is said that the so-called death act gives to the administrator for the benefit of the relatives therein mentioned a new right of action "whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the

act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof." Compare with *Brown v. Chicago & N. W. R. Co.* supra, note 1.

In *Bradshaw v. Lancashire & Y. R. Co.* L. R. 10 C. P. 189, 44 L. J. C. P. N. S. 148, 31 L. T. N. S. 847, 23 Week. Rep. 310, Mr. Justice Grove remarked that this act gives an entirely new action, and not an action connected with the estate of the deceased in the slightest degree, and the damages recoverable in it would be no part of the estate of the deceased. See English cases cited in notes 1 and 3.

In *Blake v. Midland R. Co.* 18 Q. B. 93, 21 L. J. Q. B. N. S. 233, 16 Jur. 562, Coleridge, J., said that Lord Campbell's act did not transfer the injured person's right of action to his representatives, but gave to them a totally new right of action on different principles.

In *Pym v. Great Northern R. Co.* 4 Best & S. 396, 10 Jur. N. S. 199, 32 L. J. Q. B. N. S. 377, 8 L. T. N. S. 734, 11 Week. Rep. 922, affirming judgment in 2 Best & S. 759, this act is said to give to the personal representative a cause of action beyond that which the deceased would have had, had he survived, and based on a different principle.

In *Leggott v. Great Northern R. Co.* L. R. 1 Q. B. Div. 599, 45 L. J. Q. B. N. S. 557, 35 L. T. N. S. 334, 24 Week. Rep. 784, Quain, J., said that Lord Campbell's act gives an entirely new action, not in any way connected with the estate of the deceased, and the damages recoverable are no part of the estate of the deceased.

³ *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176, holding that the cause of action given by the employers' liability act is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury had he survived. It is, however, said that a recovery or a settlement for the injury by the deceased in his lifetime extinguished the cause of action given the statutory beneficiaries.

The death act of Delaware, § 1, is held to be a survival act of the common-law or personal action brought to recover damages for injury to the person, in the event of the death of the party injured before final judgment and satisfaction, but this is not true as to § 2, as amended, which provides that whenever death shall be occasioned by

cover for the injury was extinguished by a settlement with the wrongdoer in the lifetime of the deceased for all claims for the injury to him, or by the recovery of a judgment by the injured person against the wrongdoer, or if the remedy was barred by

the statute of limitations, no right of action arises in favor of the statutory beneficiaries to recover their pecuniary loss from the subsequent death of the injured person.

In this connection it is also to be noted

unlawful violence or negligence, and no suit is brought by the party injured to recover damages during his or her life, the widow or widower of any such deceased person, or, if there is no widow or widower, the personal representative, may maintain an action for and recover damages for the death and loss thus occasioned. By this latter section a new right of action is created which is dependent upon a right of action in the deceased at the time of his death to recover for the injury. *Perry v. Philadelphia, B. & W. R. Co.* 1 *Boyce* (Del.) 399, 77 Atl. 725.

Maronen v. Anaconda Copper Min. Co. 48 Mont. 249, 136 Pac. 968, holding that the statutory provision declaring that, when the death of one person is caused by the wrongful act of another, her heirs or personal representatives may maintain an action for damages against the person causing the death, gives a right of action to the heirs or personal representatives, independent of that which the deceased would have had had he survived his injury. It is however of the same character and depends upon the same facts, and the inquiry whether the given state of facts constitutes a cause of action in favor of the surviving widow and children depends upon the answer to the inquiry whether these facts would have constituted a cause of action in behalf of the injured man.

Chicago, R. I. & P. R. Co. v. Young, 58 Neb. 678, 79 N. W. 556, asserting that the act of Nebraska commonly known as Lord Campbell's act created a new right of action, since it gave to the legal representative of the person who has died in consequence of the injury sustained through the wrongful act, neglect, or default of another, a right of action in all cases where the injured party might have sued had he survived the injury.

Kelliher v. New York C. & H. R. R. Co. post, 1178, declaring that the statute similar in effect to Lord Campbell's act gives a cause of action new and distinct from the common-law action for damages on account of personal injuries based on negligence of the defendant. It is, however, held that, where the remedy of the injured person is barred at the time of his death by the statute of limitations, all right of action under the death act is extinguished.

Littlewood v. New York, 89 N. Y. 24, 42 Am. Rep. 271, holding that the right of action given by a statute embodying the principles of Lord Campbell's act to the personal representative of one whose death has been caused by the wrongful act, default, or neglect of another, is a new right of action created by the statute, and not a mere continuation, in the representatives, of the right of action which the deceased

had in his lifetime; disapproving on this point *Schlichting v. Wintgen*. 25 Hun, 626, 30 Pac. 714. It is, however, held that this right of action may be extinguished by the act of the decedent in his lifetime.

Re Mayo, 60 S. C. 401, 54 L.R.A. 661, 38 S. E. 634, asserting that Lord Campbell's act does not cause to survive the old cause of action for the benefit of the persons named therein, although the right of action in the administrator of the decedent's estate depends upon whether had the deceased lived he would have had the right to recover, and it is pointed out that the object, scope, and measure of damages in the new action are wholly different from the action as it would stand under the common-law action revived. To the same effect see *Osteen v. Southern R. Co.* 76 S. C. 368, 57 S. E. 196. See South Carolina cases, note 1.

St. Louis Southwestern R. Co. v. Hengst, 36 Tex. Civ. App. 217, 81 S. W. 832, declaring that the action in favor of children to recover damages for the death of their father through the negligence of the defendant in one sense is separate and distinct from that existing in favor of their father prior to his death to recover damages for the injury to his person, in that the children in prosecuting their claim for his death cannot recover a single item of damages which might have been recovered by their father. His suit arose at common law, whereas theirs rests exclusively upon the statute. While he lived they had no cause of action. It accrued to them only upon his death. Technically these actions are distinct and separate. Practically, however, there is a close kinship between them. They grow out of identically the same facts. Practically the heirs inherit their father's right, the practical difference being in the measure of damages. Indeed, the actions are so closely related that a compromise on the part of the father of his claim for the injuries to his person is a bar to the children's suit for their pecuniary loss from his death, and a judgment in favor of or against the father is *res judicata* of the claim of the children, notwithstanding the fact that the statute confers upon them an independent right.

Referring to the statute of Vermont embodying the principles of Lord Campbell's act, the Vermont court in *Legg v. Britton*, 64 Vt. 656, 24 Atl. 1016, said that this act provided for a new right of recovery arising from an injury to the intestate which gave or would have given him a right of action for recovery if death had not ensued. The amount to be recovered is determined from the injuries sustained by the widow and next of kin resulting from the death of the intestate, wrongfully occasioned by the defendant. The right of

that in many of the decisions referred to, the language of the courts is that Lord Campbell's act, or an act embodying its principles, creates a new action. It is not clear whether the term "action" was used to designate the cause of action or the remedy. If used in the latter sense, the decision is consistent with those referred to in note 1. The confusion in this regard illustrates the utter futility of an attempt to construe these statutes upon any learned or scientific reasoning as to whether or not these statutes are survival statutes, or whether they create a new and independent cause of action. The intention of the statutes is reasonably clear, and points to a construction in full accord with equity and justice. As aptly remarked in a Federal Supreme Court case,^{3a} "A negligent act causing death is in itself a tort, and were it not for the rule founded on the maxim *Actio personalis moritur cum persona*, dam-

ages therefor could have been recovered in an action at common law. . . . The substantial purpose of these various statutes is to do away with the obstacle to a recovery, caused by the death of the party injured."

b. Effect of change in measure of damages and beneficiaries.

In New Hampshire a statute very similar to Lord Campbell's act, except that it omits the provision for assessing the damages to the statutory beneficiaries on the basis of their pecuniary injury, but provides that the executor or administrator may recover damages for the injury for the benefit of the widow or next of kin, is construed to be a survival statute authorizing the recovery of the same damages as the injured person might have recovered had he survived the injury to prosecute an action to final judg-

recovery and damages are different from what existed in the intestate, and this right of recovery did not exist at common law; it is wholly given by the act, and the purpose thereof is not to cause to survive a right of recovery which otherwise would be taken away by the death of the injured person. Without the act the widow and next of kin could recover no damages for the destruction of the earning capacity of the intestate. This right of recovery is conferred only when the intestate would have had remaining a right of action if he had survived.

Brown v. Chicago & N. W. R. Co. 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255, while declaring that an action for death, given the surviving relatives of a deceased person, is not a right of survivorship to the claim which existed in favor of the injured person in his lifetime, by transfer to them, by operation of law or otherwise, but they are authorized by the statute to recover the pecuniary loss to themselves caused by the wrongful taking away of the decedent, the continuance of whose life would have been beneficial to them, nevertheless holds that the action is dependent upon the injury, and the condition of liability is the existence of an actionable claim in the right of the injured party at the time of his death, and the existence of the beneficiaries mentioned in the statute. And this is true, although the liability of the wrongdoer, while dependent upon the conditions named, is not on the actionable claim called for to satisfy such condition, but on a new right created by statute. See Wisconsin cases, note 1.

B. C. Electric R. Co. v. Turner, 18 D. L. R. 430, holding that the action under Lord Campbell's act is not so entirely independent of the cause of action existing in the deceased in his lifetime that it is not affected by a release of his claim, executed L.R.A.1915E.

in accordance with a bona fide settlement by the injured person while living; and such a release, in the absence of fraud, is a bar to an action by the statutory beneficiaries to recover for their pecuniary injuries. To same effect see British Electric R. Co. v. Gentile [1914] A. C. 1034, 83 L. J. P. C. N. S. 353, 111 L. T. N. S. 682, 30 Times L. R. 594.

In Seward v. Vera Cruz, L. R. 10 App. Cas. 59, Selborne, L. C., says: "Lord Campbell's act gives a new cause of action, clearly, and does not merely remove the operation of the maxim *Actio personalis moritur cum persona*, because the action is given in substance, not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor. And not only so, but the action is not an action which he could have brought if he had survived the accident, for that would have been an action for such injury as he had sustained during his lifetime, but death is essentially the cause of the action, an action which he never could have brought, under circumstances which if he had been living would have given him, for any injury short of death which he might have sustained, a right of action, which might have been barred either by contributory negligence, or by his own fault, or by his own release, or in various other ways."

And in the same case Lord Blackburn remarked that by Lord Campbell's act a totally new action is given against the person who would have been responsible to the deceased if he had lived, an action which is new in its species, new in its quality, new in its principle, in every way new.

^{3a} Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105.

ment.⁴ And statutes in effect authorizing the prosecution of actions to recover for personal injuries resulting in death, the proceeds to inure exclusively to the benefit of designated dependents or next of kin, have also been construed to be survival statutes.⁵

These cases leave, as the only ground upon which to base the construction that acts similar to Lord Campbell's act create

a new cause of action, the fact of the difference in the measure of damages recoverable under a general survival statute and Lord Campbell's act. If, however, the theory is adopted that by this act no new cause of action is created, but there is simply substituted, for the remedy the injured person had, an action for the benefit of certain relatives to the extent of their pecuniary loss, the same result is reached, and the

⁴ *Corliss v. Worcester*, N. & R. R. Co. 63 N. H. 404, holding that a cause of action for personal injuries which at common law died with the decedent, by the general survival statute survived to his personal representative. (Death apparently the result of the injuries.)

Clark v. Manchester, 62 N. H. 578.

Lyon v. Boston & M. R. Co. 107 Fed. 386, holding in an action by the administrator of a person killed through the wrongful action of another, to recover for the wrongful death, that the statute of New Hampshire providing that, if an action is not then pending, one may be brought within a certain time, and if the administrator of the deceased is the plaintiff, and if the death was caused by the injury complained of, the mental and physical pain suffered by the deceased in consequence of the injury, the reasonable expenses occasioned his estate by the injury, the probable duration of his life but for the injury, and his capacity to earn money, may be considered as elements of damages, together with a provision for the distribution of the money among certain designated persons, does not create a new right of action in the administrator, but keeps alive a former one of the intestate, with enlarged and remedial damages.

⁵ *Williams v. Alabama G. S. R. Co.* 158 Ala. 396, 48 So. 485, 17 Ann. Cas. 516, construing the statutory provision that if the injury results in the death of the injured person, his personal representative is entitled to maintain an action therefor for the benefit of the legal distributees of his estate, and the damages recovered are not subject to the payment of debts or liabilities, it is said that no new cause of action is thereby contemplated, but the statute simply devolves upon the personal representative the right to prosecute the same cause of action the injured person had, although the action is in a sense a new one, in the interest of the distributees of the estate of the injured person.

Kling v. Torello, 87 Conn. 301, 46 L.R.A. (N.S.) 930, 87 Atl. 987, distinguishing the Connecticut statute from Lord Campbell's act, and declaring that the right of action given thereunder is not independent of or unrelated to the right of action which was in the deceased at his death; it does not spring from the death, but comes to the representative by survival. The right of recovery for the death is as for one of the consequences of the wrong inflicted upon the decedent.
L.R.A.1915E.

Broughel v. Southern New England Teleph. Co. 73 Conn. 614, 84 Am. St. Rep. 176, 48 Atl. 751, declaring that under the Connecticut statutes the right to recover a limited compensation for death alone as one of the results or consequences of a wrong inflicted upon a man in his lifetime survives to or is vested in his executors or administrators.

Budd v. Meriden Electric R. Co. 69 Conn. 272, 37 Atl. 683, 3 Am. Neg. Rep. 335, construing the Connecticut statute providing that no action to recover damages for injury to a person shall abate by reason of his death, but that his executor or administrator may enter and prosecute the same in the same manner as is now by law provided in regard to other actions, and that actions for injury to a person, whether the same did or did not result in death, shall survive to his executor or administrator, and holding that the effect of these statutes is to keep alive the cause of action which existed in the deceased person (action by administrator to recover for death of intestate for child).

Goodsell v. Hartford & N. H. R. Co. 33 Conn. 51, holding that under the Connecticut statute damages may be recovered for personal injuries and sufferings of the party if he lives to bring suit, and if he dies the same cause of action—that is, for the same damages—survives to his next of kin or administrator.

The Montana statutes have been held not to create a new cause of action, but only to carry forward the right which the injured party had before his death. *Dillon v. Great Northern R. Co.* 38 Mont. 485, 100 Pac. 960.

The statutory provision that an action or cause of action shall not abate by the death of a party, but shall, in all cases where a cause of action arose in favor of such party prior to his death, survive and be maintained by his representatives; and in case such action has not been begun, it may be begun in the name of his representative; and in case the action was begun prior to his death, the court on motion will permit his representative to be substituted and the action to proceed in his name,—applies to and effects a survival of an action for a personal injury resulting in death, and entitles the personal representative of the deceased to sue for the injury where no action was commenced during the lifetime of the deceased. *Melzner v. Northern P. R. Co.* 46 Mont. 162, 127 Pac. 146.

advantage is gained of making emphatic the point that, in assessing damages to statutory beneficiaries based upon loss of support, the basis of recovery is not the needs of the beneficiaries, but the earning capacity of the deceased, just as it would be if the action was to recover loss to his estate, except, of course, that in an action for the beneficiaries, while the net earning capacity of the deceased represents the maximum recovery, it is further limited to the contributions therefrom which these beneficiaries show they had reasonable grounds to expect, and the danger is lessened, if not entirely removed, of a double recovery for the same injury by holding not to be a bar to a subsequent recovery for the destruction of the earning power of the deceased, a prior recovery or a settlement by the injured person.

⁶ *Stuber v. Louisville & N. R. Co.* 113 Tenn. 305, 87 S. W. 411, holding that the Tennessee statute, which provides that the right of action a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, etc., of another would have had against the wrongdoer, in case death did not ensue, shall not abate or be extinguished by his death, but shall pass to his widow, etc., free from the claims of creditors, and the action may be instituted by the personal representative of the deceased or by the widow in her own name, or, if there be no widow, by the children of the deceased, and if the deceased commenced an action before his death, it shall proceed without revivor, and the damages shall go to the widow and next of kin, and the parties suing shall have the right to recover for suffering, loss of time, and necessary expense resulting to the deceased from the injury, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injury received,—does not create a new cause of action in favor of the widow and children or next of kin, but it merely alters the rule of the common law under which rights of action of this character and circumstance brought thereon abated by the death of the injured party, so as to keep alive and preserve the right of action of the deceased for the benefit of his widow, children, or next of kin. To the same effect is *Whaley v. Catlett*, 103 Tenn. 347, 53 S. W. 131.

Larue v. C. G. Kershaw Contracting Co. 177 Ala. 441, 59 So. 155, construing the provisions of the Tennessee Code, and holding that these statutes create no new and independent cause of action, but merely continue a cause of action which accrued to the injured person, so that it does not abate by his death, but survives to his widow, children, or personal representative. The court said that the cause of action was not the death of the person injured, but the breach of duty that caused

And it is to be noted that statutes varying somewhat from Lord Campbell's act, but providing that the damages recoverable shall not only be for the pain and suffering and loss of time occasioned the deceased, but also the damage resulting to the beneficiaries, have likewise been construed to be revival statutes, thereby indicating that the mere change in the beneficiaries and in the measure of damages recoverable does not create a new cause of action.⁶

c. Comparison with statutes clearly death statutes.

There exist in some states statutes which in express terms create an action in behalf of designated relatives for the death of a person through the negligence or wrongful act of another.⁷ These statutes very clear-

the injury, and if death results this is but an aggravation of the injury.

And see *Southern P. Co. v. Wilson*, 10 Ariz. 162, 85 Pac. 401, making a distinction between a statute in that state similar in substance to Lord Campbell's act, which provides for the recovery of the pecuniary loss of certain statutory beneficiaries, and a statute repealing this act, very similar in its terms, except that it provides that the damages shall be such as the jury deems fair and just, which shall be distributed to the parties in the proportion provided by law relative to the distribution of personal estates; and this latter statute is held to create an action for the benefit of the estate of the decedent, although the damages recovered are not subject to his debts.

⁷ *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67, affirming 104 Ky. 608, 47 S. W. 615, and holding that the Kentucky Constitution providing that whenever death of a person shall result from an injury incurred by negligence or wrongful act, then and in every such case, damages may be recovered for such death, etc., together with the statute containing the same provision, with the addition that when the act is wilful or the negligence is gross, punitive damages may be recovered and the action shall be prosecuted by the personal representative, . . . creates a cause of action independent of any right of action the deceased may have had, or would have had if he had survived the injury.

Northern P. R. Co. v. Adams, 54 C. C. A. 196, 116 Fed. 324, holding that the Idaho statute creates a new action, and does not transfer to the representative the right of action which the deceased person would have had had he survived the injury, but that the right of action is given to the heirs or to the personal representatives of the decedent for the injuries and damages caused to them by his death, and does not include injuries or damages caused to the deceased. This case was reversed on ap-

ly indicate a distinction between the cause of action thereby created, and that existing in the deceased. They can in no sense be called survival statutes. A comparison of the language of these statutes with statutes following the language of Lord Campbell's act lends color to the view that the latter act merely provided for the substitution of a remedy in behalf of designated beneficiaries for that existing in the injured person, which abated on his death, and that, while there was a substitution of remedies, the cause of action was the same.

peal on the ground that no cause of action existed in favor of the deceased, and hence none could exist in favor of his heirs. 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408.

Munro v. Pacific Coast Dredging & Reclamation Co. 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303, holding that the California Code, which in effect provides that when the death of a person is caused by the wrongful act or neglect of another, his heirs, or representatives may maintain an action, etc., permits but one cause of action, and that action is a new action, and not a transfer to the representative of the right of action which the deceased person would have had, had he survived the injury.

Kelley v. Union P. R. Co. 16 Colo. 455, 27 Pac. 1058, construing the general survival statute in connection with a statute providing that when the death of any person is caused by the wrongful act, conduct, negligence, or omission of another, the personal representatives of the former may maintain an action therefor against the latter, etc., and holding that the actions are not *in pari materia*, and they have no legal connection or relation to each other. The court said that the survivorship act was to prevent certain actions or causes of action already accrued from abating by reason of the death of either of the parties; the other to create a new cause of action, to wit, the death itself. The act was not to prevent any cause or causes of action from abating; on the contrary the cause of action provided for in the act did not accrue until death had already ensued. Compare with the language of the court in the late Colorado case of Denver & R. G. R. Co. v. Frederic, 57 Colo. 90, 140 Pac. 463.

Walters v. Chicago, R. I. & P. R. Co. 36 Iowa, 458, holding that the statutory provision that when a wrongful act produces death the perpetrator is civilly liable for the injury, and the parties to the action shall be the same as though brought for a claim founded on a contract against the wrongdoer and in favor of the deceased, and the sum recovered shall be disposed of in the same manner, except that when the deceased leaves a wife, child, or parent surviving him, the amount recovered shall not be liable for the payment of decedent's L.R.A.1915E

III. Lord Campbell's act as applicable to pending action.

a. In general.

As stated, in a strict view of the matter the effect of such statutes as Lord Campbell's act is to keep alive the cause of action for a personal injury which results in the death of the injured person, but the remedy to redress the same is given either directly to certain statutory beneficiaries, or to the personal representative in their behalf. Hence under this statute, while the

debts, is an innovation upon the common law, and gives a right of action where none before existed.

Perham v. Portland General Electric Co. 33 Or. 451, 40 L.R.A. 799, 72 Am. St. Rep. 730, 53 Pac. 14, holding that the Oregon statute providing that when the death of a person is caused by the wrongful act or omission of another, his personal representative may maintain an action therefor if the deceased might have maintained an action had he lived for the injury which caused his death, creates a new right of action in favor of the personal representative for the death of his decedent, and is not an action founded on survivorship of any cause of action in favor of deceased. The death, and not the injury from which the death results, is the cause of action.

Birch v. Pittsburg, C. C. & St. L. R. Co. 165 Pa. 339, 30 Atl. 826, construing the statutory provision that no action hereafter brought to recover damages for injury to a person by negligence or default shall abate by reason of the death of the plaintiff, but the personal representative of the deceased may be substituted as plaintiff, and prosecute a suit to final judgment and satisfaction; together with the provision that whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, etc., may maintain an action for and recover damages for the death thus occasioned; and holding that the latter provision gives a new right of action, and declares by whom it shall be exercised, while the former provision regulates the common-law right of action by securing to it survivorship. To the same effect is Fink v. Garman, 40 Pa. 103.

Pennsylvania R. Co. v. Zebe, 33 Pa. 318, 6 Am. Neg. Cas. 232, holding that the statutory provision that whenever death shall be occasioned through negligence, and no suit for damages be brought by the party injured, during his or her life, the widow of such deceased, or if there is no widow, the personal representative, may maintain an action and recover damages for the death thus occasioned, confers new rights unknown at common law, and the damages recoverable are for the death of the party.

cause of action, that is, the invasion of a legal right of the decedent resulting in his death, may be said to survive, the statute standing alone, does not have the effect of preventing the abatement of a pending action by the injured person to recover for the injuries.⁸

b. Continuing action by amending pleadings.

In some jurisdictions, however, by virtue of special statutory provisions, the plead-

ings in a pending action to recover for personal injuries may be amended after the plaintiff's death, and prosecuted, under Lord Campbell's act, to judgment for compensation for the pecuniary loss to the statutory beneficiaries.⁹

But where, uninfluenced by special statutory provisions, it has been denied that the personal representative may revive an action brought by his decedent in his lifetime to recover for personal injuries from which the decedent subsequently died, and

⁸ *Martin v. Baltimore & O. R. Co.* (Gering v. Baltimore & O. R. Co.) 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533, holding that §§ 5 and 6 of the West Virginia Code authorizing an action to be brought by the personal representatives of the person killed through the wrongful act of another, where if death had not ensued the injured person might have sued for his injury, do not authorize the revival of a pending action by the injured person to recover damages for the injury received, where he dies before judgment; and hence such an action cannot be revived by his administrator.

Roach v. Imperial Min. Co. 7 Fed. 698, holding that under the Nevada statute, which in substance is similar to Lord Campbell's act, except that it permits a recovery of both pecuniary and punitive damages, an action is given the personal representative for the purpose, in part, of compensating the kindred named in the act, which is a wholly new and distinct ground from that which the injured party would have had, and it cannot be said in any sense to survive. A new right is thereby created, and a new element of damages introduced.

Harkin v. Ferro Concrete Constr. Co. 185 Ill. App. 239, denying the right of the personal representative of the plaintiff in an action to recover for personal injuries to revive the action after the death of the plaintiff from the injuries, and prosecute it for the benefit of the next of kin, under the statute embodying the principles of Lord Campbell's act.

⁹ *Anderson v. Fielding*, 92 Minn. 42, 104 Am. St. Rep. 665, 99 N. W. 357, 16 Am. Neg. Rep. 92, holding that the statutory provisions that when death is caused by the wrongful act or omission of a party, the personal representative of the deceased may maintain an action for the injury if he could have done so if he had lived, but that the damages cannot exceed \$5,000, to be for the exclusive benefit of the widow and next of kin; and that if an action had been commenced by the deceased in his lifetime for such injury, and it had not been fully determined, it does not abate by the death of the plaintiff, but may be continued by the personal representative of the deceased for the benefit of the same persons, and limited to the recovery as herein provided,—authorize the personal representa-

tive of the deceased, when he died from the injury, to be substituted as plaintiff in the original action brought by the deceased and converted by an amendment of the pleadings into an action for the benefit of the widow and next of kin, but they do not authorize such substitution for the purpose of prosecuting the original cause of action which accrued to the deceased in his lifetime.

Clay v. Chicago, M. & St. P. R. Co. 104 Minn. 1, 115 N. W. 949, following *Anderson v. Fielding*, supra, on the point that under this proviso the administrator cannot revive a pending action and prosecute it for the benefit of the estate, but he may do so for the benefit of the beneficiaries.

This rule, however, does not apply after a verdict in favor of the plaintiff. In such case the personal representative of the plaintiff may be substituted to defend the verdict on appeal. *Clay v. Chicago, M. & St. P. R. Co.* 104 Minn. 1, 115 N. W. 949.

Under the Texas practice, where the husband and wife join in a suit to recover damages for personal injuries to the wife, and the latter dies before judgment, the husband by amended pleadings may continue the action to recover the damages caused him personally and the damage to his children by the death of the wife, her death being the proximate result of the injury. In this state, however, by amendment the plaintiff may set up an entirely new cause of action. *International & G. N. R. Co. v. Boykin*, 32 Tex. Civ. App. 72, 74 S. W. 93.

Galveston, H. & S. A. R. Co. v. Heard, — Tex. Civ. App. —, 91 S. W. 371, holding that the action for personal injuries commenced by the decedent in his lifetime is a liability at common law, and does not abate by reason of his death from the injuries, but survives in favor of his heirs and legal representatives by virtue of the general survival statute. The action given the wife, children, etc., however, did not exist at common law, but is a right of action given by statute to certain designated persons for the death of a relative.

St. Louis Southwestern R. Co. v. Hengst, 36 Tex. Civ. App. 217, 81 S. W. 832, holding that where the deceased in his lifetime had commenced an action to recover damages for personal injuries which thereafter resulted in his death, his children may revive such action, and amend it by also de-

by amending the pleadings prosecute it as a death action under statutes similar to Lord Campbell's act,¹⁰ in these jurisdictions, the general survival statute and statutes similar to Lord Campbell's act are held to give exclusive remedies, the one for injuries to the person not resulting in death, the other for personal injuries resulting in death.¹¹

IV. Effect of statute similar to Lord Campbell's act on construction of general survival statute.

a. In general.

In construing general survival statutes which in effect purport to cause to survive causes of action for personal injuries, where there are also, in the same jurisdiction, acts embodying the principles of Lord Campbell's act, the two statutes are construed together, and the courts as a rule have adopted a construction which would obviate the danger of the recovery of double damages for the same tort. They are not, however, in harmony as to the proper construction to overcome this difficulty; and some courts, by reasoning that will not stand the test of careful thought or con-

sideration, have held that damages under the survival statute are for a separate and distinct wrong from that for which damages are recoverable under the act embodying the principles of Lord Campbell's act, although both are based upon the earning power of the deceased.

sideration, have held that damages under the survival statute are for a separate and distinct wrong from that for which damages are recoverable under the act embodying the principles of Lord Campbell's act, although both are based upon the earning power of the deceased.

Thus in *Rowe v. Richards*, ante, 1095, the court says that it would be the limit of absurdity to contend that a wife who had been forcibly abducted could, when settling with the wrongdoer for the wrong done her, also bind her husband by settling for the wrong done him,—the violation of his right to her services, "yet such a case would in its underlying principles be on all fours with the case before us. . . . The two causes of action would, just as in the case of injury to and resulting death of a husband, result from one wrongful act." This example, the court proceeds to say, "shows the absurdity of the contention that to allow a recovery for the injury suffered by the deceased and for that suffered by the next of kin is to allow the recovery of double damages for one wrong." The court then unconsciously points out its own error, as well as the distinction between the hypothetical case of the abducted wife and an

cause other than the injuries for which the suit is brought, there may be a recovery, notwithstanding the death, for precisely the same injuries that the party himself could have recovered for, had he lived until after the final trial."

declaring for their pecuniary loss under the statute, and in this form prosecute it to judgment, and recover their pecuniary loss.
¹⁰ In *Holton v. Daly*, 106 Ill. 131, the personal representative caused himself to be substituted as the plaintiff in an action commenced by his decedent in his lifetime to recover damages for personal injuries, where he later died as a result of the injuries, and it was held that the defendant had not properly raised the question as to the right thus to revive the suit, but that the plaintiff was not entitled to recover in such suit damages for the pain and suffering of the deceased, his inability to attend to his business, or for medical care and attendance.

In *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263, construing the Revised Statutes of 1874, chap. 3, § 123, which provides that in addition to actions which survive by the common law, actions to recover damages for injuries to persons shall also survive, it is said that an action for personal injuries caused by the negligence of defendant is within the statute, and survives, and there is nothing in *Holton v. Daly*, supra, which holds to the contrary: "Indeed it is expressly therein recognized that such actions do survive upon the death of the plaintiff, and it was held, when the death is the result of the injuries for which the suit is brought, the action must be prosecuted, after the death, for the benefit of the widow and the next of kin, and that in such case there can be no recovery for the bodily pain and suffering; but that where the death results from a

cause other than the injuries for which the suit is brought, there may be a recovery, notwithstanding the death, for precisely the same injuries that the party himself could have recovered for, had he lived until after the final trial."

Harkin v. Ferro Concrete Constr. Co. 185 Ill. App. 239, holding that where a person commences an action in his lifetime to recover for personal injury, and dies during the pendency thereof, as a result of the injury, the action abates, and cannot be revived by the personal representative, and by an amended declaration prosecuted for the benefit of the widow and next of kin to recover damages for their pecuniary loss.

In *Kunkel v. Chicago Consol. Traction Co.* 156 Ill. App. 393, wherein it is said that where the death of an injured person results from the injury, and occurs after he has commenced suit to recover damages therefor, but before judgment, there can be no recovery in such suit by his personal representative.

Bolick v. Southern R. Co. 138 N. C. 370, 50 S. E. 689, holding that since a cause of action for wrongful death, under a statute adopted from Lord Campbell's act, cannot accrue until the death complained of, it cannot be set up by an amendment to an action brought by the injured person to recover for the injuries, which later caused his death.

¹¹ See infra, V. e, 1, 2.

And see note appended to *Rowe v. Richards*, ante, 1095, and *St. Louis & S. F. R. Co. v. Goode*, post, 1141, and *State use of Melitch v. United R. & Electric Co.* post, 1163.

injury to a married man which results in his death. It says: "Of course it is a recovery of two items of damages resulting from one wrongful act, but it is not the recovery of two items of damages for one injury." In the case of the abducted wife, the wrongful abduction is an injury to the wife, and the deprivation of the husband's right to her services is an injury to him,—two entirely separate and distinct matters. In the case of the injury to a married man which results in his death, however, the principal injury of which the widow can complain is the destruction of her husband's earning power, and as to this element it is clear that if she receives compensation therefor to the extent of the pecuniary loss thereby resulting to her, and the injured person or his estate is also permitted to recover for his destroyed or impaired earning power, then, as a matter of fact, the court does permit the recovery of two items of damage for the one injury.

b. Distinction between Lord Campbell's act and penal statute.

In this respect the rule that Lord Campbell's act merely substitutes a different remedy, and does not create a new cause of action, is dissimilar from that applicable to penal statutes in which a designated amount is imposed by statute by way of a penalty where under designated circumstances a person loses his life through the wrongful or negligent act of another. In such case the earning power of the deceased, his contributions to his family, or their pecuniary loss from his death, are all immaterial elements, and do not enter into consideration.

Hence a common-law action for injuries received, which by statute survives the death of the injured person, and an indictment under the statute rendering street railway corporations liable to indictment for killing a human being through negligence, do not cover the same ground. In the former, damages for the personal injuries to the deceased are alone recovered;

in the latter the purpose is to secure to the relatives some compensation for the loss to them, as well as to inflict some punishment for the offense.¹²

V. Construction of survival statute relating to causes of action.

a. In general.

In order to obviate the danger of a double recovery for the same injury, different constructions have been placed upon a general survival statute and a statute embodying the principles of Lord Campbell's act. Some courts have held that the survival statute applies where some time intervenes between the injury and the death, and the statute more or less similar to Lord Campbell's act where death is instantaneous. Other courts make the application of these statutes depend upon the cause of the death, whether the result of the injury or from some other cause; while other courts hold both statutes applicable, but the measure of damages in each action is so limited as to preclude the recovery of double damages for the same injury; and in at least one jurisdiction it is held to be optional with the plaintiff whether the remedy is sought under the survival statute or a statute very similar to Lord Campbell's act.

b. Instantaneous character of death as the test.

As stated, in some jurisdictions general survival statutes construed in connection with statutes embodying in principle Lord Campbell's act have been held to be limited, and to apply only where there was an appreciable interval of time between the continuous operation of the act causing the injury and the death. In these cases, therefore, and also in other cases not making this limitation, where death is instantaneous, the cause of action for injury to the person does not survive, but the remedy is by action for the pecuniary injury resulting to the next of kin from the death of the injured person.¹³

¹² Com. v. Metropolitan R. Co. 107 Mass. 236.

¹³ Hansford v. Payne, 11 Bush, 380; Sawyer v. Perry, 88 Me. 42, 33 Atl. 660, 15 Am. Neg. Cas. 291; Corcoran v. Boston & A. R. Co. 133 Mass. 507; Riley v. Connecticut River R. Co. 135 Mass. 292; Amos v. Mobile & O. R. Co. 63 Miss. 509; Hollenbeck v. Berkshire R. Co. 9 Cush. 478; Kearney v. Boston & W. R. Corp. 9 Cush. 108; Ely v. Detroit United R. Co. 162 Mich. 287, 127 N. W. 259; Olivier v. Houghton County Street R. Co. 134 Mich. 367, 104 Am. St. Rep. 607, 96 N. W. 434, 3 Ann. Cas. 53; Kyes v. Valley Teleph. Co. 132 Mich. 281, L.R.A.1915E.

93 N. W. 623, 13 Am. Neg. Rep. 340; Jones v. McMillan, 129 Mich. 86, 88 N. W. 206; Storrie v. Grand Trunk Elevator Co. 134 Mich. 297, 96 N. W. 569; Dolson v. Lake Shore & M. S. R. Co. 128 Mich. 444, 87 N. W. 629; Sweetland v. Chicago & G. T. R. Co. 117 Mich. 329, 43 L.R.A. 568, 75 N. W. 1066, 4 Am. Neg. Rep. 648; McVey v. Illinois C. R. Co. 73 Miss. 487, 19 So. 209; Illinois C. R. Co. v. Pendergrass, 69 Miss. 425, 12 So. 954; Dillon v. Great Northern R. Co. 38 Mont. 485, 100 Pac. 960; McLendon v. Columbia, — S. C. —, 85 S. E. 234; Louisville & N. R. Co. v. Burke, 6 Coldw. 45; Legg v. Britton, 64 Vt. 652, 24 Atl.

c. Death from injury as a test.

In many jurisdictions in construing general survival statutes in connection with statutes embodying the principles of Lord Campbell's act, the courts, in adopting a construction to avoid the imposition of a double liability for a negligent or tortious act, hold that these statutes each provide an exclusive remedy dependent upon the cause of death, whether from the injury or from some other cause. Thus, it has been held that it was not the intent of these statutes to impose a double liability for a wrongful or negligent act which resulted in death; and construing these statutes together, with this point in mind, the purpose of a general survival statute was held to be

to authorize the revival of actions or causes of action for personal injury only where the injured person died from some cause other than the injury, the remedy where death resulted from the injury being by virtue of the death act; hence a cause of action or an action for personal injuries abated where the injured person died as a result of the injury.¹⁴

And it has been declared that if an injured person survives and brings an action to recover for the injury, and during the pendency thereof dies from the effects of the injury, the action does not survive, but a different right of action is substituted by virtue of a statute similar to Lord Campbell's act, and this is the right of the personal representative of the deceased person

1016; *Boyden v. Fitchburg R. Co.* 70 Vt. 125, 39 Atl. 771; *Johnson v. Eau Claire*, 149 Wis. 194, 135 N. W. 481; *Moyer v. Oshkosh*, 151 Wis. 586, 139 N. W. 378. The cases cited on that point are only illustrative. All the cases on the question will be found in a note on instantaneous death to appear in a subsequent volume.

Under the Massachusetts statute providing that the action of trespass on the case for damages to a person shall hereafter survive, and may be prosecuted by his next of kin or administrator in the same manner as if he were living, a cause of action for personal injury to an injured person who survives for an appreciable length of time does not abate upon his death, but continues for the benefit of his estate, and may be prosecuted by his personal representative. *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Bancroft v. Boston & W. R. Corp.* 11 Allen, 34.

And see *State v. Grand Trunk R. Co.* 61 Me. 114, 14 Am. Rep. 552, holding that where a person is injured through the carelessness of a railroad company, but the injury does not produce immediate death, a right of action accrues to such person, which in case of his subsequent death survives to his personal representative. In such case—that is, where death is not instantaneous, the remedy for wrongful death by indictment does not exist. To the same effect see *State v. Maine C. R. Co.* 60 Me. 490. This decision is based upon the statute, which provides in effect that when the life of a person is lost through the carelessness of a railroad company or its servants, compensation shall be made to the heirs of the deceased, to be recovered by indictment.

But compare with *Hamilton v. Morgan's L. & T. R. & S. S. Co.* 42 La. Ann. 824, 8 So. 586, holding that the right of a child to compensatory damages for injuries received through the negligence of another, resulting in the instant death of the child, survives to the parents.

¹⁴ See *supra*, notes 1 and 2, and also notes to *St. Louis & S. F. R. Co. v. Goode*, post, 1141; *Nashville, C. & St. L. R. Co. v. L.R.A.* 1915E.

Hubble, post, 1132, and note to *Rowe v. Richards*, ante, 1095.

In *Hulbert v. Topeka*, 34 Fed. 510, following the Kansas decisions, it is held that a statute permitting an action by the personal representative of a person killed by the wrongful act or omission of another constitutes the sole remedy, and that a survival statute as to personal injuries only applies when the injured person dies from some cause other than the injury complained of; hence an action by an injured person to recover damages for the injuries does not survive where the injury finally results in his death, and the action cannot be revived.

Stout v. Indianapolis & St. L. R. Co. 41 Ind. 149, holding that under the provisions of a statute to the effect that a cause of action arising out of an injury to the person dies with the person of either party, except in cases in which an action is given for an injury causing the death of any person, an action for a personal injury which results in the death of the plaintiff abates, and it cannot be revived by his administrator. In view of this fact, however, such action is not a bar to a subsequent action by his personal representative to recover for the plaintiff's wrongful death. *Indianapolis & St. L. R. Co. v. Stout*, 53 Ind. 143.

Martin v. Missouri P. R. Co. 58 Kan. 475, 49 Pac. 605, 3 Am. Neg. Rep. 165; *Missouri P. R. Co. v. Bennett*, 58 Kan. 499, 49 Pac. 606, reversing 5 Kan. App. 231, 47 Pac. 183, holding that under a general survival statute construed in connection with a statute very similar to Lord Campbell's act, where the death of the plaintiff in an action to recover damages for personal injuries results from the injuries, the action does not survive, and cannot be maintained for the benefit of the estate. In such case there is a cause of action in favor of the next of kin.

McCarthy v. Chicago, R. I. & P. R. Co. 18 Kan. 46, 26 Am. Rep. 742, construing a statute similar to Lord Campbell's act in connection with the general survival statute providing in effect that causes of ac-

to bring a suit and recover for the pecuniary injury to the widow and next of kin occasioned by his death, and this suit is not the same as that by the injured person for damages sustained by him from the injuries.¹⁵

Where a statute expressly provides for the abatement of causes of action for injury to the person except where the injury causes death, of course, a right of action for personal injury to recover for pain and suffering caused thereby abates upon the death of the injured person.¹⁶

And where, without reference to whether the injury results in death, the measure of damages is the loss to the estate of the decedent by the injury, a pending action to recover for personal injuries may be re-

vived upon the death of the plaintiff, although the death resulted from the injuries.¹⁷

d. Death resulting from some other cause as the test.

Statutes resembling Lord Campbell's act, construed in connection with general survival statutes, only cast doubt upon the survivability of actions or causes of action for personal injuries where the injury results in death, in which case the former statute is applicable. It clearly is not applicable where the injured person dies from some cause other than the injury. In such case, general survival statutes apply and prevent abatement of the action or cause of ac-

tion for injury to the person shall survive notwithstanding the death of the injured person, and holding that the purpose of the act embodying the principles of Lord Campbell's act is not only to fix the amount of damages, and limit them to the use of the widow and children or next of kin, but to take away the right of the administrator to sue for the benefit of the estate generally, where death results from the injuries.

Ellyson v. International & G. N. R. Co. 33 Tex. Civ. App. 1, 75 S. W. 868, s. c. subsequent appeal 43 Tex. Civ. App. 45, 94 S. W. 910, holding, where an injured person dies as a result of the injuries, pending an action by him to recover damages for such injuries, the action does not survive by virtue of this statute, and the remedy is under the death statute.

¹⁵ *Prouty v. Chicago*, 250 Ill. 222, 95 N. E. 147.

¹⁶ *Hilliker v. Citizens Street R. Co.* 152 Ind. 86, 52 N. E. 607, holding that the Indiana statute providing that causes of action arising out of an injury to the person dies with the person, except where a right of action is given for injury causing death, the cause of action which the injured person had for physical pain and suffering and mental anguish abates upon his death, and no action to recover such damages can be maintained by the personal representative. To the same effect is *Stout v. Indianapolis & St. L. R. Co.* 41 Ind. 149; *Burns v. Grand Rapids & I. R. Co.* 113 Ind. 169, 15 N. E. 230; *Hilker v. Kelley*, 130 Ind. 366, 15 L.R.A. 622, 30 N. E. 304. In the *Burns Case* it is said that the statutes resembling Lord Campbell's act do not in terms revive the common-law right of action for personal injury, or make it survive the death of the injured person, but they create a new right in favor of and for the benefit of the next of kin or heirs of the decedent.

Harper v. Nash County, 123 N. C. 118, 31 S. E. 384, holding that an action to recover damages for personal injuries, where the plaintiff dies from some cause other than the injury, does not survive, but abates by the terms of the statute provided. L.R.A.1915E.

ing that upon the death of any person all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator, or collector of his estate, and the provision immediately following, to the effect that the following rights in action do not survive,—causes of action for injuries to the person, where such injury does not cause the death of the injured party.

Under this statute an action to recover damages for mental anguish for failure to deliver a telegram abates with the death of the plaintiff. *Morton v. Western U. Teleg. Co.* 130 N. C. 299, 41 S. E. 484.

The apparent assumption of these cases, that if the injury causes the death of the plaintiff the cause of action survives, is denied in *Bolick v. Southern R. Co.* 138 N. C. 370, 50 S. E. 689.

¹⁷ *Muldowney v. Illinois C. R. Co.* 36 Iowa, 462, sustaining under a general revival statute the right of the personal representative to revive an action commenced by his decedent to recover for personal injuries, where death resulted from the injuries.

Under a statutory provision that all causes of action shall survive and may be brought notwithstanding the death of a person entitled or liable to the same, a father, or in case of his death, or imprisonment, or desertion of his family, the mother, may prosecute as plaintiff an action for expenses and actual loss of services resulting from injury or death of a minor child; and under a further provision that the action of a minor must be brought by his guardian or next friend, a cause of action for the wrongful death survives to the administrator, where the person was a minor. *Lawrence v. Birney*, 40 Iowa, 377.

Mumm v. Owens, 2 Dill. 475, Fed. Cas. No. 9,919, holding that an action by a person to recover damages for personal injuries survives under the Iowa statute, and may be revived by his personal representa-

tion which the injured person had.¹⁸ While cases are referred to which hold and apply this rule, no attempt has been made to cite

all the cases to be found in the various notes in this series which apply it.

In Texas the survival statute expressly

¹⁸ *McLaughlin v. Hebron Mfg. Co.* 171 Fed. 269, holding that under the Rhode Island statute providing for the survival of actions for personal injuries, where death does not ensue from personal injuries received, but from other causes, an action to recover damages for the injury survives the death of the injured person. *Hulbert v. Topeka*, 34 Fed. 510.

Martin v. Wabash R. Co. 73 C. C. A. 646, 142 Fed. 650, 6 Ann. Cas. 582, holding that under the Illinois statute which provides that in addition to the actions which survive by common law, there shall also survive actions to recover damages for injury to the person, an action to recover damages for personal injuries may be revived by the personal representative of the decedent, and he is entitled to be substituted as plaintiff (assumed that death did not result from the injury).

Ohnesorge v. Chicago City R. Co. 259 Ill. 424, 102 N. E. 819, holding that the common-law right of action to recover damages for personal injury survives the death of the injured person only when such death is not caused by the injuries for which the suit was brought. *Prouty v. Chicago*, 250 Ill. 222, 95 N. E. 147.

Savage v. Chicago & J. Electric R. Co. 238 Ill. 392, 87 N. E. 377, wherein the administrator of a deceased person was substituted as plaintiff in a suit commenced by the decedent in his lifetime to recover damages for a personal injury, and was permitted to prosecute the action to judgment. It does not appear from the opinion whether the decedent died from the result of the injury, or from some other cause. The case, however, is cited in the *Prouty* Case as authority for the doctrine that an action for personal injury may be revived after the death of the plaintiff for some cause other than the injury.

Wetherell v. Chicago City R. Co. 104 Ill. App. 357; *Tri-City R. Co. v. Brennan*, 108 Ill. App. 471; *Clark v. O'Gara Coal Co.* 140 Ill. App. 207, holding, where the deceased died from causes other than the injuries complained of, his administratrix was entitled to be substituted as plaintiff in an action commenced by the deceased in his lifetime, to recover damages for the personal injuries.

Kunkel v. Chicago Consol. Traction Co. 156 Ill. App. 393, holding that where the plaintiff in an action to recover damages for personal injuries dies as a result of the injuries, the action abates, and cannot be revived by his personal representative; but where the deceased dies from some cause other than the injury complained of, the personal representative may revive the action and prosecute it for the benefit of the widow of the deceased.

Atchison, T. & S. F. R. Co. v. Chance, 57 Kan. 40, 45 Pac. 60. An action by the injured person to recover damages for per-

sonal injury was revived upon his death from some other cause, by the widow of the personal representative, and the action prosecuted to recover damages to the deceased.

Atchison, T. & S. F. R. Co. v. Rowe, 56 Kan. 411, 43 Pac. 683, holding that under the general survival statute, the action which the decedent has for personal injury, including damages for pain and suffering, survives his death from some cause other than the injury.

Payne v. Georgetown Lumber Co. 117 La. 983, 42 So. 475, holding a right of action to recover damages for personal injuries survives the death of the injured person from some cause other than the injury, by virtue of the statute providing that every act whatever of a man that causes damage to another obliges him by whose fault it happened to repair it; and the right of this action shall survive, in case of death of the injured person, in favor of the widow and minor children of the deceased, or either of them, and, in default of these, in favor of the surviving father or mother, or either of them; and under this statute, where the decedent left surviving him no minor child or widow and only one parent, his mother, she alone is entitled to revive the action to the exclusion of his brothers and sisters.

Rouse v. Michigan United R. Co. 164 Mich. 475, 129 N. W. 719, holding that the right of action for personal injuries not resulting in the death of the injured person survives his death, and a suit commenced by him in his lifetime to recover damages therefor may be continued by his personal representative after his death, with the same effect, according to the same rules, and to recover the same damages, as if he were living and prosecuting the action in person.

Crider v. Moorhead, 51 Pa. Super. Ct. 532, holding that under a general survival statute, where a person received personal injuries through the negligent action of another, and brought suit to recover damages therefor, but died from some cause other than the injuries during the pendency of the action, it survived to his personal representatives, and may be properly prosecuted by them.

In *Daniel v. East Tennessee Coal Co.* 105 Tenn. 471, 58 S. W. 859, in construing provisions of the Tennessee statutes relating to the survival of actions for wrongful death and actions for pain and suffering, to require that the death result from the wrongful act in order that an action pending by the plaintiff to recover for his personal injuries be revived upon his death, it is pointed out that, while these cases do not cover a case where the plaintiff did not die from the effects of the wrongful act for which he sued, there is nevertheless ample remedy for the continued prosecu-

provides for the survival, for the benefit of the heirs and legal representatives of a deceased person, of a right of action for personal injuries not resulting in death.¹⁹ Under this statute a cause of action for personal injuries survives the death of the injured person from a cause other than the injury, although no suit has been brought by the decedent in his lifetime to recover damages for the injury; and decedent's heirs may maintain a suit after his death to recover damages caused the decedent by the injury, including his pain and suffering therefrom.²⁰

In Ohio, by the express terms of the statute, if an action is based upon personal injuries received through the maintenance of a nuisance, it abates upon the death of the plaintiff from some cause other than the injuries.²¹

A cause of action for acts or omissions not causing death, but merely aggravating and intensifying the pain and suffering of the decedent, does not survive his death,

tion of an action to recover for personal injuries where the plaintiff dies from some cause other than the injuries, under the provisions of another statute to the effect that no civil action commenced, whether founded on wrongs or contracts, shall abate by the death of either party, but may be revived.

¹⁹ *Houston & T. C. R. Co. v. Rogers*, 15 Tex. Civ. App. 680, 39 S. W. 1112; *Houston & T. C. R. Co. v. Maxwell*, — Tex. Civ. App. —, 128 S. W. 160.

Compare with *Ft. Worth & R. G. R. Co. v. Robertson*, 103 Tex. 504, 131 S. W. 400, Ann. Cas. 1913A, 231, adopting dissenting opinion in 55 Tex. Civ. App. 309, 121 S. W. 202, holding that where the plaintiff in an action to recover damages for personal injuries dies, before judgment, from some cause other than the injury, the action cannot be revived and prosecuted by a woman living with him as his wife, for her benefit, but recovery may be had for the benefit of a surviving child of the decedent, although the woman intermarried with the decedent in good faith, and without knowledge that he was incapacitated from entering into that relation because of a prior marriage.

Galveston, H. & S. A. R. Co. v. Heard, — Tex. Civ. App. —, 91 S. W. 371, holding that where the injured person dies pending an action brought by him to recover damages for the injury, and his injury is not the proximate cause of his death, the beneficiaries may substitute themselves as parties plaintiff, and recover damages resulting to the decedent from the injuries.

Marshall v. McAllister, 18 Tex. Civ. App. 159, 43 S. W. 1043, 3 Am. Neg. Rep. 743, holding that an action for personal injuries, upon the death of the injured person may be revived by his representative under a statute providing that actions pending or thereafter brought for personal injuries

and an action therefor cannot be maintained by his personal representative, under a statute, giving a personal representative the right to sue for acts and omissions causing death.²²

Where by statute it is provided that a right of action for personal injuries causing death shall not abate by reason of the death of the injured person, and if such person has commenced an action before his death it shall proceed without revivor, an action to recover damages for personal injuries, brought by the injured person, does not abate upon his death from the injuries before judgment, and it may be prosecuted in his name by the persons who under the statute are beneficiaries of the fund if any is recovered.²³

And under a statute providing that no action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine by reason of such death if he have a wife or child living, it is held that where an injured person dies

not resulting in death shall survive to and in favor of the heirs and legal representatives of the injured party (assumed that the injuries did not result in death).

Under the provisions of a statute that causes of action upon which suit has been or may be thereafter brought by an injured party to recover damages for personal injuries other than those resulting in death shall not abate by reason of his death, an action by an injured person to recover damages for an injury suffered cannot be revived after the death of the plaintiff, where the injury is the proximate cause of the death. It may, however, be revived where the death results from other causes. *Ellyson v. International & G. N. R. Co.* 33 Tex. Civ. App. 1, 75 S. W. 868, subsequent appeal 43 Tex. Civ. App. 45, 94 S. W. 910.

²⁰ *Gulf, C. & S. F. R. Co. v. Moore*, 28 Tex. Civ. App. 603, 68 S. W. 559.

²¹ *Cardington v. Fredericks*, 46 Ohio St. 442, 21 N. E. 766, holding that under the statute giving a right of action for death occasioned by a wrongful act, in the name of the personal representative, for the benefit of the next of kin, or widow, or both, construed in connection with a statute providing that actions for damages for slander, libel, assault and battery, on the case for nuisance, etc., shall abate by the death of either party, an action to recover damages for a personal injury alleged to have been occasioned through the maintenance of a nuisance abates upon the death of the plaintiff, where it does not appear that such death was caused by the injuries complained of.

²² *Whitmore v. Alabama Consol. Coal & I. Co.* 164 Ala. 125, 137 Am. St. Rep. 31, 51 So. 397.

²³ *Chambers v. Porter*, 55 Coldw. 273; *Daniel v. East Tennessee Coal Co.* 105 Tenn. 470, 58 S. W. 859.

from the injuries complained of after having commenced suit to recover the damages for his injury, his beneficiaries are entitled to an order of the court granting leave to prosecute to final judgment this action. The beneficiaries are limited in their recovery to damages for the pain and suffering of the deceased from the time of his injury to his death.²⁴

e. Where actions coexist under each statute.

1. In general.

In many jurisdictions, statutes similar to Lord Campbell's act and general survival statutes have been construed together, and held to be supplementary to each other, and to provide for and permit the recovery of damages in behalf of the estate of the decedent for injuries to his person, and also of damages to the statutory benefi-

ciaries to cover their pecuniary loss from the death complained of.²⁵ In these jurisdictions, of course, so far as concerns actions to recover for personal injuries, pending at the time of the death of the injured person, the cause of death, whether from the injuries or from other cause, is immaterial. In either event the action may be revived by virtue of a general survival statute. Hence in many of these jurisdictions the right to revive a pending action to recover for, or a cause of action for, personal injuries has been sustained, without disclosing whether the plaintiff died from the injuries or from some other cause.²⁶

As a rule, where the cause of action under the survival statute and under a statute similar to Lord Campbell's act are held to be coexistent, the damages under the survival statute are held not to include destroyed earning power, except as covered by the decedent's loss in this regard from the time of his injury to his death; and the

²⁴ *Thompson v. Seattle*, R. & S. R. Co. 71 Wash. 436, 128 Pac. 1070.

Swanson v. Pacific Shipping Co. 60 Wash. 87, 110 Pac. 795, holding that under a statute providing that no action for personal injuries causing death shall abate, if the deceased have a wife or child living, but such action may be prosecuted in favor of such wife or child, an action for personal injuries may be prosecuted by such wife or child after the death of the plaintiff therein, if it is alleged and proven that his death was caused solely by the injuries which were the subject-matter of the suit.

²⁵ See note to *Rowe v. Richards*, ante, 1095, and notes to *Murray v. Omaha Transfer Co.* L.R.A. —, —, and *Florida East Coast R. Co. v. Hayes*, L.R.A. —, —.

²⁶ *Illinois C. R. Co. v. O'Neill*, 100 C. C. A. 658, 177 Fed. 328, writ of certiorari denied in 217 U. S. 604, 54 L. ed. 899, 30 Sup. Ct. Rep. 694, holding that under the Illinois statute, an action for physical and mental pain and suffering of the person injured survives to his widow and children, and may be recovered by them, as well as their loss of his support. *Freacolin v. Puget Sound Traction, Light & P. Co.* 225 Fed. 441.

St. Louis, I. M. & S. R. Co. v. Robertson, 103 Ark. 361, 146 S. W. 482, holding that under a statute providing that for wrongs to the person, an action may be maintained by the administrator. The right of action for pain and suffering survives the death of the injured person because of the injury.

Dougherty v. New Orleans R. & Light Co. 133 La. 993, 63 So. 493, holding that under the Louisiana statute, on the death of a person from injuries received, his right of action to recover for the injuries survives, notwithstanding there also exists an action for his death.

In Louisiana a cause of action for in-

juries to the person survives both where the injury results in death (*Delisle v. Bourriague*, 105 La. 77, 54 L.R.A. 420, 29 So. 731, *infra*), and where it does not (*Payne v. Georgetown Lumber Co.* 117 La. 983, 42 So. 475, *infra*).

Stewart v. United Electric Light & P. Co. 104 Md. 332, 8 L.R.A.(N.S.) 384, 118 Am. St. Rep. 410, 65 Atl. 49, holding that the cause of action accruing to the deceased person in his lifetime for injuries which finally resulted in his death does not abate upon his death, but it survives under the general statute; and an action may also be maintained for the death under Lord Campbell's act, since the damages recoverable are distinct, those recoverable under the general survival statute being limited to the pain and suffering of the deceased, loss of time between his injury and death, and the expense during that time occasioned by the injury.

Hamel v. Southern R. Co. — Miss, —, 66 So. 426, holding that under the Mississippi statutes authorizing actions for injuries producing death, and authorizing the legal representative of the deceased person to prosecute all suits at law which the decedent might have prosecuted in his lifetime, and a further provision authorizing a personal representative to prosecute an action commenced by his decedent, a suit brought by the injured person in his lifetime might be prosecuted to final judgment by his administrator, and although a substantial judgment was rendered therein (\$4,500), the widow might nevertheless bring another suit for damages for his death which were not recoverable in the first suit; and this is true although damages recovered in the first suit might have been sued for and recovered in the same case with damages for the death.

Johnson v. Butte & S. Copper Co. 41 Mont. 158, 48 L.R.A.(N.S.) 938, 108 Pac.

damage under Lord Campbell's act is held to be the pecuniary loss to the statutory beneficiaries, of contributions by the decedent from his earnings which they had reasonable grounds to expect had he continued to live. Hence double damages are not awarded.²⁷

In some cases, however, while perhaps not entirely clear upon the point, damages are apparently permitted to cover loss to the deceased of his power to earn money, based upon his life expectancy, and loss to

his statutory beneficiaries of contributions toward their support by the deceased from his earnings, thus permitting damages to be twice assessed, based upon the earning power of the deceased.²⁸

2. Federal employers' liability act.

Under the Federal employers' liability act, as originally enacted, a cause of action accruing thereunder to an employee for personal injuries abated on his death from the injury, but by amendment this cause

1057, holding that under the survival statute, the right of action for personal injuries existing in the injured person does not cease upon his death, but it may be prosecuted either by his heirs or personal representatives, but by whomsoever prosecuted, it is still the action the injured person had. In this case death was the result of the injury. The court refused to pass upon the question as to whether or not the statutory beneficiaries also had a cause of action under the provisions of the statute modeled after Lord Campbell's act, for damages which they sustained, as distinguished from the damages which the injured person or his estate suffered.

Mahoning Valley R. Co. v. Van Alstine, 77 Ohio St. 395, 14 L.R.A. (N.S.) 893, 83 N. E. 601, holding that judgment in an action commenced by the decedent in his lifetime to recover damages for injury to his person, and revived and prosecuted to judgment by his personal representative, was not a bar to an action by the personal representative based upon a statute similar in principle to Lord Campbell's act, where the elements of damage were distinct, and declaring that by survival statutes applicable both to actions and causes of action for personal injury, and a statute similar to Lord Campbell's act, it was intended to preserve from abatement the right of the administrator to recover damages for the benefit of the estate, where the party injured died from the effect of the wrongful act and as a consequence of it, and also to create a new and independent right of action to be enforced by the administrator for the benefit of the next of kin, with the right to recover damages for their pecuniary loss from the death complained of.

Bennett v. Spartanburg R. Gas. & Electric Co. 97 S. C. 27, 81 S. E. 189, holding that a cause of action for injury to the person survives the injured person's death from some other cause, under the general survival statute, while an act embodying the principles of Lord Campbell's act creates a new right of action where none existed before; hence these actions cannot be joined.

In Wisconsin, without reference to the cause of the death, a cause of action to a person because of an injury from which death ensued survives to his administrator for the benefit of his estate by virtue of the general survival statute, which in effect provides that an action for recovery of dam-

ages to the person shall survive, and the survivability is not affected by the existence of a contemporaneously enacted statute substantially similar to Lord Campbell's act, since the measure of recovery is distinct. Brown v. Chicago & N. W. R. Co. 102 Wis. 137, 44 L.R.A. 579, 77 S. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255; Nemecek v. Filer & S. Co. 128 Wis. 71, 105 N. W. 225; Lehmann v. Farwell (Lehmann v. Deuster) 95 Wis. 185, 37 L.R.A. 333, 60 Am. St. Rep. 111, 70 N. W. 170.

In the earlier Wisconsin cases, before the inclusion in a survival statute of causes of action for personal injuries, it was held that, notwithstanding the death act, a pending action to recover damages for personal injuries abated upon the death of the plaintiff, and was not subject to revival. Randall v. Northwestern Tele. Co. 54 Wis. 140, 41 Am. Rep. 17, 11 N. W. 419; Meese v. Fond du Lac, 48 Wis. 323, 4 N. W. 406.

In Quinn v. Chicago, M. & St. P. R. Co. 141 Wis. 497, 124 N. W. 653, an action by an injured person to recover damages for personal injuries, after his death from the injuries before judgment, was revived by his personal representative, who filed a supplemental complaint containing the original cause of action, and also a claim for damages based upon wrongful death. The new cause of action was demurred to, and the demurrer was sustained, but it was apparently assumed that the original cause of action was properly before the court.

²⁷ See notes to Murray v. Omaha Transfer Co. L.R.A. —, —, and Florida East Coast R. Co. v. Hayes, L.R.A. —, —.

²⁸ Rowe v. Richards, ante, 1095, asserting the doctrine that where a person has been injured by the negligent act of another he may maintain an action for such damages as he has suffered, and if pending the action he dies, the action may be revived after his death by his personal representative. If the action was not commenced during the lifetime of the injured party, his personal representative may bring an action to recover damages for the injuries the decedent suffered during his lifetime, and the amount so recovered is a part of the general assets of the estate, to be disbursed and distributed the same as any other assets of the estate. In this case death resulted from the injury. This case also holds that under a general survival statute and a statute similar to Lord Campbell's

of action survives to the statutory beneficiaries, and may be prosecuted for and in their behalf.²⁹

f. Where right of revival is optional.

In Kentucky the rule obtains that the personal representative may exercise his option to sue either for damages to the deceased, or for the injury to the statutory beneficiaries, but he cannot maintain both remedies. The matter being optional, the personal representative may revive and prosecute an action commenced by his decedent in his lifetime to recover for his personal injuries.³⁰ But he cannot sue upon

this common-law action for personal injuries, etc., and at the same time sue under the statute to recover for the death of the decedent.³¹

VI. Construction of revival statute expressly referring to pending actions.

Where a statute expressly provides that all actions to recover damages for personal injuries pending at the death of the plaintiff shall survive, and may be revived and prosecuted by decedent's personal representative or other designated person, the only condition to the right of revivor is that the action be pending; and the cause

act, two distinct causes of action exist, and a settlement by the injured person in his lifetime of his claim for injuries to his person is not a bar to an action for his subsequent death. See *supra*, IV. a.

St. Louis & S. F. R. Co. v. Goode, post, 1141, holding that an action for personal injuries does not abate upon the death of the plaintiff from the injuries, and may be revived and prosecuted by his personal representative, and this action may be co-existent with an action by the representative, based upon the death statute, to recover for the benefit of the statutory beneficiaries.

²⁹ See note in 47 L.R.A. (N.S.) 66. *Michigan C. R. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; *Thomas v. Chicago & N. W. R. Co.* 202 Fed. 766; *Cain v. Southern R. Co.* 199 Fed. 211; *Garrett v. Louisville & N. R. Co.* 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32; *Walsh v. New York, N. H. & H. R. Co.* 173 Fed. 494; *Fulgham v. Midland Valley R. Co.* 167 Fed. 660, reversed on other grounds, L.R.A. —, —, 104 C. C. A. 161, 181 Fed. 91.

American R. Co. v. Didricksen, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224, holding that under the Federal employers' liability act, before the amendment of 1910, a cause of action created in behalf of an injured employee did not survive his death or pass to his representatives, but that the act, in case of the death of such an employee from his injury, created a new and distinct right of action for the benefit of the dependent relatives named in the statute (death from injuries).

Illinois C. R. Co. v. O'Neill, 100 C. C. A. 658, 177 Fed. 328, writ of certiorari denied in 217 U. S. 604, 54 L. ed. 899, 30 Sup. Ct. Rep. 694, sustaining an instruction to the jury to the effect that the deceased had he lived would have been entitled to recover for his physical pain and suffering, and for his mental suffering, and such damages as were actually occasioned him by the accident; and this right of action survived to the widow for the benefit of herself and minor children, and in addition thereto she is entitled to recover for the loss of the support of the decedent. L.R.A. 1915E.

Under the Federal employers' liability act before the amendment of 1910, an employee's right of action for pain and suffering abated upon his death; and hence could not be revived by his personal representative. *Garrett v. Louisville & N. R. Co.* 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32 (death from injuries).

Midland Valley R. Co. v. Lemoyne, 104 Ark. 327, 148 S. W. 654, holding that by the Federal employers' liability act as amended, a right of action for injuries to a railway employee, resulting in his death, survives in favor of his personal representative.

³⁰ *Hansford v. Payne*, 11 Bush, 385; *Conner v. Paul*, 12 Bush, 144; *Donahue v. Drexler*, 82 Ky. 157, 56 Am. Rep. 886; *Hackett v. Louisville R. Co.* 95 Ky. 236, 24 S. W. 871; *Louisville & N. R. Co. v. McElwain*, 98 Ky. 700, 34 L.R.A. 788, 56 Am. St. Rep. 385, 34 S. W. 236; *Owensboro & N. R. Co. v. Barclay*, 102 Ky. 16, 43 S. W. 177; *Lewis v. Taylor Coal Co.* 112 Ky. 845, 57 L.R.A. 447, 66 S. W. 1045.

³¹ Under the survival statute of Kentucky, the cause of action for a personal injury does not abate on the death of the injured person, but survives and may be prosecuted by his personal representative. *Lewis v. Taylor Coal Co.* 112 Ky. 845, 57 L.R.A. 447, 66 S. W. 1044.

Hansford v. Payne, 11 Bush, 380, holding that under the general survival statute (chap. 10), the right of action for personal injury survives to the personal representative of the injured person.

Perkins v. Stein, 94 Ky. 433, 20 L.R.A. 861, 22 S. W. 649, holding that under the survival statute of Kentucky (§ 1 of chap. 10), an action commenced by the injured person in his lifetime to recover damages for his personal injury survives to his personal representative, and the latter is entitled to revive the same.

Lewis v. Taylor Coal Co. 112 Ky. 845, 57 L.R.A. 447, 66 S. W. 1044, holding that by virtue of the statutory provision that a cause of action for personal injuries shall not abate upon the death of the injured person, the right of action for injury to the person, including pain and suffering, survives his death (death result of injuries).

of death, whether from the injuries or otherwise, is immaterial.³³

In other jurisdictions, similar statutory provisions authorizing the revival of pend-

ing actions for personal injuries on the death of the plaintiff are applied and enforced as to pending actions, without any statement as to the cause of death,³³ there-

³³ *Birmingham v. Chesapeake & O. R. Co.* 98 Va. 548, 37 S. E. 17, asserting that the object of the statute providing that the right of action for personal injuries shall not determine, nor the action when brought abate by reason of the death of the plaintiff, and it may be revived by his personal representative, was to give the right of revival in cases where the plaintiff died pending the action, without regard to the cause of death.

³³ *Baltimore & O. R. Co. v. Joy*, 173 U. S. 226, 43 L. ed. 677, 19 Sup. Ct. Rep. 387, 5 Am. Neg. Rep. 160, construing the Ohio survival act providing that, except as otherwise provided, no action or proceeding pending in any court shall abate by the death of either or both of the parties thereto, and holding that under this act a pending action to recover damages for personal injury, removed from the state court to the Federal court, may be revived by the personal representative of the deceased.

Martin v. Wabash R. Co. 73 C. C. A. 646, 142 Fed. 650, 6 Ann. Cas. 582, holding that under the Illinois statute providing that, in addition to actions which survive at common law, actions for injury to persons also survive, an action by the injured person to recover for personal injuries does not abate by his death before judgment, and his personal representative may be substituted as plaintiff therein.

Pritchard v. Savannah Street & R. Resort R. Co. 87 Ga. 294, 14 L.R.A. 721, 13 S. E. 493, holding that an action to recover damages for personal injuries, pending at the time of the death of the injured person, may be revived by his administrator under a statute which went into effect during the pendency of the action, which provided that no action for tort should abate by the death of either party.

Southern Bell Teleph. & Teleg. Co. v. Cassin, 111 Ga. 575, 50 L.R.A. 694, 36 S. E. 881, holding that the Civil Code of Georgia (§ 3825), providing that no action for tort shall abate by the death of either party, nor shall any action for the recovery of damages for an injury to a person abate by the death of either party, but such cause of action shall survive to the personal representative of the deceased plaintiff, is not strictly a survival statute, but it is a statute to prevent the abatement of cases actually in court, for, if the injured party dies before bringing suit, his administrator cannot institute an action to recover damages for the pain, suffering, and diminished capacity to labor, etc., of the injured person by the injury.

Under the Code provision of Georgia that no action for the recovery of damages for injury to a person shall abate by the death of either party to such cause of action, and in case of the death of the plaintiff shall, in the event there is no right of survivorship in any other person, survive to the L.R.A.1915E.

personal representative of the deceased plaintiff, an action brought to recover for pain and suffering, mental and physical, resulting from personal injuries to the plaintiff, does not abate upon the death of the plaintiff, and it may be revived by his personal representative. *Stephens v. Columbus R. Co.* 134 Ga. 818, 68 S. E. 551.

Hooper v. Gorham, 45 Me. 209, holding that the administrator of a deceased person may revive an action commenced by the deceased in his lifetime to recover damages for personal injuries, where, subsequent to the commencement of the suit, a statute was enacted providing that actions of this character pending at the time of the death of either party may be prosecuted or defended by the personal representative of such party.

Norris v. Grove, 100 Mich. 256, 58 N. W. 1006, holding that by virtue of the general survival statute, an action for negligent injury survives the death of the injured person. In this state the cause of death is immaterial; the question of survivability of the cause of action depends upon whether or not the death was instantaneous.

And a pending action by the person injured, where he dies before judgment, may be revived by his personal representative, by virtue of a statute providing that actions of trespass on the case for damage to the person shall survive. *Demond v. Boston*, 7 Gray, 544.

In *Dickinson v. Boston*, 188 Mass. 595, 1 L.R.A.(N.S.) 664, 75 N. E. 68, the personal representative of the decedent was admitted as a party plaintiff to prosecute an action, commenced by the decedent in her lifetime to recover damages for personal injuries, and was permitted to amend the pleadings in order to state a cause of action, the original declaration having been defective in this regard.

Vicksburg & M. R. Co. v. Phillips, 64 Miss. 693, 2 So. 537, stating the rule that if an injured person dies while his action is pending to recover damages for the injuries, his administrator may revive the action (death from injuries).

Webster v. Hastings, 59 Neb. 563, 81 N. W. 510, holding that by virtue of the survival statute of Nebraska, which provides that no action pending in any court shall abate by the death of either or both of the parties thereto, a suit pending to recover damages for a personal injury caused by the negligence of the defendant does not abate by the death of the plaintiff, but may be revived by his administrator. In the foregoing case the cause of death is not stated. It has, however, been held that the statute applies to an action where the plaintiff dies from the injuries. *Murray v. Omaha Transfer Co.* 95 Neb. 175, 145 N. W. 360, and see opinion on rehearing, L.R.A. —, —, 153 N. W. 488.

In the original opinion in the latter case,

by leading to the inference that the cause of death is immaterial where it is sought to revive a pending action by virtue of such a statute, and this is undoubtedly the rule.

In Tennessee, however, a more limited construction has been placed upon a statute expressly applicable to pending actions, and survivability thereunder has been held to depend on the cause of the death of the plaintiff, whether from the injuries or some other cause.³⁴

In some jurisdictions the purpose of the lawmakers that only a pending action shall survive, and that this action shall be the exclusive remedy, is clearly expressed. In

such case, of course, it is immaterial whether the death resulted from the injuries or from some other cause. Thus in Pennsylvania the remedy by revival of the pending action is made exclusive by a statute, which only provides for the survival of causes of action for personal injuries where an action was commenced by the injured person in his lifetime to recover therefor.³⁵

Under a code provision that after a verdict reported or a decision in an action to recover damages for a personal injury, the action does not abate by the death of a party, but the subsequent proceedings are the same as where the cause of action sur-

is it is said that the statute makes no exception as to the cause of death, and the court should not.

Peebles v. North Carolina R. Co. 63 N. C. 238, holding that by virtue of the general provision that no action, suit, etc., brought to recover or obtain money, property, or damages, except suits for penalties and for damages merely vindictive, shall abate by reason of the death of either party, an action brought by a passenger to recover from a common carrier damages for personal injuries received while a passenger does not abate.

Ohio & P. Coal Co. v. Smith, 53 Ohio St. 313, 41 N. E. 254, holding that upon the death of the plaintiff in an action to recover damages for personal injuries, pending the action, the administrator of his estate is entitled to revive the action and prosecute it to judgment. It does not appear whether or not the plaintiff died as a result of the injuries.

Hambly v. Hayden, 20 R. I. 558, 40 Atl. 417, holding that under the statutory provision that causes of action for trespass or damage to the person survive the death of the plaintiff, and the provision that the administrator of a deceased party to a suit who dies before final judgment may prosecute it, an action to recover damages for injury to the person does not abate, and may be revived by the injured person's personal representative.

Bradley v. Andrews, 51 Vt. 525, holding that by virtue of the statute providing that if in any proper action now pending, or which may hereafter be commenced, for the recovery of damages for any bodily hurt or injury occasioned to the plaintiff by the act or default of the defendant, either party shall die during the pendency of such action, the action shall nevertheless survive, etc., an action by a minor to recover damages for a personal injury survives his death, and may be revived by his personal representative. In this case the death was apparently not caused by the injury.

³⁴*Daniel v. East Tennessee Coal Co.* 105 Tenn. 470, 58 S. W. 859, holding that under the statutory provision that the right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act, omis-

sion, or killing by another, would have had against the wrongdoer in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, etc., construed in connection with a provision that if the deceased had commenced an action before his death it should proceed without a revival, and the damages shall go to the widow and next of kin, etc., if a person wrongfully injured by another commences his action for damages while living, and he dies from the injuries sued for before judgment, leaving a widow or next of kin, his suit survives and may proceed to judgment. But if he dies from some cause other than the injury sued for, these provisions do not authorize the revival of the action; but there is another statute in Tennessee by virtue of which a pending action to recover for personal injuries may be revived where death does not result from the injury.

And see *Nashville & C. R. Co. v. Prince*, 2 Heisk. 580, holding cause of action for personal injuries survives instantaneous death.

³⁵*Crider v. Moorhead*, 51 Pa. Super. Ct. 532, holding, where an action is brought by a person who has sustained personal injuries through the negligence or default of another, and the plaintiff dies before the suit is completed, his personal representative may be substituted as plaintiff; and it is immaterial whether the death was the result of the injury or not.

Maher v. Philadelphia Traction Co. 181 Pa. 391, 37 Atl. 571, 3 Am. Neg. Rep. 85, holding an action to recover damages for personal injuries survives the death of the plaintiff as a result of the injuries, and may be revived by his personal representatives, under the Constitution, providing that in case of death from personal injuries the cause of action therefor shall survive, and the statutory provision that no action thereafter brought to recover damages for injuries to the person by negligence or default shall abate by reason of the death of the plaintiff, but the personal representative of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction.

Birch v. Pittsburgh, C. C. & St. L. R. Co. 165 Pa. 339, 30 Atl. 828, holding that where

vives, the cause of action for personal injuries will survive only in case the verdict reported or the decision was reversed upon questions of law after the death of the plaintiff; and the cause of action abates where the verdict of the jury is set aside, or judgment entered thereon reversed, if the plaintiff dies before another trial is had.³⁶

An action brought by an injured child in his lifetime to recover damages for personal injuries cannot be revived by his parent as administrator upon his death during the pendency thereof, by virtue of a statute the object of which was to continue the action when the right of action survived the death of the plaintiff, but not to give a new right of action.³⁷

VII. Conflict of laws.

The question as to the law of what forum shall apply to matters relative to the survivability of a cause of action or the revival of an action for personal injury is covered in a note in 5 L.R.A.(N.S.) 756, and hence is not treated here.

In general, however, it may be said that whether a pending action may be revived upon the death of either party and proceed to judgment depends primarily upon the laws of the jurisdiction in which the action was commenced. A right given by the statute of a state to revive a pending action for personal injuries in the name of the

personal representative of the deceased plaintiff is not lost by the removal of the case into a Federal court, and if after such removal the plaintiff dies, the action may be revived in the name of the administrator of his estate.³⁸

And although the plaintiff in a suit to recover for personal injuries received in another state is a nonresident of the state where the suit is brought, upon his death from some other cause before judgment, administration may nevertheless be had in the state of suit, and the personal representative appointed in such proceeding is entitled to revive the action under a statute authorizing suits by nonresidents for personal injuries, and also a statute providing for the survival of actions for personal injuries. And this is true although, according to the law of the state where the injury occurred, the action could not have been revived.^{38a}

VIII. Who may revive action.

a. Personal representative.

Ordinarily the statutes in authorizing the revival of actions or causes of action for personal injuries resulting in death authorize such revival by the personal representative of the deceased, although frequently the proceeds of any judgment recovered are expressly disposed of to dependents or next of kin of the deceased. In either case the

a person suing to recover damages for personal injuries dies before judgment, the action may be revived by her executrix, who may be substituted as plaintiff, where the death is the result of the injury, by virtue of a statute providing that no action brought to recover damages for injury to a person shall abate by reason of the death of the plaintiff, but the personal representative of the deceased may be substituted as plaintiff and prosecute the suit to final judgment and satisfaction, there being also a provision that whenever death shall result from unlawful violence or negligence, and no suit for damages be brought by the party during his or her lifetime, the widow of any such deceased, or, if there be no widow, the personal representative, may maintain an action and recover damages for such wrongful death. To the same effect are *Maher v. Philadelphia Traction Co.* 181 Pa. 391, 37 Atl. 571, 3 Am. Neg. Rep. 85; *McCafferty v. Pennsylvania R. Co.* 193 Pa. 339, 74 Am. St. Rep. 690, 44 Atl. 435, 6 Am. Neg. Rep. 693; *Edwards v. Gimbel*, 202 Pa. 30, 51 Atl. 357, holding that the measure of damages under such circumstances is the loss which deceased sustained by reason of his injuries.

LHOTA v. OPPENHEIMER, holding that the Constitution and statutes of Pennsylvania do not make exclusive the action therein L.R.A.1915E.

given to certain statutory beneficiaries for the death of a relative, but under the general revival statute an action to recover damages for personal injuries pending at the death of the plaintiff as a result of the injury may be revived by his personal representative, and be prosecuted to judgment for the benefit of the estate.

Where the injured person in his lifetime brought an action to recover damages for the injuries, and died during the pendency thereof, the proper practice is to revive and prosecute this action by a personal representative; and the children of the deceased cannot properly sue for their pecuniary loss by his death, where the statute authorizing children to sue only gives such power where no suit for damages has been brought by the deceased in his lifetime. *Black v. Baltimore & O. R. Co.* 224 Pa. 519, 73 Atl. 903. ³⁶ *Hughes v. Russell*, 113 App. Div. 744, 99 N. Y. Supp. 203.

³⁷ *Flinn v. Perkins*, 32 L. J. Q. B. N. S. 10, 8 Jur. N. S. 1177, 7 L. T. N. S. 364, 11 Week. Rep. 95.

³⁸ *Baltimore & O. R. Co. v. Joy*, 173 U. S. 226, 43 L. ed. 677, 19 Sup. Ct. Rep. 387, 5 Am. Neg. Rep. 760, and also the note referred to in 5 L.R.A.(N.S.) 756.

^{38a} See *Pyne v. Pittsburg, C. C. & St. L. R. Co.* 5 L.R.A.(N.S.) 756, and note.

right of revivor rests in the personal representative.³⁹

An action by a married woman to recover damages for personal injuries, upon her death before judgment may be revived by her administrator, although she has a husband living, where by statute it is provided that no action for a tort shall abate by the death of either party, nor shall an action to recover damages for an injury to a person; but such cause of action shall, in the event there is no right of survivorship in any other person, survive to the personal representative of the deceased plaintiff. This is true although it is also provided that the husband may recover for the homicide of his wife, this latter provision not applying to an action to recover damages for pain and suffering.⁴⁰

The survival act applies to rights of action as well as to actions; and under this act a right of action which vests in the injured person in his lifetime becomes upon his death an asset of his estate, to be collected and distributed according to the administration statutes.⁴¹

Under the Code, in effect a survival act, it is immaterial whether the person injured had commenced his action before his death or not. In either case this provision prevents the abatement of the right of action, and transmits it to the personal representative of the decedent for the benefit of his widow or next of kin.⁴²

b. Statutory beneficiary.

1. In general.

Where the right of revival is given to the personal representative, or, if no person qualifies, to the heirs of the decedent, an action for personal injuries prosecuted by the injured person cannot, upon his death from some cause other than the injury before final judgment, be revived by those who are his beneficiaries under the statute, where it was never revived by the administrator, and his absence is in no way excused or accounted for in the record.⁴³

And where the plaintiff in an action to recover damages for mental anguish caused by the failure of the defendant to send a telegraph message dies before judgment, the action may be revived by his executor or administrator if there is one; if not, it may be revived by his heirs; but the heirs cannot revive the action without alleging in their petition that there is no executor or administrator, where it is provided by statute that if in any suit the plaintiff shall die before a verdict, if the cause of action is one which survives the suit shall not abate by reason of such death, but the executor or administrator, and if there is no administrator, and no necessity for one, then the heirs of such deceased plaintiff, may appear and be made plaintiff, and the suit shall proceed in his or their name.⁴⁴

³⁹ Ga.—Pritchard v. Savannah Street & R. Resort R. Co. 87 Ga. 294, 14 L.R.A. 721, 13 S. E. 493.

Ill.—Holton v. Daly, 106 Ill. 131; Clark v. O'Gara Coal Co. 140 Ill. App. 207; Mattoon Gaslight & Coke Co. v. Dolan, 105 Ill. App. 1.

Kan.—Atchison, T. & S. F. R. Co. v. Rowe, 56 Kan. 411, 43 Pac. 683.

Ky.—Perkins v. Stein, 94 Ky. 433, 20 L.R.A. 861, 22 S. W. 649.

Me.—Hooper v. Gorham, 45 Me. 209.

Mich.—Rouse v. Michigan United R. Co. 164 Mich. 475, 129 N. W. 719.

Miss.—Vicksburg & M. R. Co. v. Phillips, 64 Miss. 693, 2 So. 537.

Neb.—Webster v. Hastings, 59 Neb. 563, 81 N. W. 510.

N. C.—Peebles v. North Carolina R. Co. 63 N. C. 238.

Ohio—Ohio & P. Coal Co. v. Smith, 53 Ohio St. 313, 41 N. E. 254.

Pa.—Birch v. Pittsburg, C. C. & St. L. R. Co. 165 Pa. 339, 30 Atl. 826.

Tex.—Western U. Teleg. Co. v. Kauffman, — Tex. Civ. App. —, 107 S. W. 630; Marshall v. McAllister, 18 Tex. Civ. App. 159, 43 S. W. 1043, 3 Am. Neg. Rep. 743.

Vt.—Legg v. Britton, 64 Vt. 652, 24 Atl. 1016.

Va.—Brammer v. Norfolk & W. R. Co. 107 Va. 206, 57 S. E. 593. L.R.A.1915E.

Wis.—Johnson v. Eau Claire, 149 Wis. 194, 135 N. W. 481.

When the injured person has brought suit during his lifetime, but before trial he died, and his death was not the result of his injury, the only necessary change in the declaration is a substitution of his representative as plaintiff. Wetherell v. Chicago City R. Co. 104 Ill. App. 357.

In such case the measure of recovery is the same as if the deceased were living and prosecuting the suit in person. Ibid; Tri-City R. Co. v. Brennan, 108 Ill. App. 471.

⁴⁰ Stephens v. Columbus R. Co. 134 Ga. 818, 68 S. E. 551.

⁴¹ Love v. Detroit, J. & C. R. Co. 170 Mich. 1, 135 N. W. 963.

⁴² Nashville & C. R. Co. v. Princee, 2 Heisk. 580, overruling Louisville & N. R. Co. v. Burke, 6 Coldw. 45.

⁴³ McDonald v. Nashville, 114 Tenn. 540, 86 S. W. 317.

⁴⁴ Western U. Teleg. Co. v. Kauffman, — Tex. Civ. App. —, 107 S. W. 630.

Galveston, H. & S. A. R. Co. v. Heard, — Tex. Civ. App. —, 91 S. W. 371, holding that the beneficiaries under the statute may substitute themselves as parties plaintiff, and continue the prosecution of an action commenced by their decedent in his lifetime to recover damages for personal injury to him.

But such an action cannot be revived and prosecuted by a woman in her own behalf, who lived with the decedent in his lifetime as his wife, although she intermarried with him in good faith and without knowledge that he had previously been married, and that the wife of the former marriage was living and he had not been divorced from her.⁴⁵

If the plaintiff in an action to recover damages for personal injuries dies before judgment, leaving surviving him a wife or child, under the Washington statute the action may be prosecuted by and in favor of such wife and child upon alleging and proving that the decedent's death was caused solely by the injuries complained of.⁴⁶

Where, after commencing a suit to recover damages for injuries to his person, the plaintiff dies from some cause other than the injury, and leaves no wife or child surviving him, the action survives in favor of his surviving parent, and may be revived and prosecuted by her.⁴⁷

And the right of action of a married woman to recover damages for personal injuries does not abate upon her death from

the injuries, but by the statute of 1884 survives for the benefit of her husband and children; and damages therefor may be recovered in an action by the husband in his own behalf and in behalf of his children.⁴⁸

2. Construction of statute as to beneficiary.

Where the statute designates the beneficiary of the proceeds of any judgment for personal injuries, no relative other than such beneficiary can revive the action. Thus, an action commenced by the injured person in his lifetime to recover damages for the injuries, upon his death may be revived by his mother to the exclusion of brothers and sisters, where by statute causes of action of this character are made to survive in favor of the decedent's father or mother.⁴⁹

Under a statute providing that whenever the death of a person is caused by the wrongful act, neglect, or default of another, an action therefor may be brought by the executor, etc., of the decedent, no cause of action for the services of a child survives to the father, although the child dies as a result of injuries received through

Houston & T. C. R. Co. v. Rogers, 15 Tex. Civ. App. 680, 39 S. W. 1112, holding that in order to entitle the widow of a person who dies from some cause other than the injury complained of, to revive a suit commenced by the decedent in his lifetime to recover damages for personal injuries, and which was pending at the time of his death, it must appear that there is no administration pending, and no necessity for administration.

Binyon v. Smith, 50 Tex. Civ. App. 398, 112 S. W. 138, holding that the death of the plaintiff after a judgment in his favor in an action to recover damages for personal injuries does not abate the action; and, where there is no administration of his estate, it may be revived and prosecuted by his widow and surviving children.

Houston & T. C. R. Co. v. Walker, — Tex. —, 173 S. W. 208, holding that where the injured person in his lifetime brought an action to recover damages for the injury, and subsequently died therefrom, his heirs may revive the action, and by petition prosecute it to recover pecuniary compensation for the loss to them by the decedent's death. In such case the fact that damages are included for the injury to the person of the deceased, as well as for compensation to his beneficiaries for his death, does not constitute error, where such damages are remitted.

⁴⁵ Ft. Worth & R. G. R. Co. v. Robertson, — Tex. —, 131 S. W. 400, adopting dissenting opinion in 55 Tex. Civ. App. 309, 121 S. W. 202.

⁴⁶ Swanson v. Pacific Shipping Co. 60 Wash. 87, 110 Pac. 795, holding that under the statutory provision that no action for

personal injury to any person occasioning his death shall abate, nor shall such right of action determine by reason of such death, if he have a wife or child living, or, leaving no wife or issue, if he have dependent upon him for support parents, sisters, etc., such action may be prosecuted, or commenced and prosecuted in favor of such beneficiary, where a person dies while a suit is pending by him to recover damages for personal injuries, and his death is the result of the injuries, his widow and children may revive the suit, and prosecute it for their benefit.

Thompson v. Seattle, R. & S. R. Co. 71 Wash. 436, 128 Pac. 1070, holding that children may prosecute to judgment an action commenced by their mother in her lifetime, to recover damages for injuries to her person.

⁴⁷ Payne v. Georgetown Lumber Co. 117 La. 983, 42 So. 475, holding that an action commenced in the lifetime of an injured person to recover damages for the injury, upon his death from some other cause may be revived by his mother, where by statute it is provided that every act whatever, which causes damages to another, obliges the person at fault to repair it, and this right of action shall survive, in case of the death of the injured person, in favor of his surviving father or mother.

⁴⁸ Delisle v. Bourriague, 105 La. 77, 54 L.R.A. 420, 29 So. 731.

⁴⁹ Payne v. Georgetown Lumber Co. supra, holding, where the next of kin of a deceased plaintiff in an action to recover damages for personal injuries are the mother, brothers, and sisters, the right of action survives in favor of the mother alone.

the neglect of another; but whatever cause of action survives accrues to the personal representative.⁵⁰

A statute authorizing an action by the widow and heir of a person killed through the wrongful or negligent act of another has been construed to be limited in its scope to the widow and children of the deceased, and hence not to extend to more remote heirs, such as his parents. Therefore where a child dies, leaving surviving him neither wife nor child, no action survives for the benefit of his surviving parents.⁵¹

A statutory provision that for any injury to person or property, occasioned by the wilful violation of an act prohibiting the employment of children under a certain

⁵⁰ Killian v. Southern R. Co. 128 N. C. 261, 38 S. E. 873, holding that no cause of action for the services of a child survives to the father, although the child dies as a result of the injuries received through the neglect of another; whatever cause of action survives accrues to the personal representative.

⁵¹ Henderson v. Kentucky C. R. Co. 86 Ky. 389, 5 S. W. 875, declaring that no other sustain as near relation to, or are so dependent upon, or have the same legal right to look for support to, a person as his wife and children, especially those of the latter who may be minors. Therefore the injury resulting from his death to them is actual and direct, while to his collateral heirs it is remote, and not immediate, and as to the creditors it may not exist at all. Therefore, looking to the reason for the statute, the right to sue and recover damages for the destruction of a life of one person by the act of another, and to the necessity when it can properly be done, so construing each part of the general statute as to preserve the constituency of the whole, we are of the opinion that the widow and child or children have a prior right to sue and recover for the death of the husband.

Jordan v. Cincinnati, N. O. & T. P. R. Co. 89 Ky. 40, 11 S. W. 1013, holding that under the statute authorizing the recovery, by the widow or the heirs of the deceased, of damages for his death through the wrong or negligence of another, the statutory beneficiaries are the widow and child or children, and where the deceased left surviving him neither widow nor child, the surviving parents cannot, by virtue of this statute, maintain an action to recover their pecuniary loss from his death.

Lintz v. Holy Terror Min. Co. 13 S. D. 489, 83 N. W. 571, following the Kentucky decisions relating to a similar statutory provision, and holding that a statute giving a widow and heirs a right of action for the wrongful death of her husband does not cause to survive, in favor of a parent, a cause of action for the wrongful death of a son.
L.R.A.1915E.

age, a right of action shall accrue to the party injured to recover any direct damages sustained thereby, does not create a cause of action which survives the death of the child, in favor of the parent.⁵²

A statute providing that the widow, or widow and her children, or child or children if there is no widow, of a man killed in a duel, shall have a right of action against the person killing him, and that when the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, and the jury may give such damages, pecuniary or exemplary, as under all the circumstances of the case may to them seem just,—does not apply to parents of a child killed through the negligence of another; and hence where such child leaves surviving him no widow or children, the cause of action for his death abates, and cannot be revived for the benefit of the parents.⁵³

Under the Missouri statute, an action for personal injuries to a married woman, prosecuted jointly by herself and husband as plaintiffs, does not upon the death of the wife before judgment survive in favor of the husband.⁵⁴
A. G. S.

⁵² Kansas & T. Coal Co. v. Gabsky, 70 Ark. 434, 86 S. W. 915, 72 S. W. 572.

⁵³ Noble v. Seattle, 19 Wash. 133, 40 L.R.A. 822, 52 Pac. 1013.

⁵⁴ Elliott v. Kansas City, 210 Mo. 576, 109 S. W. 627.

GEORGIA SUPREME COURT.

NASHVILLE, CHATTANOOGA, & ST. LOUIS RAILWAY COMPANY, Plff. in Err.,

v.

O. R. HUBBLE, Admr., etc., of Mary L. Hubble, Deceased.

(140 Ga. 368, 78 S. E. 919.)

Abatement — former action pending — state and Federal courts.

1. Where an action was brought in this state by a woman for a personal injury alleged to have been caused by the negligence of a railway company in Alabama, which action was removed to the circuit court of the United States, and after her death her administrator was made a party thereto, and

Headnotes by LUMPKIN, J.

Note. — Pendency of action for personal injury as abatement of action for death, or vice versa.

The principles controlling the question of the effect of a pending action based upon a

where, after the death of the original plaintiff, her administrator instituted an action in the state court to recover damages on account of her death caused by the same injury, under Civil Code Ala. 1907, § 2486, the pendency of the former action did not furnish ground for abatement of the latter.

(a) The injury having occurred in Alabama, and the suits having been brought in Georgia (it not appearing where the death took place), and the statute of Alabama having been pleaded as a basis for recovery, the question of the effect of the one action upon the other is to be determined according to the law of that state.

Pleading—demurrer—merit.

2. The demurrer was without merit, and there was no error in overruling it.

(July 19, 1913.)

personal injury upon the right to maintain another action under a different statute, but based upon the same injury, are the same as those applicable in determining other closely allied questions, such as the right to maintain several actions for injury resulting in death, which is covered in the note appended to *Rowe v. Richards*, ante, 1095, and effect of extinguishment of cause of action or remedy for personal injuries upon the right to maintain action for death from such injuries, which is considered in the notes appended to *St. Louis & S. F. R. Co. v. Goode*, post, 1141; *State use of Melitch v. United R. & Electric Co.* post, 1163; *Kelliher v. New York C. & H. R. R. Co.* post, 1178.

In this note the cases are limited to those considering the effect of a pending action for a personal injury or death therefrom on the right to maintain an action based upon the same injury. The question covered, as suggested, is very similar to that covered in *Rowe v. Richards*, the only difference being that the discussion there is the abstract question as to whether or not more than one action is maintainable under the different statutes relating to the subject, while in the present note the cases are limited to those considering the concrete question outlined.

Rule that only one action may be maintained—in general.

In many jurisdictions it is held that a personal representative cannot sue upon both causes of action, one for personal injuries to, and the other for the death of, his decedent. This rule is based upon the ground that the defendant committed a single wrong and negligent or wrongful act which caused the injury, and, while the law gives two remedies for the wrong, it was not contemplated that two recoveries should be had therefor.

Referring to the general survival statute of Maine, and construing, in connection therewith, the statute providing that whenever the death of a person shall be caused by a wrongful act which, if death had not ensued, would have entitled the party in-

ERROR to the Superior Court for Dade County to review a judgment in plaintiff's favor in an action brought to recover damages for the death of plaintiff's intestate from injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Lumpkin, J.:

Mary L. Hubble brought suit in this state against the Nashville, Chattanooga, & St. Louis Railway for a personal injury alleged to have occurred in Alabama. The case was removed to the circuit court of the United States. She died, and her administrator, O. R. Hubble, was made a party in her stead. Later the administrator brought suit in Dade superior court for the homicide of his intestate, alleging that the

injured to maintain an action and recover damages in respect thereof, then the person liable had death not ensued shall be liable to an action for damages notwithstanding the death of the person injured. Every such action shall be brought by and in the name of the personal representative of the deceased, and the amount recovered shall be for the exclusive benefit of his widow, etc. The jury may give such damages as they shall deem a fair and just compensation not exceeding \$5,000, with reference to the pecuniary injuries resulting from the death complained of to the persons for whose benefit the actions were brought,—the court said that we cannot believe the legislature intended by the statutes last referred to, "to give two actions for a single injury,—one for the benefit of the decedent's estate, and another for the benefit of his widow and children or next of kin. We think the legislative intention was to extend means of redress to a class of cases where none before existed. This class of cases was still large. There still existed a large class of cases in which redress for injuries resulting in immediate death could not be had. And we cannot resist the conviction that it was the intention of the legislature to provide means of redress for this class of cases, and not to duplicate the wrongdoer's liability, and subject him to two actions for a single injury." *Sawyer v. Perry*, 88 Me. 42, 33 Atl. 660, 15 Am. Neg. Cas. 291.

In Kansas an act similar to Lord Campbell's act is construed to give a right of action for the benefit of certain beneficiaries therein designated, where death results from injuries, and to preclude an action by the administrator of the estate of the decedent to recover damages for the wrongful injuries. A general survival statute, however, is held to continue, for the benefit of the estate of the decedent, actions to recover damages for injuries to the person, where the injured person subsequently dies from some cause other than the injury. *McCarthy v. Chicago, R. I. & P. R. Co.* 18 Kan. 46, 26 Am. Rep. 742. To the same effect is *Eureka v. Merrifield*, 53 Kan. 794,

injury on which the first suit was predicated caused her death. The defendant filed a plea in abatement, setting out the pendency of the case in the United States court. The plaintiff then dismissed that case. The plea was overruled. The defendant demurred to the petition. The demurrer was overruled, and the defendant excepted.

Messrs. Foust & Payne for plaintiff in error.

Messrs. J. P. Jacoway and B. T. Brock for defendant in error.

Lumpkin, J., delivered the opinion of the court:

1. The alleged tort was committed in Alabama, and the law of that state was

pleaded as a basis for recovery. If an action is brought in a state court, and removed to the Federal court, and while it is there pending another suit is brought in the state court for the same cause of action, a plea in abatement will be sustained. *Louisville & N. R. Co. v. Newman*, 132 Ga. 523, 26 L.R.A. (N.S.) 969, 64 S. E. 541. It has been held by a decision rendered by two judges, that where an action is pending, and a second suit is brought for the same cause of action, and a plea in abatement is filed, it cannot be met by dismissing the first case. *Singer v. Scott*, 44 Ga. 659.

The question which we have to determine is whether, under the law of Alabama, the first and second suits were for the same cause of action, so that the former would

37 Pac. 113; *Atchison, T. & S. F. R. Co. v. Rowe*, 56 Kan. 411, 43 Pac. 683.

And see *Hulbert v. Topeka*, 34 Fed. 510, holding that under the Kansas statute providing, that in addition to causes of action which survive at common law, causes of action for an injury to the person shall also survive, an action to recover damages for the wrongful act, which the decedent himself had brought in his lifetime, may be revived; but the administrator of the decedent cannot maintain an action to recover damages for the same injury, under this section and also under a subsequent section providing that when death is caused by the wrongful act or omission of another the personal representative of the decedent may maintain an action to recover for the injury, and the damages recovered shall inure to the benefit of the widow and next of kin.

The fact that the common-law right of action which survives under the general survival act is for the benefit of the decedent's estate, and that the right of action under an act similar to Lord Campbell's act is for the benefit of the decedent's heirs, does not affect the construction to be placed upon these statutes. It was not the intention of the legislature to give two rights of action for an injury which results in death. *Sweetland v. Chicago & G. T. R. Co.* 117 Mich. 329, 43 L.R.A. 568, 75 N. W. 1066, 4 Am. Neg. Rep. 648.

Munro v. Pacific Coast Dredging & Reclamation Co. 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303, holds that under the Code of California, which provides that where the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages, and damages may be given which under all the circumstances of the case may be just, but one action is given, and that action may be brought by the heirs of the deceased or his personal representative; and when an action is brought and the court has obtained jurisdiction of it, that is the only action which the statute permits.

And *Quinn v. Johnson Forge Co.* 9 Houst. L.R.A. 1915E.

(*Del.*) 338, 32 Atl. 858, holds that where the injured person during his lifetime brought an action to recover for the injuries which subsequently resulted in his death, this action survives, and neither the widow nor the personal representative has the right to bring an action to recover damages for his death.

Under the Mississippi death act, which expressly provides that there shall be but one suit, and in that suit there shall be but one recovery, which shall cover all damages of every kind to the decedent and all damages to all the parties interested under the statute, but one action can be maintained by the beneficiaries for a wrongful death; and where the widow of the decedent sues to recover damages suffered by herself and minor children, she cannot thereafter sue as her husband's testatrix to recover damages sustained by the husband. *Mobile, J. & K. C. R. Co. v. Hicks*, 91 Miss. 273, 124 Am. St. Rep. 679, 46 So. 360.

In *Bolick v. Southern R. Co.* 138 N. C. 370, 50 S. E. 689, construing a provision that the right of action for injuries to the person does not survive where the injury does not cause the death, it is held that an action by an injured person to recover damages for the injuries abates upon his death, although death results from the injury, and hence it cannot be revived by his administrator. This conclusion is reached upon the theory that there can be but one action for the tort complained of, and as, by another provision of the act, a right of action is given to recover damages for a wrongful death, this latter action is exclusive.

In *Wood v. Gray* [1892] 17 A. C. 576, 67 L. T. N. S. 628, in holding that an action by the personal representative for solatium was barred by an action, pending at the time of the death of the decedent, commenced by him in his lifetime to recover damages for the injury which finally resulted in his death, Lord Watson asserted that there is no case to be found in the reported decisions, in which an action by relatives has been sustained after deceased's claim has been settled or extinguished by

furnish ground for plea in abatement, or a judgment therein for a plea in bar, to the latter. On this subject the decisions are in distressing conflict in various states, as will be seen from *Tiffany on Death by Wrongful Act*, 2d ed. §§ 43, 44, 73, 126-128. So far as we have been able to ascertain, the exact point has not been decided in Alabama, and we therefore tread upon somewhat unexplored ground in attempting to determine what the decision of the highest court in that state will be, when the question is presented to it. But we have certain indicia from which we think we may fairly formulate an opinion upon the subject, at least until that court shall have spoken.

Section 2486 of the Civil Code of Alabama

an adverse judgment, or where he had commenced an action which passed to and might be insisted on by his executor, and the existence of such right of action has not been affirmed or even suggested by any text writer. There is not a single instance, said he, in which the court has allowed two actions to be brought in respect of the same negligent act leading to the injury and death of one person.

By the employers' liability act of Massachusetts as amended, the widow or next of kin of an employee killed during employment, if dependent upon him for support at the time of his death, is given a right of action against the decedent's employer for damages, without reference to whether the employee was instantly killed or survived his injuries; but the amount of recovery is limited where the widow brings an action to recover damages based upon this statute, which she is not entitled to maintain, and a second action is also brought by her as administratrix under the same chapter and at common law for conscious suffering preceding death, the maximum amount that may be recovered in these actions is that fixed by the employers' liability statute. *Smith v. Thomson-Houston Electric Co.* 188 Mass. 371, 74 N. E. 664.

—different elements of damage.

Where the decedent, through the sinking of the vessel on which she was being carried as a passenger, was drowned about ten minutes after the accident, an action to recover for her suffering and fright during that interval, separate and apart from an action for her death, cannot be maintained. *The Corsair*, 145 U. S. 335, 36 L. ed. 727, 12 Sup. Ct. Rep. 940.

Where an action is revived under a survival statute authorizing the revival of actions to recover damages for personal injuries, it precludes an action after the death of the plaintiff, based on another section of the statute, giving a cause of action for the wrongful death, but limiting the same to cases where no suit has been brought by the plaintiff in his lifetime to recover dam-

of 1907 reads as follows: "A personal representative may maintain an action, and recover such damages as the jury may assess, for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representative, and may be maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for the wrongful act, or omission, or negligence; and the damages recovered are not

ages for the injuries resulting in death; for the two actions cannot be sustained for the same injury although the measure of recovery is different. *McCafferty v. Pennsylvania R. Co.* 193 Pa. 339, 74 Am. St. Rep. 600, 44 Atl. 435, 6 Am. Neg. Rep. 693; *Edwards v. Gimbel*, 202 Pa. 30, 51 Atl. 357.

—election.

According to the Kentucky rule, while the personal representative may sue upon the common-law cause of action which would have accrued to the decedent had he survived the injury for a time, he cannot sue upon this cause of action, and at the same time sue under the statute, somewhat similar to Lord Campbell's act, to recover for the decedent's death. In such case the personal representative must elect whether he will sue upon the common-law cause of action which accrued to the decedent, or upon the cause of action accruing to him under the statute. *Louisville R. Co. v. Raymond* (*Louisville R. Co. v. Taylor*) 135 Ky. 738, 27 L.R.A.(N.S.) 176, 123 S. W. 281.

Louisville R. Co. v. Will, 23 Ky. L. Rep. 1961, 66 S. W. 628, holds that the cause of action for pain and suffering cannot be united with the statutory action to recover for the death, and the plaintiff may be required to elect which he will prosecute.

Where certain acts cause death they cannot be divided so as to make two actions, one to recover for the suffering caused, the other to recover for the death, and the parties must elect which action they will pursue. *Hackett v. Louisville R. Co.* 95 Ky. 236, 24 S. W. 871 (citing *Conner v. Paul*, 12 Bush, 147).

Conner v. Paul, 12 Bush, 145, holds that the personal representative cannot maintain an action for the mental and bodily suffering of his intestate, and also an action for his death, where he alleges the same acts of negligence or omissions of duty as the cause of the injuries complained of, for the acts causing the death of the party constitute but one cause of action, whether the measure of recovery is for the suffering of the intestate during his life, or for his wrongful death.

subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate." The supreme court of that state has held that the damages recoverable under the statute quoted are punitive in their nature and to prevent homicides by wrongful acts or negligence. *Buckalew v. Tennessee Coal, I. & R. Co.* 112 Ala. 146, 20 So. 606; *Richmond & D. R. Co. v. Freeman*, 97 Ala. 294, 11 So. 800. Also that evidence of pecuniary loss and mental suffering is not admissible in such a case. *Alabama G. S. R. Co. v. Burgess*, 116 Ala. 509, 22 So. 913; *Louis-*

ville & N. R. Co. v. Tegner, 125 Ala. 593, 28 So. 510.

By § 2496 of the Civil Code of Alabama of 1907 it is declared: "All actions on contracts, express or implied, and all personal actions, except for injuries to the reputation, survive in favor of and against the personal representatives." If it be assumed that this section provides for survival of the action for a personal injury which results in death after action has been brought for damages by the injured party, in such an action the damages recoverable are compensatory in character, and evidence of pecuniary loss and pain and suffering is admissible. Moreover, as death terminates all expectancy of further life on this earth, it would seem that, when an action

The rule that a personal representative cannot sue upon both causes of action has been said to be based upon the ground that the defendant committed a single wrong,—the negligence or wrongful act which caused the injury; and while the law gives two remedies for the wrong, nevertheless it was not contemplated that two recoveries should be had for the one wrong. *Louisville R. Co. v. Raymond*, *supra*.

Louisville R. Co. v. Raymond, *supra*, construes the Kentucky Constitution and statutes, and holds that the personal representative of a deceased person who was personally injured, and who survived his injury for a period of time, where death finally resulted from the injury, may sue the wrongdoer upon the injured person's common-law right of action to recover damages for the injury, or he may bring the statutory action for the wrongful death. In this regard he has his election. He cannot, however, sue upon both causes of action.

And the same rule applies under the Constitution and statutes of Kentucky as amended in 1891 and subsequently. *Ibid*.

—where pending action is not maintainable.

Where an action to recover damages for a personal injury abates on the death of the injured person, the pendency of such action is not a bar to a subsequent action by the personal representative of the deceased to recover for the plaintiff's wrongful death. *Indianapolis & St. L. R. Co. v. Stout*, 53 Ind. 143.

On this point see *NASHVILLE, C. & St. L. R. Co. v. HUBBLE*, holding that under the Alabama statute set out in the opinion, an action to recover damages for personal injuries, removed from a state to the Federal court, and to which decedent's administrator was made a party after her death, and which he dismissed after the defendant had filed a plea in abatement to an action there-after brought by him as administrator to recover damages for the death of the decedent alleged to have been the result of the injuries complained of,—was not a bar to the latter action.
L.R.A.1915E.

Rule that actions may coexist.

In many jurisdictions the rule obtains that an action under the survival statute, and an action under a statute embodying the principles of Lord Campbell's act, may coexist, and that hence the pendency of one action does not affect the right to commence or prosecute the other. With one or two exceptions noted in the note appended to *Rowe v. Richards*, ante, 1095, the cases sustaining this doctrine differ but little from those already considered, since they limit the damages recoverable, so that but one recovery is in fact permitted for the same injury, and, as hereafter shown in some of the jurisdictions permitting but one action, an action for the injury to deceased may be joined with an action for the injury to his beneficiaries, although but one recovery is permitted. See *infra*, "Joinder of actions."

St. Louis, I. M. & S. R. Co. v. Hill, 74 Ark. 478, 86 S. W. 303, sustained separate actions by the husband as administrator to recover for the pain and suffering of his wife, and by him individually to recover compensation for his pecuniary loss by her death.

In *St. Louis, I. M. & S. R. Co. v. Corman*, 92 Ark. 102, 122 S. W. 116, the right of the widow and the only child of a person killed through the wrongful act of another, to maintain an action for the injury resulting to them, was challenged on the ground that the administrator might also thereafter bring suit for the same injury. The action was, however, sustained, the court saying that the statutes of Arkansas, embodying in principle Lord Campbell's act, permitted two causes of action, one for the benefit of the estate, and the other for the widow and next of kin.

The general survival statute, and a statute embodying the provisions of Lord Campbell's act, have been held to relate to different causes of action, and hence actions under each statute may proceed *pari passu*. *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L.R.A. 283, 13 S. W. 801; *St. Louis, I. M. & S. R. Co. v. Sweet*, 63 Ark. 563, 40

by a person for an injury to him survives to his administrator, the actual death would prevent the recovery of damages based on tables of further expectancy of life. At any rate, here are two suits, one of which is a common-law action for an injury to the person (claimed under the statute to survive to the administrator), and in which compensatory damages can be recovered; the other a purely statutory cause of action, arising upon death, in which suit punitive damages are recoverable. The evidence to sustain the one is not admissible in the other. The recovery in one forms a part of the estate in the hands of the administrator, subject to the payment of the debts of the deceased. In the other the administrator is only a statutory plaintiff,

and the damages recovered are not subject to the payment of the debts of the deceased, but must be distributed according to the statute of distributions. The heirs are the real beneficiaries.

In *Wynn v. Tallapoosa County Bank*, 168 Ala. 489 (50), 53 So. 228, it was held that § 2496, above quoted, did not include causes of action or rights of action. Mayfield, J., distinguished between an action and a cause or right of action, as those terms are used in the English common law, and said: "We have no statute in this state which provides for the survival of such causes of action against the personal representative. We have a few, which either give a new right of action, or provide for the survival of a cause of action for the

S. W. 463, 2 Am. Neg. Rep. 295 (holding that an action pending on appeal, instituted by the administratrix of a person killed by the wrongful act of another to recover damages suffered by the widow and next of kin, is not a bar to an action by the administratrix to recover damages to the estate of the deceased caused by the same wrongful act, since the two suits are to recover different damages; in the suit in behalf of the widow and next of kin, a judgment was granted for \$10,000; in the suit in behalf of the estate of the injured person, damages were limited to bodily pain and suffering and mental anguish of the decedent from the time the injury occurred until his death (ten hours); a judgment of \$2,500 was reversed on the ground that the court permitted the jury to assess the amount paid for medical and surgical attendance and for funeral expenses, where there was no evidence that claims for these items had been presented and allowed against the estate).

The right of action which, notwithstanding the death of the party injured, survives to his personal representative, is entirely distinct from the action given to the next of kin. They may coexist, but they have no connection. *McVey v. Illinois C. R. Co.* 73 Miss. 487, 19 So. 209; *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693, 2 So. 537; *McLendon v. Columbia*, — S. C. —, 85 S. E. 234 (holding that where the deceased has suffered pain before death the personal representative suing under the survival statute to recover compensation therefor may also sue by new action for his death); *Grainger v. Greenville, S. & A. R. Co.* — S. C. —, 85 S. E. 968 (holding that an action in behalf of the statutory beneficiaries to recover for their pecuniary loss is not a bar to an action by the personal representative to recover compensation for the mental and physical anguish suffered by his decedent by reason of the injury which finally resulted in his death).

In *Hamel v. Southern R. Co.* — Miss. —, 66 So. 426, opinion on rehearing, page 809, sustaining the right to maintain an L.R.A.1915E.

action, or revive and prosecute a pending action, to recover for personal injuries under a survival statute, and also to recover under a death act, it is asserted that the damages recoverable are not the same, that the damages recoverable under the survival statute are no more than what the injured person could have recovered had he survived the injuries, while the damages recoverable under the death act include no element of loss prior to death. The specific damages recoverable, however, are not pointed out, but it appears that in the revived action \$4,500 was recovered, and this would indicate that, as a matter of fact, damages were twice based upon the decedent's earning capacity.

In *St. Louis & S. F. R. Co. v. Goode*, post, 1141, it is held that under the Oklahoma statutes (one of which provides that, in addition to causes of action which survive at common law, causes of action for injury to persons shall also survive, and the other, that when death is caused by the wrongful act or omission of another the personal representatives of the deceased may maintain an action therefor if the deceased could have maintained an action to recover for the injury had he lived, the damages recovered to inure to the benefit of certain designated beneficiaries), where the deceased had commenced an action in his lifetime to recover for the injury to his person, and he died from the injury during the pendency of the action, a judgment rendered in favor of the personal representative in an action to recover for his death for the benefit of his statutory beneficiaries based upon the death act is not a bar to a recovery by his personal representative in the suit commenced by the deceased in his lifetime for the damages which the deceased might have recovered therein had he lived, being the injury to him up to the time of his death.

NASHVILLE, C. & ST. L. R. CO. v. HUBBLE holds that the Alabama statutes set out in the opinion, authorizing the personal representative of the person whose death is the result of the wrongful act, neglect, or omission of another to maintain an action, etc.,

personal representative. Whether this is a new cause of action given, or the survival of an old one, it is not necessary to be now decided. We refer to the homicide statute and the employers' liability act." As to the survival of a cause of action in Alabama, it was said to be necessary to look to the common law. In *Kennedy v. Davis*, 171 Ala. 669, 55 So. 104, Ann. Cas. 1913B, 225, it was held that the action authorized by § 2486 of the Code of 1907 was purely statutory, as no such right of action existed at common law; that the damages collected in an action under the homicide act for the wrongful death of an intestate vested exclusively in the distributees of the estate, and were not assets subject to administration, the personal representative being the

agent merely to collect and pay over; and that, accordingly, where one liable to such a suit compromised a claim therefor and obtained a release from the decedent's sole heir and distributee, it was a good defense to a suit thereafter brought by the administrator of the decedent. In *Sloss-Sheffield Steel & I. Co. v. Milbra*, 173 Ala. 658 (8), 55 So. 890, it was held that a plea in abatement was not available unless the judgment which would be rendered in the prior action would be conclusive between the parties and operate as a bar to the second action.

It is not easy to perceive how a common-law right of action by a man to recover compensatory damages for injuring him is the same cause of action as a statutory

if the decedent could have maintained an action for such wrongful act if it had not caused his death, and that such action shall not abate by the death of the decedent, etc., construed in connection with a general survival statute, do not relate to the same cause of action, and the pendency of a suit based upon the survival statute to recover damages for the injury to the decedent does not abate an action based upon the other statute to recover damages for the wrongful death, for the benefit of the statutory beneficiaries.

In *Rowe v. Richards*, which sustains a double recovery, in referring to the criticism of the doctrine permitting the revival and prosecution of the cause of action which the decedent had for personal injuries which resulted in his death, and the prosecution of the cause of action in behalf of the statutory beneficiaries for his death, as permitting the recovery of double damages, the court said that this criticism was not warranted, for while the injury in both cases is caused primarily by the same negligent act, two distinct classes of damages resulted therefrom, one in favor of the injured party for loss of time, for mental and physical pain and suffering, expenses incurred for medical and surgical attendance, nursing, etc., and the other in favor of the statutory beneficiaries for such pecuniary loss as they may have suffered.

The fact that the deceased had instituted a suit for damages for injuries which resulted in his death during the pendency of the suit is not a bar to an action by his widow and minor children to recover damages for his death. *International & G. N. R. Co. v. Kuehn*, 70 Tex. 582, 8 S. W. 484, 12 Am. Neg. Cas. 603.

Action by different parties for different injury.

Where it is apparent upon the face of the pleadings that the mother of the decedent, a child, cannot maintain an action brought by her under the employers' liability act of Alabama to recover damages for the killing of her son, the pendency of L.R.A.1915E.

the action by her does not affect a suit properly brought by the administrator of the estate of the son to recover under this act damages to the estate for his wrongful death. *Tennessee Coal, I. & R. Co. v. Hernndon*, 100 Ala. 451, 14 So. 287, 13 Am. Neg. Cas. 180.

And see *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406, 2 Am. Neg. Cas. 466, holding that the pendency of a suit by the father to recover for the damage occasioned him by the death of a minor son does not abate, nor is it a bar to, a suit by the mother to recover for the value of the child's life, based upon the Code provision giving her the right to recover for the death of a child.

In *Indianapolis & St. L. R. Co. v. Stout*, 53 Ind. 143, it was held, on the ground that an action by the injured person to recover damages for personal injury abated upon his death, that the pendency of such an action was not a bar to an action commenced subsequently to the death of the plaintiff by the administrator of his estate to recover damages for the wrongful acts of the defendant which resulted in the death of the decedent.

Joinder of actions—where action for injury and death maintainable.

Aside from *Bennett v. Spartanburg R. Gas & Electric Co.* 97 S. C. 27, 81 S. E. 189, holding an action under the survival act cannot be joined with an action under the death act, although they are coexistent and the personal representative is the plaintiff in each, for the measure of damages is different and the amount recovered does not inure to the benefit of the same parties, and *McVey v. Illinois C. R. Co.* 73 Miss. 487, 19 So. 209, where a doubt is expressed on the matter, the courts hold that causes of action to recover damages for the pain and anguish suffered by decedent as the result of injuries received through the negligence of defendant, and to recover for pecuniary loss resulting to the statutory beneficiaries to the decedent by reason of his death as the result of these in-

right to sue for punitive damages for his homicide, or how the former can furnish ground for a plea to abate the latter. The two are so utterly different in origin, in right of recovery, in evidence admissible, and in beneficiaries, that it seems illogical to hold them to be identical, though some courts, under certain survival statutes and statutes authorizing suits for homicide, have held that the one abated or barred the other, apparently in some cases on the theory that, although on their face legislative acts permitted two actions to be brought or maintained—one of common-law origin and in which there might be a certain character of recovery, and the other of purely statutory origin and with a different recovery for different beneficiaries

—the legislature did not intend to do so. In other words, these courts hold that if legislative acts provided for the survival of one action, and also authorized the bringing of another, they did not intend to allow two, but only one.

It should be further noted that in certain cases, where it was intended that one action sounding in tort should bar another growing out of the same transaction, the statutes of Alabama have so expressly stated. Thus by § 2482 of the Civil Code of 1907 it is declared that an unmarried woman may sue for her own seduction. Under § 2483 a father, or under certain circumstances a mother, may sue for the seduction of a daughter; "but a suit by the daughter is a bar to an action by the father

juries, may be joined in the same complaint, although the elements of damages are different, and the amount of damages must be separately assessed by a special verdict and go into separate funds. *Nemecsek v. Filer & S. Co.* 126 Wis. 71, 105 N. W. 225; *Moyer v. Oshkosh*, 151 Wis. 586, 139 N. W. 378; *Johnson v. Eau Claire*, 149 Wis. 194, 135 N. W. 481.

McLaughlin v. Hebron Mfg. Co. 171 Fed. 269, holds that although an action for a personal injury and an action for wrongful death are distinct causes of action, they may be joined in a single suit.

St. Louis, I. M. & S. R. Co. v. Dawson, 68 Ark. 1, 56 S. W. 46, sustains the right of the administrator of a deceased person to set up in separate paragraphs in his complaint two causes of action, one for a recovery in behalf of the estate of the decedent for pain and suffering caused her by the injury, and the other for the benefit of the father and next of kin.

A recovery, under the employers' liability act, may be had in one action for the pain and suffering of the deceased, and for the pecuniary loss to the statutory beneficiaries. *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. ed. —, 35 Sup. Ct. Rep. 704; *Kansas City Southern R. Co. v. Leslie*, 238 U. S. 599, 59 L. ed. —, 35 Sup. Ct. Rep. 844.

And the jury need not indicate the amount of damages awarded for each liability claimed, in an action to recover for pain and suffering of the deceased and for the pecuniary loss to the statutory beneficiaries, under the Federal employers' liability act. *Kansas City Southern R. Co. v. Leslie*, *supra*.

Where only one action lies.

Although under the survival and death acts of Michigan there is not a double remedy, and the existence of one cause of action is entirely inconsistent with the existence of the other, nevertheless, since cases may arise where the right of recovery is certain, but the remedy uncertain and dependent upon what a trial may disclose as to whether the death was contemporaneous

with the injury, and a jury concluded as to the conjunction in point of time of the accident and death, the two causes of action may be joined in separate counts in the same declaration, and the plaintiff cannot be required to elect to proceed upon either count; and while he cannot recover on both, both may be submitted to the jury. The jury, however, must concur in a verdict based upon one or the other of the counts. *Carbary v. Detroit United R. Co.* 157 Mich. 683, 122 N. W. 367; *Pritchett v. Detroit, J. & C. R. Co.* 157 Mich. 687, 122 N. W. 1134; *Dolson v. Lake Shore & M. S. R. Co.* 128 Mich. 444, 87 N. W. 629, holding that under a general survival statute and a death act embodying in principle Lord Campbell's act, the personal representative of the person wrongfully killed cannot recover upon both counts in a declaration, one count based upon the survival act, the other on the death act.

And where it is uncertain whether the decedent's death was the result of the injuries complained of, or from other causes, the plaintiff may join counts on the theory that death did not ensue from an injury, with counts based upon the theory that death did ensue as a direct consequence of the defendant's negligence, and damages may be awarded by the jury according to the facts on this point as they find them to be. *McLaughlin v. Hebron Mfg. Co.* 171 Fed. 269.

Galveston, H. & S. A. R. Co. v. Heard, — Tex. Civ. App. —, 91 S. W. 371, following *St. Louis Southwestern R. Co. v. Hengst*, — Tex. Civ. App. —, 81 S. W. 833, holds that the wife and father of the deceased may join in the action commenced by him in his lifetime for the recovery of damages for personal injuries, although in the event the jury find that the death of the deceased did not flow from the injury complained of, the widow is exclusively entitled to recover damages for the injury to the deceased in his lifetime.

But it has been held that where the cause of action to recover damages for personal injury is pending at the death of the in-

or mother." By § 2485 provision is made for a suit for the death of a minor caused by wrongful act, omission, or negligence. It is declared that the father, or in certain instances the mother, may sue, and that if both are dead, or if they decline to sue, or fail to do so in six months from the death of the minor, the personal representative of the minor may sue; "but a suit by any one of them for the wrongful death of the minor shall be a bar to another action, either under this section or under the succeeding section" (the general section authorizing a personal representative to maintain an action for a wrongful act causing death). This express exclusion of duplication of actions in certain cases would seem to indicate a legislative intent not to exclude two suits where not so prohibited,—as a suit for a personal injury to the plaintiff, with survival of the action to his administrator, and a statutory action for punitive damages by an administrator for the benefit of distributees.

The act of Congress commonly known as the employers' liability act of 1908 (act April 22, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657), as amended (act April 5, 1910, chap. 143, 36 Stat. 291), provides that railroad companies engaged as common carriers in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then

jured person from the effect of the injuries, and the case is revived by his personal representative, who amends the declaration by joining counts to recover also for the wrongful death as well as personal injuries to the decedent, the court upon motion of the defendant is justified in dismissing the entire suit, since there cannot be a union of the two causes of action. *Merrihew v. Chicago City R. Co.* 92 Ill. App. 346.

—where plaintiff may elect remedy.

In Kentucky, where the plaintiff is given the right to sue either under the survival statute or the statute resembling Lord Campbell's act, he must make his election, and cannot join a cause of action for damages resulting in death with the cause of action for physical pain and mental suffering. *Louisville R. Co. v. Raymond* (Louisville R. Co. v. Taylor) 135 Ky. 738, 27 L.R.A.(N.S.) 176, 123 S. W. 281; *Hendricks v. American Exp. Co.* 138 Ky. 704, 32 L.R.A.(N.S.) 867, 128 S. W. 1089.

—joinder of actions accruing in individual and representative capacity.

For the wrongful death of his wife, the L.R.A.1915E.

of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence," etc. In *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, at page 68, 57 L. ed. 417, 420, 33 Sup. Ct. Rep. 192, 195, Ann. Cas. 1914C, 176, Mr. Justice Lurton, referring to the clause in regard to death, said: "This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had,—one proceeding upon altogether different principles." In *Tiffany on Death by Wrongful Act*, 2d ed. § 127, after referring to different decisions, the author says: "Upon the ground that the two causes of action arising under a survival act and under a death act are separate, distinct, and independent causes of action arising out of the same wrongful or negligent act, the damages in the one case being limited to such damages as the decedent himself might have recovered, and in the other being the pecuniary loss suffered by the persons entitled to the benefit of the action, it has been logically held in Maryland that a recovery in one action is not a bar to the other and that the two actions may be maintained concurrently. And such appears to be the rule in Arkansas, Ohio, and Wisconsin."

Under the statute of this state authorizing an action for the homicide of a husband or father, it was held in *Southern Bell Teleph. & Teleg. Co. v. Cassin*, 111 Ga. 575, 50 L.R.A. 694, 36 S. E. 881, that where

husband may recover in one action both individually and as guardian of his minor children (*Redfield v. Oakland Consol. Street R. Co.* 110 Cal. 277, 42 Pac. 822, 1063); or he may include his individual claim and his claim as the personal representative of the decedent's estate (*Curley v. Illinois C. R. Co.* 40 La. Ann. 810, 6 So. 103; *Helm v. O'Rourke*, 46 La. Ann. 178, 15 So. 400).

It has, however, been held that the plaintiff in an action to recover for wrongful death cannot include his individual claim and also his claim as administrator of the estate of the decedent. *Lucas v. New York C. R. Co.* 21 Barb. 245.

The personal representative who is the father of the decedent, a minor, cannot combine in one count a claim for loss of his son's services with his claim as administrator under the survival act, and recover for both in the same action. *Walker v. Lansing & Suburban Traction Co.* 144 Mich. 685, 108 N. W. 90, s. c. subsequent appeal, 156 Mich. 514, 121 N. W. 271; *Fournier v. Detroit United R. Co.* 157 Mich. 589, 122 N. W. 299.

A. G. S.

an injured person brought suit to recover damages, and settled with the wrongdoer therefor, and discharged him from all liability, if he subsequently died because of the injury, the settlement prevented a recovery by his wife or children. From this decision two of the six justices vigorously dissented. In *Spradlin v. Georgia R. & Electric Co.* 139 Ga. 575, 77 S. E. 799, suit was brought by an injured person for damages, and upon his death his administrator was made a party under the survival statute. After such death, his widow brought suit against the same defendant, to recover for his homicide, alleging that he died in consequence of the injuries which had furnished the basis of his suit. The administrator lost his case, and the judgment was pleaded in bar to the widow's action for the homicide. It was held not to be a good plea. From this decision two justices dissented. As Mr. Tiffany points out in his work, the decisions of the courts on this subject may not be entirely logical, but the writer entertains no doubt of the soundness of the decision in the *Spradlin* Case.

Realizing the delicacy of the task of construing the statutes of a sister state, in the absence of direct adjudication on the point of controversy by the supreme court of that state, and in the presence of the conflicting decisions of other courts, we believe that, under a proper construction of the provisions of the Alabama statutes above mentioned, the suit brought by the injured woman, to which her administrator was made a party after her death, did not furnish a ground for a plea in abatement to the subsequent action brought by the administrator of the decedent on account of her homicide.

2. There was no merit in any of the grounds of the demurrer, and it was properly overruled.

Judgment affirmed.

All the Justices concur.

OKLAHOMA SUPREME COURT. (Division No. 2.)

ST. LOUIS & SAN FRANCISCO RAIL-
ROAD COMPANY, Plff. in Err.,
v.
GERTRUDE GOODE, Admr. etc., of Frank
R. Goode, Deceased.

(42 Okla. 784, 142 Pac. 1185.)

Abatement — survival of actions of injuries.

1. The right of action of a person in-

Headnotes by BREWER, C.
L.R.A.1915E.

jured through the wrongful act of another, to recover the damages sustained thereby, existed at common law, but abated upon the death of such injured person. This common-law right of action survives, and is thus preserved in the personal representative of decedent, by the terms of §§ 5943, 5944, Comp. Laws 1909 (Rev. Laws 1910, §§ 5279, 5280), and the cause of action and its survival are quite independent of §§ 5945, 5946, Comp. Laws 1909 (Rev. Laws 1910, §§ 5281, 5282), relating to the recovery of damages for the benefit of certain beneficiary therein named. And such action may be prosecuted to final judgment by the administrator, notwithstanding that death resulted from such injuries.

Damages — in action surviving death.

2. The damages recoverable in such action, when revived, are only such as were sustained by the injured person in his lifetime (such as accrued in the period between the injury and his death), and when recovered are assets of his estate, and are not for the benefit of the widow and next of kin, except as they may take as heirs upon the final distribution of the estate.

Death — action for next of kin — surviving action.

3. Sections 5945, 5946, Comp. Laws 1909 (§§ 5281, 5282, Rev. Laws 1910), create a new cause of action, to be prosecuted for the exclusive benefit of the beneficiaries named therein; the damages recovered in such suit do not become assets of decedent's estate. Such action is not dependent upon any common-law right, and the right to maintain same is independent of §§ 5943, 5944, Comp. Laws 1909 (Rev. Laws 1910 §§ 5279, 5280). Nor will a recovery under these sections for the benefit of the widow and next of kin bar a recovery for the benefit of the estate of decedent, on account of the suffering and loss the decedent sustained through the injuries wrongfully inflicted on him, where death was not instantaneous.

Witness — husband or wife.

4. Neither the statute nor the common law prevents one spouse, after the marriage relation has terminated, from testifying in a case in which the other is a party, as to independent facts within the knowledge of the witness, and not coming within the definition of privileged communications.

Remittitur — of illegal part of verdict.

5. Where a verdict in a damage suit itemizes the damages allowed, and some of the amounts are not justified under any view

Note. — The question whether a judgment in an action for personal injury abates an action for death or *vice versa* is discussed in the note following this case, post, 1152.

As to abatement and revival of actions for personal injuries upon death of plaintiff, see note to *Lhota v. Oppenheimer*, ante, 1104.

As to several actions for death, or injury causing death, see note to *Rowe v. Richards*, ante, 1095.

of the evidence, but the other amounts allowed seem to have been proper, the court being able to separate the legal from the illegal allowances, plaintiff will be offered the right to remit the amount he is not entitled to receive.

Appeal — erroneous instruction — materiality.

6. Where an instruction has permitted the jury to award an illegal item of damage, and the illegal allowance can be clearly determined by this court on the record, and a remittur to cover the illegal allowance is offered and accepted by plaintiff, the error in the instruction becomes harmless.

(May 12, 1914.)

ERROR to the District Court for Comanche County to review a judgment in plaintiff's favor in an action brought to recover damages for injuries sustained by her husband in his lifetime through the alleged negligence of defendant. Affirmed on condition.

The facts are stated in are Commissioner's opinion.

Messrs. W. F. Evans, R. A. Kleinschmidt, Stevens & Myers, and J. H. Grant, for plaintiff in error:

Since the death of Frank R. Goode resulted from the injuries received, the right of action for his injuries abated on his death, and but one action could be maintained,—that for wrongful death.

Read v. Great Eastern R. Co. L. R. 3 Q. B. 555, 9 Best & S. 714, 37 L. J. Q. B. N. S. 278, 18 L. T. N. S. 822, 16 Week. Rep. 1040; Dibble v. New York & E. R. Co. 25 Barb. 183; Littlewood v. New York, 89 N. Y. 24, 42 Am. Rep. 271; Senior v. Ward, 1 El. & El. 385, 28 L. J. Q. B. N. S. 139, 5 Jur. N. S. 172, 7 Week. Rep. 261, 10 Mor. Min. Rep. 646; Griffiths v. Dudley, L. R. 9 Q. B. Div. 357, 51 L. J. Q. B. N. S. 543, 47 L. T. N. S. 10, 30 Week. Rep. 797; Cooley, Torts, 263, 264; 2 Redf. Railways, 4th ed. 250; Pierce, Railroads, 392; Patterson, Railway Acci. Law, 410, 508; 1 Shearm. & Redf. Neg. 5th ed. § 140; Southern Bell Teleph. & Teleg. Co. v. Cassin, 111 Ga. 575, 50 L.R.A. 694, 36 S. E. 881; Hutchinson, Carr. 1906 ed. § 1386; 3 Elliott, Railroads, § 1375; 13 Cyc. 326, 327; Hartigan v. Southern P. Co. 86 Cal. 142, 24 Pac. 851; Munro v. Pacific Coast Dredging & Reclamation Co. 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; Andrews v. Hartford & N. H. R. Co. 34 Conn. 57; Hecht v. Ohio & M. R. Co. 132 Ind. 507, 32 N. E. 302; Holton v. Daly, 106 Ill. 131; Chicago & E. I. R. Co. v. O'Connor, 119 Ill. 586, 9 N. E. 263; Louisville & N. R. Co. v. McElwain, 98 Ky. 700, 34 L.R.A. 788, 56 Am. St. Rep. 385, 34 S. W. 236; Sweetland v. Chicago & G. T. R. Co. 117 Mich. 329, 43 L.R.A. 1915E.

L.R.A. 568, 75 N. W. 1066, 4 Am. Neg. Rep. 648; Doleon v. Lake Shore & M. S. R. Co. 128 Mich. 444, 87 N. W. 629; Hulbert v. Toppeka, 34 Fed. 510; Almquist v. Wilcox, 115 Minn. 37, 131 N. W. 796; McCafferty v. Pennsylvania R. Co. 193 Pa. 346, 74 Am. St. Rep. 690, 44 Atl. 435, 6 Am. Neg. Rep. 693; Hill v. Pennsylvania R. Co. 178 Pa. 223, 35 L.R.A. 196, 56 Am. St. Rep. 754, 35 Atl. 997; Lubrano v. Atlantic Mills, 19 R. I. 129, 34 L.R.A. 797, 32 Atl. 205; Fritz v. Western U. Teleg. Co. 25 Utah, 263, 71 Pac. 209; Brown v. Chattanooga Electric R. Co. 101 Tenn. 252, 70 Am. St. Rep. 666, 47 S. W. 415; Legg v. Britton, 64 Vt. 652, 24 Atl. 1016; Brammer v. Norfolk & W. R. Co. 107 Va. 206, 57 S. E. 593; Strode v. St. Louis Transit Co. 197 Mo. 616, 95 S. W. 851, 7 Ann. Cas. 1084; Miller v. St. Louis Transit Co. 216 Mo. 99, 115 S. W. 521; Ewell v. Chicago & N. W. R. Co. 29 Fed. 57; St. Louis, I. M. & S. R. Co. v. Needham, 3 C. C. A. 129, 10 U. S. App. 339, 52 Fed. 375; Alder Co. v. Fleming, 86 C. C. A. 419, 159 Fed. 593; Tiffany, Death by Wrongful Act, § 119; McCarthy v. Chicago, R. I. & P. R. Co. 18 Kan. 46, 26 Am. Rep. 742; Eureka v. Merrifield, 53 Kan. 794, 37 Pac. 113; Martin v. Missouri P. R. Co. 58 Kan. 475, 49 Pac. 605, 3 Am. Neg. Rep. 165; Randolph v. Hudson, 12 Okla. 516, 74 Pac. 946; National Live Stock Commission Co. v. Taliaferro, 20 Okla. 177, 93 Pac. 983; State ex rel. Sims v. Caruthers, 1 Okla. Crim. Rep. 428, 98 Pac. 474.

It was error to permit Mrs. Goode to testify to privileged communications.

Pierson v. Illinois C. R. Co. 159 Mich. 110, 123 N. W. 576; Hitchcock v. Moore, 70 Mich. 112, 14 Am. St. Rep. 474, 37 N. W. 914; Chicago, K. & N. R. Co. v. Ellis, 52 Kan. 41, 33 Pac. 478; French v. Wade, 35 Kan. 391, 11 Pac. 138; 1 Greenl. Ev. §§ 333-335; Abrahams v. Woolley, 243 Ill. 365, 90 N. E. 667; Buckel v. Smith, 26 Ky. L. Rep. 494, 82 S. W. 235; Metzger v. Royal Neighbors, 86 Neb. 61, 124 N. W. 913; Wobbe v. Schaub, 143 Ill. App. 361; German-American Ins. Co. v. Paul, 5 Ind. Terr. 703, 83 S. W. 60.

There was no proof of the value of services of physicians, and the jury should not have been instructed to consider that item.

Chas. T. Derr Constr. Co. v. Gelruth, 29 Okla. 538, 120 Pac. 253; Wheeler v. Tyler Southeastern R. Co. 91 Tex. 356, 43 S. W. 876; International & G. N. R. Co. v. Boykin, 32 Tex. Civ. App. 72, 74 S. W. 93.

The court erred in construing §§ 5279, 5280, and 5281, Revised Laws 1910, as authorizing two separate and independent causes of action, where death results from a wrongful act.

McCarthy v. Chicago, R. I. & P. R. Co.

18 Kan. 46, 26 Am. Rep. 742; Eureka v. Merrifield, 53 Kan. 794, 37 Pac. 113; Martin v. Missouri P. R. Co. 58 Kan. 475, 49 Pac. 605, 3 Am. Neg. Rep. 165; Sawyer v. Perry, 88 Me. 47, 33 Atl. 660, 15 Am. Neg. Cas. 291; McCafferty v. Pennsylvania R. Co. 193 Pa. 339, 74 Am. St. Rep. 690, 44 Atl. 435, 6 Am. Neg. Rep. 693; Lubrano v. Atlantic Mills, 19 R. I. 129, 34 L.R.A. 797, 32 Atl. 205; Legg v. Britton, 64 Vt. 652, 24 Atl. 1016; Sweetland v. Chicago & G. T. R. Co. 117 Mich. 329, 43 L.R.A. 568, 75 N. W. 1066, 4 Am. Neg. Rep. 648; Brammer v. Norfolk & W. R. Co. 107 Va. 206, 57 S. E. 593; Chicago & E. I. R. Co. v. O'Connor, 119 Ill. 586, 9 N. E. 263; Holton v. Daly, 106 Ill. 131; Hecht v. Ohio & M. R. Co. 132 Ind. 507, 32 N. E. 302; Fowlkes v. Nashville & D. R. Co. 9 Heisk. 832; Louisville & N. R. Co. v. McElwain, 98 Ky. 700, 34 L.R.A. 789, 56 Am. St. Rep. 385, 34 S. W. 236; McGovern v. New York C. & H. R. R. Co. 67 N. Y. 417; Littlewood v. New York, 89 N. Y. 24, 42 Am. Rep. 271; Hartigan v. Southern P. Co. 86 Cal. 142, 24 Pac. 851; Southern Bell Teleph. & Teleg. Co. v. Cassin, 111 Ga. 575, 50 L.R.A. 694, 36 S. E. 881; Fritz v. Western U. Teleg. Co. 25 Utah, 263, 71 Pac. 209; Goodsell v. Hartford & N. H. R. Co. 33 Conn. 55; Hutchinson, Carr. 1906 ed. § 1386; 3 Elliott, Railroads, § 1375; Cooley, Torts, 262; Senior v. Ward, 1 El. & El. 385, 28 L. J. Q. B. N. S. 139, 5 Jur. N. S. 172, 7 Week. Rep. 261, 10 Mor. Min. Rep. 646; Griffiths v. Dudley, L. R. 9 Q. B. Div. 357, 57 L. J. Q. B. N. S. 543, 47 L. T. N. S. 10, 30 Week. Rep. 797; Pierce, Railroads, 392; Patterson, Railway Acci. Law, 410-508; 2 Redf. Railways, 4th ed. 250; 1 Shearm. & Redf. Neg. 5th ed. § 140; Safford v. Drew, 3 Duer, 627; Graetz v. McKenzie, 3 Wash. 194, 28 Pac. 331; Mason v. Union P. R. Co. 7 Utah, 77, 24 Pac. 796; Putman v. Southern P. Co. 21 Or. 230, 27 Pac. 1033; Alder Co. v. Fleming, 86 C. C. A. 419, 159 Fed. 593; Peers v. Nevada Power, Light & Water Co. 119 Fed. 400; Price v. Richmond & D. R. Co. 33 S. C. 556, 26 Am. St. Rep. 700, 12 S. E. 413.

The court erred in refusing to follow the construction placed upon said sections of the statute by the supreme court of Kansas, prior to the adoption thereof in this jurisdiction.

United States ex rel. Search v. Choctaw, O. & G. R. Co. 3 Okla. 404, 41 Pac. 729; National Live Stock Commission Co. v. Taliaferro, 20 Okla. 177, 93 Pac. 983; Brown v. Walker, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; Henrietta Min. & Mill. Co. v. Gardner, 173 U. S. 123, 43 L. ed. 637, 19 Sup. Ct. Rep. 327; James v. Appel, 192 U. S. 129, 48 L. ed. 377, 24 Sup. Ct. Rep. 222; McCarthy v. Chl. L.R.A.1915E.

cago, R. I. & P. R. Co. 18 Kan. 46, 26 Am. Rep. 742.

The court erred in upholding the action of the trial court in excluding from the jury the fact of a prior recovery on behalf of plaintiff.

Spade v. Lynn & B. R. Co. 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566; 8 Am. & Eng. Enc. Law, 546.

Messrs. Charles Mitschrich and J. L. Hamon for defendant in error:

Brewer, C., filed the following opinion:

In the summer of 1906, Frank R. Goode, while a passenger on plaintiff in error's train, was seriously injured in a collision. On September 15, 1906, he instituted this suit to recover damages because of personal injuries received in the sum of \$30,000, also for \$3,000 for loss sustained by his business, and \$750 expended for physicians, nurse hire, drug bills, hotel expenses, etc., incurred because of his injuries. On October 11, 1906, while this suit was pending and before its trial, he died as a result of the injuries sustained in the collision.

After Goode's death his widow qualified as administratrix and brought a new action to recover the damages allowed by statute to the widow and next of kin. This second suit was transferred on motion of the plaintiff in error to the United States court for the western district of Oklahoma, where a recovery was had, which was thereafter paid.

On February 20, 1907, this suit, brought by Goode in his lifetime, was revived in the name of Gertrude Goode, administratrix, over the objections of the railway company, and was thereafter tried in the district court of Comanche county, resulting in a recovery of damages for the benefit of the estate of the deceased in the sum of \$9,750; the jury in its verdict having itemized the damages as follows: \$7,000 general damages; \$2,000 loss to business of deceased; \$750 for medical attendance, nurses, hotel bills, etc.

No contention is made in the case that the death of Goode was not caused by the negligent acts of the railroad company, and, for the purposes of the case, we take it that defendant's actionable negligence is admitted. So in this situation it is apparent that the controlling question is as to whether or not, under the statutes in force in this state, a recovery for the benefit of the widow and children, on account of the wrongful death of the husband and father, bars a right of the recovery by the personal representative of the deceased, of the damages resulting to his personal estate on ac-

count of the wrongful act, where the death resulting therefrom was not instantaneous.

The contention of defendant below, as stated in the brief, is: "Since the death of Frank R. Goode resulted from the injuries received, the right of action for his injuries abated on his death, and but one action could be maintained, that for wrongful death."

The plaintiff, defendant in error here, states her contention as follows: "We contend that two separate and independent causes of action exist in the event death results therefrom (except in cases of instantaneous death): One for the benefit of his estate, in which the measure of damages is the same as it would have been had he lived and prosecuted the action to final judgment, limiting the damages, of course, to the date of his death; the other for the sole use and benefit of the widow and next of kin, the measure of damages in the latter being such amount as, in the good judgment of the jury, will compensate the widow and children, or next of kin, for the pecuniary loss they suffered by reason of his death."

The statutes of Oklahoma (Snyder's Comp. Laws, 1909), the construction of which, it is admitted, must determine the question presented here, follow:

"5943. In addition to the causes of action which survive at common law, causes of action for mesne profits, or for any injury to the person, or to real or personal estate, or for any deceit or fraud, shall also survive; and the action may be brought, notwithstanding the death of the person entitled or liable to the same." Rev. Laws 1910, § 5279.

"5944. No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, for a nuisance, or against a justice of the peace for misconduct in office, which shall abate by the death of the defendant." Rev. Laws 1910, § 5280.

"5945. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed \$10,000, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." Rev. Laws 1910, § 5281.

The next section (5946, Comp. Laws 1909, Rev. Laws 1910, § 5282) merely relates to who may prosecute the action under L.R.A.1915E.

certain contingencies, and has no important bearing on the question being considered.

In the instant case it must be conceded that Goode died because of the actionable negligence of defendant; that he received injuries so severe that they later caused his death; that in the interim he suffered great pain; that his injuries required and received expensive medical attention, nursing, etc., with hotel and drug bills, and the absolute loss of his time; that this resulted in damage and loss to his estate, and was unquestionably recoverable by him at the time this suit was filed. Was the right to have these damages lost at the time he died, and, if so, why? The decision of this case rests on an answer to the above question.

At common law the injured person could recover damages for the injury done his person, which included pain and suffering, and also for that occasioned his personal estate, but for the fact of his death; his death, however, prevented a recovery by abating the suit. The right to recover for the personal injury, however, was a common-law right. The recovery allowed by Lord Campbell's act, 9-10 Vict., for pecuniary loss to the family (the widow and children), or next of kin, occasioned by the death of the injured person, was unknown to the common law. It stands solely on the statute, not only on the right to prosecute the suit, but for the very right itself. The action for the injury first mentioned only needs a statute to enable the injured person to prosecute his suit (to keep it alive and from abating); he had the right (the action) at common law.

Thus far there is slight conflict in the authorities, but after this all is confusion. Even the English cases seem to be in conflict. One theory advanced in some of the cases is that the right of action given by Lord Campbell's act is merely a continuance, in the personal representative of the deceased, of a right vested in the deceased in his lifetime; other cases hold that the right to recover is an entirely new right created by the act.

As we shall presently see, this dividing line in the authorities is highly-important in this case. In fact it controls the controlling question. We believe that this can be demonstrated. Now this suit for the damages done the deceased and his estate, as we have said, was based on an existing common-law right, when it was filed; had Goode lived to prosecute it, his right of action and right to prosecute and recover on it is not and cannot be controverted; at common-law his cause of action would not, but his right to prosecute it would, have died with him. Therefore all this suit needed after his death was a removal of the

common-law bar to a recovery. By referring back to § 5943 it will be seen that this obstacle is removed. By this section large classes of actions which at common law abated with the death of the injured party are made specifically to survive his death. Actions for "meane profits," "injury to the person," or to "real or personal estate," or for any "deceit or fraud," no longer die with the injured man. This section of the statute preserves these causes of action quite independently of § 5945, and quite as fully as if it had not been passed. Then, further, in this case the cause of action had been put in suit in the lifetime of the injured man; and § 5944, "no action pending in any court shall abate by the death of either or both the parties thereto," etc., still further protects and preserves it; unless it can be successfully maintained that § 5945 merely continues the cause of action which had vested in Goode, and did not create a new cause of action, and that, it being a mere continuance of the old right, by considering the three sections of the statute as *in pari materia*, it would follow that one or all of the supposed causes of action would merge into the one right of a recovery for the pecuniary loss sustained by the family on account of the death. This shows why it is so important to determine whether § 5945 creates a new cause of action. If it does, the other sections discussed most certainly preserve the original cause of action.

We have become fully convinced that according to the weight of authorities, both in England and the United States, the cause of action given by Lord Campbell's act (which is substantially § 5945) is a new cause of action, and not a continuation of the one vested in deceased in his lifetime. And outside of the authorities reason brings this conclusion. If it is the same cause of action, why should not all the elements of damage recoverable in the old one be recoverable under the statute? Yet they are not. Under Lord Campbell's act, and the state statutes modified on it, the widow and next of kin, or whosoever of relatives may be named as beneficiaries, are never allowed to take into the account of their damages the pain and suffering the injured person endured; in such suit the damages are confined and limited to compensation for the pecuniary loss sustained by the beneficiaries, because of the death of the one from whom they confidently expected financial assistance had he lived. Besides, in such cases no part of the recovery becomes assets of the dead man's estate; it all goes to those named in the statute. But under the injured man's own cause of action, all the recovery would be assets of his estate and subject to the demands of creditors, if any. L.R.A.1915E.

So we see that, under the section we are discussing, the recovery is based and awarded on different elements of damage, and the amount recovered becomes funds of an entirely different nature. And, further, the right is given, and most generally arises, in cases of instantaneous death. It seems to us to be very difficult to argue that, in cases of instantaneous death, there was a cause of action vested in the decedent in his lifetime to be continued.

We shall not quote on this point the authorities, but shall content ourselves with citing a number of them, and referring anyone who cares to go minutely and analytically into the English and early American authorities (prior to 1889) to a careful review thereof, made by Mr. Chas. R. Darling, in which, after a critical study, he arrives at the conclusion we have come to on the point. This paper is reported in 28 Am. L. Reg. N. S. at pages 385, 515, 577.

In volume 13 Cyc. 316, title "Death," it is said: "In many jurisdictions, under statutes providing that whenever death shall be caused by wrongful act, such as would, if death had not ensued, have entitled the party injured to maintain an action, the persons who would have been liable had death not ensued shall be liable notwithstanding such death, and designating the beneficiaries, it is held that such action is not a survival of the former right of action, but that a new cause of action arises, since there is an element in it in addition to that which constituted the cause of action in favor of the person injured, namely, death must ensue as a consequence of the injury, and also because only the damages which ensue from the death are recoverable; and under these statutes, creating a new cause of action in favor of designated beneficiaries, the right of action thereunder is not affected by the fact that the deceased is instantaneously killed."

See *Blake v. Midland R. Co.* 18 Q. B. 93, 21 L. J. Q. B. N. S. 233, 16 Jur. 562; *Pym v. Great Northern R. Co.* 2 Best & S. 759; *Barnett v. Lucas*, Ir. Rep. 6 C. L. 247; *Fink v. Garman*, 40 Pa. 95; *Perham v. Portland General Electric Co.* 33 Or. 451, 40 L.R.A. 799, 72 Am. St. Rep. 730, 53 Pac. 14, 24; *Whitford v. Panama R. Co.* 23 N. Y. 465; *Malott v. Shimer*, 153 Ind. 35, 74 Am. St. Rep. 278, 54 N. E. 101, 6 Am. Neg. Rep. 263; *Andrews v. Hartford & N. H. R. Co.* 34 Conn. 57; *Smith v. Louisville & N. R. Co.* 75 Ala. 449; *The City of Norwalk (D. C.)* 55 Fed. 98; *The Oregon (D. C.)* 73 Fed. 846; *Northern P. R. Co. v. Adama*, 54 C. C. A. 196, 116 Fed. 324.

When it is once conceded or established that the widow's action, under § 5945 of the statute, is an entirely new cause of action,

it follows that it is independent, both in the right and the enforcement of it, of § 5943; in other words, this last-named section might be stricken from the law without injury to the right to recover the widow's damage. And as has been suggested elsewhere, the right to recover decedent's personal damage for his estate is perfect under the common law, aided by § 5943, independent of and without any aid from § 5945. This leads us to believe that the two causes of action, in cases such as this, are coexistent; that a recovery on the one does not bar a recovery on the other; that the damages to the estate begin with the wrong and cease with the death; that the widow's damages begin with the death; that they do not cover the same field, nor do they overlap. We think, after a somewhat extended study of the cases, arising under a similar condition of the statute law, that the holding here made is supported not only by reason, but by the weight of authority. In approaching the matter, the investigator will be bewildered by the variety of views expressed and the apparently hopeless conflict into which the courts have fallen; but this is more apparent than real. Much of the trouble comes from the fact that the statutes involved in the various states differ widely. In some states we find only the statute allowing the widow's recovery, and no general revivor section. Obviously a decision from such a state would be valueless here. In other states the statute in terms or by necessary implication limits the right to one recovery. In some states the two sections of the statute were passed at different times, in others as part of the same legislation; and this fact seems to have influenced the decisions, although it is difficult to see why it should. Therefore a decision, to be of value to us, must have been based on a similar condition of the statutes. And, as the question is a new one in this jurisdiction, we shall quote liberally from decisions which, under the above suggestion, are quite applicable to the instant case.

The Arkansas supreme court, where the statutes, while differing in phraseology, are materially alike in meaning, has gone into the question in *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 123-126, 7 L.R.A. 283, 13 S. W. 801, 802, and says: "These appeals involve three suits brought against the railway on account of an injury to a minor resulting in his death. Two are by the personal representative of the minor; one of them for the benefit of his estate, the other for the benefit of the next of kin. The third is an action by the father of the minor to recover for the loss of his son's services during his minority. The question pre-

sented at the threshold of the cases is: Who can maintain action against a railroad for an actionable injury resulting in the death of a minor? The answer involves a consideration of the common law and the statutes on the subject. The cause of action which accrued to the injured party by the common law survives to his administrator after his death by virtue of a provision of the Revised Statutes of 1838, which is carried into Mansfield's Digest as § 5223. . . . The question then is: What is the effect of this statute (Mansfield's Dig. §§ 5225, 5226) upon the general provision (Id. § 5223) regulating the revival of actionable wrongs to the administrator or executor of the injured person? We are not without authority upon the question. The English rule, which is commonly followed by the courts of the states whose statutes embody the provisions of Lord Campbell's act, is that the right of action given by the latter statute to the personal representative of one whose death has been caused by the default of another is created by the statute, and is not a continuation of the right of action which the deceased had in his lifetime, although the new right, it has been ruled, arises only by preserving the cause of action which was in the deceased. If the deceased never had a cause of action, none accrues to his representative or next of kin. The right which accrued to the deceased revives to his administrator by virtue of the former statute (Id. § 5223); the newly created right results from, and accrues on, the death of the injured party. Both actions are prosecuted in the name of the personal representative, where there is one, and may proceed *pari passu*, without a recovery in the one having the effect of barring a recovery in the other, because the suits are prosecuted in different rights, and the damages are given upon different principles to compensate different injuries. One is for the loss sustained by the estate and for the suffering from the personal injury in the lifetime of the decedent, the recovery in which goes to the benefit of the decedent's creditors, if there are any; the other takes no account of the wrongs done to the decedent, but is for the pecuniary loss to the next of kin, occasioned by the death alone. The death is the end of the period of recovery in one case and the beginning in the other. In one case the administrator sues as legal representative of the estate, for what belonged to the deceased; in the other he acts as trustee for those upon whom the act confers the right of recovery for the pecuniary loss inflicted upon them. *Blake v. Midland R. Co.* 18 Q. B. 93, 21 L. J. Q. B. N. S. 233, 16 Jur. 562; *Pym v. Great Northern R. Co.* 2 Best & S. 759;

Barnett v. Lucas, Ir. Rep. 6 C. L. 247; *Needham v. Grand Trunk R. Co.* 38 Vt. 294; *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271; *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693, 2 So. 537; *Hulbert v. Topeka*, (D. C.) 34 Fed. 510; *Fordyce v. McCanta*, 51 Ark. 509, 4 L.R.A. 296, 14 Am. St. Rep. 69, 11 S. W. 694, *supra*. The statutes under which the two actions are brought do not therefore cover the same ground; there is no repugnancy between them, and the latter does not impair the right conferred by the former. *Needham v. Grand Trunk R. Co.* 38 Vt. 294, *supra*; *Com. v. Metropolitan R. Co.* 107 Mass. 236."

Quite like the Arkansas case is that of *Brown v. Chicago & N. W. R. Co.* 102 Wis. 141-143, 44 L.R.A. 579, 77 N. W. 748, 749, 5 Am. Neg. Rep. 255, in which that court said: "The learned counsel for respondent contend, with much learning, that the section last referred to, and §§ 4255 and 4256 of the statutes, giving a right of action to relatives in certain circumstances specified, should be construed together, so as to limit actions that survive under § 4253 to cases where death does not ensue from the injury. That claim has the merit of being supported by decisions elsewhere under similar laws, but, looking only to the language of the statutes, no good reason is perceived for resorting to construction at all to determine their meaning. The language seems too plain to allow that. We have not even good reason for saying, as some courts have, that the statutes were enacted at the same time, or went into effect at the same time, and it is therefore unreasonable to hold that the legislature intended to give two rights of action at the same time for one injury. The law of this state conferring upon surviving relatives the right to recover their pecuniary loss caused by the wrongful taking off by death of a husband, wife, child, father, or mother has existed for over forty years, while the law reviving the right in favor of the personal representatives of a deceased person, to his claims for damages to his person, was not enacted till 1887. But independent of that circumstance, as before observed, the language of the two provisions is plain. They refer to entirely distinct losses recoverable in different rights; the one in the right of the deceased for the loss occasioned to him, the other in the right of the surviving relatives for the loss to them. Both are dependent on the injury, but only one dependent on the death with surviving relatives to take under the statute. The language of one provision is that 'actions for personal injuries shall survive,' and of the other, 'in case of the death of a person by the wrongful act of another,' under certain circumstances named, the wrongdoer

'shall be liable to an action for damages, notwithstanding the death of the person injured, if the death be caused in this state.' The only condition of the right of action in the former case is the existence of the actionable claim for damages at the time of the death of the injured party. The statute creates no new liability, but prevents the lapsing by death of an old one. The only condition of liability under the other provision is the existence of an actionable claim in the right of the injured party at the time of his death and the existence of the beneficiaries mentioned in the statute. The liability of the wrongdoer, while dependent on the condition named, is not on the actionable claim called for to satisfy such condition, but on a new right created by the statute,—the right of the surviving relatives to compensation for the loss which falls upon them. The language of the statutes, when viewed in the light of the evident legislative purpose, is too plain to justify courts in interpolating into them language not there by necessary implication from the context, in order to make them accord with the ideas of judges as to the best legislative policy."

And on rehearing in the above case the court, in an opinion worth reading throughout, reported in *Brown v. Chicago & N. W. R. Co.* 102 Wis. 151, 44 L.R.A. 585, 78 N. W. 771, adds: "We should say, in passing, that the suggested difficulties in administering the law, and danger of injustice to defendants, are largely imaginary, and will gradually disappear as we adopt ourselves to the new conditions which the revival statute creates. The trial judge can easily, by proper instructions, limit the recovery in a revived action to the loss actually caused to the deceased prior to his death; and in the action under § 4255, Rev. Stat. to the pecuniary loss sustained by the surviving relatives entitled to the benefits of that provision. . . . The injustice of two recoveries for distinct grievances, suggested by the learned counsel, and by some courts that have taken the view pressed upon us, is not perceived. A little dispassionate reflection on the subject, it would seem, would prevent unqualified condemnation of the legislative wisdom that says, if a person be wrongfully injured, the pain and suffering and expenses to him in consequence thereof shall not be lost to his estate by the circumstance of his death from the injury before receiving satisfaction for his damages, even though the damages to his surviving relatives, to satisfy their own grievance, may be recovered. . . . The idea that our statute (§ 4255, Rev. Stat.) does not grant a new right of action, but continues an old one, with different benefi-

ciaries and different rules for assessing damages, is urged as correct, with such confidence that we are called upon to go over the subject anew. No attempt will be made to harmonize all the conflicting observations found in decisions elsewhere regarding the nature of Lord Campbell's act. That cannot be done, and it is not necessary, for most of the conflicts will disappear as one applies judicial observations to the particular facts in regard to which they were made. We said in the former opinion that the view that the statute for the benefit of surviving relatives confers a new right of action for a grievance separate and distinct from that of the injured person is supported by the better reasoning and the greater weight of authority."

The supreme court of Massachusetts has said in *Bowes v. Boston*, 155 Mass. 349, 15 L.R.A. 365, 29 N. E. 634: "In the last two suits, the court was right in refusing to rule that the administrator could not recover in both actions if he proved the facts alleged in both. The right of action given by Pub. Stat. chap. 52, § 17, is independent of the right of action given by § 18 of the same chapter. The statute creating it was enacted at a different time and for another purpose. The right to recover damages suffered in his lifetime by one who dies from an injury received on a highway survives to his administrator for the benefit of his estate, and the damages are estimated on the theory of making compensation. Pub. Stat. chap. 165, § 1. The action by an administrator, under § 17, on account of his intestate's loss of life, is to recover a sum not exceeding \$1,000 for the benefit of the widow and children or of the next of kin of the deceased, to be estimated according to the degree of culpability of the defendant. Both actions, under the statute, may proceed at the same time, on independent grounds and for different purposes."

The supreme court of Michigan has held in the syllabus to *Hurst v. Detroit City R. Co.* 84 Mich. 539, 48 N. W. 44: "The right of action given by How. Stat. § 8314, to the personal representatives of a deceased person for the pecuniary injury resulting from his negligent killing, and that which survives under act No. 113, Laws of 1885 (3 How Stat. § 7397), for negligent injuries to the person, are separate and distinct causes of action, and the latter cannot be introduced into a cause based upon the right given under the first statute cited, by way of amendment to the declaration."

The supreme court of Mississippi has held in *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 702, 703, 2 So. 538, as follows: "The right of the administratrix to sue and recover whatever damages her intestate might

recover, if living, is indisputable. Code, §§ 2078, 2079. If Jo. Brantley had sued, as he might, and died while the action was pending, it would have survived to his administrator by virtue of § 1513 of the Code. Section 2078 authorizes the prosecution by the personal representative of any personal action whatever which the decedent might have commenced and prosecuted, and § 2079 specifically authorizes an action for any trespass done to the person or property, real or personal, of the decedent. The last named may have been unnecessary, but it cannot be held to limit the comprehensive language of § 2078. Certainly it authorizes this action, even if it is a limitation of the preceding section. It probably sprung from the determination to secure the survival of this kind of action. It is found as article 46, p. 485, of Code of 1857, while the original of § 2078, supra, is article 119, p. 455, Code of 1857. It is manifest that the death of Jo. Brantley did not destroy the right of action, for, had he commenced an action, it would have survived by § 1513, as stated above, and § 2079 plainly provides for the institution of such an action by the personal representative. Section 1510 provides for an action to recover for the death of a person, and it is entirely distinct from and independent of an action by the personal representative. They may coexist, but have no connection."

The supreme court of Georgia held in *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406, 2 Am. Neg. Rep. 466, in the syllabus: "It is no bar to a suit by the mother for the homicide of her minor son, that the father has a pending suit in which he claims damage for the loss of the son's services up to the time the latter would have arrived at his majority."

The supreme court of Vermont in *Needham v. Grand Trunk R. Co.* 38 Vt. 294, said: "The principles on which the intestate's cause of action rested at common law are the same, irrespective of the cause of his death. He had a right of action for the injury, and that right existed till his death. At common law his right of action died with his person, but it is revived by the statute in favor of his administrator. The action by the administrator founded on the claim of his intestate under the provisions of § 12 could include nothing more than his intestate's cause of action. That section simply revives, but does not enlarge, the common-law right of the intestate. Under the provisions of that section, it is evident that no damages could be assessed by reason of his death, nor resulting from his death. The sum recovered by the administrator in an action founded exclusively upon the claim of his intestate, under the

provisions of the 12th section, would be treated as assets in the hands of the administrator for distribution among the creditors and heirs of the intestate, agreeably to the general provisions of our statute. It is urged that if the intestate's cause of action is revived when death occurs in consequence of the injury, it constitutes no distinct cause of action, but is devolved upon his personal representative under the provisions of the 15th section, and forms part of the ground of recovery under the provision of the latter section for the exclusive benefit of the widow and next of kin. It will be evident, we think, that such conclusion is not warranted by the provisions of the statute, nor could it be sustained on principle. In the first place, the act of 1849 (§§ 15, 16, and 17 of chapter 52 of the General Statutes) does not profess to revive the intestate's cause of action. The intestate's cause of action is revived by the provisions of the act of 1847. It would not be reasonable to suppose that the legislature intended, without reference to the extent of the intestate's claim and cause of action, without reference to the legal or equitable claims of his creditors, without reference to the extent of the injury resulting from his death to his wife or other relatives, and without reference to the number and situation of his relatives, whether near or remote, to include the intestate's cause of action in a recovery under the provisions of the 15th section for the exclusive benefit of the widow and next of kin. The intent of the 15th, 16th, and 17th sections was to make the damage or pecuniary injury resulting from such death to the widow and next of kin the subject of a new cause of action and right of recovery, wholly distinct from the consequences of the wrong to the injured party, and wholly distinct from his claim or damages resulting from such injury. The provisions of the last-mentioned sections have introduced principles wholly unknown to the common law, or to any previous statute of this state, namely, that the value of a man's life to his wife and next of kin constitutes a part of his estate to be administered by his personal representative, and that the whole proceeds of the recovery for such loss shall go to his widow or surviving relatives. Notwithstanding the action in such case is to be prosecuted in point of form by the executor or administrator, he is only a trustee of the sum recovered for the use of the widow and next of kin, and the sum so recovered cannot be treated as assets in his hands for distribution among the creditors. No right of action, under the provisions of § 15, exists during the lifetime of the injured party. When death occurs from

L.R.A.1915E.

the injury, the right of action given under the provisions of that section arises after and at the moment of his decease. The damages resulting from his death are then prospective. Such damages to the widow and next of kin begin where the damages to the intestate ended, *viz.*, with his death."

But counsel say in the brief that the above case was later overruled by the Vermont court in *Legg v. Britton*, 64 Vt. 652, 24 Atl. 1016. We answer this with the words of Justice Marshall in meeting this same contention in *Brown v. Chicago & N. W. R. Co.* supra: "Now a few words in regard to the Vermont case, *Needham v. Grand Trunk R. Co.* supra, which will be considered in the light of *Legg v. Britton*, supra. . . . [after discussing the question says], it was not discredited, but rather was affirmed, in the subsequent discussion in *Legg v. Britton*. . . . There is nothing new in the decision. It is in perfect harmony with *Needham v. Grand Trunk R. Co.*, which, instead of being considered overruled, should be considered as affirmed, and so it is considered by other courts that have reviewed the subject."

The supreme court of South Dakota in *Rowe v. Richards*, decided last year and reported in 32 S. D. 66, ante, 1095, 142 N. W. 664, said in the syllabus: "A cause of action for injury to the person and one based on death by negligence do not conflict with each other, nor do they merge on the death of the injured party; neither is the prosecution or satisfaction of either a bar to prosecution and recovery on the other; . . . the cause of action for injury being for benefit of the party injured, and, if death ensued, the amount of recovery would be assets of the estate, while a cause of action for death is for benefit of the dependents entitled thereto."

In an opinion by Federal Judge McPherson in *Jacobs v. Glucose Sugar Ref. Co.* (C. C.) 140 Fed. 767, while reluctantly following the Iowa rule, otherwise observed: "Plaintiff's counsel contend with much force that under an Iowa statute all causes of action survive, despite the death of the person entitled to the same; and he rightly contends that, had Jacobs survived, he could have maintained the action for pain and suffering. Under this statute I am not able to see why he did not have a cause of action and his estate another. And whether such recoveries would be paid over to the same person in the same right, with or without the same exemptions, in my opinion, is of no importance. The proper probate court would take care of that question. Suppose that at the end of five days, when it was not known that Jacobs would die from his injuries, the attending physician had neg-

ligerly or wilfully given Jacobs a poison, from which he died within a few minutes. Can any lawyer say that the administrator could not maintain an action against the defendant herein for pain and suffering, and another action against the physician for damages to the estate? And if this be so, then by what logic or reasoning can it be said that two actions cannot be brought against one wrongdoer, the one for pain and suffering and the other for damages to the estate? Both are actions for compensatory damages. The one survives to the administrator under one statute, and the other is given to the administrator under another."

As sustaining a recovery for the benefit of the estate, as distinguished from a recovery on account of pecuniary loss to the family, it was held in the English case of *Bradshaw v. Lancashire & Y. R. Co.* L. R. 10 C. P. 189, that the principle upon which the first-mentioned recovery was allowed was not affected by Lord Campbell's act. In that action the defendant was a common carrier on whose road the deceased was a passenger when the injuries were received which resulted in his death. The action seems to have been brought in form *ex contractu*. Justice Grove said in the opinion: "Does the fact that in this case, besides the injury to the estate, the testator's death has likewise resulted from the breach of contract make any difference, or does the fact that provision has been made in such cases for compensation in respect of the death to certain relatives by Lord Campbell's act take away any right of action that the executrix would have had but for that act? It does not seem to me that the act has that effect, either expressly or by necessary implication. The intention of the act was to give the personal representative a right to recover compensation as a trustee for children or other relatives left in a worse pecuniary position by reason of the injured person's death, not to affect any existing right belonging to the personal estate in general. There is no reason why the statute should interfere with any right of action an executor would have had at common law. In the case of such right of action he sues as legal owner of the general personal estate which has descended to him in course of law; under the act he sues as trustee in respect of a different right altogether on behalf of particular persons designated in the act."

See also, as bearing on the point, *International & G. N. R. Co. v. Kuehn*, 70 Tex. 582, 8 S. W. 484; *Roach v. Imperial Min. Co.* (C. C.) 7 Sawy. 224, 7 Fed. 608.

But it is contended, as against the force of authorities cited above, that the case of *L.R.A.1915E.*

McCarthy v. Chicago, R. I. & P. R. Co. 18 Kan. 46, 26 Am. Rep. 742, decided by the Kansas court in 1877, and the later cases following it, are controlling. It is true in that case the court seems to have held that the section allowing a recovery of pecuniary loss to certain beneficiaries took away the right of the administrator to sue for the benefit of the estate, where death resulted from the injuries. The court reached this conclusion, that the general survival section of the statute (our § 5943, *supra*) must be limited, by construction, so as to permit actions to survive only in cases where the injured person does not die from those particular injuries. We do not believe there is any room for such a construction of this section of the statute; that it is opposed to reason and the generally observed rules of construction, and is against the weight of authority in states having similar statutes. *Hutchinson v. Krueger*, 34 Okla. 23, 41 L.R.A.(N.S.) 315, 124 Pac. 591, Ann. Cas. 1914C, 98; *Ex parte Bowes*, 8 Okla. Crim. Rep. 201, 127 Pac. 20.

It has been pointed out clearly above that most of the states around us, and from which much of our population came, had applied an entirely different construction. Therefore we feel that the statute having come here construed, as it had been by so many states, contrary to the Kansas construction, we are not bound, as a matter of law, to follow the Kansas rule. We are strengthened in this belief when we read the criticism of the Kansas construction in *McCarthy v. Chicago, R. I. & P. R. Co.* *supra*, announced in *Hulbert v. Topeka*, 34 Fed. 510, by Judge Brewer, who was on the Kansas court at the time, and concurred in the *McCarthy* decision. Judge Brewer said in the *Hulbert* Case, in discussing the *McCarthy* Case, that "I was a member of the supreme bench of Kansas at the time this opinion was filed, and concurred in it. I feel constrained to follow that decision; and yet I may be permitted to say that my examination of this case has led me to doubt the correctness of that conclusion, for the measure of damages and the basis of recovery under the two sections are entirely distinct. Section 422 gives a new right of action, one not existing before; an action which is not founded on survivorship; an action which takes no account of the wrong done to the decedent, but one which gives to the widow or next of kin damages which have been sustained by reason of the wrongful taking away of the life of the decedent. It makes no difference whether the injured party was killed instantly or lived months; whether he suffered lingering pain or not; whether or not he was put to any expense for medical attendance and nursing. None

of these matters are to be considered in an action under § 422; and the single question is: How much has the wrongful taking away of his life injured his widow or next of kin? . . . Suppose, as in this case, the decedent lived a long time after injury, was put to great expense for medical attendance and nursing; for these matters, which work a loss to the estate, she had a right of action in her lifetime. That action it is which, by § 420, survives. . . . It is obvious that both of these causes of action may exist against two different parties, and why may they not exist against the same party? Suppose A commits an assault and battery upon B, a cause of action exists in favor of B against A for those injuries which survives by § 420. Suppose, after such action is instituted by B, he should be killed by the wrongful acts of C. There certainly would be an action under § 422 against C for such wrongful death. Would that defeat the first action, or would not that survive, as provided under § 420? If that be true where there are two wrongdoers, why should it not also be true where there is but one wrongdoer?"

We also note that the Kansas court of appeals in *Missouri P. R. R. Co. v. Bennett*, 5 Kan. App. 231, 47 Pac. 183, took a different view from that announced in the *McCarthy* Case, although the supreme court has continued to hold fast to the original holding.

The supreme court of Kansas held that a cause of action arose under the section allowing damages to the widow, and that decedent's own cause of action for damages for the injuries was not revived, but died with him. Illinois supreme court in *Holton v. Daly*, 106 Ill. 131, takes the view that the statute giving damages to the relatives is a continuation of the common-law action decedent had for his injuries. These two courts reach the same conclusion, that but one recovery can be had in case of death, but the reasoning of the one in reaching it is inconsistent with the reasoning of the other in reaching the same conclusion. This illustrates the uncertain foundation for the holding, which we are constrained to believe the courts came to make out of, in our judgment, the groundless fear that the person or corporation which wrongfully causes the death of a human being would be compelled to pay too heavy damages.

The views we have expressed here in no way conflict with the holding in *Shawnee Gas & Electric Co. v. Motesenbocker*, 41 Okla. 454, 138 Pac. 790. In that case §§ 4611, 4612, Stat. Okla. 1903 (§§ 5945, 5946, Comp. Laws 1909; §§ 5281, 5282, Rev. Laws 1910), were being considered. L.R.A.1915E.

2. The next point urged in the brief is that the court erred in admitting the testimony of the widow of deceased. This point is without merit. The testimony of the witness, after the termination of the marital relation, was as to facts within her knowledge, not to confidential communications from her husband. She testified as to his actual condition after his injury; as to the necessity for attention and nursing; that she took him to Illinois, where he died; how long he lingered there; and that he was able to walk on crutches, etc. This evidence was competent. *Adkins v. Wright*, 37 Okla. 771, 131 Pac. 686.

3. The next point made is that there was no proof of the value of the medical services rendered deceased. The jury, as has been observed in stating the facts of this case, itemized the damages allowed in the verdict. The jury allowed \$750 for medical attention, etc. There was positive proof that plaintiff had paid \$450 for medical attention; beyond this there was no evidence except by the inference that it costs money to obtain drugs and nursing, and be cared for at a hotel, etc., but the jury cannot award expenses of this kind without some proof of their value or what was paid out on that account. This item is \$300 too large under the evidence. This will have to be remitted.

4. The next objection is that the court erred in refusing to admit in evidence the pleading in the other suit. This evidence was for the evident purpose of establishing the former recovery, on the theory that it was a bar and complete defense in this suit. Having held that it was not, it was therefore immaterial, and its rejection was not error.

5. Complaint is made also as to the damages allowed for loss of business. We think this point is well taken. Defendant in error replies to this contention as follows: "While there was no definite evidence as to the exact amount of loss to the business of deceased, yet it was apparent that the closing of the factory must, of necessity, have injured the business. If the court is of the opinion that they were not justified in so doing, the same rule would be applicable to this item as we have indicated in reference to the amount allowed for physicians' services, etc."

We do not think the item of \$2,000 allowed in the verdict, evidently on the theory that the small manufacturing plant of deceased was forced to close down at a loss because of the injury and death of Goode, was justified. This sum should be remitted if the judgment is to stand.

6. The objections urged to the instructions ought not to be sustained. The fea-

ture of the instructions most questionable related to the recovery of certain damages which we will require to be remitted; therefore they worked no injury.

We therefore conclude that if, within thirty days from the rendition hereof, the defendant in error shall file with the clerk of this court a remittitur in the sum of \$2,300 to cover the award of improper dam-

ages, the judgment as to the remaining sum should be in all things affirmed.

If the remittitur is not made the case to stand reversed, with remand for a new trial.

Per Curiam:

Adopted in whole.

Petition for rehearing denied September 15, 1914.

Note. — Judgment in action for personal injury as abatement of action for death or vice versa.

- I. In general, 1152.
- II. Effect of judgment rendered during life of the injured person, 1152.
- III. Action pending when injured person died, or subsequently commenced.
 - a. In general, 1156.
 - b. As between personal representative and beneficiaries, 1161.
 - c. As between parents, 1162.
 - d. As between parent and children, 1162.
 - e. Effect of fraud or collusion, 1162.
- IV. Judgment in action by person in one capacity as bar to action by same person in different capacity.
 - a. Action by parent, 1162.
 - b. Action by personal representative, 1163.

I. In general.

The effect of a final judgment in an action to recover for personal injuries in behalf of the estate of the injured person or the statutory beneficiaries, as a bar to another action to recover for a party not represented in the prior proceedings, is presented under various conditions, and has invoked various decisions not in all cases reconcilable. The question arises in cases where the deceased in his lifetime prosecuted to final judgment an action for personal injuries which subsequently resulted in his death where the deceased in his lifetime commenced an action to recover for personal injuries which resulted in his death during the pendency of the action, and this action was subsequently revived by his personal representative and final judgment rendered therein, or where the personal representative or statutory beneficiaries or some of them have prosecuted to final judgment an action to recover for their pecuniary loss from the death complained of.

II. Effect of judgment rendered during life of the injured person.

When presented with reference to the effect of a final judgment rendered in the L.R.A.1915E.

lifetime of deceased as a bar to any action after his death, the real question is, Is it a condition requisite to the remedy in favor of the personal representative or statutory beneficiaries given by statutes embodying the principles of Lord Campbell's act, that the claim of the decedent to recover for the injury shall have existed at the time of his death? Does the extinguishment of all claim in behalf of the deceased in his lifetime render the statute in behalf of his statutory beneficiaries inapplicable because without anything to operate upon?

Upon this point it is to be remembered that before the death of the injured person there was but one cause of action, the action in favor of the injured person to recover for the injury. Undoubtedly, if this cause of action continues unextinguished up to the time of his death, there arises, by virtue of these statutes, an action for the benefit of the statutory beneficiaries, "notwithstanding such death." Can the conclusion be logically reached, however, that if this cause of action, which existed in favor of the injured person, is extinguished prior to his death, there is anything upon which the statute in favor of certain relatives can operate? What action or cause of action does it keep alive, "notwithstanding the death" of the injured person, when all claim and right of action for the injury has been extinguished prior to the death of the person in whom it vested?

If the primary right of action has been extinguished in the lifetime of the deceased, how can there be substituted for it a right of action in someone else? It is inconceivable that there can be a substitution of a secondary action for an action which does not exist; that there can be a substitution of something for nothing. Such an absurdity cannot be attributed to the lawmaking power in creating this action, or be inferred from the terms of the statute, which indicate an intent to substitute for the primary action of the injured person, an action for the benefit of those suffering pecuniary loss through his death, notwithstanding his death, which extinguished the primary action. The term, "notwithstanding the death," is indicative of the intent of the lawmaking power that the primary

action must be existing in the decedent at the moment of dissolution.

The true construction of statutes similar to Lord Campbell's act, therefore, would seem to be that they are in reality survival statutes, and confer a new remedy to enforce an existing cause of action which vested solely in the injured person during his life. Upon his death, by virtue of these statutes, for the enforcement of this cause of action a new remedy for the benefit of dependents or next of kin is given, in substitution, in whole or in part, for the remedy which existed in the deceased up to the time of his death, but the cause of action is the same, *viz.*,—an injury to the person of the deceased which resulted in the destruction of his earning power.¹ Hence, while the real parties in interest and the basis upon which the damages are assessed are different, the principal element of damage is the same,—the destroyed earning capacity. The only new

element introduced is loss of parental training and advice, and in some jurisdictions loss of the society of the deceased.

This construction is in entire accord with the apparent intent of the legislature and with the principles not only of justice and equity, but of the law applicable to the liability of tortfeasors in general, for there is no language in these statutes indicative of any intent on the part of the lawmaking power to make so radical a change in the law of damages for torts as to permit a double recovery. The primary basis of the recovery being lost or destroyed earning power, to the extent at least that this element is covered in a judgment rendered in an action by the deceased in his lifetime, this judgment should be a bar to any claim after his death for the loss of any of his earnings.

And the cases hold that such a judgment is a complete bar to any action after the death of the injured person.² The doc-

¹ The foundation of the right of action under this act of Congress is the original wrongful injury to the decedent, and the new action is dependent upon the existence of a right in the decedent immediately before his death to maintain an action for his wrongful injury. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176.

The cause of action under the Illinois statute embodying the principles of Lord Campbell's act is plainly the wrongful act, neglect, or default which caused the death of the deceased, and not the death itself. *Holton v. Daly*, 106 Ill. 131; *Crane v. Chicago & W. I. R. Co.* 233 Ill. 259, 84 N. E. 222; *Mooney v. Chicago*, 239 Ill. 414; *Devine v. Healy*, 241 Ill. 34, 89 N. E. 251.

In *Eden v. Lexington & F. R. Co.* 14 B. Mon. 204, it is said that where the cause of action for injuries to the person dies with the person injured, it follows as a necessary consequence, the cause of action having itself abated, that no separate action can be maintained for such damages as are exclusively consequential.

In *Helman v. Pittsburgh, C. C. & St. L. R. Co.* 58 Ohio St. 400, 41 L.R.A. 860, 50 N. E. 986, in considering the effect of contributory negligence of the deceased on the right of his administrator to recover for his death through the negligence of the defendant, the court says: "The effect of the statute is to pick up this abated right of action of the deceased, and permit it to be prosecuted by the administrator for the benefit of the next of kin. It is not a new right of action that is prosecuted by the administrator, but it is the same right of action which the deceased had until his death. Upon the death of the injured party, the right of action, by the force of the statute, passes by succession to the administrator for the benefit of the next of kin. This succession more clearly appears when L.R.A.1915E.

considered with reference to the defendant. By his wrongful act he caused an injury which caused a pecuniary loss to both the injured party and to his next of kin. The right of action to recover damages in respect to such act rests in the injured party alone so long as he lives, and should he be compensated in his lifetime, no action can be maintained by his administrator or next of kin for damages, even though it should be clear that the next of kin sustained a great pecuniary loss by reason of the wrongful act. In such cases the pecuniary loss sustained by the next of kin is deemed compensated by the increase of the estate of the deceased. Should the defendant fail to make compensation to the injured party during his lifetime, the liability to make compensation for the pecuniary injury resulting from the wrongful act, instead of abating as at common law, is, by force of the statute, kept alive; and the administrator succeeds to the right to bring an action upon such liability to recover damages in the nature of compensation, for the pecuniary loss sustained by the next of kin by reason of such wrongful act. The liability of the defendant to the party injured, and the liability over to the administrator for the benefit of the next of kin, is for the same wrongful act, and is the same liability; and such liability does not exist in favor of the injured party and his next of kin at the same time, but in succession. There is no new liability created by the statute upon death of the injured party, but the right of succession in the administrator to recover upon the liability already existing is created."

But this language is not in entire harmony with the reasoning of the court in *Mahoning Valley R. Co. v. Van Alstine*, 77 Ohio St. 395, 14 L.R.A.(N.S.) 893, 83 N. E. 601.

* *Kling v. Torello*, 87 Conn. 301, 46 L.R.A.

(N.S.) 930, 87 Atl. 987, declaring that under the Connecticut statutes, which are distinguished from Lord Campbell's act, if a person receiving personal injuries survives and recovers damages for the injury, he recovers once for all; if he dies before recovery, his executor or administrator stands in his place.

Perry v. Philadelphia, B. & W. R. Co. 1 Boyce (Del.) 399, 77 Atl. 725, construing a provision of the statute that whenever death shall be occasioned by unlawful violence or negligence, if no suit is brought by the party injured to recover damages during his life, certain designated persons may maintain an action and recover damages for the death and loss occasioned, and holding that a new right of action is created in favor of the person or persons named in the statute, but such right of action is dependent upon the right of the party injured, had he not died in consequence of his injuries, to maintain his action for personal injuries; hence, if the deceased has done anything in his lifetime which would bar an action by him for such personal injuries, the same will operate as a bar to the statutory action.

Hecht v. Ohio & M. R. Co. 132 Ind. 507, 32 N. E. 302, construing the Indiana statutes which are said in principle to embody Lord Campbell's act, and asserting that, although the statute provides that the proceeds of the judgment for the wrongful death shall go to the widow or child or next of kin of the deceased, nevertheless the cause of action is the same, for, if the administrator recovers, he must do so by reason of the same wrongful act on the part of the defendant, and, in order that the action may be maintained, the intestate must have had a right of action against the person whose wrongful act or omission caused the injury, which he could have maintained had he lived. The holding in this case, however, was merely that the recovery for damages for personal injuries in the lifetime of the person injured was a bar to any action subsequently to his death based upon these statutes for the wrongful death, and the case has been distinguished in later Indiana cases, holding that the fact that any right of action by the injured person was barred by the statute of limitations before his death did not preclude an action subsequently to his death to recover for the wrongful death. See note to Kelliher v. New York C. & H. R. R. Co. post, 1178.

Golding v. Knox, 56 Ind. App. 149, 104 N. E. 978, holding that a judgment recovered by the injured person in her lifetime for her injuries is a bar to an action after her death by her personal representative for her wrongful death, and citing note in 27 L.R.A. (N.S.) 176.

Dougherty v. New Orleans R. & Light Co. L.R.A. 1915K.

133 La. 993, 63 So. 493, holding that the right of action conferred upon an injured person to recover for personal injuries survives his death only where it is not exercised and exhausted by him in his lifetime.

Hamel v. Southern R. Co. — Miss. —, 66 So. 809 (rule stated).

Strode v. St. Louis Transit Co. 197 Mo. 616, 95 S. W. 851, Ann. Cas. 1084, asserting that the Missouri statutes never contemplated that there should be two independent and distinct causes of action in case of death resulting from a wrongful act, by virtue of which a recovery might be had by the injured person in his lifetime, and afterward another and further recovery by the widow and children in case of his death.

Schmelzer v. Central Furniture Co. 252 Mo. 12, 158 S. W. 353, holding that a final judgment on appeal, reversing a judgment obtained by the injured person for injuries received in his lifetime, which subsequently caused death, is a bar to an action after his death by his statutory beneficiaries to recover their pecuniary loss by reason of his death.

Littlewood v. New York, 89 N. Y. 24, 42 Am. Rep. 271, holding where an injured person in his lifetime brought an action to recover damages for injuries which subsequently resulted in his death, and received satisfaction for such injuries, that it was not the purpose or intent of the act, which embodied in principle Lord Campbell's act, to superadd to the liability of the wrongdoer who had paid damages for the injury, a further liability in case the party afterward died from the injury, for the damages occasioned by his death to his next of kin.

Reed v. Northeastern R. Co. 37 S. C. 42, 16 S. E. 289, asserting that if the decedent did not himself sue to judgment or release his right of action, then a right of action for his wrongful death, as provided in the statute similar to Lord Campbell's act, remains for the benefit of his family, regardless of the character of the death.

St. Louis Southwestern R. Co. v. Hengst, 36 Tex. Civ. App. 217, 81 S. W. 832, declaring that while technically the action given beneficiaries for the death of a relative is distinct and separate from the action the injured person had, and the measure of recovery is different, practically, however, there is close kinship between them. They grow out of identically the same facts, and the heirs practically inherit the decedent's right, and a settlement or recovery for the injury by him entirely destroys their right of action.

Legg v. Britton, 64 Vt. 652, 24 Atl. 1016, holding that the death act gives a right of action to the representative of the deceased person for the benefit of certain beneficiaries, provided the decedent in person or through his representative has not recovered or settled for the injury which occasioned his death.

Wood v. Gray [1892] A. C. 576, 67 L. T. N. S. 628, declaring that no case can

trine of these cases is that since the cause of action vested in the deceased while living, the exercise by him of his common-law remedy completely extinguished the cause of action. Many of the courts are influenced in reaching this result by the language of the statute providing that the personal representative may maintain an action for damages when the injury is such that the decedent could have maintained an action had he lived.³

But, as pointed out in the note following *Rowe v. Richards*, ante, 1095, this is insecure foundation for the decision on this

point, since it may at least be plausibly urged that this language refers only to the circumstances of the injury, and has no relation to the subsequent acts of the injured person.

A judgment reversing on appeal a judgment in favor of the plaintiff in an action to recover for personal injuries is also a bar to an action based on the death statute, where the reversing judgment was rendered a few days after his death and no attempt has been made to revive the action, for in such case the judgment is not void, but merely voidable, and hence it stands as

be found in the reported decisions in which an action by relatives was sustained after the claim of decedent had been settled or extinguished by adverse judgment.

But compare with *Ohnesorge v. Chicago City R. Co.* 259 Ill. 424, 102 N. E. 819, referring to the Illinois statute embodying in principle Lord Campbell's act, and declaring that this statute is not a survival statute, and does not continue to the personal representative the cause of action that the injured person had at common law, but it creates a new and independent cause of action never before that time recognized as existing. It was not designed by the legislature to give damages for the injury received by the decedent, but to create a cause of action in the name of the administrator for the pecuniary loss which the widow and next of kin may have sustained by reason of the death of the injured person, and it is said that in *Holton v. Daly*, 106 Ill. 131, it was held that the action survives only in cases where the death was from some cause other than the injury. If the death resulted from the injury, the only action that could be maintained was by the personal representative under the statute referred to. The court remarked that the entire separation of the two causes of action and the independence of each may be illustrated by supposing that a person receives an injury for which suit is brought by him, recovery had, and judgment satisfied; afterward the injured person dies from the effects of the injury. In such case recovery by the deceased in his lifetime is not a bar to a suit by the personal representative under this statute for the benefit of the widow and next of kin. But see *Beard v. Skeldon*, 113 Ill. 584, *infra*, note 9. And see Illinois cases in the notes heretofore referred to.

³ In *State use of Melitch v. United R. & Electric Co.* post, 1163, in holding that a release of a claim for personal injuries was a bar to an action subsequently to the releasor's death from the injuries, to recover for his death, the court said that the language of the statute that liability of the wrongdoer exists where the deceased could have recovered if death had not ensued, clearly excludes the idea that where the decedent receives satisfaction for his injuries, the condition requisite to the right L.R.A.1915E.

of surviving relatives may exist notwithstanding.

Charlton v. St. Louis & S. F. R. Co. 200 Mo. 413, 98 S. W. 529, holding that where a statute authorizes an action for the death of a person through the wrongful act of another in cases where the decedent, had he lived, might have maintained such an action, the issue in an action based on this statute is whether or not the decedent, had he survived the injury, could have maintained an action to recover therefor.

Referring to this point in *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271, it is said that the provision making liability depend upon the fact that the act, neglect, or default must be such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages, shows that the legislature had in mind the case of a party who was entitled to maintain an action, but whose right of action by the rule of the common law was extinguished by his death. The only defense of which the wrongdoer was intended to be deprived was that afforded him by the death of the party injured, and it is assumed throughout the act that at the time of such death the defendant was liable.

Brown v. Chicago & N. W. R. Co. 102 Wis. 150, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255, holding that the Wisconsin statute which on this point provides that if the death of a person is caused by the wrongful act of another under such circumstances that, if death had not ensued, the injured person could have recovered damages for his injury, the wrongdoer shall be liable for damages notwithstanding the death, means that the liability of the wrongdoer exists where the deceased could have recovered if death had not ensued, and saying that this provision clearly excludes the idea that where the decedent receives satisfaction for his injuries, the condition requisite to the right of the surviving relatives may exist notwithstanding.

It has been said that the intention of Lord Campbell's act was that the death of the injured person should not free the wrongdoer from an action in cases where the person injured could have maintained an action to recover damages for the injury *Read v. Great Eastern R. Co.* L. R. 3 Q. B.

a bar to any action to recover for the wrongful death.⁴

III. Action pending when injured person died, or subsequently commenced.

a. In general.

When the injured person dies while his action to recover damages for the injury is pending, or when no action had been commenced by him during life, a somewhat different question is presented. In such case, in jurisdictions where there are both a revival statute and a death act, the question rests largely upon the holding of the court as to whether under these statutes two actions are permitted, or whether the remedy is limited to a single action. This question is discussed in another note.⁵

It would seem that where the injured person dies without having extinguished his cause of action, either by judgment, settlement of his claim, or failure to pursue his remedy, there should exist in the personal representative or the statutory beneficiaries the remedy given them by these statutes. Construing the death statute as giving a remedy in substitution for that existing in the deceased at the time of his death, then, for a judgment in favor of the representative or beneficiaries to have the effect of concluding other actions, it should cover the different elements of damage recoverable under either statute,⁶ and it should be conclusive only in so far as these elements were recoverable in the action in which the judgment was rendered.⁷

555, 9 Best & S. 714, 37 L. J. Q. B. N. S. 278, 18 L. T. N. S. 82, 16 Week. Rep. 1040.

And for recent assertions of the English and Canadian courts to the same effect, see *British Electric R. Co. v. Gentile* [1914] A. C. 1034, 83 L. J. P. C. N. S. 353, 111 L. T. N. S. 682, 30 Times L. R. 594; *British Electric R. Co. v. Turner*, 49 Can. S. C. 470, 18 D. L. R. 430.

But see *Sherlock v. Alling*, 44 Ind. 184, holding that the provision that no action can be maintained under the statute unless the act or omission causing the death was such that the deceased might if living maintain an action for the injury caused by the same act or omission is inserted for the purpose of defining the degree of delinquency with which a party must be chargeable in order to subject him to an action. And see to same effect *Rowe v. Richards*.

⁴ *Schmelzer v. Central Furniture Co.* 252 Mo. 12, 158 S. W. 353.

⁵ See note appended to *Nashville, C. & St. L. R. Co. v. Hubble*, ante, 1132.

⁶ *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L.R.A. 283, 15 S. W. 801, holding that the statute of that state permitting the personal representative to bring an action for wrongs done to the person of another after the death of such person, in effect, is a survival statute, and is not affected by the enactment subsequently of statutes embodying the provisions of Lord Campbell's act, since these statutes relate to different causes of action; both actions may proceed *pari passu*, without a recovery in the one barring a recovery in the other; one is for the loss sustained by the estate and for the suffering of the person injured in the lifetime of the decedent, a recovery in which goes to the benefit of the decedent's creditors, if there are any; the other takes no account of the wrongs done to the decedent, but is for the pecuniary loss to the next of kin occasioned by the death alone. The death is the end of the period of recovery in the one case, and the beginning in the other. In one case the administrator sues as legal representative of the

estate for what belongs to the estate, and in the other he acts as trustee for those upon whom the act confers the right of recovery for the pecuniary loss inflicted upon them.

Under the employers' liability act as amended there can be but one recovery. The action is prosecuted after the death of the injured person for the benefit of the widow and next of kin, and may include compensation for the pain and suffering endured by the injured person, as well as for pecuniary loss of earnings and contributions; but these must be recovered in one action. *St. Louis & S. F. R. Co. v. Conarty*, 106 Ark. 421, 155 S. W. 93; *Kansas City Southern R. Co. v. Leslie*, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915B, 834.

St. Louis, I. M. & S. R. Co. v. Sharp, — Ark. —, 171 S. W. 95, holding that under the Federal employers' liability act there may be a recovery both for the benefit of the estate and the next of kin, although the entire recovery inures to the benefit of the widow and next of kin.

⁷ *Dougherty v. New Orleans R. & Light Co.* 133 La. 993, 63 So. 493, holding that the recovery of a judgment by the injured person for loss of earnings to the date of the suit, and also during the period of his expectancy of life, and his expenses for drugs and medicines, and also for the pain and inconvenience suffered and to be suffered by him, although paid to his personal representative after his death, was not a bar to an action following his death from the injury, by his widow and minor children under a statute providing that every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the widow and children, who may also recover the damages sustained by them by such death. It is, however, held that where the judgment included damages for loss of earnings, past and prospective, and pain and suffering of the deceased, these elements cannot be taken into consideration in a subsequent suit by the beneficiaries

But it has been held that where the injured person in his lifetime brought a suit to recover damages for a personal injury, and pending the suit he died from the injury received, and his personal representative revived the suit or brought an action for the injury, and prosecuted it to final judgment, which was satisfied, this judgment was a bar to an action subsequently brought by him under the death act similar in principle to Lord Campbell's act, to recover for the widow and next of kin for the pecuniary injury resulting to them from the death of the intestate.⁸ And this is true although the damages recoverable in the first action are such as the injured person might have recovered if he had survived, including expenses of doctoring and nursing, loss of services, and

compensation for pain and suffering, and although these damages become a part of the estate of the deceased, and are disposed of as such, while under the death act the recovery does not include any loss or injury to deceased while in life, and the damages are not to be assessed with reference to the loss sustained by his estate, but solely with reference to the pecuniary injury resulting to the beneficiaries from his death.⁹

Where Lord Campbell's act is held to provide for the exclusive remedy when death results from the injury, it, of course, follows that a judgment rendered in an action based upon this act is a bar to any other action.¹⁰

However, where it is held that the damages recoverable under one statute are for entirely different elements than those recov-

under the statute mentioned, and where there is no evidence of the loss of the decedent's society, sympathy, counsel, affection, or moral support, and where the deceased in his lifetime recovered damages based upon an entire loss of earning power, and it appears from the evidence that, as a result of his injuries, the decedent was a misery to himself and a burden to others, it cannot be said that the beneficiaries under the statute have sustained any injury for which they are entitled to recover damages.

⁸In *Conner v. Paul*, 12 Bush, 144, referring to the Kentucky statute, the court said that it had only changed the remedy and given to the parties a cause of action unknown to the common law. "The party entitled to bring the action, either at common law or under the statute, must make his election; and while the right of recovery under our statute for wilful negligence may increase the measure of recovery, such an action is a bar to a cause of action that survived at common law upon the same facts. The acts constituting the wrong being inseparable, a recovery by the administrator for the mental and bodily suffering of the intestate is a bar to any proceeding under the statute either by the personal representative or the next of kin."

The cause of action for damages resulting in death cannot be joined with the cause of action for physical pain and mental suffering, and a recovery in one action is a bar to the other action. *Lewis v. Taylor Coal Co.* 112 Ky. 845, 57 L.R.A. 447, 66 S. W. 1044.

Mobile, J. & K. C. R. Co. v. Hicks, 91 Miss. 273, 124 Am. St. Rep. 679, 46 So. 360, holding that where the widow and children recover a judgment for the wrongful death of the husband and father, the widow is not entitled thereafter to maintain another action as administratrix of her husband's estate, to recover the damages sustained by the husband himself from the injury which resulted in his death, although different statutes permit actions by the personal representative, also the widow and

children; but it is also by statute expressly provided that there shall be but one suit for the same death, which shall inure to the benefit of all the parties concerned.

Brammer v. Norfolk & W. R. Co. 107 Va. 206, 57 S. E. 593, holding that if an action by an injured person to recover damages for injuries, upon his death, is revived by his administrator, and upon trial judgment is rendered in favor of the defendant, such judgment is a bar to any subsequent action in behalf of the beneficiaries. And see to same effect *Beaver v. Putnam*, 110 Va. 713, 67 S. E. 353.

⁹*Legg v. Britton*, 64 Vt. 652, 24 Atl. 1016; and see *Kling v. Torello*, 87 Conn. 301, 46 L.R.A. (N.S.) 930, 87 Atl. 987, *supra*.

¹⁰See note appended to *Lhota v. Oppenheimer*, ante, 1104, and especially subdivisions V. b and c, thereof.

Alder Co. v. Fleming, 86 C. C. A. 419, 159 Fed. 593, holding that the statute providing that the heirs or personal representatives of a deceased adult person may maintain an action for damages for the death of such person when caused by the wrongful act or negligence of another, in which action such damages may be given as under all the circumstances may be just, creates a liability where none existed at common law. It does not create two measures of liability, one to the deceased and one to his heirs, but, without reference to whether such action is brought by the personal representative or by the heirs of the deceased, there can be put one recovery, and this, by the express terms of the statute, may embrace such damages as under all the circumstances of the case may be just.

Beard v. Skeldon, 113 Ill. 584, holding that the statute of Illinois providing that for an injury to person or property occasioned by any wilful violation of an act called a minors' act, a right of action shall accrue to the person injured for any direct damages sustained thereby, and in case of any loss of life a right of action shall accrue to the widow of the person killed, lineal heirs, or adopted children, for like recovery of damages for the injuries

erable under the other, a judgment in an action based upon one statute is not a bar to an action on the other statute.¹⁰

For example, where the personal representative of the deceased plaintiff in an action to recover damages for personal injuries, who died during the pendency of the action as a result of the injuries, revives the action under a general survival statute which provides that, in addition to the causes of action which survive at common law, causes of action for injuries to the person shall also survive, and prosecutes it to judgment, but the damages recovered are limited to the pain and suffering of the decedent from the injuries complained of, he is not thereby barred from prosecuting in his capacity as administrator an action to

recover for the benefit of the next of kin, damages for the wrongful death given by a provision embodying the principles of Lord Campbell's act.¹¹

And some decisions indicate a tendency on the part of the courts to permit a recovery under the survival act for loss of earning power as an element of damages, and the recovery under the death statute for loss of support suffered by statutory beneficiaries, thereby permitting, in part at least, a double recovery of damages based upon the prospective future earnings of the deceased, had he lived out his life expectancy.¹²

The distinction between the effect of a final judgment rendered in the lifetime of the plaintiff in an action to recover dam-

sustained by reason of such death, authorizes but one action and but one recovery for the entire loss. And when one party entitled to sue brings suit, all damages which may be recovered on account of the death must be included in the judgment rendered in such suit. Compare with *Ohnesorge v. Chicago City R. Co.* 259 Ill. 424, 102 N. E. 819, *supra*, note 2.

Blount v. Gulf, C. & S. F. R. Co. — Tex. Civ. App. —, 82 S. W. 305, holding that under the Texas statute which follows Lord Campbell's act, construed in connection with a general survival statute, there is but one cause of action, and there can be but one compensation.

¹⁰ *Grainger v. Greenville, S. & A. R. Co.* — S. C. —, 85 S. E. 968, construing a statute similar to Lord Campbell's act in connection with a general survival statute, and holding that by these statutes two causes of action to enforce the liability for the injury are given, and a judgment in one of them is not a bar to the other. The actual holding in this case, however, was that an action in behalf of the statutory beneficiaries for their pecuniary loss was not a bar to an action by the personal representative to recover for the pain and anguish suffered by the deceased from the injury. And see cases cited in notes 6 and 7.

See cases cited *infra*, note 13.

¹¹ *Mahoning Valley R. Co. v. Van Alstine*, 77 Ohio St. 395, 14 L.R.A. (N.S.) 893, 83 N. E. 601. While not involving the question of the effect of a judgment under one statute to bar an action under the other, in harmony with the doctrine of the preceding case, many cases may be found sustaining the right to maintain actions under both statutes, but limiting the damages as they are limited in the preceding case.

¹² *Rowe v. Richards*, *ante*, 1095, asserting that the cause of action growing out of injuries to the person, and the cause of action based upon death by negligence, do not conflict with each other or merge upon the death of the injured party, and the prosecution or satisfaction of one of such actions is not a bar to the prosecution and recovery on the other.
L.R.A.1915E.

Hamel v. Southern R. Co. — Miss. —, 66 So. 809. And see cases in note on several actions for wrongful death, appended to *Rowe v. Richards*, *ante*, 1095, and in the note on effect of release by injured person of claim for damages for personal injuries on action for his death from the injuries, appended to State use of *Melitch v. United R. & Electric Co.* *post*, 1163.

And see *St. Louis & S. F. R. Co. v. Goode*, holding that an action brought by the decedent in his lifetime to recover damages for personal injuries, revived under a general survival statute following his death, by his personal representative, was not barred by the fact that this personal representative brought an action under a statute similar to Lord Campbell's act to recover damages for the wrongful death for the benefit of the widow and next of kin, and that a recovery was had therein which was satisfied. In this case the damages recovered in the revived action included \$7,000 "general damages." It is to be inferred from the decision, however, that these damages did not include destroyed earning capacity computed for a period beyond the death of the deceased.

While the point is not considered, a recovery has been permitted for the wrongful death of a boy about thirteen years old, in behalf of his father, under a statute giving a right of action for the wrongful death of a minor child, and authorizing a recovery by the father of damages for the loss of services of his minor child, and also such sum for the mental pain and suffering of the parent or parents as the jury may assess, and likewise an action has been permitted by the father as the personal representative of the deceased child to recover damages under a statute giving a right of action to recover compensation for those who have sustained damage or loss by reason of the death of a person caused by the default of another; and in the first action, damages to the amount of \$12,500 were awarded and sustained (*Florida East Coast R. Co. v. Hayes*, 66 Fla. 589, 64 So. 274), and in the second action damages in the sum of \$15,000 were reduced to \$2,000

ages for personal injuries as a complete extinguishment of the cause of action, and the judgment in such a suit after its revival by the personal representative, is made in a late Mississippi case.^{12a} It is here conceded that, had the injured person recovered judgment in his lifetime for the injury, or had he settled therefor, all right of action for his death from the injury would have been extinguished; but it is held that a judgment in the revived suit covering the damages which the deceased might have recovered had he lived is not a bar to a suit to recover the damages to the beneficiaries under the death act. While the court assumes that the damages recovered in the revived action did not include any of the elements recoverable in the action based on the death act, this fact does not clearly appear. Indeed, the natural inference from the language used would indicate that in the survival action one element of damages recovered for was destroyed earning power, and the amount of the judgment supports this view, and the court clearly says that an element of damages to the beneficiaries under the death act is their loss of a breadwinner, i. e., loss of support, which, of course, is based upon the decedent's earning capacity. If this is the correct interpretation of the decision, it is clear that damages were twice assessed for decedent's destroyed earning power.

The question also arises as to the effect of a judgment in favor of the defendant. In such case, of course, the matter is not complicated by any question of the extent of damages awarded, but it directly raises the point whether a judgment in defendant's favor on the question of his liability for the injury and death complained of is conclusive in another case, although seeking to recover in behalf of other persons. In

a jurisdiction where only one action lies to recover damages for injuries resulting in death, it has been held that where on the merits a judgment is rendered in favor of the defendant to an action by the personal representative based upon one of the statutes, it constitutes a complete bar to an action by him upon the other statute.¹³

But where more than one action lies to recover damages for different injuries based on the same wrongful act, it has been held that a judgment for the defendant in an action by the personal representative to recover for personal injuries to his decedent is not a bar to an action by him to recover for the wrongful death of the decedent. A judgment, however, in one action for personal injuries, is a bar to any subsequent action based upon a different statute, also to recover for personal injuries suffered by the decedent.¹⁴

And a judgment entered by compromise in an action by the personal representative in one state is a bar to an action by the personal representative in another state to recover for the same death, when the amount agreed upon has been paid to the statutory beneficiary.¹⁵

But a judgment for compensatory damages is not a bar to an action to recover punitive damages for the same death. Thus, an action brought by an injured person during her life to recover damages for personal injuries, which after her death is prosecuted to judgment in her favor by the administrator of the estate of the decedent, covering damages for decedent's conscious suffering flowing from the injury which caused her death, is not a bar to a subsequent action under Rev. Laws, chap. 171, as amended by Stat. 1907, chap. 375, for damages occasioned by the negligence of the defendant, since damages in the former ac-

and sustained. (Florida East Coast R. Co. v. Hayes, — Fla. —, L.R.A. —, —, 64 So. 504.)

^{12a} *Hamil v. Southern R. Co.* supra.

¹³ *Lubrano v. Atlantic Mills*, 19 R. I. 129, 34 L.R.A. 797, 32 Atl. 205, holding that a general survival statute, together with a death act embodying in principle Lord Campbell's act, does not create separate and distinct causes of action, and a judgment in favor of defendant in an action under Lord Campbell's act, prosecuted by the administrator of the decedent's estate, is a bar to an action by such administrator under the general survival act, to recover damages for his decedent's pain and suffering from the injury which caused his death.

If judgment is rendered in favor of defendant, such judgment is a bar to any subsequent action in behalf of the beneficiaries under a statute giving the beneficiaries a right to recover damages for the wrongful L.R.A.1915E.

death of a person upon whom they were dependent. *Brammer v. Norfolk & W. R. Co.* 107 Va. 206, 57 S. E. 593.

¹⁴ *Clare v. New York & N. E. R. Co.* 172 Mass. 211, 51 N. E. 1083. And see *infra*, IV.

And see *Frescoln v. Puget Sound Traction Light & Power Co.* 225 Fed. 441, holding that, although there exist a cause of action in favor of the wife for the death of her husband and also an action by her as personal representative, yet the right of recovery in either case is predicated upon the same negligence of the defendant, and each case is predicated upon and supported by the same facts; hence an adjudication in favor of the defendant with relation to the negligent acts relied upon destroys the foundation of the right of recovery in any other action.

¹⁵ *Robinson v. Chicago, R. I. & P. R. Co.* 96 Kan. 137, 150 Pac. 636.

tion became the assets of the estate of intestate available for all uses, expenses, and distributions, while the damages which may be recovered in the later suit will not be assets of the deceased in the hands of the administrator, but under the statute, there being no widow, will go to the next of kin of the deceased. Moreover, this cause of action is altogether different in kind from that of the earlier action. It is a cause of action unknown to the common law, and rests wholly upon statute, while the earlier action was recognized by the common law; and the later action is penal in its nature, damages being not compensatory, but assessed solely with reference to the culpability of the defendant. They are in substance a fine imposed by the court upon one who by his negligence causes the death of a human being, and the fine, instead of being paid into the treasury of the commonwealth, is given as a gratuity to the next of kin.¹⁶

Where the personal representative has the option either of suing under the revival statute or the death act, but he cannot sue under both, it has been held that a

judgment in an action based upon one of the statutes is a bar to any action based upon the other statute, although the measure of recovery is different.¹⁷

So, where the statute clearly indicates that but one action can be maintained, as by providing for the revival of pending actions for personal injuries, and also authorizing a recovery for wrongful death, where no action was brought in the lifetime of the injured person to recover for the injuries resulting in death, the remedy indicated by the statute must be pursued, and judgment on the merits is a bar to any other action, although the measure of damages recoverable in the actions is different.¹⁸

It has been held that a statute authorizing the heirs, representatives, or relatives of deceased persons to sue for and recover damages when the death of the ancestor, relative, testator, or intestate has been caused or occasioned by the negligent, culpable, or wrongful act of another, was intended to give to the parties therein named an action similar in character to that which might have been maintained by

¹⁶ *McCarthy v. William H. Wood Lumber Co.* 219 Mass. 566, 107 N. E. 439.

And see *Bowes v. Boston*, 155 Mass. 344, 15 L.R.A. 365, 29 N. E. 633, holding that where by one statute the right of action in the decedent to recover damages for personal injuries for the benefit of his estate survives, the damages to be estimated upon the theory of compensation, and by another statute, enacted at a different time, the recovery of a limited sum for the benefit of the widow and children or next of kin of the decedent is authorized, to be assessed according to the degree of culpability of the defendant, both actions may proceed at the same time, and a recovery in one is not a bar to the other.

¹⁷ *Louisville R. Co. v. Raymond* (Louisville R. Co. v. Taylor) 135 Ky. 738, 27 L.R.A. (N.S.) 176, 123 S. W. 281.

Hansford v. Payne, 11 Bush, 385, holding that the recovery of punitive damages for the destruction of a life will bar another action for the injury or any of its consequences, and if the party elects to sue and enforce the right of action that survives to him, he will not be allowed afterward to avail himself of the benefits of a punitive statute and recover also under its provisions.

Lewis v. Taylor Coal Co. 112 Ky. 845, 57 L.R.A. 447, 86 S. W. 1044, holding that the cause of action for damages resulting in death cannot be joined with the cause of action for physical pain and mental suffering, and a recovery for one bars an action for the other.

Louisville & N. R. Co. v. McElwain, 98 Ky. 700, 34 L.R.A. 788, 56 Am. St. Rep. 385, 34 S. W. 236, holding that where the husband of a person killed through the L.R.A. 1915E.

negligence of a railroad company, as her personal representative, sues and recovers damages for her wrongful death by virtue of § 1, chap. 57 of Ky. Gen. Stat., this judgment is a bar to a subsequent action by him to recover damages for the loss of her society.

Henderson v. Kentucky C. R. Co. 86 Ky. 389, 5 S. W. 875, holding that under the statutory provision that if the life of any person is lost or destroyed by the neglect of any person, corporation, etc., the widow, heir, or personal representative of the deceased shall have a right to sue such person, corporation, etc., and recover punitive damages for the wrongful death, either the widow, heir, or personal representative may sue, but each of them cannot maintain a separate action, for but one recovery can be had. To the same effect is *Louisville & N. R. Co. v. Sanders*, 86 Ky. 259, 5 S. W. 563.

¹⁸ *McCafferty v. Pennsylvania R. Co.* 193 Pa. 339, 74 Am. St. 690, 44 Atl. 435, holding that where an action was commenced by the injured person in his lifetime to recover damages for his injury, which was revived by his personal representative after his death, a judgment therein was a bar to an action for the benefit of certain relatives of the person wrongfully killed, and this is true although the measure of damages in the action that is revived is the loss sustained by the decedent, that is, the same damages may be recovered as the decedent might have recovered had death not intervened. Included therein are damages for pain and suffering and diminution of earning power during the period of life which the decedent would probably have lived had it not been for the injury.

the party injured if death had not ensued, when death ensues by the means or under the circumstances indicated in it. But it was not intended to authorize a succession of independent actions by the several parties indicated. It may be brought by one or all; in any event it is brought for the sole and exclusive benefit of them all.¹⁹

b. As between personal representative and beneficiaries.

A judgment in a suit prosecuted by the personal representative of a person who, at the time of his death, had a right of action to recover for personal injuries, is not a bar to any right of action by persons having a claim against the wrongdoer by reason of such injury or death independently

of and distinct from the claims represented by or vested in the representative.²⁰

But a husband by bringing his action to recover damages for loss of services of his wife, killed through the negligent act of the defendants, and recovering judgment therein, conclusively establishes the fact that the wife was not emancipated, and that he was entitled to her services, and he cannot thereafter, as administrator of her estate, maintain an action to recover, for the benefit of her estate, for loss of prospective earnings during her expectancy of life.²¹

And the general rule referred to does not apply where the personal representative represents all claims of the statutory beneficiaries, even though these beneficiaries might have maintained an action in their own behalf.²²

¹⁹ Houston & T. C. R. Co. v. Moore, 49 Tex. 31, 30 Am. Rep. 98, 10 Am. Neg. Cas. 282.

²⁰ Spradlin v. Georgia R. & Electric Co. 139 Ga. 575, 77 S. E. 799, holding that the fact that the administrator made himself a party to a suit brought by his decedent in his lifetime to recover for personal injuries and prosecuted this suit to judgment which was adverse to him, does not render the adverse judgment a bar to a suit by the widow of the deceased plaintiff to recover damages suffered by her from his death, based upon the Code provision giving a right of action for homicide to the widow, or to the children if there is no widow.

Indianapolis & M. Rapid Transit Co. v. Reeder, 42 Ind. App. 520, 85 N. E. 1042, holding that an action by the husband to recover for the loss of services and society of his wife by reason of injuries which finally resulted in her death is not barred by an action commenced by her in her lifetime to recover damages for the injury, which was revived by her administrator after her death and prosecuted to judgment.

Lawrence v. Birney, 40 Iowa, 377, holding that where an infant is wrongfully killed, for such of his earnings as accrued prior to his attaining majority, the father, or where abandonment is shown, the mother, may maintain an action, and the bringing of an action by the administrator does not in any way affect such action.

Putnam v. Southern P. R. Co. 21 Or. 230, 27 Pac. 1033, holding that where the deceased had reached his majority and had married and was a man of family, but nevertheless was aiding in the support of his parents, his parents may sue for loss of such support, by virtue of the statutory provision that a father, or in case of his death or the desertion of his family, the mother, may maintain an action for the injury or death of a child, and such action is not barred by a judgment in favor of the administrator of the decedent in an action based upon the statute providing that when the death of a person is caused by the wrongful act or omission of another, the L.R.A.1915E.

personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action had he lived, and the amount recovered, if any, shall be administered as other personal property of the deceased. In such case the damages recoverable by the parents are measured by the reasonable expectation of pecuniary advantage or prospect of support from the continuance of the relation if the decedent's life had been spared. The defendant is required to respond only in such amount of damages as the parent has sustained by the deprivation of the child's services or support, which would never have constituted any part of the child's accumulations or formed any part of his estate, consequently could not be included in any recovery by his administrator after his death. To the same effect under very similar statutory provisions, see Mayhew v. Burns, 103 Ind. 328, 2 N. E. 793.

Compare with Givens v. Kentucky C. R. Co. 89 Ky. 231, 12 S. W. 257, holding that where one section of a statute permits a personal representative to sue, and the other gives to the widow and children the right to recover punitive damages and to appropriate the amount of recovery to their own use, if the personal representative sues he will be confined in his recovery to compensatory damages, and where the widow, child, or personal representative sues for punitive damages, a recovery in the name of either will bar a right of action by the personal representative for compensatory damages for the benefit of the estate, since the right to recover under the different sections depends upon a different degree of negligence by the defendant.

²¹ Walker v. Lansing & Suburban Traction Co. 156 Mich. 514, 121 N. W. 271.

²² Hartigan v. Southern P. Co. 86 Cal. 142, 24 Pac. 851, holding that under the act of California, § 377, an action to recover damages for the wrongful death may be brought by either the heirs of the decedent or by his personal representative. Separate

c. As between parents.

Applying the doctrine applicable to personal representatives and statutory beneficiaries, it has been held that where by statute a right of action is given a mother to recover damages for the wrongful death of a child, a suit by her to recover such damages is not a bar to a suit by the father of the child for the damage occasioned to him by the loss of the child's services.²³

d. As between parent and children.

As between the surviving spouse and children, it has been held that a final judgment in an action by the surviving parent to recover for the death of the other, in the absence of fraud, will exhaust the remedy given by statute, and the judgment is conclusive upon the children. It is apparent that in the cases sustaining this rule the plaintiff in the action in which the judgment was rendered was regarded as representing all the statutory claimants.²⁴ A different rule has been applied where the judgment plaintiff has been regarded as representing only his own claim, and in such case it has been held that a judgment in an action by a part of the statutory beneficiaries is not binding upon those not parties thereto.²⁵

actions cannot be brought and maintained by both, and where the personal representative brings such action, and a compromise judgment is rendered therein under the authority of the probate court, it is a bar to an action by the widow of the decedent, although she objected to the action of the administrator.

²³ *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406, 2 Am. Neg. Cas. 466.

²⁴ *Daubert v. Western Meat Co.* 139 Cal. 480, 96 Am. St. Rep. 154, 69 Pac. 297, 73 Pac. 244, holding that where, for a wrongful death, the statute gives an action which can be maintained either by the heirs or personal representative, a recovery under this right of action by the widow exhausts the statute, and is a bar to a subsequent action by a child not born at the time of the prior suit, whose existence at that time was unknown to the defendant.

²⁵ *Taylor v. San Antonio Gas & Electric Co.* — Tex. Civ. App. —, 93 S. W. 674, holding that where the second wife made the children by the first wife parties to the suit to recover damages for the death of her husband, a judgment rendered therein in favor of the second wife is binding upon the children, although they had no notice of the action and no damages were apportioned to them, there being no evidence of fraud on the part of the defendant, or of knowledge of the plaintiff's fraud.

Galveston, H. & S. A. R. Co. v. Kutac, 72 Tex. 643, 11 S. W. 127, holding that an action by surviving children to recover their

e. Effect of fraud or collusion.

Where a judgment in a suit by one beneficiary, under the statute giving certain beneficiaries a right of action for pecuniary loss from death of a relative resulting from the wrongful act of another, in amount, was grossly inadequate as compensation for all the beneficiaries, and it was rendered upon default of the defendant, and apparently in collusion with him, it is not a bar to a subsequent suit by other beneficiaries.²⁶

*IV. Judgment in action by person in one capacity as bar to action by same person in different capacity.**a. Action by parent.*

Where a parent, as an individual or as representative of the estate of a child killed through the wrongful act of another, sues to recover the damages occasioned thereby, the judgment rendered in this action is a bar to another action by the same plaintiff although suing in a different capacity, in so far as the subsequent suit is based upon elements of damage recoverable in the first action.²⁷ But a recovery by a parent either as an individual or as the personal representative of the estate of

pecuniary loss from the death of their mother is not barred by a judgment against the father in a suit by him on the same cause of action, to which they were not parties; but in the action by them the recovery cannot include damages for the benefit of the father.

Nelson v. Galveston, H. & S. A. R. Co. 78 Tex. 621, 11 L.R.A. 391, 22 Am. St. Rep. 81, 14 S. W. 1021, holding that the right of a posthumous child to recover its pecuniary loss from the death of a parent is not barred by the recovery by the other statutory beneficiaries for their pecuniary loss by the same death.

Eichorn v. New Orleans & C. R. Light & P. Co. 114 La. 712, 38 So. 526, 3 Ann. Cas. 98, holding that where the widow sued and recovered judgment for the wrongful death of her husband, this exhausted the cause of action for the damages which the deceased might have recovered had he survived his injuries and left to the minor children only the right of action to recover the pecuniary loss sustained by them by reason of their father's death.

²⁶ *Sutberry v. Meridian Fertilizer Factory*, — Miss. —, 64 So. 723.

²⁷ *McGovern v. New York C. & H. R. R. Co.* 67 N. Y. 417, holding that in an action by the father as administrator to recover for the wrongful death of his son, based upon the statute authorizing a recovery of the pecuniary loss to the next of kin, the damages for the loss of services of the deceased may be included in the recovery as part of

the child, of certain elements of damages, is not a bar to an action by the same plaintiff in a different capacity to recover elements of damages not recoverable in the former action.³⁰

b. Action by personal representative.

The action given by Lord Campbell's act to the personal representative, to recover compensation as trustee for children or other relatives of the decedent, does not affect any existing right belonging to the personal estate in general, and does not bar an action by the personal representative for damages for breach of contract with the decedent in his lifetime safely to carry him, and a recovery may be had for loss to decedent from inability to attend to his business and for such medical expenses as were the direct and natural result of the injury complained of.³¹

the pecuniary loss resulting to the next of kin from his death, and the recovery will bar another action for the same damages by the father individually.

Graham v. Hannibal & St. J. R. Co. 28 Fed. 744, holding that under the two statutes of Missouri, one giving a penalty for causing death through negligence, and the other allowing a certain amount of damages, a recovery by parents of damages for the death of a child, including loss of earnings of the deceased, is a bar to a subsequent action by the parents not under the statute, but as a common-law action, to recover for the loss of the earnings of the child during his minority.

³⁰ A recovery by the father of a child injured through the negligence of another, as the administrator of the estate of the child for the child's death, based upon a statute giving such a right of action, is not a bar to an action by the father based upon his common-law right to recover damages for loss of services of the child. Hedrick v. Ilwaco R. & Nav. Co. 4 Wash. 400, 30 Pac. 714.

Bradley v. Andrews, 51 Vt. 525, holding that a recovery by a father for loss of services, etc., of a minor son, is not a bar to an action by the father as administrator of the estate of the son, to recover damages for the pain and suffering of the son, etc., as a result of the injuries.

Barley v. Chicago & A. R. Co. 4 Biss. 430, Fed. Cas. No. 997, holding that the recovery of a judgment in an action for the loss of services of a child from the time of the injury complained of until death, for medical attendance, funeral expenses, loss of time by the parents by reason of the accident from the time of its occurrence to the commencement of the suit, is not a bar to an action by the father as next of kin to recover under the statute his pecuniary loss for the death of the child.

³¹ Bradshaw v. Lancashire & Y. R. Co. L. R. 10 C. P. 189, 44 L. J. C. P. N. S. 148, 31 L. T. N. S. 847, 23 Week. Rep. 310. L.R.A.1915E.

And a common-law action against a common carrier based upon a contract of carriage, for negligently injuring the decedent while a passenger, may be maintained as well as an action based on Lord Campbell's act, and hence a recovery in one action is not a bar to the other, although both are prosecuted by the personal representative.³⁰

Under a statute which permits the recovery of damages for a wrongful death, the proceeds to go for the benefit of the next of kin of the decedent, free from any claim of creditors, the recovery of damages for wrongful death in an action by the administrator is not a bar to a subsequent action to recover damages for the destruction of property of the decedent, destroyed in the accident which resulted in his death.³¹

A. G. S.

³⁰ Leggett v. Great Northern R. Co. L. R. 1 Q. B. Div. 590, 45 L. J. Q. B. N. S. 557, 35 L. T. N. S. 334, 24 Week. Rep. 784.

³¹ Peake v. Baltimore & O. R. Co. 26 Fed. 495.

MARYLAND COURT OF APPEALS.

STATE OF MARYLAND TO USE OF
NATA MELITCH, Appt.,
v.

UNITED RAILWAYS & ELECTRIC COMPANY OF BALTIMORE.

(121 Md. 457, 88 Atl. 229.)

Release — claim for personal injury — effect on claim for death.

A release by a person injured by another's negligence, of all and every claim for damages which he may or could possibly have for or on account of his injuries, precludes an action for his death from such injuries, under a statute rendering one who would have been liable for damages for personal injuries if death had not ensued liable to an action for damages notwithstanding the death of the person injured.

(June 26, 1913.)

Note. — Does settlement by injured person of his claim against tortfeasor preclude an action for his death resulting from the injury.

The present note supplements the note to Louisville R. Co. v. Taylor, 27 L.R.A. (N.S.) 176.

As to effect of a release executed by the injured person prior to his injury, on the right of action based upon his death, see note to Mehegan v. Boyne City, G. & A. R. Co. post, 1170.

The reasoning of the courts in holding that a release by the injured person is a bar to an action in behalf of his statutory

A PPEAL by plaintiff from a judgment of the Baltimore City Court in defendant's favor in an action brought to recover damages for the death of plaintiff's intestate alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. William J. Ogden and Sylvan Hayes Lauchheimer, for appellant:

The recovery and payment to the deceased in his lifetime was no bar to an action by the administrator for the wrongful killing of his intestate.

Schlichting v. Wintgen, 25 Hun, 626; Stewart v. United Electric Light & P. Co. 104 Md. 332, 8 L.R.A.(N.S.) 384, 118 Am. St. Rep. 410, 65 Atl. 49; Tucker v. State,

beneficiaries is discussed at length in Rowe v. Richards, ante, 1095, and the note to that case and also to St. Louis & S. F. R. Co. v. Goode, ante, 1141. As shown in these notes, one of the principal grounds for holding that a release or other act by the injured person in his lifetime, extinguishing his cause of action, is a bar to any claim by his beneficiaries, is that the statutory provision primarily relating to the character of the injury also constitutes a condition to the existence of any right of action in the beneficiaries. Hence no right of action accrues to them under these statutes where no right of action to recover for the injury existed in the injured person at the time of his death. While the result reached by the cases thus construing the statute is just and equitable, yet, as pointed out in the notes referred to, this construction of the statute is unnecessary in order to reach the result attained, and is properly subject to criticism. In a subsequent portion of this note, in referring to Rowe v. Richards, what is believed to be the sounder doctrine is suggested. The application of the doctrine suggested secures the same results as that referred to, and has the merit of being more consistent and of affording a more consistent rule applicable to the many questions arising from the enforcement of statutes embodying Lord Campbell's act, construed in connection with general survival statutes.

Although differing as to the grounds for the holding, as pointed out in the note in 27 L.R.A.(N.S.) 176, by the great weight of authority a release of all claim for personal injuries, executed by an injured person in his lifetime, if based upon a sufficient consideration and free from fraud of all kinds, extinguishes the cause of action which the injured person had against the wrongdoer; and upon the death of the former as the result of the injuries, no right of action arises for or in behalf of statutory beneficiaries by virtue of statutes embodying in principle Lord Campbell's act. The following cases also sustain this rule:

—Perry v. Philadelphia, B. & W. R. Co. 1 Boyce (Del.) 399, 77 Atl. 725, holding L.R.A.1915E.

89 Md. 479, 46 L.R.A. 181, 43 Atl. 778, 44 Atl. 1004.

Messrs. J. Pembroke Thom and Wallis Giffen, for appellee:

A release given by the deceased in his lifetime is a bar to an action under Lord Campbell's act.

Read v. Great Eastern R. Co. 9 Best & S. 714, 37 L. J. Q. B. N. S. 278, L. R. 3 Q. B. 555, 18 L. T. N. S. 82, 16 Week. Rep. 1040; Haigh v. Royal Mail Steam Packet Co. 52 L. J. Q. B. N. S. 395; Griffiths v. Dudley, L. R. 9 Q. B. Div. 357, 51 L. J. Q. B. N. S. 543, 47 L. T. N. S. 10, 30 Week. Rep. 797; Tiffany, Death by Wrongful Act, 2d ed. § 124; Strode v. St. Louis Transit Co. 197 Mo. 617, 95 S. W. 851, 7 Ann. Cas. 1084; Thompson v. Ft.

that a release by an injured person in his lifetime is a bar to an action following his death, to recover either for the injury or for the death, and asserting the rule that the statutes of Delaware, which embody in principle Lord Campbell's act, create in favor of the person or persons named in the statute a new right of action, which, however, is dependent upon the right of the party injured to maintain an action to recover for such injuries at the time of his death;

—Mooney v. Chicago, 239 Ill. 414, 88 N. E. 194, holding, where the wrongful act, neglect, or default does not result in instant death, the administrator cannot maintain an action unless the deceased had the right to sue to recover for the injury at the time of his death. Hence if he has released the defendant in his lifetime, the statute does not authorize the administrator to sue for his death, although it is the result of the injury;

—Louisville R. Co. v. Raymond (Louisville R. Co. v. Taylor) 135 Ky. 738, 27 L.R.A.(N.S.) 176, 123 S. W. 281, holding that a release by the injured person in his lifetime will bar an action to recover for his death from the injuries, as there can be no substantial distinction between acts done by the decedent at the time of the injury and after the injury, as affecting the right of his personal representative to recover, where such acts on his part would bar a recovery;

—Lincoln v. Detroit & M. R. Co. 179 Mich. 189, 51 L.R.A.(N.S.) 710, 146 N. W. 406, construing a statutory provision that whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, to give an action only when the deceased himself, if the injury had not resulted in his death, might have maintained one, and hence where the deceased received satisfaction for his injuries, the condition requisite to the right of surviving relatives does not exist;

Worth & R. G. R. Co. 97 Tex. 590, 80 S. W. 990, 1 Ann. Cas. 231; *Bruns v. Welte*, 126 Ill. App. 541; *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271; *Solar Ref. Co. v. Elliott*, 15 Ohio C. C. 581, 8 Ohio C. D. 225; *Price v. Richmond & D. R. Co.* 33 S. C. 556, 26 Am. St. Rep. 700, 12 S. E. 413; *Hill v. Pennsylvania R. Co.* 178 Pa. 223, 35 L.R.A. 196, 56 Am. St. Rep. 754, 35 Atl. 997; *Brown v. Chattanooga Electric R. Co.* 101 Tenn. 252, 70 Am. St. Rep. 666, 47 S. W. 415; *Legg v. Britton*, 64 Vt. 652, 24 Atl. 1016.

Burke, J., delivered the opinion of the court:

The equitable plaintiff in this case is the widow of Velko Melitch, who was in-

jured on the 25th of October, 1910, by the alleged negligence of the defendant, and died on the 8th day of March, 1911. This suit was brought under article 67, §§ 1-4, of the Code (1904) to recover damages sustained by her as the result of his death.

On January 13, 1911, Velko Melitch by deed, for a valuable consideration, released the defendant from all and every claim and demand which he might or could possibly have for or on account of his injuries. There is no question in this case as to the validity of the release. The defendant pleaded this release in bar of this action. The conclusiveness of this release as a bar to the suit was raised by demurrer, and the court, being of opinion that it consti-

—*St. Louis Southwestern R. Co. v. Hengst*, 36 Tex. Civ. App. 217, 81 S. W. 832, declaring that while technically the action given beneficiaries for the death of a relative is distinct and separate from the action the injured person had and the measure of recovery is different, practically, however, there is close kinship between them. They grow out of identically the same facts, and the heirs practically inherit the decedent's right, and a settlement or recovery for the injury by him entirely destroys their right of action;

—*British Columbia Electric R. Co. v. Turner*, 18 D. L. R. 430, holding that the action under Lord Campbell's act is not so entirely independent of the cause of action existing in the deceased in his lifetime that it is not affected by a release of his claim, executed in accordance with a bona fide settlement by the injured person while living, and that such a release, in the absence of fraud, is a bar to an action by the statutory beneficiaries to recover for their pecuniary injuries. To same effect see *British Electric R. Co. v. Gentile* [1914] A. C. 1034, 83 L. J. P. C. N. S. 353, 111 L. T. N. S. 682, 30 Times L. R. 594.

In *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176, the doctrine is asserted that, as the foundation of the right of action by the beneficiaries under a statute permitting a recovery of damages for their benefit for the wrongful death of someone upon whom they were dependent is the wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury.

In *Strode v. St. Louis Transit Co.* 197 Mo. 616, 95 S. W. 851, 7 Ann. Cas. 1084, in holding that a release of all claims for personal injuries, executed by the deceased in his lifetime, was a bar to an action for his death from such injuries, it is said that, "whether the right of action is a transmitted right or an original right, whether it be created by a survival stat-

ute or by a statute creating an independent right, the general consensus of opinion seems to be that the gist and foundation of the right in all cases is the wrongful act, and that for such wrongful act but one recovery should be had, and that if the deceased had received satisfaction in his lifetime, either by settlement and adjustment, or by adjudication in the courts, no further right of action existed."

Upon this point in *Southern Bell Teleph. & Teleg. Co. v. Cassin*, 111 Ga. 575, 50 L.R.A. 694, 36 S. E. 881, the court said that however new the action created by such a statute may be, in the very nature of things it cannot be independent; it is inherently rooted and grounded in the injury to the deceased. It grows out of it, and is a part of it, having almost complete identity of substance, and subject to the same defenses; and hence the release by the decedent in his lifetime, of the damages occasioned him by the personal injuries, is a bar to an action brought subsequently to his death to recover damages for his wrongful death, for the benefit of his widow and next of kin.

In *Casey v. Auburn Teleph. Co.* 155 App. Div. 66, 139 N. Y. Supp. 579, where a person sued a city to recover damages for personal injuries, and settled the suit, such settlement was held to be a bar to a suit against a telephone company by the next of kin for damages for the death of the injured person as a result of the injury, even though the city was not liable.

(Generally as to effect of release of one person from liability for a tort, to release another, where the former was not in fact or in law liable, see note in 14 L.R.A. (N.S.) 322.)

And see *STATE USE OF MELITCH v. UNITED R. & ELECTRIC Co.* holding that a release by the injured person, of all claim for damages which he may or might have for or on account of his injuries, is a bar to an action in behalf of the statutory beneficiaries to recover damages for his wrongful death as a result of such injuries.

In view of the foregoing decision of the Maryland court, attention is called to the

tuted a complete defense, a judgment was entered for the defendant.

The sole question presented by the record is this: Does the release constitute an effectual bar to a recovery in this case? The sections of the Code to which we have referred are taken from the act of 1852, chapter 299, and are almost a literal transcript of Lord Campbell's act, passed in 1846 (Stat. 9 and 10 Vict. chap. 93). In *Baltimore & O. R. Co. v. State*, 24 Md. 84, 87 Am. Dec. 600, the court said: "The general assembly of this state, in the year

1852, finding the common-law maxim, 'Personal actions die with the person,' unsuited to the circumstances and conditions of the people, enacted a law entitled 'An Act to Compensate the Families of Persons Killed by the Wrongful Act, Neglect, or Default of Another Person.' To make its design more obvious, the 4th section provides 'the word "person" shall apply to bodies politic and corporate,' and 'all corporations shall be responsible under this act, for the wrongful acts, neglect, or default of all agents employed by them.' The material

earlier decision of that court in *Stewart v. United Electric Light & P. Co.* 8 L.R.A. (N.S.) 385, holding an action may be maintained under a general survival statute for such damages as the deceased suffered in his lifetime from the injuries which finally resulted in his death, and also an action under a statute embodying in principle Lord Campbell's act, for such damages as the statutory beneficiaries sustained by the death.

It is to be noted that the same result is reached as to the effect of a release of his cause of action by the injured person in his lifetime, in jurisdictions permitting two actions, one for the benefit of the estate and one for the benefit of the beneficiaries, and in jurisdictions where but one action is permitted, although, as heretofore suggested, the holdings are based on different grounds, which, however, are not dependent upon the holding as to whether there is one or two actions under Lord Campbell's act or a survival statute.

The two decisions of the Maryland court heretofore referred to clearly show that the mere fact that there may be two coexistent remedies for a wrongful act resulting in death, in behalf of different parties, and in which the damages recoverable are clearly distinct, does not affect the rule that the injured person in his lifetime may, by releasing all claim for the injury, extinguish the cause of action, thereby barring any remedy given by the death act for his death from such injuries.

In *Rowe v. Richards*, ante, 1095, which holds contrary to the rule stated, in the majority opinion on the point it is said that the cause of the two injuries—that to the husband and that to the wife—(assuming that the husband was the injured person) is the same, the one wrongful or negligent act, but the right violated in the one case is entirely different from the right violated in the other. And it is further said that this right of the wife may never accrue, and from its very nature cannot accrue until the death of the husband.

In view of the position of the court that this right of the wife, which, it is conceded, rests upon the wrongful or negligent injury of the husband, and which may never accrue, cannot be affected by any act of the injured person in settling with the wrongdoer for the injury, it is proper to

inquire more specifically as to the nature of the right.

It will not be denied that it is competent for the law-making power to provide that for the death of a person through the wrongful or negligent act of another, the decedent's widow or next of kin shall have a right of action and may recover certain damages, but no express provisions to this effect are to be found in the statutes under consideration, and the real question is, Can such a provision be read into a statute similar to Lord Campbell's act? As pointed out, the South Dakota court undertakes to do so upon the theory of the creation of a right in the widow or next of kin, the nature, character, and source of which, if viewed as an independent cause of action, is most obscure.

The liability is based almost entirely upon the loss occasioned by the destruction of the decedent's earning power, and according to the court's concession, the liability to the wife or next of kin gives her no right to complain of the injury during the life of the injured person. He may survive his injury for years, and the injury may be of such a character as totally to destroy his earning powers, and make him a helpless burden upon his wife; nevertheless she has no right to complain, and, should he outlive her, she never has such right.

Under this theory, if the injured person sues to recover for the injury in his lifetime, what is to be the measure of damages where the effect of the injury is the total destruction of his earning power? If it be said that the measure of damages is compensation for pain and suffering and loss of earning power, is the latter to be based upon his life expectancy in view of the injury, or upon his life expectancy in the condition he was in before the injury? If the latter, and full compensation is made for destroyed earning power, how can it reasonably be said that the widow or next of kin have suffered any pecuniary loss by the destruction, through the decedent's death, of an earning power for which compensation has already been made. And it is to be remembered that the death of the injured person brings to them indirectly from the wrongdoer, by way of inheritance from the deceased, not only full compensation for their pecuniary loss of the support of

provisions of this act, as well as its title, are derived from the ninth and tenth Victoria, and are embodied in article 65 (title, Negligence) of the Code. . . . The American cases, arising upon acts varying in language, necessarily lead, as observed by Judge Redfield, to a diversity of decisions. We have no better guide than the construction of a statute originating in the same policy, and expressed in the same words, by enlightened jurists, distinguished for their independence and jealous regard for the rights of suitors."

the deceased, but more than that; for had it not been for the injury, there was always the contingency of the death of the deceased, or the widow, or next of kin, or his failure always to recognize his legal or moral duty to support such parties.

After these persons have received more than full compensation for a pecuniary loss, certainly a statutory provision should plainly require what might properly be termed a bounty in the way of additional compensation, before the court construes it to give such bounty. On vague and obscure language the lawmaking power ought not to be convicted of intending legislation so unreasonable as to reward a widow for the death of her husband through negligence, or to thus punish the offender, where the negligence complained of is usually caused by the disobedience or fault of a servant, in the employment of whom due care has been taken.

And in view of the apparent injustice resulting from this rule, an injustice not only to the defendant, but also to the injured person should he desire to settle for the injury or recover damages therefor, and in consideration of the disagreements on the part of the courts as to the effect of these statutes, it would seem advisable to dispose of the matter according to the apparent intent of the statutes, without indulging in any refinement of reasoning as to whether these statutes create one or more actions, or whether the action created is a new cause of action, or merely the remedy for the original cause of action. On this point see notes to *Rowe v. Richards*, ante, 1095; *Lhota v. Oppenheimer*, ante, 1104; *Nashville, C. & St. L. R. Co. v. Hubble*, ante, 1132; *McKnight v. Minneapolis Street R. Co.* ante, —; and *Kelliher v. New York C. & H. R. Co.* post, 1178.

Maguire v. Cincinnati Traction Co. 33 Ohio C. C. 24, also holds that a release executed by the injured person in his lifetime is not a bar to an action authorized by statute by his personal representative for the benefit of the widow and next of kin, citing as authority *Mahoning Valley R. Co. v. Van Alstine*, 77 Ohio St. 395, 14 L.R.A. (N.S.) 893, 83 N. E. 601, which holds that an action by a personal representative to recover damages for the benefit of the statutory beneficiaries, occasioned by the death of his decedent, is not barred by the re-

In Read v. Great Eastern R. Co. L. R. 3 Q. B. 555, 9 Best & S. 714, 37 L. J. Q. B. N. S. 278, 18 L. T. N. S. 82, 16 Week. Rep. 1040, the husband was injured on a railroad as a passenger, and, before he died from the effects of the injury, compromised his claim against the railroad company. His widow brought suit under Lord Campbell's act to recover damages which she had sustained by his death. The court held that, since the settlement made by the husband would have precluded him from recovering "if death had not ensued," the

vival, by such personal representative, of the action commenced by the deceased person in his lifetime to recover damages for the injuries, and the prosecution thereof to final judgment, since the measure of damages is not the same.

Cases like *Causey v. Seaboard Air Line R. Co.* post, 1185, in which the release was held not binding upon the plaintiff in an action for death, upon the ground that it was fraudulently procured, are not within the scope of this note. They, of course, do not militate against the general rule above stated, since that rule presupposes a release that would be valid as against the injured person by whom it was given.

Where right of beneficiaries is based upon a punitive statute.

The injured person has no control over the cause of action given his next of kin by a punitive statute for wrongful death, and this is true although he survives his injury for a considerable time in full possession of his faculties, since the cause of action does not arise until his death. And hence a release by him of his claim for injuries to his person does not affect such right of action. *Boott Mills v. Boston & M. R. Co.* 218 Mass. 582, 106 N. E. 680. And to the same effect is *Bowes v. Boston*, 155 Mass. 344, 15 L.R.A. 365, 29 N. E. 633; *Merrill v. Eastern R. Co.* 139 Mass. 252, 29 N. E. 666, 3 Am. Neg. Cas. 818; *Church v. Boylston & W. Cafe Co.* 218 Mass. 231, 105 N. E. 883.

This distinction is also made in *Denver & R. G. R. Co. v. Frederic*, — Colo. —, 140 Pac. 463, holding that the statute, construed as assessing a penalty against railroad companies for causing the death of employees through the negligence of the company, for the benefit of the next of kin of such employees, creates a right of action which does not depend upon the question as to whether or not the deceased could have maintained an action, but it creates a new and independent cause of action. Hence an agreement by the deceased, made in his lifetime, exempting the defendant from liability to him, is not a defense to an action based upon such statute, and evidence of such an agreement is inadmissible.

A. G. S.

widow by the terms of the statute could have no better right. This interpretation of Lord Campbell's act has been, without question, uniformly followed by the English courts; and, if we are to be guided by the construction placed upon the statute by those courts, the release set up in this case constitutes a complete bar to the action. All the American states have passed acts providing for compensation to families of a deceased person killed by the wrongful act, neglect, or defaults of others, and the books are full of cases dealing with those statutes, and whenever the courts have had occasion to deal with Lord Campbell's act they have approved the construction placed upon it by Lord Blackburn in *Read v. Great Eastern R. Co.* supra. It is not necessary to review the many cases upon this subject, but a reference to two or three cases will sufficiently show the general consensus of the American courts upon the question here presented.

In *Brown v. Chicago & N. W. R. Co.* 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255, which was cited and approved by this court in *Stewart v. United Electric Light & P. Co.* 104 Md. 332, 8 L.R.A.(N.S.) 384, 118 Am. St. Rep. 410, 65 Atl. 49, the court said, referring to *Read's Case*, supra: "The decision there is only to the effect that if an injured person has satisfaction of his claim before death, the subsequent death from the injuries does not confer a right of action upon surviving relatives; that such right exists only where there is an injury to a person, and there is an existing claim for damages therefor at the time of his death. Justice Blackburn, who delivered the opinion, said, in substance, that the proper construction of the statute is that it gives a right of action to certain surviving relatives of a person when death was caused by the wrongful act of another, where he had not received satisfaction in his lifetime, and that to go further would be straining the language of the law. That seems plain. The language of our statute is that liability of the wrongdoer exists where the deceased could have recovered if death had not ensued. That clearly excludes the idea that where the decedent receives satisfaction for his injuries, the condition requisite to the right of surviving relatives may exist notwithstanding. There is nothing in *Read v. Great Eastern R. Co.* in conflict with *Blake v. Midland R. Co.* 10 Eng. L. & Eq. Rep. 443, where, in a very instructive opinion by Coleridge, J., it is said that Lord Campbell's act does not transfer to the surviving relatives mentioned the claim for damages previously possessed by the

deceased, but gives them an independent cause of action for damages peculiarly incident to their relation to the deceased. The two cases are often cited to opposite views, but are in fact, when correctly understood, in perfect harmony. The one holds that the right of the relative named in the statutes is separate and distinct from that possessed by the deceased, and the other that the right of the relatives is contingent on the death of the injured person without having satisfied his claim for damages."

In *Hecht v. Ohio & M. R. Co.* 132 Ind. 507, 32 N. E. 302, the supreme court of Indiana, in construing the statute of that state, which provided that when death is caused by a wrongful act, the personal representatives of the decedent may sue therefor if the decedent might have maintained an action had he lived, said: "It is contended that the section of the statute (§ 284, supra) gives a new right of action in favor of the administrator for the benefit of the widow and children, if any, or the next of kin. This is true in a certain sense. Without the statute, the action could not be maintained; but, in order that it may be maintained, the intestate must have had a right of action against the person whose wrongful act or omission caused the injury, which he could have maintained had he lived, and when, as in this case, the injured party has prosecuted an action for damages on account of the injury to final judgment, and the judgment has been satisfied prior to his death, he, if he had lived, could not have prosecuted an action against the person causing the injury for the same act or omission. The construction we have given to this section of the statute is well supported." The court then referred to *Read v. Great Eastern R. Co.* supra; *Griffiths v. Dudley*, L. R. 9 Q. B. Div. 357, 51 L. J. Q. B. N. S. 543, 47 L. T. N. S. 10, 30 Week. Rep. 797; *Haigh v. Royal Mail Steam Packet Co.* 52 L. J. Q. B. N. S. 395, 640, 49 L. T. N. S. 802, 5 Asp. Mar. L. Cas. 189, 48 J. P. 230.

In *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271, the plaintiff's intestate during his lifetime brought suit against the defendant for injuries sustained by him, and recovered judgment, which was paid by the defendant. Suit was afterwards brought by his administrator for the benefit of the next of kin, under a statute substantially like our own. The court, in a strong opinion delivered by Judge Rapallo, decided that he could not recover. In the course of the opinion the court said: "The language of the act plainly indicates, I think, that the framers had in view the common-

law rule, *actio personalis*, etc., and that their main purpose was to deprive the wrongdoer of the immunity from civil liability afforded by that rule. The entire gist of the first section is that the wrongdoer 'shall be liable to an action for damages notwithstanding the death of the person injured, and though the death shall have been caused under such circumstances as amount in law to a felony.' It does not provide that the wrongdoer shall be liable notwithstanding that he shall have satisfied the party injured, or notwithstanding that the latter has recovered judgment against him, or notwithstanding any other defense he might have had at the time of the death, but merely that the death of the party injured shall not free him from liability; showing that this is the point at which the statute is aimed. The condition upon which the statutory liability depends is declared to be 'that the act, neglect, or default if such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages,' etc. This language is accurate if the act was intended to apply to the case of a party who, having a good cause of action for a personal injury, was prevented, by the death which resulted from such injury, from pursuing his legal remedies, or who omitted in his lifetime to do so. It precisely fits such a case, but it is singularly inappropriate to the case of one who has in his lifetime maintained the action and actually recovered his damages. The form of expression employed in the act shows that the legislature had in mind the case of a party entitled to maintain an action, but whose right of action was by the rule of the common law extinguished by his death, and not the case of one who had maintained his action and recovered his damages. This still more strongly appears by reference to the words of the act, which describes the wrongdoer against whom a right of action is given. He is not described by any language which is applicable to a party against whom judgment has been obtained by the deceased for the injury, but as 'the person who would have been liable if death had not ensued.' And the enactment is that this person shall be liable notwithstanding the death. It seems to me very evident that the only defense of which the wrongdoer was intended to be deprived was that afforded him by the death of the party injured, and that it is, to say the least, assumed throughout the act that at the time of such death the defendant was liable. In the present case the defendant does not answer the description of 'the person who would have been liable if death had not ensued.' It would

not have been liable if the injured party were living, for the former judgment would be a complete bar. The statute may well be construed as meaning that the party who at the time of the bringing of the action 'would have been liable if death had not ensued' shall be liable to an action notwithstanding the death, etc. It is argued, and the adjudications sustain the argument, that the condition that the wrongful act, etc., must be such as would have entitled the party injured to maintain an action has reference to the circumstances of the injury and the character of the act, including the question of contributory negligence, etc. This is undoubtedly true, and such is the purport of the language. But it does not follow that it can have no further effect, and that it cannot be considered for the purpose of determining whether the right of action created by the statute was intended to be given in cases where the deceased had in his lifetime actually recovered damages for the injury, or only in cases where he could have recovered them had he lived, but had not done so."

There is nothing in these cases in conflict with the decision of this court in *Stewart v. United Electric Light & P. Company*, 104 Md. 332, 8 L.R.A. (N.S.) 384, 118 Am. St. Rep. 410, 65 Atl. 49, or with the reasoning of Judge McSherry in that case. That suit was not brought under the act of 1852, and it was not pretended that the plaintiff could have recovered under that act. The injuries sustained by the deceased resulted in his death a few hours after the accident. He had made no settlement with the defendant, and the single question before the court, as stated by Judge McSherry, was: "Did the cause of action which, according to the averments of the narr., accrued to the deceased in his lifetime from the alleged wrongful act and negligence of the defendants, abate when he died, or did it survive so that suit upon it might be instituted and maintained by his administrator?" Upon a full review of the legislation in this state relating to the survival of actions, the court decided that under § 104 of article 93 of the Code of 1888 (appearing as § 103 of article 93 of the Code of 1904), the plaintiff, as administrator of the deceased, could commence and prosecute a suit for injuries sustained by him as set forth in the narr. The court distinguished the measure of damages in a suit brought under the provisions of the Code referred to from one brought for the benefit of the family under the act of 1852, and was careful to say that "we are now speaking of the effect of a settlement made by the injured person in his lifetime."

While the court stated the settled rule of law of Maryland to be that the act of 1852 created a new cause of action, it held that the right of the relatives named in the statute to recover "is contingent upon the death of the injured person without having his claim for damages satisfied."

Judgment affirmed, with costs.

MICHIGAN SUPREME COURT.

LILLIAN S. MEHEGAN

v.

BOYNE CITY, GAYLORD, & ALPENA
RAILROAD COMPANY, Plff. in Err.

(178 Mich. 694, 141 N. W. 905.)

Railroads — licensing private transportation.

1. A railroad company may grant to a manufacturing plant which ships its raw material and finished product over its road permission to run a motor car upon its tracks under supervision of its own employees to aid the employees of the licensee in procuring material and increasing the output of the plant if it will not interfere with the performance of the duties of the railroad to the public.

Same — exemption from liability.

2. A railroad company in granting permission to a manufacturing company to run a motor car upon its tracks may contract for exemption from liability for injury which may result to operatives of the car.

Note. — Release of all claim for injury before receiving injury resulting in death, as affecting right of statutory beneficiaries.

The effect of a release by the injured person after the injury as affecting the right to recover for his death is considered in the note to State use of Melitch v. United R. & Electric Co. ante, 1163.

The question involved in the present note presupposes the validity of the release as against the person injured. That question, so far as concerns a contract exonerating a master in advance from liability for negligent injury to a servant, is discussed generally in the note to Johnston v. Fargo, 7 L.R.A.(N.S.) 537. As to contracts requiring servant to elect between acceptance of relief funds and a claim against the master for damages, see notes to Frank v. Newport Min. Co. 11 L.R.A.(N.S.) 182, and Koeller v. Chicago, B. & Q. R. Co. 48 L.R.A.(N.S.) 440. As to validity of such a stipulation under Federal employers' liability act, see notes in 47 L.R.A.(N.S.) 50 and L.R.A.1915C, 53. As to contract exempting railroad company from liability for negligent injury to sleeping car employees, or others sustaining a similar relation to the L.R.A.1915E.

Death — release from damages — effect on action by representative.

3. A contract by one to release another from liability for injuries which the latter may negligently inflict upon him prevents an action for his death through such negligent injuries under a statute providing that whenever the death of a person shall be caused by wrongful act and the act is such as would, if death had not resulted, have entitled the injured person to maintain an action therefor, then the negligent person shall be liable to an action, to be brought by the personal representative of the deceased person, and the recovery distributed as intestate property.

(May 28, 1913.)

ERROR to the Circuit Court for Otaego County to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's decedent. Reversed.

The facts are stated in the opinion.

Messrs. Harrison Geer and H. R. Martin, with Messrs. Harris & Ruegsegger, for plaintiff in error.

Messrs. George E. Nichols and H. A. Jersey, with Mr. DeVere Hall, for defendant in error.

Moore, J., delivered the opinion of the court:

The defendant is a railroad corporation organized under the laws of Michigan. It owns and operates a railroad which extends from Boyne City to Gaylord, and has

company, see notes to Denver & R. G. R. Co. v. Whan, 11 L.R.A.(N.S.) 432, and Coleman v. Pennsylvania R. Co. 50 L.R.A.(N.S.) 432.

Where the validity of a release prior to the injury is sustained, it is the rule, as in cases of release after the injury, that such a release is a bar to all right of action by the statutory beneficiaries of the injured person, based upon statutes embodying in principle Lord Campbell's act. MEHEGAN v. BOYNE CITY G. & A. R. Co. Sewell v. Atchison, T. & S. F. R. Co. 78 Kan. 1, 96 Pac. 1007 (reversed on rehearing on the ground that the release was violative of the statutes of Kansas).

In Sewell v. Atchison, T. & S. F. R. Co. supra, it is said that the cause of action which the injured person would have under the statute if living, and the cause of action for his wrongful death, which exists in favor of his beneficiaries, are separate and distinct. Nevertheless one depends upon the other, and any contract which would be a bar to the first in the lifetime of the injured person will destroy the second (contract by the injured person not to assert any claim against a railroad company for any injury he might receive while acting as express messenger on its line).

This is also the holding in Northern P.

branches and spurs running from its main line. Among other things, it transports timber products from the forests along its line of road to the mills and factories in Boyne City, and is what is generally called a logging railroad.

The Boyne City Chemical Company manufactures charcoal, wood alcohol, and by-products, and chars large quantities of wood each day, a large part of which is hauled over defendant's road from the forests along its line.

In July, 1905, the said Boyne City Chemical Company became the owner of a motor car which was propelled by gasoline. The chemical company desired to use it upon the tracks of the defendant for the convenience of its men in going from its plant at Boyne City out along the line of the railroad for the purpose of measuring wood and performing other duties. The chemical company and the defendant railroad company thereupon entered into an agreement which bears date July 6, 1905. Under this agreement permits were issued to one William Spratt and the deceased, James Mehegan, to ride upon this motor car, which is designated in the agreement as "Number 99."

Mehegan and Spratt, before being permitted to ride upon the motor car upon the tracks of the defendant, were required, under the terms of the contract, to execute to the defendant a release; the plaintiff in this case joining with her husband in the execution of the same, and Mrs. Spratt, the wife of William Spratt, joining with him in the execution of said release. Later, and about August, 1908, one Ralph Bearss also became a scaler for the Boyne City Chemical Company. He executed a like release, and was granted a permit to ride

upon and assist in operating the said motor car upon the tracks of the defendant company. Under the terms of the agreement and after delivery of the release the deceased and Spratt, and later Bearss, continued from time to time to operate the motor car upon the tracks of the defendant company. In all train orders and train sheets, said car was known as "No. 99." Spratt, Bearss, and the deceased were men familiar with the railroad rules.

At a point east of the west line of Park street, which is the east line of the passenger depot in Boyne City, a house had been constructed for the housing of this motor car. It was situated about 20 feet north of the north rail of the main line of defendant's track, and stands partly upon a lot owned by the deceased, Mehegan, and from it extends a siding, which connects with the main line a few feet west of the west line of Boyne avenue, the distance from the motor car house to where the siding strikes the main line being approximately 195 feet. East of Boyne avenue, on the north side of the track, and 1,041 feet east of the motor car house, and 1,801 feet east of the depot, between the railroad track and the cooperage plant, are the steam vats of the cooperage plant, and east of the vats 739 feet is the telephone box on the south side of the railroad track, above mentioned. East of this telephone box a short distance is the side track connected with the main track, known as Mill No. 3 siding, sometimes called the Elm Cooperage siding, above mentioned. The steam vats are 65 feet long and lie almost parallel with the railroad track. In certain kinds of weather, with the wind in the north, northwest, or northeast, the steam from the vats along

R. Co. v. Adams, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408, in applying the Idaho statute, which is in effect a death statute, providing that when the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representative may maintain an action for damages against the person causing the death. In this case the holding of the court is based upon the ground that the agreement that the defendant shall not be liable under any circumstances, whether of negligence of agents or otherwise, for injury to the person of the releasor, relieves the wrongdoer of liability, since the right of action of the widow of the statutory beneficiaries arises only when death is caused by the wrongful act or neglect of the defendant, and the effect of this agreement is to prevent the omission of duty on the part of the defendant from amounting to a wrongful act or negligence.

Compare with Pittsburgh, C. C. & St. L. R. Co. v. Hosea, 152 Ind. 412, 53 N. E. 419, holding that a person cannot, prior to an

injury, contract away the right of action given to his family by statute for his death, since the remedy given by this statute is a new cause of action not related to the cause of action existing in the deceased in his lifetime for the injury to his person. A different rule obtains in this state as to the effect of a judgment in an action by the injured person, rendered in his lifetime. See note to Nashville, C. & St. L. R. Co. v. Hubble, ante, 1132.

A release of the character under consideration, however, is not effective as a bar to an action for the death of the releasor where based upon a statute imposing a penalty upon a person causing death through negligence for the benefit of certain relatives of the deceased, since the cause of action given by this statute is in no way connected with the cause of action in the deceased for the injury to him. Doyle v. Fitchburg R. Co. 162 Mass. 66, 25 L.R.A. 157, 44 Am. St. Rep. 335, 37 N. E. 770.

A. G. S.

the track will at times settle down over the track so that it will obscure for perhaps 100 feet at times.

Many passenger and other trains arrive at and leave the station at Boyne City daily, going east and returning. Among others on February 19, 1909, was a regular passenger train scheduled to leave Boyne City at 9:05 in the morning. That morning car No. 99 was in the motor car house east of the depot, and Mr. Bearss, Mr. Spratt, and plaintiff's decedent went to the motor car house for the purpose of taking the car to make a trip eastward on the tracks of the defendant. An order was obtained from the train despatcher.

Previous to 9:05 A. M. on the morning of the 19th of February, a switch engine was working in the yard, and when the morning passenger train left the depot at 9:07 and when it passed the cooperage switch, this engine was standing on the siding just off the main line. Immediately after the passenger train passed, the conductor opened the switch on the main line, the engine ran out, the switch was closed, and the engine proceeded west on the main line toward the depot. The conductor did not call up the despatcher and get permission to go out onto the main line before the engine ran out of the siding onto the main line. At this time the steam from the vats enveloped the track. No. 99, which left the motor siding switch on the main line at 9:10, was going east, following the passenger train. The steam obscured the view of the men on No. 99 of the track ahead of them, and it also obscured the view of the men on the switch engine of the track ahead of them, and No. 99 and the switch engine collided just as the switch engine emerged from the steam. Plaintiff's decedent was driving the motor car. He and Mr. Spratt occupied the front seats. Bearss, who was acting as switchman, and who had opened the switch for the car to pass out, and had closed it after the car passed out upon the main track, was standing up in the car in the rear of Mehegan and Spratt, buttoning his coat. Spratt and Mehegan were both killed by the collision.

Plaintiff claims that the defendant was negligent, and that its negligence resulted in the death of her decedent; that having established a telephone at the cooperage or mill 3 switch, and having issued a bulletin that the crews of engines working on that siding should call the despatcher's office and receive orders to come out upon the main line over the switch to run to the depot before running upon the main line, it was negligence for the switching crew on this

morning not to obtain such an order before coming out upon the main line, and that this negligence caused the death of plaintiff's decedent, and that the defendant is liable therefor.

The defendant contends that this collision occurred within its yard limit, and that plaintiff's decedent, who was operating the motor car, was operating it without regard to various rules of the company. The defendant further contends that even though its crew were negligent, and there was no negligence upon the part of the deceased and the others of the crew of the motor car No. 99, the plaintiff's decedent assumed the risk of operation of said motor car upon the defendant's tracks, whether the negligence which caused the accident was that of the defendant or themselves, under the contract between the chemical company and the defendant and the release executed by the plaintiff, Mrs. Mehegan, and her decedent.

At the close of the plaintiff's proofs, the defendant moved for a directed verdict in its favor. The trial judge overruled the motion. The defendant did not introduce any evidence and the case was submitted to the jury. It rendered a verdict in favor of the plaintiff for \$12,000. The defendant made a motion for a new trial, which was overruled by the circuit judge. The case is here by writ of error.

The defendant discusses the following propositions:

1. The place where the accident occurred was within the defendant's yard limits; and rules 91 and 93 were not in any way modified or superseded by the bulletin claimed to have been issued relative to switching crews obtaining orders over the telephone before coming out of the cooperage or mill 3 siding onto the main track.

2. Plaintiff's decedent and his associates were guilty of contributory negligence.

3. The contract between the Boyne City Chemical Company and the defendant, the Boyne City, Gaylord, & Alpena Railroad Company, was valid, and the release executed by the plaintiff's decedent, James E. Mehegan, and the plaintiff herself, who was his wife, is likewise valid, and this contract and this release preclude recovery in this suit.

4. The circuit judge should have granted the defendant's motion for a new trial.

In our view of the case it will be necessary to discuss only the third of the above propositions. The material parts of the contract to which reference has been made read as follows:

Permit Granting Privilege by Boyne City, Gaylord, & Alpena Railroad Company to the Boyne City Chemical Company to Operate a Motor Car upon Tracks of the Railroad Company.

Whereas, the said Boyne City Chemical Company own a motor car, and in connection with its business it is necessary that its employees visit at different points upon and along the right of way of the said railroad company; therefore:

The said railroad company hereby grant a permit to the said chemical company for itself and certain of its employees to use said car upon the tracks of the company, subject always to the conditions and regulations hereinafter set forth as follows:

1. This permit shall be for employees of the Boyne City Chemical Company upon business only.

2. The Boyne City Chemical Company shall furnish to the railroad company a list of its employees to be permitted by them to operate and ride upon this car.

3. Such employees shall give to the railroad company a full release for all damages to themselves, their heirs and personal representatives which they shall suffer by reason of the operation of this car, whether the same be caused by the negligence of the railroad company or its employees, or by their own negligence or the negligence of the chemical company.

4. The chemical company shall release the railroad company from all claim of damage to said motor car caused by its operation or storage upon any of the railroad company's tracks and grounds, whether caused by the negligence of the railroad company's employees or otherwise.

5. The chemical company shall execute a good and sufficient bond to the railroad company in the penalty of \$10,000, conditioned to reimburse the railroad company for all damages it may suffer arising to its property, its employees, to third persons and their property through the storage and operation of such motor car upon the tracks and grounds of the said railroad company.

6. Said motor car shall have painted in large distinct figures upon front and rear of car, "No. 99," and shall be known and designated as "No. 99" in all communications and train orders.

8. Owing to the weight and bulk of said motor car it will be necessary to authorize its movements over the tracks of the railroad company by train orders in the same manner as extra railroad trains are now being operated by said railroad company; therefore it shall be the duty of the chemical company employees who are authorized to operate said motor car to first obtain

and use a copy of the current time-tables and rules governing the operation of the railroad company's trains.

10. The rules and regulations governing the operation of the engines and trains of the railroad company shall apply and the chemical company and its employees shall be bound by them in the same manner and to the same extent as the employees of the railroad company are thereby controlled and bound.

11. The chemical company and its said employees, before starting upon any trip with said motor car, shall first obtain a train order for such trip from the train despatcher of the railroad company then on duty, and shall conform to all laws and ordinances of the state and municipalities relating to the operation of railroad trains as to speed, etc.

12. The railroad company reserves the right to cancel this permit and to terminate the operation of said car upon its tracks without notice.

Dated this 1st day of July, A. D. 1905.

Boyne City Chemical Company, through its president and treasurer, hereby accepts the above permit, and agrees that said chemical company shall be bound thereby.

Dated this 6th day of July, A. D. 1905.

The release heretofore referred to reads as follows:

Boyne City, Mich., July 15, 1905.

In consideration of my being permitted to ride upon the motor car of the Boyne City Chemical Company upon the tracks of the Boyne City, Gaylord & Alpena Railroad Company, I hereby stipulate with the Boyne City, Gaylord & Alpena Railroad Company that I am in the employ of the Boyne City Chemical Company, and that I hereby release the said Boyne City, Gaylord & Alpena Railroad Company from any and all liability for any damage or injury which I may receive while riding upon or operating the said motor car of the Boyne City Chemical Company upon the tracks of the said railroad company, both as to any right of action that may accrue to myself, my heirs and personal representatives. I further stipulate and agree while operating or riding upon said motor car to be bound by all orders, rules and regulations of the said railroad company.

W. T. Spratt.

Mrs. Wm. Spratt.

James E. Mehegan.

Mrs. James E. Mehegan.

In presence of

Gladys Spratt.

Mrs. Wm. Dow.

It is the claim of plaintiff that the defendant had no right under the powers conferred upon it to enter into such a contract as was made here. No case is cited by counsel upon either side that is upon all fours, but there is a line of cases which establishes a principle which we think is applicable here.

Before calling attention to these cases a further statement of the situation disclosed by the record will be profitable.

The Boyne City Chemical Company carried on a manufacturing business at Boyne City. It uses large quantities of wood in its manufacturing business, about 5,000 cords a month, which is shipped to its plant at Boyne City over the defendant's road. In connection with the cutting and shipping of this wood, it is necessary for certain employees to visit different points along the defendant's line of road for the purpose of buying wood, and measuring the wood, superintending the loading of it on cars, and looking after it in general in the woods. The employees who did this work at the time of the accident lived at Boyne City. Before the contract was made in July, 1905, these employees used to drive teams to and from their work. Frequently when they drove it took until nearly noon for them to get to their work, and sometimes they were away at camp two or three days at a time, and, in order that they might be at home more, it was decided to use the motor car. With it they were enabled to go to their work in the morning and get back at night, except when they went to Gaylord.

It will be seen that it was an advantage to all the parties to bring about the result which was attempted to be reached by the use of the motor car. The men were able to spend more time with their families at home. Less time was spent upon the road, so that more effective work was done for the chemical company at the same wage, and more freight for the railway company would also result by the expenditure by the men of the same amount of time.

The record discloses that the use of their motor car by the chemical company, through its employees, upon the tracks of the defendant railroad company, did not interfere with the performance by the defendant of its corporate duties to the public. It did not lessen the number of trains or materially interfere with the freight or passenger traffic except possibly to increase the former, while at the same time the officers of the defendant road did not relinquish the right to control the movements of the motor car.

In *Coup v. Wabash, St. L. & P. R. Co.* 56 Mich. 111, 56 Am. Rep. 374, 22 N. W. L.R.A.1915E.

215, which was a suit for damages on account of injuries to a circus which had been carried under a special contract, it was held that the railway company was not a common carrier of circuses, and, therefore, that the contract which exempted it from liability was valid. Justice Campbell, speaking for the court, said: "Unless this undertaking was one entered into by the defendant as a common carrier, there is very little room for controversy. The price was shown to be only 10 per cent of the rates charged for carriage, and the whole arrangement was peculiar. If it was not a contract of common carriage, we need not consider how far in that character contracts of exemption from liability may extend. In our view it was in no sense a common carrier's contract, if it involved any principle of the law of carriers at all. The business of common carriage, while it prevents any right to refuse the carriage of property such as is generally carried, implies, especially on railroads, that the business will be done on trains made up by the carrier and running on their own time. . . . It cannot be claimed on any legal principle that plaintiff could, as a matter of right, call upon defendant to move his trains under such circumstances and on such conditions, and if he could not, then he could only do so on such terms as defendant saw fit to accept. It was perfectly legal and proper, for the greatly reduced price, and with the risks and trouble arising out of moving peculiar cars and peculiar contents on special excursions and stoppages, to stipulate for exemption from responsibility for consequences which might follow from carelessness of their servants while in this special employment."

In *Clough v. Grand Trunk Western R. Co.* 11 L.R.A.(N.S.) 446, 85 C. C. A. 1, 155 Fed. 81, it was said: "That the railway company was under no common-law obligation to move the circus company over its line in the manner it was being transported at the time of the injury to the plaintiff in error must be conceded. If the railway company was under no statutory or common-law obligation to render the special service it was called upon to render there were no reasons of public policy which forbade the rendition of such service upon such terms as the parties might stipulate. The right to make special stipulation under such conditions has been recognized and applied in a number of cases substantially like the case at bar when circus trains were hauled under special agreements relieving the company from carrier's liability." See same case in 212 U. S. 579, 53 L. ed. 659, 29 Sup. Ct. Rep. 688; also *Forepaugh v.*

Delaware, L. & W. R. Co. 128 Pa. 217, 5 L.R.A. 508, 15 Am. St. Rep. 672, 18 Atl. 503; Robertson v. Old Colony R. Co. 156 Mass. 525, 32 Am. St. Rep. 482, 31 N. E. 650; Chicago, M. & St. P. R. Co. v. Wallace, 30 L.R.A. 161, 14 C. C. A. 257, 24 U. S. App. 589, 66 Fed. 506; Wilson v. Atlantic Coast Line R. Co. (C. C.) 129 Fed. 774; and 2 Elliott, Railroads, § 451; Cleveland, C. C. & St. L. R. Co. v. Henry, 170 Ind. 94, 83 N. E. 710,—which indicate that special contracts exempting railroad companies from liability are valid.

There are many other cases cited to the same effect in the briefs of counsel for defendants.

It is said by counsel for plaintiff that the contract and release cannot take away the rights of Mrs. Mehegan and her child. In one of the briefs it is said: "These sections (referring to the statute) give Mrs. Mehegan and the infant a right of action not possessed by decedent in his lifetime, but one arising from his death. As applied here, the right is one in no manner accruing to decedent, as it did not begin until his life terminated. He could not release that which he never possessed."

In the other brief it is stated this way:

"It also may be conceded under the circumstances of this case, had deceased been injured, he could not have recovered from the railroad company. Having released the company from all liability for injuries that might befall him through its negligence, he could not be allowed to recover from it in the face of this release. The proposition is not admitted, and the concession is only made for the purpose of the argument."

"The 'death act,' Comp. Laws, § 10,427 (5 How. Anno. Stat. 2d ed. § 13,702), provides that there can be recovery under the statute only when the party injured would have been entitled to recover if death had not ensued. It might seem, upon first thought, that since Mehegan could not have recovered had he been injured, then of course there can be no recovery under the statute for his death; but this is not the logical conclusion when the statute appears in the full light of its true construction."

"The true construction of this statute must be that it was intended that the liability of the person or corporation causing the death of a deceased should be determined by the same state of facts and the same degree of evidence that would determine liability toward the deceased for any injuries he might have sustained. If the company, under the facts, was liable to the injured had he lived, then, under the same state of facts it was liable to his wife and children for his death. In other words, the L.R.A.1915E.

statute, it seems to me, was intended to bar a recovery only when the state of facts applicable to the primary right of action was such as to bar recovery, and did not intend that the right the statute gave to a wife and her children, expressly and purposely for their maintenance, their pecuniary damage, should be defeated by any affirmative defense such as a release, or waiver, or compromise. To follow such a construction would be to take from the wife and children the cloak thrown around them for their protection, and place it upon the shoulders of the husband and father, to barter it away as he thought fit.

"The right given under the statute in no way inures to the benefit of the deceased; it is not even in existence, only as an inchoate right in the wife and children, until after his death; damages recovered under the statute belong not to his estate, but to those pecuniarily dependent upon him; he can have no pecuniary interest growing out of his own death; under no version of the statute has he even the remotest interest in any damages recovered for his death, and having no such interest, it follows that he cannot, by any manner of contract, defeat a recovery under the statute."

In view of these contentions so ingeniously and ably urged it is important to refer to the statute. It reads as follows:

"Comp. Laws, § 10,427. Sec. 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages, in respect thereof, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Comp. Laws, § 10,428. Sec. 2. Every such action shall be brought by, and in the names of, the personal representatives of such deceased person, and the amount recovered in every such action, shall be distributed to the persons and in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered."

5 How. Anno. Stat. 2d ed. §§ 13,702, 13,703.

These provisions of the statute have been

before this court several times. *Sweetland v. Chicago & G. T. R. Co.* 117 Mich. 329, 43 L.R.A. 568, 75 N. W. 1066, 4 Am. Neg. Rep. 648; *Dolson v. Lake Shore & M. S. R. Co.* 128 Mich. 444, 87 N. W. 629; *Ingersoll v. Detroit & M. Co.* 163 Mich. 268, 32 L.R.A. (N.S.) 362, 128 N. W. 227; *Verlinde v. Michigan C. R. Co.* 165 Mich. 371, 130 N. W. 317; *Habitz v. Wabash R. Co.* 170 Mich. 71, 135 N. W. 827. A reference to the opinions filed in those cases will show a great diversity of views on the part of the justices as to the construction the statute should have. It is, however, now established as the law in this state that the statute does not provide for two separate and distinct causes of action.

The following cases are instructive:

In *Brown v. Chattanooga Electric R. Co.* 101 Tenn. 252, 70 Am. St. Rep. 666, 47 S. W. 415, it was held that an adjustment by deceased, in his lifetime, of his claim for damages for personal injuries, barred an action by his widow to recover for his death resulting from such injury.

In *Southern Bell Teleph. & Teleg. Co. v. Cassin*, 111 Ga. 575, 50 L.R.A. 694, 36 S. E. 881, the plaintiff's decedent had been injured through negligence of the Telephone & Telegraph Company, and had instituted suit, and while the suit was pending had settled with the company and executed a release of his claim. Later he died, and his widow brought suit against the company, under the death act of Georgia, claiming that the release executed by him was not binding upon her. Held, that she was bound by the release, and that she could not maintain the suit. The court was composed of six judges, and two of them dissented from the majority opinion. The majority opinion contains a very exhaustive discussion of the authorities on the question. In the course of the majority opinion it is said:

"But it is said that no decision that a release by the husband bars a subsequent suit by or for the wife is of any value in this case, unless it was rendered by a court which holds that the survival and death acts create new and distinct causes of action. This, therefore, must be borne in mind in estimating the weight of the authorities cited. In reading them, with this prominently in view, it is remarkable to note the various expressions used in the effort to define the relation which the action by or for the widow bears to the action in favor of the injured husband. Some, in fact all, of the courts, may be said to call it a new cause of action, as in *Western & A. R. Co. v. Bass*, 104 Ga. 390, 30 S. E. 874. Some call it a 'new, but not an independent, cause L.R.A.1915E.

of action.' Cooley on Torts, 264, speaks of it as an 'enlargement' or 'continuation.' . . . Others say 'the cause of action for the homicide is "contingent" on the death of the injured party without having satisfied his claim for damages.' But notwithstanding this variety of expressions, there is substantial unity in holding that a release by the husband bars the wife; this view being taken even by those courts which insist most strongly that the two acts create two causes of action, and by courts also which rule that concurrent suits may be maintained. However new it may be, in the very nature of things it cannot be independent; it is inherently rooted and grounded in the injury to the husband. It grows out of it, and is a part of it, having almost complete identity of substance, and subject to the same defenses. More than a dozen courts have directly passed upon the effect of a release by the husband, and all except those of Massachusetts and Kentucky have held that it bars a suit after his death."

After discussing the cases which it was claimed supported the right of the widow to maintain the action, the court, in majority opinion, said:

"We think the cases above cited are the very strongest which can be found in favor of the position taken by the defendant in error. It will be seen that they are based either upon penal statutes or upon decisions which have been overruled, or that they are discussing the effect of concurrent remedies after the death of the injured party, or that the decisions themselves have been weakened by conflicting decisions in the same jurisdictions."

It was further said in the majority opinion:

"If the wife is in privity with her husband, it is conceded that his settlement will bind her; but if there is no privity between them as to this class of cases, then if the husband should sue and fail to recover, the wife, after his death, would not be bound by that judgment; she may bring suit and obtain a verdict, notwithstanding the husband failed in his suit. So that not only is a settlement no bar, but neither is a verdict against the husband a bar. This would not only make the statutes penal, but it would not allow the defendant to buy his peace by paying money, nor could he secure peace by making a successful defense immediately after the injury, when the recollection of the witnesses is fresh, when they are all accessible, and when the circumstances of the injury can be most certainly and truthfully portrayed. . . .

"The settlement also operates as a bar upon considerations of public policy, inter-

posing a statute of repose; for, if the settlement is not a bar, there is practically no statute of limitations, and oftentimes no person with whom the defendant can settle, and even after a settlement, marriage, birth of after-born children, death of the wife, minority of the children, and the possibility that the children themselves may die during the lifetime of the injured party, all make the defendant liable to an uncertain extent, as of an uncertain date, to unknown and unknowable persons. In the nature of things, one who claims as a wife is bound by the husband's conduct. His freedom from fault inures to her benefit, but his negligence is imputed to her, when, as a quasi substituted plaintiff, she asks the court to investigate the circumstances of his killing. If his negligence in the act is imputed to her, should not also his conduct after the injury be imputed to her? In spite of all the recent statutes 'the husband is still the head of the family,' his life is his own, his body is his own, and whatever right in that life the law gives to his wife must be subject to the superior right of the husband. While the law gives her the full value of that life, she takes it as he left it. If it was a valuable life, in a pecuniary sense, if his health, his strength, his habits, were such as to give it a great earning capacity, then great is her recovery. But if, on the contrary, he had so lived as to lessen these elements of pecuniary value, if by idleness and vice and dissipation he had shorn himself of his strength, the wife's right therein must be taken burdened by what he has done in his lifetime. While he lives, his life and his person belong to himself, and he must use that life and body for the support of his family. He must be left free, when injured, to settle for the wrongs which were done to him, and to him alone; he must be at liberty to adjust that wrong without the amount of his settlement being diminished by the possibility, or probability, that the person dealing with him will have to pay a second time for the same act. The family stand to him in the relation of heirs, and, like all heirs, have no rights which can interfere with those of the living. They take what he leaves; they take under him and subject to him, and not adversely to him. Under this statute, the cause of action primarily grows out of the relation between the husband and the wrongdoer and his rights against the wrongdoer. The full value of action is in him; only secondarily is it in the wife, and it comes to her, if it comes at all, burdened and encumbered by his conduct, his settlement, and whatever else he did in his lifetime in reference thereto. It is true she

may recover the full value of his life, but that value depends on what he was, and what he did in his lifetime, and if before his death he has settled with the defendant, he has, by his own act, transmuted the value of a cause of action into dollars and cents, and deprived his family of any further value growing out of the negligence complained of. . . . The contention of the defendants in error means that if a settlement takes place, the defendant may be called upon to pay a second time in case of death. It means double damages. It means the statute is to be treated as penal, and not compensatory. It means that we are to lay at the door of our statute the reproach which was so often and so justly uttered against the statutes of some of the other states, as to which it was said that it was actually 'cheaper to kill than to hurt.' With us, hereafter, it would mean the same thing, because for the death of the husband there would only be one recovery. For his injury and subsequent death there could be two recoveries. We have seen that statutes identical with ours in substance, having the same object in view, and intended to give the same rights, have all, or very nearly all, been construed to mean that where the husband was injured and subsequently settled for the injury, and thereafter died from the effect of the injury, there could be no recovery by his wife for his death. She stands in his shoes. She recovers if he could have recovered. She fails if, for any reason, he would have failed. If he consented to the injury he cannot recover. If he ratifies the injury by accepting compensation, she cannot recover. If by ordinary care he could have avoided the injury, she cannot recover. If he obtains judgment against the defendant, she cannot recover. What would have estopped him estops her. Not only would it be a hardship to require a defendant to pay double damages, but there are considerations of public policy which cry out against such a construction, a public policy so pronounced that it would require every reasonable doubt to be resolved in its favor. If the defendant is to pay the injured man full damages, and subsequently is to pay the full value of his life, it becomes manifest that settlements are impossible. It would operate to deprive the injured party 'of the power of settling his claim, or realizing anything from it in his lifetime. It would naturally, if not inevitably, prevent settlements, and procrastinate litigation, until it could be determined whether death would ensue from the injury. There could be little inducement to settle without suit, because whatever might be paid to the injured party would neither bar nor diminish

the claim of his representative, should death ensue. The statutes should not be strained to bring about such a result, nor should it be reached unless required by the plain language of the enactment.' *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 276, 277. Under such a construction the law, by its own act, would encourage litigation, in spite of the maxim that 'it is to the interest of the commonwealth that there should be an end of litigation.' It would make it impossible to obey the injunction, 'Agree with thine adversary quickly whilst thou art in the way with him,' for the defendant can properly ask, 'Who is mine adversary?' He might be willing to settle, he may have agreed on terms, and yet he would be compelled to say to a husband and father, 'It is impossible to say whether you will die as a result of these injuries or not, or whether, when you die, your wife and your children will then be living or not, or whether you will be wifeless and childless. She may consent to the settlement, but she may also die, and you may marry again. Or, the wife may die and leave you children. It is impossible to settle with them, because they are minors, and even if that were legally possible, there may be after-born children, and all of these uncertainties must be considered in our negotiations.' Surely the law does not intend that any case shall be so inchoate that the person liable does not know to whom he may be ultimately liable, and cannot adjust and settle, even when he admits liability and is willing to pay."

There are many other authorities cited in the brief of plaintiff in error to the same effect.

It is urged by counsel for plaintiff that *Ingersoll v. Detroit & M. R. Co.* 163 Mich. 368, 32 L.R.A. (N.S.) 362, 128 N. W. 227, sustains their contention. A reference to the case will show that the effect of a release by the husband either before or after a cause of action would have otherwise arisen was not involved.

The language of the statute suggests very clearly that if the husband would not have a cause of action had he survived the injuries, that his widow and child would not have one. It is clear from the record that the chemical company, the defendant company, and the employees of the chemical company recognized that defendant company could not be compelled to permit the use of this motor car upon its tracks. It is also clear they thought it would be to their mutual advantage to permit its use. The defendant company was willing to enter into the arrangement if it could do so freed from all liability. To bring about the use of the

motor the chemical company and the employees were willing to free the defendant company of liability. A reading of the contract and release shows that the parties thought they were accomplishing this result. We can see nothing illegal or contrary to public policy in what the parties undertook to do.

The judgment is reversed. No new trial will be granted.

Steere, Brooke, and Stone, JJ., concur.

A petition for rehearing having been filed, Moore, J., on July 24, 1914, handed down the following response (178 Mich. 713, 148 N. W. 173):

This case was originally heard in this court before five justices. One of them, Justice Blair, died. An opinion was handed down, signed by the other four justices. The case, upon the application of the plaintiff, was reheard, all of the justices sitting. We think the result reached in the opinion which was handed down is right, and deem it unnecessary to write a further opinion.

The judgment of the court below is reversed. No new trial will be granted.

McAlvay, Ch. J., and Brooke, Kuhn, Stone, Ostrander, Bird, and Steere, JJ., concur.

NEW YORK COURT OF APPEALS.

SARAH KELLIHER, Admr., etc., of Daniel Kelliher, Deceased, Appt.,
v.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Resp't.

(212 N. Y. 207, 105 N. E. 824.)

Death — action in favor of decedent barred — effect.

An administrator who by statute may maintain an action for wrongful death within two years thereafter if decedent left husband, wife, or next of kin, against one who would have been liable to decedent had death not ensued, cannot maintain an action if decedent's right to sue was barred by limitation before his death.

(Willard Bartlett, Ch. J., dissents.)

(June 16, 1914.)

Note. — Right of action by administrator when action to recover for personal injuries was barred at the time of the injured person's death.

One of the perplexing questions arising from the statutes permitting recovery for

A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, reversing a judgment of a Special Term for Steuben County in plaintiff's favor, in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

Statement by Werner, J.:

The plaintiff in her complaint alleges that her intestate, Daniel Kelliher, was injured through the negligence of the defendant, his employer, on November 22, 1906, and that as result of such injuries he died February 24, 1912. She was thereafter appointed his administratrix, and on May 20, 1912, about six months after his

death, brought this action under § 1902 of the Code of Civil Procedure to recover the damages sustained through his death. The allegations of the complaint charge the defendant with negligence both at common law and under the employers' liability act (Consol. Laws, chap. 31).

In its answer the defendant set up three separate defenses, numbered "fourth," "fifth," and "sixth," the sufficiency of each of which the plaintiff challenged by demurrer. In the fourth defense the defendant alleged, in substance, that the action was barred by the three years' statute of limitations applying to actions for personal injuries based on negligence. Code Civ. Proc. § 383. The fifth denies that the notice required to be served under the em-

personal injuries resulting in death is the effect on the remedy there given of the fact that the right of action by the injured person to recover for the injuries has been barred by the statute of limitations. The question thus raised is not the question whether an action in behalf of the statutory beneficiaries is barred by a limitation statute referring to the remedy of the injured person, but is rather as to the effect of the extinguishment in this manner of all remedy in behalf of the injured person. As shown in the notes to *St. Louis & S. F. R. Co. v. Goode*, ante, 1141, and *State use of Melitch v. United R. & Electric Co.* ante, 1163, a final judgment in an action by the injured person to recover for his injuries, rendered in his lifetime, or a release by him of all claim against the wrongdoer for such injuries, constitutes a bar to any action in behalf of his statutory beneficiaries to recover their pecuniary loss of support by reason of the injured person's death as a result of the injuries; but the cases supporting these holdings are not entirely analogous, for the judgment or release has the effect of entirely extinguishing the injured person's cause of action, while the statute of limitations does not affect the cause of action except as it destroys any remedy.

This question was not of importance in *KELLIHER v. NEW YORK C. & H. R. R. Co.*, for the statute authorizing an action for personal injuries resulting in death provides that the action can be maintained against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Under this statute there must have been a remedy existing in behalf of the injured person at the time of death, to sustain an action in behalf of his statutory beneficiaries.

The *KELLIHER CASE* illustrates the value of the rule which makes a remedy in the injured person at the time of his death a condition to any right of action in behalf of his statutory beneficiaries, for any other rule, once it becomes generally known, must result in greatly increased litigation and much injustice to the defendants. Thus, in *L.R.A.1915E*.

the *KELLIHER CASE* about six years had elapsed between the injury and death. If the court had sustained the right of the beneficiaries to maintain an action under these circumstances, it might well be said that no laches on the part of the injured person could affect the right of his statutory beneficiaries. After the expiration of years the question whether death was the result of injuries must of necessity be largely a matter of opinion, and on this question the defendant is necessarily at great disadvantage, for not only are the facts affecting this issue almost entirely in the control of the statutory beneficiaries, but the opportunity and consequent temptation to color them to meet the exigencies of the case are great. And, as shown in the notes referred to, the effect of some decisions is that neither a judgment for or against the wrongdoer in an action by the injured person, nor a settlement with him, is any protection against an action by the statutory beneficiaries, and under the holding that the right of these beneficiaries is not affected by the fact that the remedy in behalf of the injured person was barred at the time of his death, it follows that where a person is injured through the negligence of another, the latter—no matter what he does for the injured person—has perhaps for years hanging over him a liability to the statutory beneficiaries.

It is to be observed that the provision construed in this case differs from that found in Lord Campbell's act and the statutes following it, in that it relates more particularly to the right of the deceased to have been able to maintain an action at the time of his death, and in this regard it differs also from the statute construed in *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271. A comparison of the different provisions indicates the intent of the statute construed in the *KELLIHER CASE* to make it a condition to the right of the beneficiaries to maintain an action, that a right of action should exist in the deceased at the time of death, while the provision of Lord Campbell's act, if construed according to the natural import of the language,

ployers' liability act was served within the 120 days from the occurrence of the accident, as directed by the statute. The sixth defense avers that the action was not commenced within one year from the occurrence of the accident, as required by the employers' liability act.

The demurrer to each of these defenses was sustained by the court at special term, but in the appellate division the judgment of the special term was reversed and the demurrer overruled. The appellate division allowed an appeal to this court, and certified for our determination three questions, presenting the inquiry whether the separate defenses are sufficient in law upon the face thereof to constitute a defense to the facts alleged in the complaint.

refers to the character of the injury, and it is only by judicial construction that it is made to include subsequent acts of the injured person.

It is, however, to be noted that the same construction has been placed upon Lord Campbell's act as that placed on the New York statute, not only by the New York courts, but other courts. In fact, this construction is quite general, as demonstrated in the notes heretofore referred to, and it is placed upon such statutes in considering the effect of the extinguishment of the remedy of the injured person in his lifetime to recover for his injuries.

Thus, *Williams v. Mersey Docks & Harbour Board* [1905] 1 K. B. 804, 74 L. J. K. B. N. S. 481, 69 J. P. 196, 53 Week. Rep. 488, 92 L. T. N. S. 44, 21 Times L. R. 397, 3 L. G. R. 529, holds that where the deceased could not at the date of his death or at any time after six months from his injury have maintained an action in respect to that injury, his representative after his death cannot maintain an action to recover damages in respect of his death which resulted from the injuries, and it is said that where an action could not have been brought by the deceased person, it cannot be maintained in respect of the same accident by his representative.

Under the statutes of Alabama, which are very similar to the New York statutes, which provide that the personal representative may maintain an action to recover such damages as the jury may assess for the wrongful act, omission, or negligence of any person, etc., whereby the death of his testator or intestate is caused, if the testator or intestate could maintain an action for such wrongful act, omission, or negligence if it had not caused death, and that the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distribution,—where all right of action in favor of the injured person himself was barred by the limitations statute prior to his death, no action can be maintained by his personal representative, though this statute L.R.A.1915E.

Mr. James O. Sebring, for appellant:

The limitation of time prescribed in § 1902 of the Code of Civil Procedure, by virtue of which section this action is brought, alone determines the period of time within which this action shall be brought, any other period of limitation in any other section or sections of said Code to the contrary notwithstanding.

Crapo v. Syracuse, 183 N. Y. 395, 76 N. E. 465, 19 Am. Neg. Rep. 429; *Rosin v. Lidgerwood Mfg. Co.* 89 App. Div. 245, 86 N. Y. Supp. 49; *Weber v. Third Ave. R. Co.* 12 App. Div. 512, 42 N. Y. Supp. 789; *Schlichting v. Wintgen*, 25 Hun, 626; *Whitford v. Panama R. Co.* 23 N. Y. 465; *O'Reilly v. Utah, N. & C. Stage Co.* 87 Hun, 407, 34 N. Y. Supp. 358; *Conway v. New York*,

gives to the personal representative of the decedent a cause of action which he could not have had at common law, and prescribes its own period of limitation. *Seaboard Air Line R. Co. v. Allen*, 112 C. C. A. 642, 192 Fed. 480, writ of certiorari denied in 226 U. S. 612, 57 L. ed. 382, 33 Sup. Ct. Rep. 325.

And see *Williams v. Alabama*, G. S. R. Co. 158 Ala. 396, 48 So. 485, 17 Ann. Cas. 516, holding that where a person survives an injury for some time, and does not commence a suit to recover damages therefor, so that at the time of his death his right of action is barred by the statute of limitations, no action can be maintained by his personal representative to recover damages for his wrongful death, based upon a statute providing that if the injury results in the death of the person injured, the personal representative is entitled to maintain an action therefor, for the benefit of the legal distributees of his estate.

The *KELLNER CASE* is followed in *Casey v. Auburn Teleph. Co.* 155 App. Div. 66, 139 N. Y. Supp. 579, holding that where all action by an injured person to recover damages for a personal injury was barred by the statute of limitation, no action could be maintained in behalf of the next of kin after her death as a result of the injury, to recover pecuniary damages which they sustained thereby.

And on this point see *Sachs v. Sioux City*, 109 Iowa, 224, 80 N. W. 336, holding that where, for failure to give notice to a city of his claim against it for personal injuries, the injured person in his lifetime lost his cause of action, there is nothing to survive his death on which his administrator can base a suit.

Compare with *Orth v. Belgrade*, 87 Minn. 237, 91 N. W. 843, 12 Am. Neg. Rep. 294, holding that the fact that the decedent did not in his lifetime give notice to the defendant of any claim for the injury which resulted in his death, and that therefore his right of action to recover for such injury was barred at the time of his death, did not preclude an action by a personal representative under the statute providing that when

139 App. Div. 446, 124 N. Y. Supp. 660; Barnes v. Brooklyn, 22 App. Div. 520, 48 N. Y. Supp. 36; Bonnell v. Jewett, 24 Hun, 524; Pernisi v. John Schmalz' Sons, 142 App. Div. 53, 126 N. Y. Supp. 880; Cavanaugh v. Ocean Steam Nav. Co. 19 N. Y. Civ. Proc. Rep. 391, 13 N. Y. Supp. 540; Conolly v. Hyams, 176 N. Y. 403, 68 N. E. 662; McKnight v. New York, 186 N. Y. 35, 78 N. E. 576; Jorgensen v. Reformed Low Dutch Church, 23 N. Y. Civ. Proc. Rep. 232, 26 N. Y. Supp. 876.

Mr. Halsey Sayles, with Mr. John B. Stanchfield, for respondent:

The defense that the action was not brought within three years after the accident is valid.

Dibble v. New York & E. R. Co. 25 Barb.

death is caused by a wrongful act or omission, the personal representative of the deceased may maintain an action if deceased might have maintained an action had he lived for an injury caused by the same act or omission by which the death was caused.

It has been held that, even conceding the correctness of the doctrine that if an action by the injured person to recover for the injury was barred at the time of his death, no right of action survived for the benefit of the statutory beneficiaries, the rule does not apply where, at the time of his death, there was an action pending brought by the injured person in his lifetime to recover damages for the injury. *Altzheimer v. Central R. Co.* 75 N. J. L. 424, 67 Atl. 1051.

In some jurisdictions, however, it has been held that the fact that the remedy of the injured person to recover for a personal injury was barred by the statutes of limitation at the time of his death did not preclude a recovery in behalf of his statutory beneficiaries under a statute substantially similar to Lord Campbell's act, and, as hereafter pointed out, in Indiana this rule is sustained although it is there held that a judgment in favor of the injured person in his lifetime is a bar to any action by his statutory beneficiaries after his death.

Thus, it has been held that, although the right of action of an injured person to recover damages for the injury was barred by the statute of limitations before his death, this does not bar a cause of action of the personal representative to recover damages for the wrongful death given by the statutory provision that whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action for damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured. *Hoover v. L.R.A.1915E.*

183; *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271; *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; *Hodge v. Rutland R. Co.* 112 App. Div. 142, 97 N. Y. Supp. 1107; *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 230, 238, 38 L. ed. 422, 424, 14 Sup. Ct. Rep. 579; *Seaboard Air Line R. Co. v. Allen*, 112 C. C. A. 642, 192 Fed. 480; *Williams v. Mersey Docks & Harbour Board* [1905] 1 K. B. 804, 74 L. J. K. B. N. S. 481, 69 J. P. 196, 53 Week. Rep. 488, 92 L. T. N. S. 44, 21 Times L. R. 397, 3 G. L. R. 529; *Read v. Great Eastern R. Co.* L. R. 3 Q. B. 555, 9 Beat & S. 714, 37 L. J. Q. B. N. S. 278, 18 L. T. N. S. 822, 16 Week. Rep. 1040; *Elliott v. St. Louis & I. M. R. Co.* 67 Mo. 272; *Spiva v.*

Chesapeake & O. R. Co. 46 W. Va. 268, 33 S. E. 224.

The West Virginia court reasoned on this point that while the real cause of action is the negligent injury, it is not completed until it results in death, and then the cause of action accrues to the personal representative, and not until then. The court said that to hold otherwise was to make two statutes of limitation, both of which would be bars affecting the cause of action; one continuing to run at the inception of the cause of action, the other at its consummation. *Ibid.*

And *Causey v. Seaboard Air Line R. Co.* post, 1185, holds that under the North Carolina statutes, the fact that the right of action in favor of a decedent to recover damages for personal injury was barred by the statute of limitations at the time of his death cannot avail the defendant in an action by the administrator to recover damages for death resulting from the same injury. The court said that there was no privity between the administrator and the intestate as to this cause of action, and the former succeeded to no rights of the latter, and hence it was illogical to hold that the failure of the intestate to sue for a personal injury barred the right of the administrator to recover damages for his death resulting therefrom, for the first right of action did not pass to the administrator, and the second did not exist until death.

Nestelle v. Northern P. R. Co. 56 Fed. 261, applying the statutes of Washington, also holds that the fact that the right of action by the decedent to recover damages for the injury which finally resulted in his death was barred prior to his death did not preclude or operate as a bar to the statutory action by his personal representative to recover damages for his wrongful death.

Donnelly v. Chicago City R. Co. 163 Ill. App. 7, holds that under the statute providing that whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to re-

Osage Coal & Min. Co. 88 Mo. 68; Evansville & C. R. Co. v. Lowdermilk, 15 Ind. 120; Price v. Richmond & D. R. Co. 33 S. C. 556, 26 Am. St. Rep. 700, 12 S. E. 413; Solar Ref. Co. v. Elliott, 15 Ohio C. C. 581, 8 Ohio C. D. 225; Williams v. Alabama G. S. R. Co. 158 Ala. 396, 48 So. 485, 17 Ann. Cas. 516; Northern P. R. Co. v. Adams, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408; Alzheimer v. Central R. Co. 75 N. J. L. 424, 67 Atl. 1051.

Werner, J., delivered the opinion of the court:

The allegations of the complaint disclose that plaintiff's intestate was injured in November, 1906, and died as a result thereof February, 1912. There was therefore an

interval of almost six years between the two events. The plaintiff's intestate brought no action during his lifetime to recover for his injuries. Within a few months after his decease, his widow and administratrix brought this action under § 1902 of the Code of Civil Procedure, to recover the damages sustained by her and his next of kin.

The first question to be determined is whether the action is barred by the provisions of § 383 of the Code of Civil Procedure, which provides that an action to "recover damages for a personal injury resulting from negligence" must be brought within three years after the cause of action accrued. *Id.* § 380.

It is familiar learning that at common law no action would lie against a wrong-

cover damages in respect thereof, then, etc., the fact that the right of action to recover damages for personal injuries vested in the injured person was barred before his death does not preclude an action by his personal representative based upon the statute.

In *Wilson v. Jackson Hill Coal & Coke Co.* 48 Ind. App. 150, 95 N. E. 589, it is held that the fact that the injured person's right of action to recover damages for personal injuries received is barred by the statute of limitations prior to his death does not bar a subsequent action by his administrator to recover damages for his wrongful death by virtue of a statute substantially similar to Lord Campbell's act. The court, in reaching this conclusion, relied upon *Pittsburgh, C. C. & St. L. R. Co. v. Hosea*, 152 Ind. 412, 53 N. E. 411, and apparently construed that case as limiting the doctrine of *Hecht v. Ohio & M. R. Co.* 132 Ind. 507, 32 N. E. 302. The *Hosea* Case, however, is clearly distinguishable, since it merely held that a person could not in his lifetime, prior to an injury, contract away any right of action which his wife or family might have for his wrongful death. The *Hecht* Case is authority for the doctrine that recovery by an injured person of damages for personal injuries received is a bar to an action brought subsequently to his death from such injuries, to recover damages for the wrongful death for the benefit of the widow and next of kin. Under the doctrine of this latter case, which was not overruled by the *Hosea* Case, it would seem clear that any right of action for the benefit of the widow and the next of kin depended upon the right of action in the injured person for the injuries which resulted in his death, at the time of his decease. The requirement that such right shall exist at the time of the decedent's death is not inconsistent with the holding that he cannot, prior to an injury, contract away any right of action which may accrue to his family or next of kin in the event that he receives personal injuries resulting in his death.

And see *German American Trust Co. v. Lafayette Box Board & Paper Co.* 52 Ind. L.R.A.1915E.

App. 211, 98 N. E. 874, holding that death is the foundation of an action created by the Indiana statute embodying the principles of Lord Campbell's act, and the right of action thereby created is affected only by the limitation period prescribed by that statute, and is not affected by the fact that an action by the injured person to recover damages for the injury was barred by another statute of limitations at the time of his death, citing and following *Wilson v. Jackson Hill Coal & Coke Co.* supra. While these cases construe the Indiana statute to be similar in principle to Lord Campbell's act, the language, however, is essentially different, for the Indiana statute expressly provides for an action for death by wrongful act, etc.

In a few other cases, the holding that the extinguishment of the remedy in behalf of the injured person does not affect the remedy of the statutory beneficiaries is based upon statutes distinguishable from Lord Campbell's act.

Thus, a case apparently much misunderstood on this point is *Robinson v. Canadian P. R. Co.* [1892] A. C. 481. This case is frequently cited to the point that the fact that the right of action by the decedent to recover damages for personal injury resulting in his death had become barred by the statute of limitations at the time of his death does not affect the statutory right of action vested in his beneficiaries. While this case so holds, it is, however, not authority for this point, but, if anything, is authority for the contrary doctrine. The case itself is based upon a statute containing a provision to the effect that "in all cases where the person injured by the commission of an offense or a quasi offense dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offense or quasi offense, or his representatives, all damages occasioned by such death." Lord Watson points out that this provision ignores the representative of the injured person, and gives a direct right

doer for an injury resulting in the death of the victim. This harsh rule was changed in England in 1846 by a statute commonly known as Lord Campbell's act. 9 & 10 Vict. chap. 93, § 1. In the following year this state adopted a similar act (Laws 1847, chap. 450), and this statute as amended is now embodied in § 1902, Code of Civil Procedure, which, so far as material to the present inquiry, provides as follows: "The executor or administrator of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in fa-

vor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death."

It is now settled beyond the possibility of profitable discussion that this statute gives a cause of action that is new and distinct from the common-law action for damages on account of personal injuries based on negligence. *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271; *Re Meekin*, 164 N. Y. 145, 51 L.R.A. 235, 79 Am. St. Rep. 635, 58 N. E. 50, 8 Am. Neg. Rep. 490; *Crapo v. Syracuse*, 183 N. Y. 395, 76 N. E. 465, 19 Am. Neg. Rep. 429; *McKay v. Syracuse Rapid Transit R. Co.* 208 N. Y. 359, 101 N. E. 885; *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 69, 70, 57 L. ed. 417,

of action to his widow and relatives, and also says that a difference of much greater importance is the fact that the Code distinctly specifies certain conditions affecting the right of action in the deceased, which are also to operate as a bar against any suit at the instance of his widow and his ascendant or descendant relations after his death, and he adds: "These conditions are not expressed in either of the statutes referred to [Lord Campbell's act and the provincial statute of 1859], and, according to a well-known canon of construction, it must be taken that they were inserted in the Code for the purpose of making it clear that no conditions affecting the personal claim of the deceased, other than those specified, are to stand in the way of the statutory right conferred upon his widow and relatives."

Louisville & N. R. Co. v. Simrall, 127 Ky. 55, 104 S. W. 1011, petition to modify opinion denied in 32 Ky. L. Rep. 240, 104 S. W. 1199, holds that a person suing for personal injuries must bring an action within a year, and he can recover only for the physical and mental suffering and the impairment of his ability to earn money, present and prospective. If the injured person dies of his injuries, his administrator may recover for his mental and physical sufferings, loss of time, and surgical bills down to the time of his death, provided he brings the action within the statutory period within which the injured person might have brought it. On the other hand, if the administrator sues to recover for the wrongful death, the measure of damages is wholly different; there can be no recovery for physical or mental suffering of the injured person, or the mere impairment of his power to earn money, but the recovery is for the death of the intestate alone, and is limited to such a sum as will compensate his estate for the destruction of his power to earn money. This latter cause of action does not accrue until the death of the injured person, and the fact that his cause of action to recover damages for the injury was barred by the statute of limitations at the time of his death L.R.A.1915E.

does not affect the right to sustain the action for the wrongful death. This case is distinguishable from the cases holding that the bar by the statute of limitations of the action by the injured person in his lifetime to recover for injuries is a bar to any action subsequently to his death to recover damages for his wrongful death. The doctrine of the latter class of cases is based on the ground that the statute permits an action for the wrongful death only in cases where the injured person at the time of his death might have maintained an action. This provision does not appear in the Kentucky statute or Constitution. Section 241 of the Constitution, applicable in this case, provides that "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The general assembly may provide how the recovery shall go and to whom belong; and until such provision is made the same shall form part of the personal estate of the deceased person;" and § 6 of the Kentucky statute provides that "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is wilful or the negligence is gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representative of the deceased. The amount recovered, less funeral expenses and the cost of administration, and such costs about the recovery, including attorney fees, as are not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased."

A. G. S.

421, 422, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176. This distinction is the main reliance of counsel for the appellant. He argues that a limitation applicable to actions for personal injuries cannot be construed to apply to an entirely different and separate cause of action arising only when the injured party dies, and in which the damages are "exclusively for the benefit of the decedent's husband or wife and next of kin." Code Civ. Proc. § 1903. This contention is not without force, for it is supported by authorities in other jurisdictions which have statutory provisions similar to our own. *Western & A. R. Co. v. Bass*, 104 Ga. 390, 30 S. E. 874; *Hoover v. Chesapeake & O. R. Co.* 46 W. Va. 268, 33 S. E. 224; *Nestelle v. Northern P. R. Co.* (C. C.) 56 Fed. 261. It is to be noted, however, that the right of action provided for in § 1902 is qualified by the condition that the representative action may be brought only against a natural person who, or the corporation which, "would have been liable to an action in favor of the decedent by reason thereof if death had not ensued." We think the framers of the section considered that no action should be maintainable under it unless the decedent, at the time of his death, could have maintained an action. The section has been held to bar an action in favor of the representative where his decedent in his lifetime recovered a judgment for personal injuries, which was afterwards paid (*Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271); or where there has been a settlement between the injured person and the party charged with negligence (*Dibble v. New York & E. R. Co.* 25 Barb. 183); or where the defendant is released from liability by the agreement of the intestate (*Hodge v. Rutland R. Co.* 112 App. Div. 142, 97 N. Y. Supp. 1107, affirmed in 194 N. Y. 570, 88 N. E. 1121); or where the intestate was guilty of such contributory negligence as would have barred an action by him (*Shearm. & Redf. Neg.* 6th ed. § 140a, and cases cited).

In the case at bar the decedent allowed the three years to expire within which he was permitted to commence an action. His subsequent death could not revive the cause of action based upon his injuries in favor of his representative. By the express language of the statute the wrongdoer is liable to the representative only in a case where he would have been liable to the decedent had death not ensued. In construing the meaning of this language in the *Littlewood Case*, Judge Rapallo said: "It seems to me very evident that the only defense of which the wrongdoer was intended to be deprived was that afforded him by the death of the party injured, and that it is, to say the L.R.A.1915E.

least, assumed throughout the act that at the time of such death the defendant was liable." 89 N. Y. 28.

In a case involving a similar statute the United States Supreme Court said: "As the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death, to have maintained an action for his wrongful injury." *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 69, 70, 57 L. ed. 417, 421, 422, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176.

Again, in *McKay v. Syracuse Rapid Transit R. Co.* supra, Judge Miller said: "Her [the injured person's] cause of action abated upon her death, but the legislature has substituted a new action and has specified the condition upon which it may be maintained, i. e., the right of the injured person to maintain an action if death had not ensued." 208 N. Y. 363.

The statute and these decisions establish the rule that, where an action could not have been brought by the decedent, it cannot be maintained for the same accident by his representative. That is the law as established in England (*Williams v. Mersey Docks & Harbour Board* [1905] 1 K. B. 804, 74 L. J. K. B. N. S. 481, 69 J. P. 196, 53 Week. Rep. 488, 92 L. T. N. S. 44, 21 Times L. R. 397, 3 G. L. R. 529), in a case where the precise question was involved, and in other jurisdictions (*Seaboard Air Line R. Co. v. Allen*, 112 C. C. A. 642, 192 Fed. 480; *Williams v. Alabama*, G. S. R. Co. 158 Ala. 396, 48 So. 485, 17 Ann. Cas. 516).

There have been cases in this court, and in some of the lower courts, in which it has been held that under the short statutes of limitations, applicable to negligence actions against municipalities, the cause of action under § 1902 does not accrue until after the appointment of the representative. *Crapo v. Syracuse*, 183 N. Y. 395, 76 N. E. 465, 19 Am. Neg. Rep. 429; *Barnes v. Brooklyn*, 22 App. Div. 520, 48 N. Y. Supp. 36; *Conway v. New York*, 139 App. Div. 446, 124 N. Y. Supp. 660. These cases do not conflict with the conclusion at which we arrive, for in none of them had the time expired within which the injured person could himself have brought an action.

The conclusion we have reached in sustaining the defense of the three years' statute of limitations is an absolute bar to the maintenance of this action. It will therefore be unnecessary to consider the question certified as to the sufficiency of the other two defenses. The order of the appellate division, after overruling the demurrers, granted to the plaintiff leave to

plead over. In the circumstances this is plainly futile, for the bar of the statute prevents further procedure, and the logical disposition of the case suggests a modification of the order. This we have no power to do, since the defendant has not appealed. For these reasons we affirm the order, with costs, and answer the first question in the affirmative. The second and third questions are not answered.

Hiscock, Chase, Hogan, Miller, and Cardozo, JJ., concur.

Willard Bartlett, Ch. J., dissents on the ground that the sole limitation applicable to such an action is prescribed by § 1902 of the Code of Civil Procedure itself.

NORTH CAROLINA SUPREME COURT.

R. L. CAUSEY, Admr., etc., of H. O. Causey,
Deceased,
v.

SEABOARD AIR LINE RAILWAY COMPANY, Appt.

(166 N. C. 5, 81 S. E. 917.)

Evidence — fraud — release — sufficiency.

1. Undue influence in securing a release by an employee of damages for injuries received in the business may be found from evidence that it was secured by the employer's claim agent when he was alone with the injured employee, and absolves the employer from all further liability when only a fraction of the lost time was paid for, without allowing anything for suffering and reduced capacity.

Limitation of actions — statutory action for death — bar of action for injury.

2. The bar by lapse of time of a common-law action by a person injured by another's negligence to recover for the injuries will not affect the right of his administrator to maintain a statutory action for his death from such injuries.

(May 20, 1914.)

APPEAL by defendant from a judgment of the Superior Court for Randolph County, in plaintiff's favor, in an action brought to recover damages for the alleged wrongful death of plaintiff's intestate through defendant's negligence. **Affirmed.**

Note. — As to right of action by administrator when action to recover for injuries was barred at the time of the injured person's death, see note to Kelliher v. New York C. & H. R. R. Co. ante, 1178. L.R.A.1915E.

Statement by Allen, J.:

The intestate was injured on December 1, 1903, and died on June 7, 1912. On December 27, 1903, the intestate executed the following conditional release:

Seaboard Air Line Railway. Conditional Release Agreement.

If, before the expiration of thirty days from this date, the Seaboard Air Line Railway shall pay to me, H. O. Causey, the sum of \$75, I hereby agree to release the said railway of and from all claims whatsoever for damages for or on account of personal injury sustained by No. 1 freight, running into A. C. L. freight at Hilton Bridge, throwing me against stove, cutting my head, on 1 December, 1903.

Witness my hand and seal, this 27th day of December, 1903.

[Signed] H. O. Causey. [Seal.]

Witness: [Signed] R. M. Baldwin.

The foregoing conditional release agreement has the following indorsement stamped on it: "Voucher made for 5 January, 1904, amount shown," and, "Voucher sent to auditor disbursements, 8 February, 1904."

On February 17, 1904, the intestate executed the following release:

Seaboard Air Line Railway. Release.

For and in consideration of the sum of seventy-five and no/100 dollars (\$75) to me paid, the receipt of which is hereby acknowledged, I, H. O. Causey, do hereby release and forever discharge the Seaboard Air Line Railway, and any and all railroads owned, leased, operated, or controlled by it, and its successors, from all injuries received by me in collision of trains, S. A. L. No. 1 and A. C. L. No. 80, on or about 1 December, 1903, at or near Wilmington, N. C., while a conductor, in the employ of the Seaboard Air Line Railway; the consideration hereinbefore referred to being in full compromise, satisfaction and discharge of all claims and causes of action arising out of the injuries, and in exoneration of the railway from all liability by reason thereof. In witness whereof, I have hereto set my hand and seal, this 17 February, A. D. 1904.

[Signed] H. O. Causey. [Seal.]

Signed, sealed and delivered in the presence of: [Signed] R. M. Baldwin.

The defendant pleaded the release as a defense, and also the statute barring a recovery for personal injury within three years.

The plaintiff replied, alleging that the re-

lease was procured by undue influence and fraud.

The jury returned the following verdict:

"(1) Was H. O. Causey, the intestate of the plaintiff, killed by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"(2) Did H. O. Causey, the intestate of plaintiff, execute the release as alleged by the defendant, the Seaboard Air Line, in its answer? Answer: Yes.

"(3) If plaintiff's intestate did execute and deliver the said release, did he at the time of the execution thereof have sufficient mental capacity to understand the nature and effect of the said release? Answer: Yes.

"(4) If the deceased, H. O. Causey, did not have such mental capacity, did the defendant have notice thereof? Answer: No.

"(5) If said release was executed and delivered as alleged in the answer, was the same procured by fraud and undue influence of the defendant, the Seaboard Air Line, as alleged by the plaintiff? Answer: Yes.

"(6) Is the plaintiff's cause of action barred by the statute of limitations? Answer: No.

"(7) What damage, if any, is the plaintiff entitled to recover? Answer: \$6,075."

Mr. Walter H. Neal, for appellant:

The release executed by the decedent in his lifetime is a bar to the action by the administrator.

Hood v. American Teleph. & Teleg. Co. 162 N. C. 94, 77 S. E. 1094; Broadnax v. Broadnax, 160 N. C. 432, 42 L.R.A.(N.S.) 725, 76 S. E. 216; Killian v. Southern R. Co. 128 N. C. 261, 38 S. E. 873; Bennett v. North Carolina R. Co. 159 N. C. 346, 74 S. E. 883; Read v. Great Eastern R. Co. L. R. 3 Q. B. 555, 9 Best & S. 714, 37 L. J. Q. B. N. S. 278, 18 L. T. N. S. 82, 16 Week. Rep. 1040; Whitford v. Panama R. Co. 23 N. Y. 465; Southern Bell Teleph. & Teleg. Co. v. Cassin, 111 Ga. 575, 50 L.R.A. 698, 36 S. E. 881; Strode v. St. Louis Transit Co. 197 Mo. 625, 95 S. W. 851, 7 Ann. Cas. 1084; Patterson, Railway Acci. Law, pp. 410-508; Tiffany, Death by Wrongful Act, 2d ed. § 124; Pierce, Railroads, p. 392; Canadian P. R. Co. v. Robinson, 19 Can. S. C. 292; Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 230, 237, 38 L. ed. 422, 423, 14 Sup. Ct. Rep. 579; Michigan C. R. Co. v. Vreeland, 227 U. S. 70, 57 L. ed. 421, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; Sawyer v. Perry, 88 Me. 42, 33 Atl. 660, 15 Am. Neg. Cas. 291; Mehegan v. Boyne City, C. & A. R. Co. 178 Mich. 694, ante, 1170, 141 N. W. 911, 148 N. W. 173; Louisville R. Co. v. Raymond, 135 Ky. 738, L.R.A.1915E.

27 L.R.A.(N.S.) 176, 123 S. W. 281; Price v. Richmond & D. R. Co. 33 S. C. 556, 26 Am. St. Rep. 700, 12 S. E. 413; Legg v. Britton, 64 Vt. 652, 24 Atl. 1016; Hecht v. Ohio & M. R. Co. 132 Ind. 507, 32 N. E. 302; Dibble v. New York & E. R. Co. 25 Barb. 183; Lubrano v. Atlantic Mills, 19 R. I. 129, 34 L.R.A. 797, 32 Atl. 205; Littlewood v. New York, 89 N. Y. 24, 42 Am. Rep. 271; Hill v. Pennsylvania R. Co. 178 Pa. 223, 35 L.R.A. 196, 56 Am. St. Rep. 754, 35 Atl. 997; Hughes v. Auburn, 161 N. Y. 96, 46 L.R.A. 636, 55 N. E. 389, 7 Am. Neg. Rep. 139; Louisville & N. R. Co. v. McElwain, 98 Ky. 700, 34 L.R.A. 790, 56 Am. St. Rep. 385, 34 S. W. 236; 13 Cyc. 352; Cooley, Torts, 263, 264; Shearm. & Redf. Neg. §§ 140, 301; 6 Thomp. Neg. § 7028; Suell v. Derricott, 161 Ala. 262, 23 L.R.A.(N.S.) 996, 49 So. 895, 18 Ann. Cas. 636; Senoir v. Ward, 1 El. & El. 385, 28 L. J. Q. B. N. S. 139, 5 Jur. N. S. 172, 7 Week. Rep. 261, 10 Mor. Min. Rep. 646; Griffiths v. Dudley, L. R. 9 Q. B. Div. 357, 51 L. J. Q. B. N. S. 543, 47 L. T. N. S. 10, 30 Week. Rep. 797; 2 Redf. Railways, 4th ed. 250; 2 Thomp. Neg. 1286; Kelliher v. New York C. & H. R. R. Co. 153 App. Div. 617, 138 N. Y. Supp. 895; Seaboard Air Line R. Co. v. Allen, 112 C. C. A. 642, 192 Fed. 480; Brown v. Chattanooga Electric R. Co. 101 Tenn. 252, 70 Am. St. Rep. 666, 47 S. W. 415; Blount v. Gulf, C. & S. F. R. Co. — Tex. Civ. App. —, 82 S. W. 306; McKay v. Syracuse Rapid Transit R. Co. 208 N. Y. 363, 101 N. E. 885; Blake v. Midland R. Co. L. R. 18 Q. B. 93, 21 L. J. Q. B. N. S. 233, 16 Jur. 562.

Plaintiff's cause of action was barred by the statute of limitations.

Canadian P. R. Co. v. Robinson, 19 Can. S. C. 292; Kelliher v. New York C. & H. R. R. Co. 153 App. Div. 617, 138 N. Y. Supp. 894; Seaboard Air Line R. Co. v. Allen, 112 C. C. A. 642, 192 Fed. 480.

Messrs. Hammer & Kelly, for appellee:

There was sufficient evidence of fraud to warrant the submission of the issue as to fraud in the procurement of the alleged release relied on by the defendants.

Sprinkle v. Wellborn, 140 N. C. 174, 3 L.R.A.(N.S.) 174, 111 Am. St. Rep. 827, 52 S. E. 666; King v. Atlantic Coast Line R. Co. 157 N. C. 65, 48 L.R.A.(N.S.) 450, 72 S. E. 801; Leonard v. Southern P. Co. 155 N. C. 10, 70 S. E. 1061.

Even if there was no sufficient evidence of fraud, it was harmless error for the court to submit this issue, as the release relied on by defendants was not sufficiently pleaded by them to constitute a bar to the action.

Shelby v. Charlotte Electric R. Light & P. Co. 147 N. C. 538, 61 S. E. 377; King

v. Atlantic Coast Line R. Co. 157 N. C. 52, 48 L.R.A.(N.S.) 450, 72 S. E. 801; Russ v. Harper, 156 N. C. 444, 72 S. E. 570; Phillips v. Houston, 50 N. C. (5 Jones, L.) 302; Clark, Contr. p. 75.

But even if sufficiently pleaded, the said release is not a bar to the action.

Crawley v. Timberlake, 36 N. C. (1 Ired. Eq.) 460; Bolick v. Southern R. Co. 138 N. C. 370, 50 S. E. 689; Hartness v. Pharr, 133 N. C. 570, 98 Am. St. Rep. 725, 45 N. E. 901; Hood v. American Telegraph. & Teleg. Co. 162 N. C. 92, 77 S. E. 1094; 19 Am. & Eng. Enc. Law, 2d ed. 280.

Allen, J., delivered the opinion of the court:

There was evidence to support the finding by the jury that the injury in 1903 caused the death of the intestate, and this is practically conceded by the defendant.

It is, however, earnestly insisted that there was no evidence of fraud or undue influence in procuring the execution of the release, set up as a defense.

No presumption of fraud arises from the relation of employer and employee, "but it is recognized by the courts that the employer has great influence in determining the conduct of the employee and may use it to his injury." King v. Atlantic Coast Line R. Co. 157 N. C. 63, 48 L.R.A.(N.S.) 450, 72 S. E. 809. And "where there is no coercion amounting to duress, but a transaction is the result of a moral, social, or domestic force exerted upon a party, controlling the free action of his will and preventing any true consent, equity may relieve against the transaction on the ground of undue influence, even though there may be no invalidity at law. In the vast majority of instances, undue influence naturally has a field to work upon in the condition or circumstances of the person influenced which render him peculiarly susceptible and yielding,—his dependent or fiduciary relation towards the one exerting the influence, his mental or physical weakness, his pecuniary necessity, his ignorance, lack of advice, and the like." 2 Pom. Eq. Jur. § 851.

The plaintiff relies upon circumstantial evidence to prove fraud and undue influence, and as was said by Justice Brown in the matter of Re Everett, 153 N. C. 85, 68 S. E. 925: "Experience has shown that direct proof of undue or fraudulent influence is rarely attainable, but inference from circumstances must determine it. . . . Undue influence is generally proved by a number of facts, each one of which, standing alone, may be of little weight, but taken collectively may satisfy a rational mind of its existence." L.R.A.1915E.

Let us, then, examine the circumstances connected with the execution of the release. The intestate was in the employment of the defendant when the release was executed, and wished to continue the employment. He was injured on December 1, 1903, by a blow on the back of the head, and, while the jury finds that he had sufficient mental capacity to execute a release, it was in evidence that he had trouble with his head continuously after the injury. He accepted \$75 in settlement for an injury which finally resulted in death. The settlement was made under an agreement to pay him for his lost time (the claim agent of the defendant testifies to this), and he was at that time earning from \$90 to \$95 a month, and, according to the evidence of the plaintiff, lost 2½ months. The evidence does not disclose that anyone was present when the release was executed, except the claim agent of the defendant, and he made conflicting statements as to his meeting with the intestate, saying, "I met him by appointment. He sent word that he wanted to see me. I did not meet him by appointment. I did not send for him to come and see me. I met him on the hotel porch at Hamlet by accident." The conditional release was executed on December 27, 1903, conditioned to accept \$75, if paid within thirty days, under an agreement to pay for lost time, when there was due him then, computing at the rate of \$90 per month, \$81, and the time he would lose could not then be ascertained, as he had not resumed work. The sum of \$75 was not paid within the thirty days, but the intestate stood by the agreement, and at the end of two months and seventeen days, while still unable to work, executed a full release for \$75, under the same agreement, the defendant says, to pay for lost time, when his wages alone would, at that time, have amounted to \$231, not considering damages for mental and physical suffering and for reduced capacity, for which the defendant was liable, if for anything.

We have, then, a full release executed upon the payment of less than one third of the amount agreed to be paid, and when the most important element of damages was not then taken into consideration,—mental and physical suffering, and reduced capacity. It was executed by an employee who was, at the time, suffering mentally and physically from his injury, and who wished to retain his place with the defendant, and when no one was with him except the claim agent of the defendant, who made contradictory statements about his meeting with the intestate. It would seem that one of two conclusions must follow, if the jury accepted this evidence: That the intestate did not have sufficient mind to execute a re-

lease, or that he was improperly influenced. The jury has adopted the latter solution, and in our opinion there was evidence to support it.

In *King v. Atlantic Coast Line R. Co.* 157 N. C. 65, 72 S. E. 809, quoting from our own reports and from the Supreme Court of the United States, as to the effect of inadequacy of consideration upon an issue of fraud and undue influence, we said: "In *Byers v. Surget*, 19 How. 311, 15 L. ed. 673, the Supreme Court of the United States says: 'To meet the objection made to the sale in this case, founded on the inadequacy of the price at which the land was sold, it is insisted that inadequacy of consideration, singly, cannot amount to proof of fraud. This position, however, is scarcely reconcilable with the qualification annexed to it by the courts, namely, unless such inadequacy be so gross as to shock the conscience, for this qualification implies necessarily the affirmation that, if the inadequacy be of a nature so gross as to shock the conscience, it will amount to proof of fraud.' And again, in *Hume v. United States*, 132 U. S. 411, 33 L. ed. 395, 10 Sup. Ct. Rep. 136: 'It (fraud) may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses, and not under delusion, would make, on the one hand, and as no honest and fair man would accept, on the other.' Our court, speaking through Justice Brown, so declares the law in reference to awards and other transactions. In *Perry v. Greenwich Ins. Co.* 137 N. C. 406, 49 S. E. 890, he says: 'Where there is a charge of fraud or partiality made against an award, the fact that it is plainly and palpably wrong would be evidence in support of the charge, entitled to greater or less weight according to the extent or effect of the error and the other circumstances of the case. There might be a case of error in an award so plain and gross that a court or jury could arrive only at the conclusion that it was not the result of an impartial exercise of their judgment by the arbitrators. *Godard v. King*, 40 Minn. 164, 41 N. W. 659. The settled rule, which is applicable not only to awards, but to other transactions, is that mere inadequacy alone is not sufficient to set aside the award; but, if the inadequacy be so gross and palpable as to shock the moral sense, it is sufficient evidence to be submitted to the jury on the issues relating to fraud and corruption, or partiality and bias.' Where there is inadequacy of consideration, but it is not gross, it may be considered in connection with other evidence upon the issue of fraud, but will not, standing alone, justify setting

J.R.A.1915E.

aside a contract or other paper-writing on the ground of fraud."

The finding of the jury that the release was procured by fraud and undue influence, rendered upon competent evidence, makes it unnecessary to consider the effect of a valid release executed by the intestate on the plaintiff's right of action.

The remaining question presented by the appeal is the effect of the lapse of time between the injury to and the death of the intestate.

The right of action in favor of the intestate to recover damages for personal injury was barred by the statute of limitations of three years at the time of his death, and the question is presented whether this can avail the defendant in an action by the administrator to recover damages for death, the result of the same injury.

Ordinarily, the bar of the statute is a good defense against the administrator, if available against the intestate; but this is because the administrator succeeds to the rights of the intestate, derives his title from him, and is endeavoring to enforce a right which belonged to him; and, if no such relation exists in a given case, there would seem to be no good reason for admitting the defense.

The right to recover damages for personal injury belonged to the intestate, and terminated at his death, while the right to recover damages for wrongful death never belonged to him, and did not exist until death. A recovery in an action for personal injury belongs to the estate of the intestate, but a recovery for death is no part of the assets of the intestate. The two rights of action have no common source, one being under the principles of the common law, and the other the creature of statute. The administrator sues, not because of any privity between him and the intestate, but for the reason that the statute designates him as the party plaintiff, and he is substantially a statutory trustee.

This court said, in *Hood v. American Teleph. & Teleg. Co.* 162 N. C. 94, 77 S. E. 1095, in considering the statute conferring the right of action for death (Rev. § 59): "Prior to the statute, which was first enacted in 1854, there was no right of action to recover damages for wrongful death (*Killian v. Southern R. Co.* 128 N. C. 261, 38 S. E. 873), and, as the right of action is conferred by the statute, it may designate who may sue. In 8 Am. & Eng. Enc. Law, 887, the author says: 'The right of action for the death of any person caused by the wrongful act of a defendant is, with the isolated exceptions mentioned, purely statutory, and in all cases the statute must be

looked to in determining to whom such right belongs.' When we turn to our statute, we find that the right of action is given to the executor, administrator, or collector, and, there being an executor in this case, the plaintiff cannot sue. The statute designates the person to bring the action and determines the disposition of the recovery. As was well said by Justice Walker in *Hartness v. Pharr*, 133 N. C. 570, 98 Am. St. Rep. 725, 45 S. E. 903: 'It must be borne in mind that, whatever the varying forms of the statutes may be, the cause of action given by them, and also by the original English statute, was in no sense one which belonged to the deceased person or in which he ever had any interest, and the beneficiaries under the law do not claim by, through, or under him; and this is so although the personal representative may be designated as the person to bring the action. *Baker v. Raleigh & G. R. Co.* 91 N. C. 308. The latter does not derive any right, title, or authority from his intestate; but he sustains more the relation of a trustee in respect to the fund he may recover for the benefit of those entitled eventually to receive it, and he will hold it when recovered actually in that capacity, though in his name as executor or administrator, and though in his capacity as personal representative he may perhaps be liable on his bond for its proper administration. *Ibid.*'

If there is no privity between the administrator and the intestate as to this cause of action, and the former succeeds to no rights of the other, it is illogical, as it appears to us, to hold that the failure of the intestate to sue for personal injury will bar the right of the administrator to recover damages for death, when the first right of action could not pass to the administrator and the second did not exist until death. It would be, in effect, an adjudication that the second cause of action was barred before it came into existence.

The weight of authority elsewhere is, we think, in support of the position that the action is not barred.

In *Robinson v. Canadian P. R. Co.* [1892] A. C. 481, it was held by the privy council, on appeal from the supreme court of Canada: "That the Civil Code of Lower Canada does not make it a condition precedent to the right of action given by § 1056 to the widow of a person dying as therein mentioned, that the deceased's right of action should not have been extinguished in his lifetime by prescription under § 2262(2). The death is the foundation of the right given by the former section, which is governed by the rule of prescription contained therein and is exempt from the rule L.R.A.1915E.

of prescription which barred the claim of the deceased."

In *Hoover v. Chesapeake & O. R. Co.* 46 W. Va. 268, 33 S. E. 224 (the statute of limitations in West Virginia being one year), the court said: "It is claimed that, the injured having lost his right to sue by reason of the bar of the statute of limitations at the time of his death, the cause of action is thereby destroyed, both as to himself and his administratrix; that death must find him with a cause of action legally enforceable, or she has none. This is undoubtedly true where the cause of action never existed, or is defeated by contributory negligence, or it has been compromised or released; for in such cases there is a complete want of or destruction by satisfaction of the cause, not merely of the right of action or remedy. *Dibble v. New York & E. R. Co.* 25 Barb. 183; *Whitford v. Panama R. Co.* 23 N. Y. 484; *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271; *Fowlkes v. N. & D. R. Co.* 5 Baxt. 663. In a certain class of cases the bar of the statute not only takes away the remedy, but destroys the cause of action. When the liability and the limitation are created by the same statute, the latter operates on the former, or liability, and not on the remedy alone. *The Harrisburg*, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140. Generally speaking, however, the statute of limitations acts on the remedy, and takes away the right of action; and, while it prevents relief, it does not destroy the cause of action, or the moral obligation on the negligent party to make good the injury caused by his default or neglect. . . . The first clause of the section, 'whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof,' plainly relates to the character of the injury, without regard to the question of time of suit or death. In other words, if the character of injury is such that the injured party could have at any time maintained a suit in relation thereto, his administrator could sue after his death. His cause of action is the negligent injury, but the administrator can have no cause of action until such negligent injury results in death. If such were not the case, why not provide merely that the decedent's cause of action survive to his personal representative, without making the death, coupled with the negligence that occasioned it, a new cause of action? And why not give the damages recovered to his estate, instead of exempting them from his debts

and liabilities? . . . It is possible for learned and able counsel to give the statute a different construction, but the court adopts what appears to be the more reasonable view, and this is that an action lies, notwithstanding the death of the injured person did not occur until more than a year after the negligence which caused the injury occurred."

In *German American Trust Co. v. La Fayette Box, Board & Paper Co.* 52 Ind. App. 211, 98 N. E. 874, the appellate court of Indiana held that "the foundation of the right given by Burns's Anno. Stat. 1908, § 285, providing that, when one's death is caused by the wrongful act of another, his personal representative may sue therefor, if he, had he lived, might have sued for an injury for the same act, and the action shall be commenced in two years, is death; and the limitation for the action thereon is two years from the death, unaffected by decedent's action for his injuries being barred before his death."

In *Louisville & N. R. Co. v. Simrall*, 127 Ky. 60, 104 S. W. 1012, the supreme court of Kentucky said of this question: "It is strongly insisted for appellant that the court erred in sustaining appellee's demurrer to its pleas of the statute of limitations; it being the contention of counsel that no right of action exists for negligently causing the death of a person where no right of action for the injury causing the death exists at the time the death occurs, and, further, that neither § 241 of the Constitution of Kentucky nor § 6 of the Kentucky Statutes of 1903 was intended to give a right of action for causing the death of a person, unless a right of action for the injury existed at the time of the death. The argument advanced by learned counsel for appellant is that, as § 2516, Ky. Stat. 1903, which provides: 'An action for an injury to the person of the plaintiff, or his wife, child, ward, apprentice, or servant, or for injuries to person, cattle or stock, by railroads or any company or corporation . . . shall be commenced within one year next after the cause of action accrued and not thereafter,' applies to actions for injuries resulting in death, as well as those which do not result in death, the statute runs in each case from the time the injury was inflicted. It is further argued that the starting point is the same in each case, and that if, in the case of an injury subsequently resulting in the loss of a leg, the statute runs from the date of the original injury, and not from the loss of the leg, so, in the case of any injury subsequently resulting in death, the statute runs from the date of the original injury, and not from the death. It is also urged that any L.R.A.1915E.

other construction of the statute than that contended for by appellant would lead to injustice and oppression, for the reason that, if an administrator may maintain an action for causing the death of his intestate, where the death did not result until the lapse of ten or fifteen years from the time the injury was inflicted, then he may recover, although his intestate could not do so, if living, for the injuries received, and that, too, very probably, after many of the witnesses have died or disappeared, and after the circumstances surrounding the infliction of the injury have faded from the memories of those by whom it was witnessed. Though plausible, the foregoing argument is unsound. Hardships may result in exceptional cases from the application of any statute or legal principle, however salutary the operation of either in general. . . . In the first case the cause of action is asserted by the person injured, or his administrator, and it arises out of and is for the injury received. It therefore accrues from and at the time of the infliction of the injury; hence the statute then begins to run. In the second case the cause of action does not accrue until the death of the person injured occurs, because the action is not for the injury sustained by the intestate, but for the death resulting from the injury, which is an independent and distinct grievance, created by statute, for which the personal representative alone may sue. This being true, the statute [of limitation] begins to run at the death and with the accrual of the cause of action. It is an indisputable rule that the statute of limitations can never begin to run until the cause of action accrues."

In *Nestelle v. Northern P. R. Co.* (C. C.) 56 Fed. 261, the plea of the statute was denied; the court holding: "The statute of limitations begins to run against the statutory right of action for an injury resulting in death only at the time the death occurs, although that event takes place long after the time of receiving the injury."

In *Western & A. R. Co. v. Bass*, 104 Ga. 390, 30 S. E. 874, the date of the injury was February 21, 1891, and death ensued five years thereafter, and the court says upon the question now before us: "Was the plaintiff's right of action barred by the statute of limitations, because her suit was not filed within two years from the date her husband was injured? 'Actions for injuries done to the person shall be brought within two years after the right of action accrues.' Civil Code, § 3900. If the plaintiff's husband had sued for the injuries to his person, he must have brought his action within two years from the date such in-

juries were inflicted. The plaintiff's action, however, was not for injuries done to the person of her husband. She had no right under the law to sue for such injuries; no one except the husband himself could maintain an action for them. If, however, such injuries resulted in his death, then, under § 3828 of the Civil Code, a right of action accrued to her. That section provides that a widow may recover for the homicide of her husband, and plaintiff's suit is based upon the cause of action therein given her. This statute does not profess to revive the cause of action for the injury to the deceased in favor of his widow, nor is such its legal effect, but it creates a new cause of action, in favor of the widow, unknown to the common law. The right of action given by the statute is for the homicide of the husband, in all cases where the death results from a crime, or from criminal or other negligence, and is founded on a new grievance, namely, his homicide, and is for the injury thereby sustained by the widow, and children, to whose exclusive benefit the damages must inure, as, under § 3829 of the Civil Code, 'in the event of a recovery by the widow, she shall hold the amount recovered, subject to the law of descents, as if it had been personal property descending to the widow and children from the deceased, and no recovery had . . . shall be subject to any debt or liability of any character of the deceased husband.' The widow's right of action for the wrongful homicide of her husband cannot exist at all until he is actually dead, and she cannot, as a matter of course, bring suit before her cause of action comes into life. The statute of limitation begins to run from the time the right of action accrues; that is, as soon as the party is entitled to apply to the proper tribunal. Angell, Limitations, 6th ed. § 42. It is clear, therefore, that the statute of limitations which began to run against the husband from the date his right of action accrued, namely, the time the injuries were inflicted, could not be pleaded against the plaintiff in a suit for his homicide, alleged to have been caused by the same injuries, because she had no right of action until her husband died, and the statute could not run against a right of action before it came into existence."

In Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 230, 38 L. ed. 422, 14 Sup. Ct. Rep. 579, which was an action to recover damages for death, the railroad relied upon the rule of the common law, obtaining in prosecutions for murder, that death must ensue within a year and a day. The court repudiated the defense, and the reasoning, based upon a construction of the statute giving a right of action for death, strongly

supports our view. The court says: "The statute, in express words, gives the personal representative two years within which to sue. He cannot sue until the cause of the action accrues, and the cause of action given by the statute for the exclusive benefit of the widow and children or next of kin cannot accrue until the person injured dies. Until the death of the person injured, the 'new grievance' upon which the action is founded does not exist. To say, therefore, that, where the person injured dies one year and two days after being injured, no action can be maintained by the personal representative, is to go in the face of the statute, which makes no distinction between cases where death occurs within less than a year and a day from the injury, and where it does not occur until after the expiration of one year and a day. Although the evidence may show, beyond all dispute, that the death was caused by the wrongful act or omission of the defendant, and although the action by the personal representative was brought within two years after the death, yet, according to the argument of learned counsel, the action cannot be maintained if the deceased happened to survive his injuries for a year and a day. We cannot assent to this view. Was the death, in fact, caused by the wrongful act or omission of the defendant? That is the vital inquiry in each case. The statute imposes no other condition upon the right to sue. The court has no authority to impose an additional or different one. If death was so caused, then the personal representative may sue at any time within two years from such death."

The diligent and learned counsel for the defendant has collected all of the cases holding to the contrary.

Canadian P. R. Co. v. Robinson, 19 Can. S. C. 292, 54 Am. & Eng. R. Cases, 49, by the supreme court of Canada, was, as we have seen, reversed on appeal.

The two Alabama cases (Williams v. Alabama G. S. R. Co. 158 Ala. 398, 48 So. 485, 17 Ann. Cas. 516, and Suell v. Derricott, 161 Ala. 259, 23 L.R.A.(N.S.) 996, 49 So. 895, 18 Ann. Cas. 636), and Seaboard Air Line R. Co. v. Allen, 112 C. C. A. 642, 192 Fed. 480, by the circuit court of appeals, are based upon the construction of the Alabama statute conferring a right of action for death, which is different from ours in that the right there is not new and independent, but is a survival of the right of action of the intestate. In the first of these cases, the court says: "The object of the statute (§ 1751, Code 1896), as we understand it, was to continue the cause of action which the person injured had—and which he had not enforced, but might have enforced had

not death intervened—for the benefit of the legal distributees of his estate; and to enable the distributees to obtain their damages, resulting from the same primary cause, and not to create an entirely new and additional right of action, although the mode of estimating the damages might be entirely different from that employed had the action been brought by the employee. 'In the view we take of the statute, the right to be enforced is not an original one, springing into existence from the death of the intestate, but is one having a previous existence, with the incident of survivorship, derived from the statute itself.' The circuit court of appeals adopts this construction, the injury causing death in that case having occurred in Alabama.

Kelliher v. New York C. & H. R. R. Co. 153 App. Div. 617, 138 N. Y. Supp. 894, is in point, but it is now pending on appeal in the court of appeals of New York.

We are therefore of opinion, on reason and authority, that the cause of action is not barred by the statute of limitations.

No error.

Petition for rehearing denied.

NEW YORK COURT OF APPEALS.

FRANK SHARROW, Admr., etc., of James Farrell, Deceased, Appt.,
v.

INLAND LINES, Limited, et al., Respts.

(214 N. Y. 101, 108 N. E. 217.)

Pleading — injury resulting in death — duty to allege time of death.

A complaint filed to recover damages for wrongful death is not demurrable for fail-

ure to state that the action was brought within the period prescribed, after death, under a statute giving the personal representative a right under certain circumstances to maintain an action for wrongful acts resulting in death, to be commenced within two years after the death.

(Chase and Collin, JJ., dissent.)

(February 5, 1915.)

A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Special Term for Erie County, dismissing a complaint filed to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendants' negligence. Reversed.

The facts are stated in the opinion.

Mr. Irving W. Cole, with Mr. Hamilton Ward, for appellant:

The sustaining of defendants' demurrer on the ground that the complaint omits to affirmatively allege that the action was brought within two years after the death of decedent was error.

Wilson v. New York, 15 How. Pr. 500; *Getty v. Hudson River R. Co.* 8 How. Pr. 177; *Mitchell v. Thorn*, 134 N. Y. 536, 30 Am. St. Rep. 699, 32 N. E. 10; *Hirsch v. New England Nav. Co.* 200 N. Y. 263, 93 N. E. 524; *Harden v. Ongley Electric Co.* 89 Hun, 487, 35 N. Y. Supp. 405; *L. D. Garrett Co. v. Morton*, 65 App. Div. 366, 73 N. Y. Supp. 40; *Pernisi v. John Schmalz's Sons*, 142 App. Div. 53, 126 N. Y. Supp. 880.

The two-year limitation in § 1902 of the Code of Civil Procedure is a statute of limitation, and not an integral part of the cause of action created by said section.

Ackerman v. Ackerman, 200 N. Y. 72, 93

pleaded to be availed of. And upon the theory that a provision in the statute authorizing the action requires that it be commenced within a designated period of time after the death complained of, *SHARROW v. INLAND LINES* holds it to be unnecessary for the plaintiff to allege facts showing that the action was commenced within the period specified.

To the same effect is *Chiles v. Drake*, 2 Met. (Ky.) 146, 74 Am. Dec. 406, holding that a provision in a statute of the character under consideration, that all actions brought under it shall be within one year from the time of the death complained of, is a limitation provision, and hence the plaintiff need not show that the death complained of was within the statutory period.

A very similar statute authorizing an action where injuries to the person result in his death, providing that the action must be brought within a certain time from the death complained of, has been construed as

Note. — Necessity for alleging that action for death is within the statutory period.

The few decisions on the point disagree as to the necessity of alleging in the declaration, complaint, or petition in an action to recover for injuries resulting in death, facts showing that the action was commenced within the statutory period. The difference of opinion on the question grows out of the construction of the statute as to whether the limitation of time is a condition upon compliance with which the right of action depends, or whether it is merely a statute of limitation. Of course, if the provision is construed to be a condition of the right of action, it is clear that the plaintiff, in order to maintain his action, must allege facts bringing himself within the stipulated time. On the other hand, if the provision is construed to be merely a statute of limitations, this is a defense which must be

L.R.A.1915E.

N. E. 192; *McNair v. McNair*, 140 App. Div. 226, 125 N. Y. Supp. 1; *Kaiser v. Kaiser*, 16 Hun, 602; *Hyden v. Pierce*, 144 N. Y. 512, 39 N. E. 638; *Wetyeh v. Pick*, 178 N. Y. 223, 70 N. E. 497; *Conelly v. Hyams*, 176 N. Y. 403, 68 N. E. 662; *Titus v. Poole*, 145 N. Y. 414, 40 N. E. 228; *Hamilton v. Royal Ins. Co.* 156 N. Y. 327, 42 L.R.A. 485, 50 N. E. 863; *Rowell v. Janvrin*, 151 N. Y. 60, 45 N. E. 398; *Shepard v. Fulton*, 171 N. Y. 184, 63 N. E. 966; *People v. Ebelst*, 180 N. Y. 470, 73 N. E. 235; *Romeo v. Yonkers*, 126 App. Div. 402, 110 N. Y. Supp. 724; *Stein v. Dunne*, 119 App. Div. 1, 103 N. Y. Supp. 894; *Boynton v. Sprague*, 100 App. Div. 443, 91 N. Y. Supp. 839; *Acker, Merrill & Condit v. Richards*, 63 App. Div. 305, 71 N. Y. Supp. 929; *Lang v. Lutz*, 180 N. Y. 254, 73 N. E. 24; *Nehasane Park Asso. v. Lloyd*, 167 N. Y. 431, 60 N. E. 741; *Bellinger v. German Ins. Co.*

creating a conditional right, and by averments the plaintiff must bring himself within the condition; hence, where a petition to recover damages for injuries resulting in death fails to show that the action was commenced within the prescribed time, it is defective, where attacked by demurrer. *Eureka v. Merrifield*, 9 Kan. App. 579, 58 Pac. 243; *Hamilton v. Hannibal & St. J. R. Co.* 39 Kan. 56, 18 Pac. 57.

Construing the statute providing that whenever the death of a person is caused by a wrongful act, neglect, or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, . . . to be brought within one year, and holding the limitation of time to be a condition annexed to the right of action, and not a statute of limitations, it has been held necessary for the plaintiff, in order to maintain the action, to allege and prove that the right of action accrued within the statutory period. *Gulledge v. Seaboard Air Line R. Co.* 147 N. C. 234, 125 Am. St. Rep. 544, 60 S. E. 1134.

To the same effect is *Bennett v. North Carolina R. Co.* 159 N. C. 345, 74 S. E. 883, holding that the pleadings on the part of the plaintiff must show that the action is brought within the special statutory period.

So, where a statute provides for the recovery of a maximum and minimum amount, first, by the husband and wife of the deceased; or second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased,—a petition by the widow of the deceased is defective where it shows that the death of the deceased occurred more than six months before bringing the suit, and is silent on the existence of children. *Chandler v. Chicago & A. R. Co.* 251 Mo. 592, 158 S. W. 35. This case may be distinguished from the point under consideration on the ground that on its face the petition L.R.A.1915E.

51 Misc. 466, affirmed in 113 App. Div. 917, 100 N. Y. Supp. 424, 189 N. Y. 533, 82 N. E. 1124.

Messrs. Brown, Ely, & Richards, for respondents:

The action created by chapter 450 of the Laws of 1847, and continued by § 1902 of the Code, was unknown at common law, and does not exist independently of the limit of time therein contained.

Whitford v. Panama R. Co. 23 N. Y. 465; *Hoffman v. Delaware & H. Co.* 163 App. Div. 50, 148 N. Y. Supp. 609; *Re Meekin*, 164 N. Y. 145, 51 L.R.A. 235, 79 Am. St. Rep. 635, 58 N. E. 50, 8 Am. Neg. Rep. 490; *Debevoise v. New York, L. E. & W. R. Co.* 98 N. Y. 377, 50 Am. Rep. 683; *McDonald v. Mallory*, 77 N. Y. 546, 33 Am. Rep. 664; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48, 38 Am. Rep. 491; *Hegerich v. Keddie*, 99 N. Y. 258, 52 Am. Rep. 25, 1 N. E.

showed the action was not brought within the statutory period unless there were minor children, and since it was silent upon this point, the petition did not state a cause of action. It may very fairly be said, however, that the allegation of the existence of children under the circumstances was an essential part of the allegation necessary to bring the case within the period of the statute of limitations; and see in this connection *Barker v. Hannibal & St. J. R. Co.* 91 Mo. 86, 14 S. W. 280, holding that, in the absence of averment or proof that the decedent left minor children surviving him, a demurrer to the evidence was properly sustained where the action was commenced more than six months after the death complained of.

It has been held, however, not necessary specifically to allege in the declaration that the action was brought within the time prescribed by the statute authorizing the action, but it is sufficient in this regard if it appears by the writ that the action was brought within the time (*Winifred Bros. v. Rutland R. Co.* 71 Vt. 48, 42 Atl. 980); and an allegation showing the time of the death complained of, which was within the specified period, is sufficient after verdict. *Hill v. New Haven*, 37 Vt. 501, 88 Am. Dec. 613.

But it has been held that it is necessary that the plaintiff aver in such a way that the defendant can traverse the material fact as to the time of death with reference to the commencement of the action, and it is not sufficient to lay the date under a *videlicet*. *Seitter v. West Jersey & S. R. Co.* 79 N. J. L. 277, 75 Atl. 435.

The question whether the provision in a statute as to time within which an action thereby given must be brought is a condition of the action or a mere limitation is considered in its bearing on the conflict of laws in the note to *Louisville & N. R. Co. v. Burkhart*, 46 L.R.A.(N.S.) 687.

A. G. S.

787; *Wooden v. Western N. Y. & P. R. Co.* 126 N. Y. 10, 13 L.R.A. 458, 22 Am. St. Rep. 803, 26 N. E. 1050; *Stuber v. McEntee*, 142 N. Y. 200, 36 N. E. 878.

A complaint or declaration which fails to show that the action was brought within the time limited is demurrable.

Hanna v. Jeffersonville R. Co. 32 Ind. 113; *Jeffersonville, M. & I. R. Co. v. Hendricks*, 41 Ind. 48, 3 Am. Neg. Cas. 106; *Radezky v. Sargent & Co.* 77 Conn. 110, 58 Atl. 709; *Lapsley v. Public Service Corp.* 75 N. J. L. 266, 68 Atl. 1113; *Dowell v. Cox*, 108 Va. 460, 62 S. E. 272; *George v. Chicago, M. & St. P. R. Co.* 51 Wis. 603, 8 N. W. 374.

Since the commencement of the action within two years after the death of the decedent is a condition precedent to the maintenance of the action, it was necessary for plaintiff to allege and prove that the action was brought within the time therein prescribed.

Hayden v. Pierce, 144 N. Y. 512, 39 N. E. 638; *Conolly v. Hyams*, 176 N. Y. 403, 68 N. E. 662; *Reining v. Buffalo*, 102 N. Y. 308, 6 N. E. 792; *Pernisi v. John Schmalz's Sons*, 142 App. Div. 53, 126 N. Y. Supp. 880; *Keene v. Newark Watch Case Material Co.* 81 App. Div. 48, 80 N. Y. Supp. 859; *Lapsley v. Public Service Corp.* 75 N. J. L. 266, 68 Atl. 1113; *Gullede v. Seaboard Air Line R. Co.* 147 N. C. 234, 125 Am. St. Rep. 544, 60 S. E. 1134; *Bennett v. North Carolina R. Co.* 159 N. C. 345, 74 S. E. 883; *Chandler v. Chicago & A. R. Co.* 251 Mo. 592, 158 S. W. 35.

Willard Bartlett, Ch. J., delivered the opinion of the court:

This is an action to recover damages for negligently causing the death of the plaintiff's intestate. The complaint does not show that the action was commenced within two years after the death of the decedent. The courts below have held that it is essential to the maintenance of such an action as this that it must appear upon the face of the complaint that it was commenced within two years after the decedent's death, and that the omission of an allegation to that effect is fatal on demurrer. The only question presented by the appeal is whether this ruling is correct.

The present Constitution of the state of New York, adopted in 1894, contains the following provision: "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation." Const. art. 1, § 18.

The action, thus preserved by the fundamental law, is provided for in § 1902 of the L.R.A.1915E.

Code of Civil Procedure. The portion material to be considered reads as follows: "The executor or administrator of a decedent, who has left, him or her surviving, a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death."

As is well known, this legislation had its origin in the English statute known as Lord Campbell's act, enacted by Parliament in 1846; and, as has repeatedly been pointed out, it gave rise to an entirely new cause of action unknown to the common law. Similar statutes now exist in most, if not all, the states of the Union. The original New York statute was passed on the 13th of December, 1847. Laws 1847, chap. 450. The 1st section provided that whenever the death of a person should be caused by wrongful act, neglect, or default, which would have entitled the party injured (if death had not ensued) to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, should be liable to an action for damages notwithstanding the death of the person injured, and although the death should have been caused under such circumstances as amount in law to a felony.

The 2d section read as follows: "Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property, left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person; provided that every such action shall be commenced within two years after the death of such deceased person."

It will be observed that the limitation of time in the act of 1847 was put in the form of a proviso.

The law continued substantially as thus enacted until 1880, when the statutory provisions relating to actions for wrongfully or negligently causing death were trans-

ferred into the Code of Civil Procedure, where they now appear as §§ 1901-1905, inclusive. This transfer, however, was accompanied by a change of phraseology, so far as the limitation of time is concerned, which I deem of controlling importance in the question under consideration upon this appeal. The time limitation no longer appeared as a proviso, the words "provided that" were omitted, and the clause was made to read merely, "Such action must be commenced within two years after the decedent's death."

I cannot agree that this constitutes a mere change of language without any change in meaning or effect. The nature of a proviso has long been well understood by legislators as well as lawyers, and I think we should not be justified in holding that the omission of the words "provided that," which were contained in the act of 1847 was intentional or ineffectual. Assuming, as I do, that so long as the time limitation remained a proviso it related to the right rather than the remedy, I think there were reasons which might well have influenced the legislature to make a change in the law in this respect. The right of action to recover damages for wrongfully causing death, which has since been made a constitutional right by the action of the people, was thereafter to be provided for and regulated, not in a separate statute, but in a general statute designed to be a permanent part of our system of jurisprudence. Suits to enforce it had ceased to be special and peculiar. They had become a familiar feature in the business of our courts. No good reason existed why the benefit of the general exceptions given by law to the parties against whom the bar of the statute of limitations is invoked should not be given to plaintiffs in this class of cases; and it seems to me that it is not going too far to suppose that this consideration may have led to the alteration in the language of the statute. At all events, the time limitation as to actions of this sort ceased to be a proviso, and has become a simple requirement that suit shall be begun within two years. Although its form is in no wise different from that of an ordinary statute of limitations, we are asked to hold that the provision is so indissolubly bound up with the right as to oblige the plaintiff to plead compliance therewith in order to state a good cause of action.

I cannot think that this is necessary, in view of the form which the statute assumed upon its incorporation into the Code. It must be conceded that our courts of intermediate appeal have held that the time prescribed by the statute within which the action must be commenced is of the essence

of the right to maintain the suit, and not a mere statute of limitations (*Colell v. Delaware, L. & W. R. Co.* 80 App. Div. 342, 80 N. Y. Supp. 675; *Pernisi v. John Schmalz's Sons*, 142 App. Div. 53, 126 N. Y. Supp. 880), and that decisions to the same effect in regard to like statutes have been made in the Federal courts (*The Harrisburg*, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140), and in the courts of other states (*Benjamin v. Eldridge*, 50 Cal. 612; *Lapsley v. Public Service Corp.* 75 N. J. L. 266, 68 Atl. 1113; *Hill v. New Haven*, 37 Vt. 501, 88 Am. Dec. 613; *Rodman v. Missouri P. R. Co.* 65 Kan. 645, 59 L.R.A. 704, 70 Pac. 642; *Poff v. New England Teleph. & Teleg. Co.* 72 N. H. 164, 55 Atl. 891). On the other hand, many of the cases in other jurisdictions which are cited in support of the proposition do not appear to sustain it when subjected to careful examination. Thus, I cannot find that *Murphy v. Chicago, M. & St. P. R. Co.* 80 Iowa, 26, 45 N. W. 392, has any application to the point under consideration. In *George v. Chicago, M. & St. P. R. Co.* 51 Wis. 603, 8 N. W. 374, it was held that a demurrer would lie to a complaint which showed that the limitation of the statute had run against the cause of action before the suit was commenced. The case, however, throws no light on the question whether the complaint would be bad if it failed to show that the time within which suit must be brought had not expired. In *Hanna v. Jeffersonville R. Co.* 32 Ind. 113, it was merely held that, inasmuch as the complaint showed on its face that the action was not brought in time, the objection could be raised by demurrer without requiring the defendant to plead that the statutory period already had elapsed, as such a plea would constitute only a repetition of facts which already appeared on the record. In *Radezky v. Sargent & Co.* 77 Conn. 110, 58 Atl. 709, as I read it, the restriction as to time was treated as a limitation upon the remedy rather than upon the right. There it appeared that the statute provided that no action should be brought upon it but within one year after the neglect complained of. The complaint, read in connection with the writ, showed that the suit was not brought within the prescribed period. It was claimed that the common-law rule to the effect that the statute of limitations must be pleaded remained in force under the Connecticut practice act, and was therefore available to the plaintiff. The court held, however, that it was permissible in framing the complaint in an action against which the statute of limitations had apparently run for the plaintiff to state his whole case and allege the facts

deemed legally sufficient to enable him to maintain his action, notwithstanding that the time limit for its commencement had expired; and when this was done, it permitted the defendant to raise the question of law by demurrer to the complaint. The decision thus simply sanctioned a familiar practice, and, so far as it intimates anything as to the character of the limitation, suggests that it operates upon the remedy.

But whatever may be the view which has found acceptance in other jurisdictions, the question presented by this appeal is an open one in this court, unless we are foreclosed by what was decided in the two cases which afford the strongest support for the position of the respondent, namely, *Hill v. Rensselaer County*, 119 N. Y. 344, 23 N. E. 921, and *Johnson v. Phoenix Bridge Co.* 197 N. Y. 316, 90 N. E. 953. The first of these was a statutory action to recover compensation for property destroyed in consequence of a mob or riot. The special law which authorized the maintenance of such a suit provided that "no action shall be maintained under the provisions of this act unless the same shall be brought within three months after the loss or injury," and the court held, in an opinion by Gray, J., that as the action was brought under a special law and was maintainable solely by its authority, the limitation of time was so incorporated with the remedy given as to make it a condition precedent to the maintenance of the action at all. In other words, the civil remedy given by the special law was deemed to be independent of the Code remedies, and hence was excepted from the operation of the chapter on limitations contained in the Code. Code Civ. Proc. § 414. In the *Phoenix Bridge Case* the right to maintain the action was dependent upon the existence in Lower Canada of a statute similar to ours, permitting the recovery of damages for wrongfully causing death; and the Canadian statute, the operation of which was invoked, provided for a right of action in behalf of the relatives of the decedent, "but only within a year after his death, to recover from the person who committed the offense, or quasi offense, or his representatives, all damages occasioned by such death." The use of the positive and exclusive phrase, "but only within a year after his death," in the enactment in question, warranted the statement in the opinion that the cause of action under the Canadian statute was made dependent upon the suit being commenced within a year after the decedent's death, and that the commencement, as therein provided, was a condition precedent to its successful maintenance. The language of § 1902 of the Code is so

L.R.A.1915E.

different as, in my opinion, to justify a different view of it.

It is to be noted that the trend of our adjudications has long been in the direction of broadening the scope and operation of the general rules regulating limitations which are embodied in the Code of Civil Procedure. In *Conolly v. Hyams*, 176 N. Y. 403, page 407, 68 N. E. 662, the court was called upon to consider the effect of a provision in the mechanics' lien acts that a lien should not continue for a longer period than one year after the notice of the lien had been filed, unless within that time an action was commenced to foreclose the lien, and notice of the pendency thereof filed with the county clerk. It was contended that the plaintiff's cause of action, which would otherwise have been lost by reason of the operation of this provision, was saved by § 405 of the Code of Civil Procedure, which provides that, if an action be commenced within the time limited therefor, and be terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff may commence a new action for the same cause after the expiration of the time so limited and within one year after such reversal or determination. If that section applied, it was conceded that the action was brought in time; but it was insisted, on the other hand, that the case was governed exclusively by the provisions of the mechanics' lien law. The court held against the latter contention and in favor of the application of the beneficial provisions of § 405 of the Code, and in so doing, said, in an opinion written by Judge Cullen: "The tendency of the latest decisions of this court has been to extend to all claims the benefit of the exceptions given by the Code of Civil Procedure to the bar of the statute of limitation, except where there is an express statute or contract to the contrary."

In illustration of this tendency he cited *Hayden v. Pierce*, 144 N. Y. 512, 39 N. E. 638; *Titus v. Poole*, 145 N. Y. 414, 40 N. E. 228; and *Hamilton v. Royal Ins. Co.* 156 N. Y. 327, 42 L.R.A. 485, 50 N. E. 863. The case of *McKnight v. New York*, 186 N. Y. 35, 78 N. E. 576, involved a consideration of the provision in chapter 572 of the Laws of 1886 that no action for negligence may be maintained against a municipality having 50,000 inhabitants or over "unless the same shall have been commenced within one year after the cause of action shall have accrued." The action was brought in behalf of an infant to recover damages for personal injuries alleged to have been sustained by reason of the negligence of the

city, but it was not commenced within one year after the cause of action accrued. The appellant contended, and the court held, that this requirement was not operative against the plaintiff during his infancy, by reason of the exception in favor of infants contained in § 396 of the Code of Civil Procedure. The effect of the one-year limitation prescribed by the act of 1886 was deemed to be to amend the Code of Civil Procedure by reducing the period of limitation in actions for personal injuries due to negligence from three years to one year, where the defendant was a municipality with a population of 50,000 persons. "In this change," said the court, "we can find no evidence of a legislative intent to deprive an injured infant in such cases of the benefit of the general exception contained in § 396, which prevents the statute of limitations from running against a claimant while the disability of infancy exists." p. 38.

It seems to me that similar considerations to those which influenced the action of the court in the two cases last cited, in addition to the argument based upon the change from the original form of a proviso, should lead us to take a similar view of the clause presented for consideration upon this appeal, and that we should hold that it is a limitation upon the remedy, and not upon the right. To affirm the judgment under review would be to require that, in every suit brought to recover damages for negligently or wrongfully causing death, the complaint must allege that the action had been brought within two years after the decedent's death. It would plainly be impossible to comply with this requirement unless the summons was served before the complaint was prepared; as otherwise it would be impossible to allege truthfully in the complaint that the action had been commenced. This difficulty was pointed out by Mr. Justice Thomas in *Pernisi v. John Schmalz's Sons*, 142 App. Div. 53, 126 N. Y. Supp. 880. While, of course, it is not conclusive as to the construction which ought to be given to the statute, it may properly be considered if we assume that a choice is open as between the two views contended for upon this appeal.

For the reasons which have been stated, I advise a reversal of the judgment. Judgment reversed, with costs, and demurrer overruled, with leave to defendants to withdraw demurrer and serve answer within twenty days.

Hogan, Miller, Cardozo, and Seabury, JJ. concur.

Chase, J., dissenting:

The plaintiff contends that the two-year L.R.A.1915E.

period of time provided by the statute in which the action must be commenced is a statute of limitations, with all of the conditions and exceptions contained in chapter 4 of title 2 of the Code of Civil Procedure. The defendants contend that the time within which the action must be brought operates as a limitation on the liability itself, and cannot be extended in any way by circumstances or by the parties or either of them.

If it was intended by the statute to give two years in which to bring the action therein provided, and make such period of time an integral part of the right to maintain the action, its commencement within such time becomes a condition precedent to the maintenance of the action, and the plaintiff should affirmatively plead and prove that the action was commenced within such prescribed limit of time. *Debevoise v. New York, L. E. & W. R. Co.* 98 N. Y. 377, 50 Am. Rep. 683.

Under the common law there was no right of action for injuries resulting in death arising from a wrongful act. A personal cause of action for injuries ceases to exist with the death of the person injured.

In 1846 the act known as Lord Campbell's act was passed in England, which began by declaring that "no action at common law is now maintainable against a person who by his wrongful act, neglect or default may have caused the death of another person and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injuries so caused by him."

The act provided for a recovery of damages against the wrongdoer in favor of persons pecuniarily injured by reason of a death caused by a wrongful act. In 1847 an act was passed in this state (Laws of 1847, chap. 450) which provided for the recovery of damages by a party injured against a person or corporation causing the death of a person by wrongful act, neglect, or default. That act concludes with the words, "Provided that every such action shall be commenced within two years after the death of such deceased person." That act remained in force, with some amendments not now of importance, until it was substantially embodied in the Code of Civil Procedure in 1880. Sections 1902-1905; *Re Meekin*, 164 N. Y. 145, 51 L.R.A. 235, 79 Am. St. Rep. 635, 58 N. E. 50, 8 Am. Neg. Rep. 490. When included in the Code it was to some extent changed in form, and broken into sentences, and the word "provided" at the beginning of the sentence quoted was omitted. A mere change of phraseology in the codification or revision of statutes will not be construed as a change of the law unless the intended

change appears from the ordinary meaning of the language used, or in some other authoritative manner. *Lewis's Sutherland*, Stat. Constr. § 451; *Davis v. Davis*, 75 N. Y. 221; *De Grauw v. Long Island Electric R. Co.* 43 App. Div. 502, 506, 60 N. Y. Supp. 163, affirmed on opinion below in 163 N. Y. 597, 57 N. E. 1108.

There is no reason from which to conclude that the legislature intended in 1880 to change the provision relating to the time within which the action shall be commenced from one constituting a part of the substance of the right to maintain the action to a mere limitation on the remedy.

Very soon after the passage of the act of 1847 the action of *Whitford v. Panama R. Co.* was commenced. It is reported in this court in 23 N. Y. 465. In that case, referring to the act of 1847, the court says (p. 470): "It is not a simple devolution of a cause of action which the deceased would have had which the statute affects, but it is an entirely new cause of action. . . . The right of action for damages on account of his bodily injuries, which belonged to the deceased while he lived, was extinguished by his death. The statute does not profess to revive his cause of action in favor of the executor or administrator. The compensation for the bodily injuries remains extinct, but a new grievance of a distinct nature, namely, the deprivation suffered by the wife and children, or other relatives, of their natural support and protection, arises upon his death, and is made by the statute the subject of a new cause of action."

The statutory provisions became part of the substantive law of the state. *O'Reilly v. Utah, N. & C. Stage Co.* 87 Hun, 406, 34 N. Y. Supp. 358. See *Isola v. Weber*, 147 N. Y. 329, 41 N. E. 704.

Statutes have been passed in all or nearly all of the states of the Union to the same general effect as the present Code provisions in this state mentioned. The statutes creating the right of action in most cases provide in express terms within what time the action shall be commenced. There is substantial, although not absolute, unanimity in the authorities of this and other states, holding that the time provided by the statute in which the action must be commenced is of the essence of the right to maintain the action, and not a mere statute of limitations.

It does not seem advisable to extend this opinion as would be necessary to quote the statutes of the different states, and from the many decisions involving the question under consideration. With the exception of *L.R.A.1915E.*

Hoffman v. Delaware & H. Co. 85 Misc. 535, 147 N. Y. Supp. 475, and 163 App. Div. 50, 148 N. Y. Supp. 509, with which I do not concur, the authorities in this state, so far as they have considered the statute now before us, are against the appellant's contention. *Johnson v. Phoenix Bridge Co.* 133 App. Div. 807, 118 N. Y. Supp. 88, s. c. 197 N. Y. 316, 90 N. E. 953; *Hill v. Rensselaer County*, 119 N. Y. 344, 23 N. E. 921; *Kiefer v. Grand Trunk R. Co.* 12 App. Div. 28, 42 N. Y. Supp. 171, affirmed on opinion below in 153 N. Y. 688, 48 N. E. 1105; *Cavanagh v. Ocean Steam Nav. Co.* (Sup.) 13 N. Y. Supp. 540; *Colell v. Delaware, L. & W. R. Co.* 80 App. Div. 342, 80 N. Y. Supp. 675; *Bonnell v. Jewett*, 24 Hun, 524; *Dailey v. New York, O. & W. R. Co.* 26 Misc. 539, 57 N. Y. Supp. 485; *Pernisi v. John Schmalz's Sons*, 142 App. Div. 53, 126 N. Y. Supp. 880. See *Tiffany*, "Death by Wrongful Act," 2d ed. §§ 120, 121.

The following authorities from other states hold, in substance, that at the end of the time provided by statute the right to maintain the action, which is wholly derived from the statute, comes to an end: *Martin v. Pittsburgh R. Co.* 227 Pa. 18, 26 L.R.A.(N.S.) 1221, 75 Atl. 837, 19 Ann. Cas. 818; *Lambert v. Ensign Mfg. Co.* 42 W. Va. 813, 26 S. E. 431; *Radezky v. Sargent & Co.* 77 Conn. 110, 58 Atl. 709; *Poff v. New England Teleph. & Teleg. Co.* 72 N. H. 164, 55 Atl. 891; *Staefler v. Menasha Woodenware Co.* 111 Wis. 483, 87 N. W. 480; *Elliott v. Brazil Block Coal Co.* 25 Ind. App. 592, 58 N. E. 736; *Rodman v. Missouri P. R. Co.* 65 Kan. 645, 59 L.R.A. 704, 70 Pac. 642; *Van Vactor v. Louisville & N. R. Co.* 112 Ky. 445, 66 S. W. 4; *Best v. Kinston*, 106 N. C. 205, 10 S. E. 997; *Foster v. Yazoo & M. Valley R. Co.* 72 Miss. 886, 18 So. 380; *Taylor v. Cranberry Iron & Coal Co.* 94 N. C. 525; *Pittsburgh, C. & St. L. R. Co. v. Hine*, 25 Ohio St. 629; *Louisville & N. R. Co. v. Simrall*, 127 Ky. 55, 104 S. W. 1011; *Earnest v. St. Louis, M. & S. E. R. Co.* 87 Ark. 65, 112 S. W. 141; *Dowell v. Cox*, 108 Va. 460, 62 S. E. 272; *Kirton v. Atlantic Coast Line R. Co.* 57 Fla. 79, 49 So. 1024; *Bretthauer v. Jacobson*, 79 N. J. L. 223, 75 Atl. 560; *Louisville & N. R. Co. v. Chamblee*, 171 Ala. 188, 54 So. 681, Ann. Cas. 1913A, 977; *Anthony v. St. Louis, I. M. & S. R. Co.* 108 Ark. 219, 157 S. W. 394; *Hill v. New Haven*, 37 Vt. 501, 88 Am. Dec. 613; *Benjamin v. Eldridge*, 50 Cal. 612; *Hanna v. Jeffersonville R. Co.* 32 Ind. 113; *Lapsley v. Public Service Corp.* 75 N. J. L. 266, 68 Atl. 1113; *George v. Chicago, M. & St. P. R. Co.* 51 Wis. 603, 8 N. W. 374;

O'Kief v. Memphis & C. R. Co. 99 Ala. 524, 12 So. 454; Barker v. Hannibal & St. J. R. Co. 91 Mo. 86, 14 S. W. 280; Birmingham v. Chesapeake & O. R. Co. 98 Va. 548, 37 S. E. 17; Goodwin v. Bodcaw Lumber Co. 109 La. 1050, 34 So. 74.

To the same substantial effect are the following Federal authorities: The Harrisburg, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140; The Corsair (Barton v. Brown) 145 U. S. 335, 344, 36 L. ed. 727, 730, 12 Sup. Ct. Rep. 949; Davis v. Mills, 194 U. S. 451, 48 L. ed. 1067, 24 Sup. Ct. Rep. 692; Swanson v. Atlantic, G. & P. Co. (D. C.) 156 Fed. 977; Partee v. St. Louis & S. F. R. Co. 51 L.R.A.(N.S.) 721, 123 C. C. A. 292, 204 Fed. 970; International Nav. Co. v. Lindstrom, 60 C. C. A. 649, 123 Fed. 475; Kavanagh v. Folsom (C. C.) 181 Fed. 401; Stern v. La Compagnie Générale Transatlantique (D. C.) 110 Fed. 996; Williams v. Quebec S. S. Co. (D. C.) 126 Fed. 591. The Kavanagh and Williams Cases construe the statute of this state.

The cases in this state relied upon by the appellant (*viz.*, Ackerman v. Ackerman, 200 N. Y. 72, 93 N. E. 192; Conolly v. Hyams, 176 N. Y. 403, 68 N. E. 662; Hayden v. Pierce, 144 N. Y. 512, 39 N. E. 638; Titus v. Poole, 145 N. Y. 414, 40 N. E. 228; Hamilton v. Royal Ins. Co. 156 N. Y. 327, 42 L.R.A. 485, 50 N. E. 863; Bellinger v. German Ins. Co. 51 Misc. 466, affirmed on opinion of trial judge in 113 App. Div. 917, 100 N. Y. Supp. 424, affirmed in 189 N. Y. 533, 82 N. E. 1124) hold that in the particular cases under consideration the limitations of time in the statutes or contracts involved were limitations upon the remedy. They do not, nor does either of them, deny that when a statute fixes a limit of time beyond which the right of action provided thereby shall not extend, the action must be commenced within the time prescribed or it is wholly lost. Thus, in the Ackerman Case, the court says: "Undoubtedly a limitation of time may be the essence of and qualify a right of action so that it does not exist independent of the limitation."

The weight of authority, it seems to me, is so overwhelmingly in accord with the conclusion reached in this case by the Special Term and Appellate Division that I am of the opinion that the judgment should be affirmed. If the people desire to change the statute as it has been so many times interpreted, it can be readily done by the legislature.

Collin, J., concurs with Chase, J.
L.R.A.1915E.

NEW YORK COURT OF APPEALS.

RACHEL MAY RADLEY, Exrx., etc., of
Earl Radley, Deceased, Respt.,
v.

LE RAY PAPER COMPANY, Appt.

(214 N. Y. 32, 108 N. E. 86.)

Death — marriage after injury — damages.

That a woman's marriage takes place after her husband has received a mortal injury through another's negligence does not prevent her recovering substantial damages for his death as executrix of his estate, where the statute permits the personal representative of a decedent who has left a wife surviving, to recover damages for the wrongful act by which the death was caused, against the one who would have been liable to an action in favor of decedent had death not ensued.

(January 26, 1915.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Jefferson County in plaintiff's favor, and from an order denying a motion for new trial, in an action brought to recover damages for the death of plaintiff's husband, alleged to have been caused by defendant's wrongful act. Affirmed.

The facts are stated in the opinion.

Messrs. Purcell, Cullen, & Purcell, for appellant:

The theory of law under which the trial court submitted to the jury the question of damages was an erroneous one, in that it laid down an incorrect rule for the meas-

Note. — Marriage of injured person after his injury as affecting damages recoverable for his death from such injury.

As to remarriage of widow as affecting her damages for death of husband, see note in 67 L.R.A. 95.

The position taken on this point by RADLEY v. LE RAY PAPER Co. is sustained by Gross v. Electric Traction Co. 180 Pa. 99, 36 Atl. 424, holding, where a statute authorizes an action by a widow of a person killed through the unlawful violence or negligence of another, the fact that the widow did not marry the deceased until after the injury which resulted in his death does not affect her right of action.

For receipt of proceeds of insurance as affecting damages for injury or death, see note to Brabbau v. Baltimore & O. R. Co. post, 1201.

As to receipt by beneficiary of property from estate of decedent, see note to McLaughlin v. United R. Co. post, 1205.

A. G. S.

urement of such damages, which was highly prejudicial to defendant.

4 Sutherland, Damages, § 1264, p. 3708; Pitkin v. New York C. & H. R. R. Co. 94 App. Div. 31, 87 N. Y. Supp. 906, 109 App. Div. 911, 95 N. Y. Supp. 1154, affirmed in 185 N. Y. 548, 77 N. E. 1195; Re Meekin, 164 N. Y. 145, 51 L.R.A. 235, 79 Am. St. Rep. 635, 58 N. E. 50, 8 Am. Neg. Rep. 490; Gross v. Electric Traction Co. 180 Pa. 99, 36 Atl. 424; Domestic Relations Law, § 114; Re Leask, 197 N. Y. 193, 27 L.R.A. (N.S.) 1158, 134 Am. St. Rep. 866, 90 N. E. 652, 18 Ann. Cas. 516; Carpenter v. Buffalo General Electric Co. 213 N. Y. 101, 106 N. E. 1026.

Mr. Pardon C. Williams with Messrs. Breen & Breen, for respondent:

The plaintiff was the person for whose benefit the action was brought, and therefore the damages might be such sum as the jury deemed to be a fair and just compensation for her pecuniary injuries resulting from the death.

Code Civ. Proc. § 1904; Gross v. Electric Traction Co. 180 Pa. 99, 36 Atl. 424.

Hogan, J., delivered the opinion of the court:

This action was brought by the widow of one Earl Radley, in the capacity of executrix, to recover damages for the death of Mr. Radley, concededly caused by the wrongful act of the defendant.

Earl Radley, at the time he sustained the injuries which resulted in his death, was twenty-seven years of age, temperate, industrious, in fairly good health, and was earning \$1.75 per day. The accident occurred about half past 7 in the morning of September 8, 1911, at the paper mill of the defendant in the village of Carthage, Jefferson county, and soon thereafter Mr. Radley was removed to a hospital at the city of Watertown, some 18 miles distant, where he died between 8 and 9 o'clock Monday morning, September 11, 1911. At the time of the accident Earl Radley was unmarried. He was engaged to marry the plaintiff, who was then twenty-six years of age, and, when injured, he sent for her. She immediately went to the mill of the defendant, and thereafter, accompanied by George G. Radley, the father of Earl Radley, she went to the hospital at Watertown, where the father of Earl Radley remained over Friday night, and plaintiff remained until after the death of Earl Radley, on Monday morning.

On Friday night the deceased expressed a desire that he and the plaintiff be married. Plaintiff having consented, a minister, resident of the city, was called, and performed the marriage ceremony about L.R.A.1915E.

midnight Friday, or very soon thereafter. The defendant, upon the trial, conceded the validity of the marriage.

Upon the first trial of the action, the trial justice instructed the jury that the interest of the plaintiff personally in the life of the deceased began only at the time of her marriage to the deceased, and that the amount of damages recoverable was the value of the reasonable expectation of pecuniary benefits to the wife from the continuance of his life, to be calculated upon the condition of the decedent at the time of the marriage.

The jury awarded plaintiff damages in a substantial amount, which the appellate division held to be excessive, in view of the law of the case as held by the trial justice, and for that reason reversed the judgment and ordered a new trial. The justice writing for the appellate division expressed the opinion that the plaintiff would be entitled to recover substantial damages.

Upon a retrial of the action the trial justice followed the opinion of the appellate division, and permitted the jury to find substantial, rather than nominal, damages. The jury awarded the plaintiff a verdict in excess of the amount of the verdict rendered upon the first trial. Upon appeal the judgment was affirmed by a divided court.

The defendant, upon appeal to this court, argued that the expectancy of the life of Earl Radley was to be calculated upon his condition at the time of his marriage to the plaintiff, and any recovery by her in this action is to be limited to that expectancy; that plaintiff, as matter of law, was not entitled to recover more than nominal damages. These questions were presented upon the trial by exceptions to the charge of the trial justice and to refusals to charge, which need not be separately considered, as a determination of the questions stated will dispose of the rights of the plaintiff in this action.

On September 8, 1911, the relation of master and servant existed between the defendant and Earl Radley. On that day Mr. Radley received an injury concededly due to the wrongful act of the defendant, by reason whereof a right of action became immediately vested in him to recover damages for any pecuniary loss sustained by him, and, in addition, for pain and suffering of mind and body. Upon his death on September 11, 1911, that right terminated, and a new and distinct cause of action arose in favor of this plaintiff under § 1902 of the Code of Civil Procedure. Littlewood v. New York, 89 N. Y. 24, 42 Am. Rep. 271; Re Meekin, 164 N. Y. 145, 51 L.R.A. 235, 79 Am. St. Rep. 635, 58 N. E. 50, 8 Am. Neg. Rep. 490; McKay v. Syracuse Rapid

Transit Co. 208 N. Y. 359, 101 N. E. 885; Kelliher v. New York C. & H. R. R. Co. 212 N. Y. 207, ante, 1178, 105 N. E. 824.

What was the new and distinct cause of action that became vested in the plaintiff upon the death of Earl Radley? The answer is found in the language of § 1902* of the Code of Civil Procedure, "to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused."

In such an action it was essential to a recovery by plaintiff that she should establish: First, that the death of Earl Radley was caused by the wrongful act, neglect, or default of the defendant; second, that defendant would have been liable to an action in favor of Earl Radley for the injuries inflicted upon him if his death had not ensued. In the case at bar the defendant conceded the facts necessary to establish defendant's liability. The gravamen of the action was clearly the wrongful act, neglect, or default of the defendant, which resulted in the death of Mr. Radley. It was the wrongful act of defendant which caused the injuries that ultimately proved fatal, and a right of recovery existed by reason of such wrongful act, to be measured by "a fair and just compensation for the pecuniary injuries resulting from the decedent's death, to the person or persons for whose benefit the action is brought."

The statute contemplated that the expectancy of the deceased should be ascertained as of the time of the injury caused by the wrongful act or neglect of the defendant. It would be illogical to hold that the pecuniary damages recoverable are to be measured by the expectancy of the victim at a time subsequent to the moment when fatal injuries were sustained by him as a result of the negligence of the defendant, and in his then physical condition.

Such a rule would permit a wrongdoer to assert that the life destroyed by its wrongful act was worthless. It is therefore immaterial when the relation of husband and wife between Earl Radley and the plaintiff arose. At the time of the death of Earl Radley, plaintiff was his wife, and, upon his death, which resulted by reason of the wrong of the defendant, she was entitled

to recover damages for the wrongful act, neglect, or default of the defendant which caused the death of her husband.

Our attention has not been called to any decision in this state directly bearing upon the question presented, and research has failed to discover such precedent. Our conclusions are, however, justified by a construction of the provisions of the Code to which attention has been called, and in principle by the following cases: Gross v. Electric Traction Co. 180 Pa. 99, 36 Atl. 424; The George & Richard, L. R. 3 Adm. & Eccl. 466, 24 L. T. N. S. 717, 20 Week. Rep. 246, 1 Asp. Mar. L. Cas. 50; Quinlen v. Welch, 69 Hun. 584, 23 N. Y. Supp. 963.

In view of the conclusion we have reached in this case, we do not find that error was committed by the trial justice in the admission of evidence upon the trial to which objections were made by the defendant and exceptions noted.

The judgment should be affirmed, with costs.

Willard Bartlett, Ch. J., and Hiscock, Collin, Cuddeback, and Seabury, JJ., concur. Cardozo, J., absent.

Petition for rehearing denied March 27, 1915.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

LEONARD W. BRABHAM, Admr., etc., of
Raymond H. Brabham, Deceased, Plff. in
Err.,

v.

BALTIMORE & OHIO RAILROAD COMPANY.

(220 Fed. 35.)

Damages — death — effect of insurance.

1. In an action under the Federal employers' liability act for the benefit of the mother of decedent, who was dependent upon his earnings, evidence is not admissible as to the amount which she collected on a

Note. — Receipt of proceeds of insurance as affecting the measure of damages for injury or death.

*The material part of § 1902 is as follows: "The executor or administrator of a decedent, who has left him or her surviving, a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued."

L.R.A.1915E.

The earlier cases on this question will be found in a note appended to Nashville, C. & St. L. R. Co. v. Miller, 67 L.R.A. 92, and to which this note is supplemental.

As to receipt by beneficiary of property from estate of decedent, see note to McLaughlin v. United R. Co. post, 1205.

For other notes relating to damages in action for death, see references in note following Rowe v. Richards, ante, 1095.

As to right of life or accident insurance

policy of insurance upon his life in her favor.

Appeal — inadmissible evidence — correction of error.

2. Error in the admission, in an action for damages for wrongful death, brought in favor of the dependent mother of decedent, of evidence of the amount of insurance which she collected on his life, is not rendered harmless by testimony that she used it to pay funeral expenses and debts.

(November 5, 1914.)

ERROR to the District Court of the United States for the Northern District of West Virginia to review a judgment in

plaintiff's favor for insufficient damages in an action brought under the Federal employers' liability act to recover damages for the alleged wrongful death of plaintiff's son. Reversed.

The facts are stated in the opinion.

Argued before Pritchard, Knapp, and Woods, Circuit Judges.

Messrs. Vachel B. Archer and Lewis N. Tavenner, for plaintiff in error:

It was error to permit defendant, over plaintiff's protest, to prove that the mother of the decedent collected upon her son's death \$2,500 life insurance.

Clune v. Ristine, 36 C. C. A. 450, 94 Fed.

company to be subrogated to the right of action against the tortfeasor, see note in 18 L.R.A.(N.S.) 211.

The courts are in harmony on the point that the defendant cannot secure a reduction of the damages for which he is liable for negligently causing the death of another by showing that the plaintiff or party in interest is entitled to collect or has collected for his individual use, proceeds of life insurance policies upon the life of the deceased:

—*Nevers Lumber Co. v. Fields*, 151 Ala. 367, 44 So. 81, holding that the fact that the personal representative of the decedent, subsequently to his death, collected the proceeds of an insurance policy on his life, cannot be taken into consideration in deduction of damages or his death through the negligence of the defendant.

—*Carroll v. Missouri P. R. Co.* 88 Mo. 239, 57 Am. Rep. 382, holding that the fact that the statutory beneficiaries had received the proceeds of insurance policies on the life of the decedent does not affect the recovery in their behalf under a statute fixing the amount of damages recoverable.

—*Houston & T. C. R. Co. v. Lemair*, 55 Tex. Civ. App. 237, 119 S. W. 1162, holding that the fact that the life of the decedent was insured and that his statutory beneficiaries would receive the proceeds of the insurance cannot be used to diminish the damages recoverable.

In an action by a wife to recover damages for the death of her husband, based upon the statute fixing the amount of damages recoverable, no deduction can be made by showing that the husband carried a life insurance policy on his life in favor of his wife, and that since his death she has received the amount thereof. *Carroll v. Missouri P. R. Co.* supra.

And since the fact that the statutory beneficiaries have received the proceeds of insurance policies on the life of the deceased does not affect the amount of recovery in their behalf for his death through the negligent or wrongful act of the defendant, evidence is inadmissible to show the receipt of such money or the existence of such insurance policies. *Clune v. Ristine*, 36 C. C. A. 450, 94 Fed. 745, 6 Am. Neg. Rep. 416; *Sherlock v. Alling*, 44 Ind. L.R.A.1915E.

184 (holding that the receipt of a sum of money by the persons for whose benefit the action was prosecuted by the personal representative, on account of a policy of insurance on the life of the decedent, cannot be shown to reduce the amount of recovery); *Kellogg v. New York C. & H. R. R. Co.* 79 N. Y. 72 (holding, in an action by an administrator to recover damages for the injury resulting in the death of his decedent, that evidence is inadmissible that the decedent's life was insured); *North Pennsylvania R. Co. v. Kirk*, 90 Pa. 15 (holding that, in an action by a parent to recover for the death of his son, evidence is inadmissible that the son was insured for the benefit of the parent); *Coulter v. Pine Twp.* 164 Pa. 543, 30 Atl. 490 (holding that evidence as to money received by the plaintiff on an insurance policy on the life of the deceased is inadmissible to reduce the damages recoverable for decedent's death); *Boulden v. Pennsylvania R. Co.* 205 Pa. 284, 54 Atl. 906 (holding, in an action by the personal representative, that the defendant cannot show that the mother of the decedent would receive or had received from it certain death benefits, due to the death of the decedent); *Tyler South-eastern R. Co. v. Raspberry*, 13 Tex. Civ. App. 186, 34 S. W. 794 (holding that evidence is inadmissible to show that some of the statutory beneficiaries have received the proceeds of insurance on the life of the decedent); *Galveston, H. & S. A. R. Co. v. Cody*, 20 Tex. Civ. App. 520, 50 S. W. 135 (holding that testimony is inadmissible that the deceased carried life insurance, and the surviving wife obtained the proceeds thereof); *Lipscomb v. Houston & T. C. R. Co.* 95 Tex. 5, 55 L.R.A. 869, 93 Am. St. Rep. 804, 64 S. W. 923 (holding it proper to exclude evidence that the statutory beneficiaries had received money upon policies of insurance upon the decedent's life); *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 431, 26 Am. Rep. 384 (holding that, in an action by the personal representative to recover for the wrongful death of his decedent, evidence that the decedent carried insurance on his life for the benefit of his wife and children, and that since his death the proceeds have been paid to them, is inadmissible).

A. G. S.

745, 6 Am. Neg. Rep. 416; Althorf v. Wolfe, 22 N. Y. 358; Kellogg v. New York C. & H. R. R. Co. 79 N. Y. 72; Terry v. Jewett, 78 N. Y. 338, 5 Am. Neg. Cas. 225; Harding v. Townshend, 43 Vt. 536, 5 Am. Rep. 304; Baltimore & O. R. Co. v. Wightman, 29 Gratt. 431, 26 Am. Rep. 384; Carroll v. Missouri P. R. Co. 88 Mo. 239, 57 Am. Rep. 382; Geary v. Metropolitan Street R. Co. 73 App. Div. 441, 77 N. Y. Supp. 54; Illinois C. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435; North Pennsylvania R. Co. v. Kirk, 90 Pa. 15; Coulter v. Pine Twp. 164 Pa. 543, 30 Atl. 490; Lipscomb v. Houston & T. C. R. Co. 95 Tex. 5, 55 L.R.A. 869, 93 Am. St. Rep. 804, 64 S. W. 923; Houston & T. C. R. Co. v. Lemair, 55 Tex. Civ. App. 237, 119 S. W. 1162; Pennsylvania R. Co. v. Keller, 67 Pa. 300; Pittsburgh, C. & St. L. R. Co. v. Thompson, 56 Ill. 138; Bradburn v. Great Western R. Co. L. R. 10 Exch. 1, 44 L. J. Exch. N. S. 9, 31 L. T. N. S. 464, 23 Week. Rep. 48, 8 Eng. Rul. Cas. 439; Yates v. Whyte, 4 Bing. N. C. 272, 5 Scott, 640, 1 Arnold, 85, 7 L. J. C. P. N. S. 116, 2 Jur. 303, 8 Eng. Rul. Cas. 429.

The evidence showing that the parents of decedent received insurance which the decedent carried in their favor could under no circumstances be competent. A general objection to such evidence is sufficient.

American Car & Foundry Co. v. Brinkman, 77 C. C. A. 138, 146 Fed. 712; *Turner v. Newburgh*, 109 N. Y. 301, 4 Am. St. Rep. 453, 16 N. E. 344; *Pittsburgh & W. R. Co. v. Thompson*, 27 C. C. A. 333, 54 U. S. App. 222, 82 Fed. 720; *Noonan v. Caledonia Gold Min. Co.* 121 U. S. 393, 30 L. ed. 1061, 7 Sup. Ct. Rep. 911; *Wellington v. Pelletier*, 97 C. C. A. 458, 26 L.R.A. (N.S.) 719, 173 Fed. 908.

Where illegal evidence or improper instructions have been admitted or given, over the objection of a party, it will be cause for setting aside the verdict, unless it clearly appears that the objecting party was not prejudiced thereby. The legal presumption is that error produces prejudice.

Layne v. Chesapeake & O. R. Co. 68 W. Va. 213, 31 L.R.A. (N.S.) 414, 69 S. E. 700; *Choctaw, O. & G. R. Co. v. Holloway*, 52 C. C. A. 260, 114 Fed. 458, affirmed in 191 U. S. 334, 48 L. ed. 207, 24 Sup. Ct. Rep. 102, 15 Am. Neg. Rep. 235; *United States v. Gentry*, 55 C. C. A. 658, 119 Fed. 70; *Armour & Co. v. Russell*, 6 L.R.A. (N.S.) 602, 75 C. C. A. 416, 144 Fed. 614; *Union P. R. Co. v. Field*, 69 C. C. A. 536, 137 Fed. 14; *United States v. Ute Coal & Coke Co.* 85 C. C. A. 302, 158 Fed. 20; *Mutual Reserve L. Ins. Co. v. Heidel*, 88 C. C. A. 477, 161 Fed. 535; *National Biscuit Co. v. Nolan*, 70 C. C. A. 436, 138 Fed. 6; *Stewart L.R.A.1915E.*

v. Brune, 102 C. C. A. 534, 179 Fed. 350; *Norfolk & P. Traction Co. v. Miller*, 98 C. C. A. 453, 174 Fed. 607.

Messrs. J. W. Vandervort and Van Winkle & Ambler for defendant in error.

Pritchard, Circuit Judge, delivered the opinion of the court:

This is an action in trespass on the case, brought under the Federal employers' liability act for wrongful death. On December 27, 1910, Raymond H. Brabham, an unmarried adult, a son of Leonard W. and Mary A. Brabham, was employed as a fireman on a locomotive drawing a train of freight cars on the Ohio river division of the defendant, in the state of West Virginia, and on that day was killed in a collision, which collision was the result of the negligence of the employees of the defendant, other than Raymond H. Brabham. After the death of Raymond H. Brabham, the father, Leonard W. Brabham, qualified as administrator of his estate, and instituted this action for damages in the then circuit court of the United States for the northern district of West Virginia, and on February 7, 1912, filed his declaration. On February 16, 1913, the plaintiff, by leave of the court, amended his declaration. The defendant pleaded not guilty, upon which plea issue was joined, and the case was tried by a jury on June 18, 1913, and a verdict was rendered in favor of Leonard W. Brabham for \$500, and in favor of Mary A. Brabham for \$2,000. Stipulations were entered in the cause whereby it was agreed in effect that both plaintiff's decedent and the defendant railroad company were engaged in interstate commerce at the time of the collision resulting in the instant death of Raymond H. Brabham; that plaintiff's decedent was at his post of duty, and in the exercise of ordinary care for his own protection; that the cause of the accident was the negligence of the employees other than plaintiff's decedent; and that the negligence of the defendant's employees was the proximate cause of the death of plaintiff's decedent.

During the progress of the trial the defendant was allowed to prove by plaintiff's witness that Raymond H. Brabham carried life insurance in the sum of \$2,500, which sum was paid to Mary A. Brabham, the mother of the decedent. The plaintiff, at the conclusion of the testimony, asked for certain instructions. Instruction No. 1 was refused by the court. Exception was taken to the ruling of the court in refusing to give said instruction to the jury.

The proof shows that Raymond H. Brabham was a fireman in the employ of the defendant company; that he was born Feb-

ruary 18, 1889, and at the time of his death was twenty-one years, ten months, and a few days old; that he resided with his parents, and was unmarried; that he was a stout, hearty, strong, young man, and weighed between 190 and 200 pounds; that the father, at the time of decedent's death, was about fifty-one years of age; that the son brought his wages home, and contributed in this way to the support of his father and mother; that his father was a laborer, who could not make enough by his own wages to keep the family; that the decedent worked about the house and garden when he had time, and in this way assisted his father and mother; that he brought his check for his wages home, and delivered it to his mother, who would get the check cashed and use the proceeds; that the father and mother were dependent upon the decedent for support.

Mary A. Brabham, the mother, in testifying as to the dependence of herself and husband upon the deceased son, said: If it hadn't been for him, I do not know what we would have done; that is just it. He assisted me by means of money, and by helping clothe me, and bringing his check home, and I would have it cashed, and use it, as I seen fit, with the exception of what he necessarily needed for himself.

Q. How often?

A. His check was paid to him every month, and there never was a check he ever drew he didn't give me the most of it.

Q. How much?

A. Well, different amounts; the amount would vary, of course; sometimes he needed things for himself; in the early part of his work for the B. & O. he didn't draw so much; but in the latter part he would give me at least \$50 a month, after he got to be fireman.

Mrs. Brabham, at the time of her son's death, was about forty-five years of age. Decedent was earning about \$100 a month at the time of his death,—to be exact, an average, covering the whole period of his services as fireman, of \$82.17 per month.

The jury returned a verdict in favor of the plaintiff below for the sum of \$2,500, to which he excepted upon the ground that the sum recovered was inadequate, and the case now comes here on writ of error.

The principal question to be determined in this controversy is as to whether the court below erred in permitting the defendant, over plaintiff's objection, to prove that the mother of the decedent collected \$2,500 life insurance on her son's death. Testimony of this character, when considered by the jury, could have but one effect, to wit, to cause the jury to deduct the amount of

insurance paid to the mother from such sum as they might think she would be entitled to recover on account of the death of her son.

We have examined the authorities bearing upon this question, and, as a general rule, it has been determined by the state and Federal courts adversely to the contention of the defendant. The case of *Harding v. Townshend*, 43 Vt. 536, 5 Am. Rep. 304, cites the case of *Althorf v. Wolfe*, 22 N. Y. 358, in approval. In that case the court, in discussing this point, said: "It would seem to be a perversion of justice to subrogate the wrongdoer, who has caused the loss, to the rights of the injured party as to his remedy against the insurer."

The case of *Carroll v. Missouri P. R. Co.* 88 Mo. 239, 57 Am. Rep. 382, also, cites the case of *Althorf v. Wolfe*, *supra*, and also the case of *Harding v. Townshend*, *supra*. There the defendant set up the defense that plaintiff had collected \$2,700 insurance taken out by the husband for the benefit of the plaintiff. The trial court refused to permit the defendant to interpose the same as a defense to the action. In that case the supreme court of Missouri said: "The construction of appellant [defendant railroad company], if allowed, would defeat or modify actions under the statute, where the party killed had, by his own prudence and at his own expense, sought to provide for the maintenance of his family in the event of his death, and would enable the wrongdoer to protect himself to the extent of the insurance against the consequences of his own wrongful and unlawful acts. As against this plaintiff in this action upon the statute for the damages for the death of her husband, we think the matter thus set up in the third special defense was irrelevant and immaterial, and the action of the court in striking it out was, we think, right and proper."

This question was passed upon by the circuit court of appeals for the eighth circuit in the case of *Clune v. Ristine*, 36 C. C. A. 450, 94 Fed. 745, 6 Am. Neg. Rep. 416. Judge Thayer, who wrote the opinion of the court in this case, among other things, said: "In the course of the trial the court permitted the defendant to prove, by way of mitigating the damages which the plaintiff might recover, that she had collected from an insurance company, after the death of her son, the sum of about \$2,000, and for that reason was not entitled to recover to the full extent of her loss. An exception was taken to the admission of such evidence. We think that the testimony should have been excluded, and that the objection thereto was well taken. When an action is brought against a wrongdoer, he is not

entitled to have the damages consequent upon the commission of his wrongful act reduced by proving that the plaintiff has received compensation for the loss from a collateral source wholly independent of himself. This doctrine is well established by the authorities, and is applicable to the case in hand. *Sutherland, Damages*, 2d ed. § 158, and cases there cited. On the second trial the evidence complained of should be excluded."

To the same effect are the following cases: *Kellogg v. New York C. & H. R. R. Co.* 79 N. Y. 72; *Terry v. Jewett*, 78 N. Y. 338, 5 Am. Neg. Cas. 225; *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 431, 26 Am. Rep. 384; *Geary v. Metropolitan Street R. Co.* 73 App. Div. 441, 77 N. Y. Supp. 54; *Illinois C. R. Co. v. Prickett*, 210 Ill. 140, 71 N. E. 435; *North Pennsylvania R. Co. v. Kirk*, 90 Pa. 15; *Coulter v. Pine Twp.* 164 Pa. 543, 30 Atl. 490; *Lipscomb v. Houston & T. C. R. Co.* 95 Tex. 5, 55 L.R.A. 869, 93 Am. St. Rep. 804, 64 S. W. 925; *Houston & T. C. R. Co. v. Lemair*, 55 Tex. Civ. App. 237, 119 S. W. 1162.

It is contended by counsel for defendant that, even if the court erred in permitting testimony to be introduced as to the amount of insurance which the mother received, such error would be harmless, in view of the fact that the mother was permitted to testify that the amount of insurance she received was used to pay burial expenses and certain debts. However, a consideration of the evidence impels us to the conclusion that this testimony tended to influence the jury largely in determining the amount which the plaintiff was entitled to recover, and it is but natural that they should have taken this view of the matter. To say the least of it, the evidence was incompetent, and presented an issue not germane to the real question involved in this case, and therefore calculated to mislead and confuse the jury, and as such was prejudicial to the rights of the plaintiff.

It is also contended by counsel for plaintiff that the court below erred in refusing to give certain instructions. A careful consideration of the instructions tendered, in connection with the charge of the court in its entirety, discloses the fact that the learned judge who heard this case stated the law fully and impartially to the jury as respects the questions raised by the pleadings. Such being the case, we do not deem it necessary to enter into a further discussion of this phase of the case.

For the reasons stated, we are of opinion that the court below erred in permitting the defendant to prove that the mother of the decedent received the sum of \$2,500 insurance on account of the death of her son. L.R.A.1915E.

Therefore it follows that the judgment of the lower court should be reversed, and a new trial granted, with instructions for further proceedings in accordance with the views herein expressed.

CALIFORNIA SUPREME COURT. (In Banc.)

MAUD McLAUGHLIN et al., Respts.,
v.
UNITED RAILROADS OF SAN FRANCISCO, Appt.

(— Cal. —, 147 Pac. 149.)

Evidence — wrongful death — property of deceased.

1. Upon the question of financial loss for which children are to be compensated in case of the negligent killing of their mother, evidence is not admissible of the property left by her which comes into their possession, although income used by her for their benefit was derived from such property.

Appeal — refusal of instructions — absence of error.

2. Refusal to instruct, in an action by children to recover for the negligent killing of their mother, that the pecuniary value of the life of decedent to the plaintiffs is the value in money of the life of their decedent to the plaintiffs at the time of her death, is not error if the element of damages has been fully explained to the jury, or there is nothing to explain to them what is included in the term "value in money."

(March 2, 1915).

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco, in plaintiffs' favor, and from an order denying a motion for new trial, in an action brought to recover damages for the alleged negligent killing of plaintiffs' mother. Affirmed.

The facts are stated in the opinion:

Mr. Kingsley W. Cannon, and Messrs. William M. Abbott and William M. Cannon, for appellant:

The court erred in refusing to receive in evidence the inventory and appraisement and decree of final distribution in the estate of Margaret Mary McLaughlin.

Note. — Receipt by beneficiary of property from estate of decedent as affecting damages recoverable for decedent's death.

The early cases on this question will be found in a note appended to Nashville, C. & St. L. R. Co. v. Miller, 67 L.R.A. 91, and to which this note is supplemental.

San Antonio & A. P. R. Co. v. Long, 87 Tex. 148, 24 L.R.A. 637, 47 Am. St. Rep. 87, 27 S. W. 113; *Pym v. Great Northern R. Co.* 4 Best & S. 403, 32 L. J. Q. B. N. S. 377, 10 Jur. N. S. 199, 8 L. T. N. S. 734, 11 Week. Rep. 922; *Grand Trunk R. Co. v. Jennings*, L. R. 13 App. Cas. 800, 58 L. J. P. C. N. S. 1, 59 L. T. N. S. 879, 37 Week. Rep. 403; *Nashville, C. & St. L. R. Co. v. Miller*, 120 Ga. 453, 67 L.R.A. 87, 47 S. E. 959, 1 Ann. Cas. 210.

Damages must be actual and for loss of a pecuniary nature, nothing being given by way of solace.

Morgan v. Southern P. Co. 95 Cal. 516, 17 L.R.A. 71, 29 Am. St. Rep. 143, 30 Pac. 603; *Pepper v. Southern P. Co.* 105 Cal. 389, 38 Pac. 974, 11 Am. Neg. Cas. 200; *Harrison v. Sutter Street R. Co.* 116 Cal. 169, 47 Pac. 1019, 1 Am. Neg. Rep. 403; *Green v. Southern P. Co.* 122 Cal. 563, 55 Pac. 577; *Wales v. Pacific Electric Motor Co.* 130 Cal. 521, 62 Pac. 932, 1120; *Sneed v. Marysville Gas & Electric Co.* 149 Cal. 710, 87 Pac. 376; *Bond v. United R. Co.* 159 Cal. 277, 48 L.R.A.(N.S.) 687, 113 Pac. 366, Ann. Cas. 1912C, 50.

The statute does not allow the recovery of punitive damages.

Lange v. Schoettler, 115 Cal. 388, 47 Pac. 139; *Christensen v. Floriston Pulp & Paper Co.* 29 Nev. 552, 92 Pac. 217.

The right to recover damages for death of a relative was not recognized by com-

mon law, and exists by virtue of statute only.

Bond v. United R. Co. 159 Cal. 275, 48 L.R.A.(N.S.) 687, 113 Pac. 366, Ann. Cas. 1912C, 50.

The court erred in refusing to instruct the jury that pecuniary value of the life of the decedent to the plaintiffs is the value in money of such life to the plaintiffs.

Hillebrand v. Standard Biscuit Co. 139 Cal. 236, 73 Pac. 163, 14 Am. Neg. Rep. 520; *Hayne*, New Trial & App. revised ed. § 120.

The case of *San Antonio & A. P. R. Co. v. Long*, although frequently distinguished, has never been discredited.

Tyler Southeastern R. Co. v. Raspberry, 13 Tex. Civ. App. 185, 34 S. W. 794; *Gulf, C. & S. F. R. Co. v. Younger*, 90 Tex. 387, 38 S. W. 1121, 1 Am. Neg. Rep. 378; *Missouri, K. & T. R. Co. v. Rains*, — Tex. Civ. App. —, 40 S. W. 635; *Missouri, K. & T. R. Co. v. Eyer*, — Tex. Civ. App. —, 69 S. W. 453; *Chicago, R. I. & G. R. Co. v. Trippett*, 50 Tex. Civ. App. 279, 111 S. W. 761.

The *Long Case* is not at variance with recent text writers.

Tiffany, Death by Wrongful Act, 2d ed. 1913, § 176; *Joyce*, Damages, § 555; 4 *Sutherland*, Damages, 3d ed. 1265; *Hale*, Damages, 2d ed. 1912, p. 479.

Messrs. Sullivan & Sullivan and Theodore J. Roche for respondents.

As to effect of receipt of proceeds of insurance, see note to *Brabham v. Baltimore & O. R. Co.* ante, 1201.

For other notes on damages in action for death, see references in note following *Rowe v. Richards*, ante, 1095.

The American and English rules differ somewhat as to whether or not, in assessing the damages to the statutory beneficiaries, the amount of property they have received or will receive from the deceased is to be taken into consideration. According to the American rule the statutory beneficiaries are entitled to recover their pecuniary loss by reason of the death complained of, and the amount thereof is in no way affected by what they have received or may receive from the estate of the decedent, either by inheritance or otherwise, for the defendant cannot escape full statutory liability for his wrongful or negligent act by showing that, as a result thereof, the statutory beneficiaries have profited or will profit pecuniarily.

—*Sloss-Sheffield Steel & I. Co. v. Holloway*, 144 Ala. 280, 40 So. 211, holding that, in an action by the personal representative, the fact that the decedent had accumulated some money from his earnings, which his widow received, did not reduce the amount of recovery for his wrongful death.

—*McLaughlin v. United R. Co.*, hold- L.R.A.1915E.

ing that the fact that children suing for the death of their mother inherited property from her is not to be considered in order to diminish the damages they are entitled to recover for their pecuniary loss from her death.

—*Devine v. Chicago*, 172 Ill. App. 246, holding that evidence is inadmissible as to the amount, if any, of pension a widow is receiving because of the death of her husband.

—*Pennsylvania R. Co. v. Keller*, 67 Pa. 300, declaring that if it were permitted the defendant to show that the beneficiaries had profited from the death complained of, it would follow that persons who, from youth, old age, or other circumstances, are nonproducers, might become victims of negligence without any compensation to the survivors, and the corollary of the postulate would prevent compensation where the survivors were benefited by the death, either as gainers by the distribution of the property of the deceased, or by the riddance of a troublesome charge. The controversy which would arise if this were the rule would be repugnant and offensive to the sensibilities of every person.

—*San Antonio & A. P. R. Co. v. Long*, 19 Tex. Civ. App. 649, 48 S. W. 599, holding that the fact that the decedent, through the superior management of her estate in

Henshaw, J., delivered the opinion of the court:

Plaintiffs are the children and heirs at law of Margaret McLaughlin, a widow, whose death was occasioned by the admitted negligent act of defendant. Two of the children, Maud and Ralph, had attained their majority. Juanita, at the time of her mother's death, was a minor, aged seventeen years. The jury returned a verdict in favor of the plaintiffs for the sum of \$7,500. From the judgment which followed and from the order of the court denying defendant's motion for a new trial this appeal is prosecuted. Upon the appeal the principal question urged and argued is the error of the court in refusing to admit certain evidence offered by defendant. The case was first heard and decided in department, and a reconsideration of it was ordered before the court in banc because the question of the admissibility of the evidence here presented is new in this state, and in other states there is a contrariety of judicial opinion upon it.

Mrs. McLaughlin was a woman of refinement and of executive ability. Upon the death of her husband, a physician, she successfully conducted a drug store, which business brought in a net income of \$250 a month. In addition to this she had a fixed income by way of rentals from real property of about \$85 a month. The offered and rejected evidence was the inventory and appraisal and decree of final distribu-

tion in her estate. In short, it was evidence showing that the children—plaintiffs herein—had by the death of the mother come into the ownership of all of her property. The contention of the defendant upon the offer was that this evidence, showing what property the children had received because of the death of the mother, was not only proper, but necessary, for the consideration of the jury in the latter's effort to arrive at and declare in terms of money the loss with which the children had met because of her wrongful death, and that this is peculiarly and especially true as to the sum of \$85 a month from rentals, which monthly sum represented a return in no wise dependent upon the skill, ability, or exertions of the deceased; that the exclusion of this evidence would necessarily result in a verdict by the jury greater than is warranted by the law.

At common law no right of action existed in favor of anyone for the wrongful death of another. Human life was considered to be of such a character that its wrongful destruction could not be measured in terms of money. Where, therefore, such an action exists, it is the creature of statute. It is so in England by virtue of Lord Campbell's act (Stat. 9 and 10, Vict. chap. 93). It is so in many of the states of the United States. These statutes differ in important respects. Thus, in England and in some of the states, while the action may be brought by all of the heirs, there

her lifetime, was able and ready at all times and in increasing degree to provide for the present and possible necessities of her adult children, even to furnishing a home for them, was a matter of loss not replaced or set off by the property received by them through her death.

And it has been held that the fact that the deceased left an estate, the revenue from which equaled the amount he would have contributed to the support of his widow, was no defense to an action by her to recover for his death through the negligence of the defendant. *Chicago, R. I. & G. R. Co. v. Trippett*, 50 Tex. Civ. App. 279, 111 S. W. 761.

According to the English rule, when the means of the deceased have been exclusively derived from his own exertions, physical or intellectual, in determining the extent, if any, to which the receipt of such property by such beneficiaries may be used to diminish the damages recoverable for his death, it becomes necessary to consider what, but for the accident which terminated his existence, would have been his reasonable prospects of life, work, and remuneration. Thus, when property is a life insurance policy, the pecuniary benefit thereby accruing consists in the accelerated receipt of the proceeds, the consideration for which had already been paid by the deceased out

L.R.A.1915E.

of his earnings. In such case the extent of the benefit may fairly be taken to be represented by the use or interest of the money during the period of acceleration. *Hicks v. Newport, A. & H. R. Co.* 4 Best & S. 403; *Grand Trunk R. Co. v. Jennings*, L. R. 13 App. Cas. 800, 58 L. J. P. C. N. S. 1, 59 L. T. N. S. 679, 37 Week. Rep. 403.

The fact that the premature death of a parent through the negligence of the defendant caused an acceleration of the enjoyment of his estate by the children does not prevent a recovery by them of substantial damages for their pecuniary loss by reason of his death where there was a reasonable expectation that the whole of the estate of the deceased would come to his children at his death. *Goodwin v. Michigan C. R. Co.* 14 D. L. R. 411.

The English rule has been applied in this country to the extent of holding that, in estimating the probable savings the decedent would have accumulated had he lived out his life expectancy, the income derived from his investments is not to be considered, since these investments pass to his next of kin upon his death, and they come into the immediate enjoyment of the income therefrom. *Denver & R. G. R. Co. v. Spencer*, 25 Colo. 9, 52 Pac. 211.

A. G. S.

is the wise provision that the award shall be segregated amongst the heirs, for manifestly the loss by the death of a mother to a dependent minor daughter is much greater than the loss by the death of the same parent to an adult self-supporting married son. Some states in turn, because of the difficulty which they thought the jury would experience in making the award, have limited the maximum amount to various named sums. In this state (Code Civ. Proc. § 377) the jury is advised that it may give "such damages as under all the circumstances of the case may be just." Upon two propositions, however, all the statutes and all the decisions are agreed, that compensation for the grief and wounded feelings is not a legitimate element of the damages to be assessed, nor is the suffering of the injured person, though a matter for which he, had he lived, might recover, an element of the compensation of the plaintiffs. Indeed, it may be said that upon the fundamental principle governing the award in such cases all of the authorities are in harmony. The elements of damage differ, as, for example, the elements of damage to a husband for the loss of his wife are not identical with the elements of damage to the minor children for the loss of their mother. But fundamentally the law seeks to compensate in terms of money for the loss (in the case here of children) of their reasonable expectations of financial benefit from the continued existence of the parent, including in this money estimate the loss of the nurture, instruction, training, and care, of which the children have been deprived. These latter elements are not here in question, and what is said has no reference to them. Our concern is solely with the question of the direct material, property loss, and of the legitimate evidence bearing upon that consideration.

The English courts adopted the broad view that whatever of property the plaintiffs could be shown to have received through the death was competent evidence for the consideration of the jury in their effort to determine the amount of damage occasioned by the death. Thus the English courts held that, if a father had nothing and earned nothing and contributed nothing to the support of his family, the heirs' recovery under the statute would be nominal; that if the father's income was from fixed property, wholly independent of his own exertions, and this property went to plaintiffs, this could be shown to lessen the amount of the damages which might otherwise be awarded. Lord Campbell instructed his jury that the amount of an accident policy which the plaintiffs had received should be deducted from any award made L.R.A.1915E.

to them. He thought that deduction should also be made on account of a regular life insurance policy, and suggested the nature of the allowance. But he ended his advice to the jury in this regard, by "leaving the matter, however, entirely in your hands." *Pym v. Great Northern R. Co.* 4 Best & Smith, 403, 32 L. J. Q. B. N. S. 377, 10 Jur. N. S. 199, 8 L. T. N. S. 734, 11 Week. Rep. 922; *Bradburn v. Great Western R. Co.* L. R. 10 Exch. 1, 44 L. J. Exch. N. S. 9, 31 L. T. N. S. 464, 23 Week. Rep. 48, 8 Eng. Rul. Cas. 439; *Jennings v. Grand Trunk R. Co.* L. R. 13 App. Cas. 800, 58 L. J. P. C. N. S. 1, 59 L. T. N. S. 679, 37 Week. Rep. 403. Diametrically opposed to this line of authority are the decisions of many of the courts of the United States, holding, for the reasons hereinafter considered, that it is not permissible to present such evidence to the consideration of the jury; while occupying a middle ground are cases typified by one which is perhaps the most quoted,—*San Antonio & A. P. R. Co. v. Long*, 87 Tex. 156, 24 L.R.A. 637, 47 Am. St. Rep. 87, 27 S. W. 116. Certain expressions in the Long Case would seem to carry the doctrine of the Texas court to the full extent of the English decisions, as "under such a law we cannot see how it can be maintained that one has been damaged by the death, when he has received from the estate of the deceased property exceeding in value all the prospective benefits which would have accrued to him had the death not ensued." But the force of this general language is much modified by later decisions. *Gulf, C. & S. F. R. Co. v. Younger*, 90 Tex. 387, 38 S. W. 1121; *Tyler Southeastern R. Co. v. Rasberry*, 13 Tex. Civ. App. 186, 34 S. W. 794; *Lipscomb v. Houston & T. C. R. Co.* 95 Tex. 5, 55 L.R.A. 869, 93 Am. St. Rep. 804, 64 S. W. 923; *Houston & T. C. R. Co. v. Lemair*, 55 Tex. Civ. App. 237, 119 S. W. 1162. In short, the Texas courts have shown no disposition to put into judicial effect the language of the Long Case, above quoted. And yet it must be apparent that there is no logical middle ground such as that sought to be established in the Long Case. The English doctrine is at least logical, in allowing all of the evidence of this character to go before the jury. It is certainly extremely illogical to admit certain evidence and refuse consideration to other evidence of like character tending equally to establish the controverted issue, namely, the amount of damage sustained. The other doctrine, which may be designated the American doctrine, since it finds acceptance in most of the courts of the United States, announces, as has been said, the diametrically opposite view, that none of this evidence is ad-

missible, and none of it is entitled to the jury's consideration. The best-reasoned of these cases is *Stahler v. Philadelphia & R. R. Co.* 199 Pa. 383, 85 Am. St. Rep. 791, 49 Atl. 273. While the discussion is all of interest and value, we must content ourselves with a brief quotation, which succinctly presents the view in opposition to that of the English courts: "The true question is: What had these plaintiffs the right to expect to receive from the parent during his life? And for the loss of this they are to be compensated. What they got after his death does not enter into the case. The loss spoken of is the taking away of that which they were receiving, and would have received had he lived. It is the destruction of their expectations in this regard that the law deals with, and for which it furnishes compensation. To say, 'True it is we have taken from you his benefactions, but you get by law, not from us, but from his estate which we thus make available for you, something better,' is to substitute the heirs' legal right under the law for the company's liability."

This rule of evidence has its foundation in the refusal of the court to allow the defendant to benefit by his own wrong, to lessen his responsibility in damages for the injury which he has inflicted, by a showing that, quite fortuitously, through no contribution of defendant's own, the plaintiffs have received a certain pecuniary benefit.

As we have said, there is no tenable middle ground and no sound fluctuating rule of evidence. Under the English view all such evidence is admissible and logically admissible. Under the American view such evidence is in its nature base, is founded upon the tort of the party who seeks to avail himself of it, and should not be admitted; so the law will admeasure the consequences of the defendant's act by the situation existing at the time of the act, and not by after-accruing consequences. That this, as has been said, is the American view, citation may be made to numerous cases, *viz.*: *Kellogg v. New York C. & H. R. R. Co.* 79 N. Y. 72; *Althorff v. Wolfe*, 22 N. Y. 355; *Geary v. Metropolitan Street R. Co.* 73 App. Div. 441, 77 N. Y. Supp. 54; *Illinois C. R. Co. v. Barron*, 5 Wall. 90, 18 L. ed. 591; *Ladd v. Foster*, (D. C.) 31 Fed. 833; *Clune v. Restine*, 36 C. C. A. 450, 94 Fed. 749, 6 Am. Neg. Rep. 416; *Chicago, R. I. & P. R. Co. v. Hambel*, 2 Neb. (Unof.) 607, 89 N. W. 643; *Houston v. Gran*, 38 Neb. 687, 57 N. W. 403; *Western & A. R. Co. v. Meigs*, 74 Ga. 887; *Harding v. Townshend*, 43 Vt. 536, 5 Am. Rep. 304; *Carroll v. Missouri P. R. Co.* 88 Mo. 239, 57 Am. Rep. 382; *Sloss-Sheffield Steel & I. Co. v. L.R.A.* 1915E.

Holloway, 144 Ala. 280, 40 So. 211; *Chicago, R. I. & P. Co. v. Holmes*, 68 Neb. 826, 94 N. W. 1007; *Tiffany, Death by Wrongful Act*, § 176; 13 Cyc. 364, 8 Am. & Eng. Enc. Law, 935; 4 *Sutherland, Damages*, 1265. In conclusion upon this matter, we hold that the rule of evidence thus announced by the American authorities is more in consonance with justice than that which obtains in England, and that therefore the proffered evidence was properly rejected.

Appellant complains of the court's refusal to give an instruction in the following language: "The pecuniary value of the life of the deceased to the plaintiffs is the value in money of the life of said decedent to the plaintiffs at the time of her death."

It is said that this instruction was approved as a correct exposition of the law in *Hillebrand v. Standard Biscuit Co.* 139 Cal. 236, 73 Pac. 163. In the *Hillebrand Case* the action was on behalf of the father and mother, sole heirs, to recover for the death of their daughter. The court had instructed the jury that its award must be limited to the pecuniary damages, and then had said that "the pecuniary loss in such case means the value in money, if any, of the life of the deceased to her father and mother."

Appellant, objecting to this instruction, contended merely that the phrase "to her father and mother" would justify an allowance greater than the actual pecuniary loss sustained. This court declared merely that such a ground of objection was trivial and untenable. But to hold that an instruction is not erroneous for the reason above indicated is an entirely different matter from saying that a case should be reversed for a refusal to give the instruction. And, indeed, such an instruction, standing alone, might very properly be refused, as tending to confuse, rather than to enlighten. It states a truth as obvious as that two and two make four, and therefore there is no necessity for giving it. The giving of it alone and unexplained, therefore, would tend to arouse inquiry in the jurors' minds as to some deeper significance, some profounder truth, which it might be thought to contain. In a very broad sense, the plaintiffs do recover for the "value in money" to them of the life which is taken away. But unless fully advised, the jury might not understand that that value in money includes elements upon which in truth no real value in money can be placed,—elements the value of which the law, for utter lack of a better method of compensation, says shall be estimated in terms of money. Who can accurately estimate, for example, in terms of money, the value to a growing daughter of the care of a wise and loving mother? With that companionship the

daughter may grow into a worthy successor of the mother; without it she may fall upon evil ways, and her loss be incalculable in any terms of money. These are legitimate elements of consideration by the jury, but they are elements which are not obvious in the mere declaration, standing alone, of "the value in money of the life of the deceased." Wherefore we hold that, since the jury was fully and fairly instructed upon all of these matters, the refusal to give this particular instruction was not error, and, if the jury had not been fully instructed upon these matters the court would have been justified in refusing to give this instruction, which, though verbally accurate, might have occasioned misleading confusion in the jurors' minds.

The judgment and order appealed from are affirmed.

We concur: Angellotti, Ch. J.; Shaw, J.; Sloss, J.; Lorigan, J.; Melvin, J.

Petition for rehearing denied, April 1, 1915.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

SANDUSKY PORTLAND CEMENT COMPANY, Appt.,
v.

DIXON PURE ICE COMPANY.

(221 Fed. 200.)

Water — pollution — turning heated water into stream.

The use by a riparian owner of such quan-

tity of the water of the stream to cool his machinery that, when returned to the stream in its heated condition, it prevents the formation of ice which a lower owner takes from the river for commercial purposes, is unreasonable, and may be enjoined.

(January 15, 1915.)

A PPEAL by defendant from a judgment of the District Court of the United States for the Western Division of the Northern District of Illinois, Kenesaw M. Landis, Judge, enjoining defendant from discharging heated water into a river to the injury of plaintiff's ice industry. Affirmed.

Statement by Kohlsaat, Circuit Judge:

Upon a hearing in the district court upon the bill herein, it was ordered that a perpetual injunction issue against appellant, hereinafter termed defendant, restraining it from causing heated water to flow across or upon the land of appellee, herein called complainant, at such time or times as ice would, in the course of nature, otherwise form thereon, and from causing and doing such acts as would tend to cause the retardation of the formation of ice thereon, and that the question of the consideration of damages be reserved for a future hearing.

From the record it appears that each of the parties is the owner or lessee of extensive riparian rights upon the southerly bank of Rock river, near the city of Dixon, in the state of Illinois. Complainant owns and operates upon its side a plant for the gathering, storing, and sale of ice in large quantities, which ice is taken from said Rock river opposite its said plant. That

Note. — Discharging matter into stream preventing formation of, or polluting, ice.

As to common right to use of ice on river, see note to *Brown v. Cunningham*, 12 L.R.A. 583.

"It is the right of every riparian owner to have the stream continue to flow through or by his premises in its natural condition of purity, and free from any such contamination or pollution as renders it unfit for his domestic purposes, or for manufacturing purposes, and he is under no duty to protect himself from injury through pollution at his own cost. The right to purity of water is, however, subject to the right of each riparian owner to use the stream to a reasonable extent, and each owner is entitled to make such use of the stream as does not inflict substantial injury upon other owners." 40 Cyc. 593.

A careful search has disclosed but few cases like *SANDUSKY PORTLAND CEMENT Co. v. DIXON PURE ICE Co.*, passing upon the right of a riparian owner to discharge mat-

ter into a stream preventing the formation of ice. The view taken by the court in that case is in accord with the other cases on the subject, and seems to harmonize with the general principles above stated concerning the right of a riparian owner as to the purity of the water which passes over his premises. And it seems not unjust to hold that, if the water of a stream in its natural condition of purity has ice-forming properties, the discharge therein of matter preventing the formation of ice is an unreasonable use of the water, and one against which the law affords him a remedy either by award of damages, injunction, or both.

In *Walker Ice Co. v. American Steel & Wire Co.* 185 Mass. 463, 70 N. E. 937, cited in the *DIXON CASE*, it was held that a lease of a pond to a manufacturing company "to be used for flowage purposes only, . . . with the exclusive right to flow, store, and use water in said pond," reserving to the lessor, his heirs, etc., "the exclusive right to cut, harvest, sell, and store for sale, ice from said . . . pond as at

defendant owns and operates a cement factory or plant situated upstream from complainant. That complainant is dependent upon the freezing up of that part of said river upon which its ice plant abuts for its ice supply. That defendant takes from and returns to the said river between 3,000,000 and 4,000,000 gallons of water per day for cooling purposes in connection with its condensing machinery. That when discharged from defendant's factory into the river the water so used is heated to a temperature of from 50° to 60°, and that, from the point of discharge, it flows a distance of about 3,125 feet to the upper line of complainant's shore rights, which distance it accomplishes in about two and one half hours.

It further appears that complainant has introduced in evidence the testimony of a host of witnesses and a great mass of documentary evidence, and also certain exhibits, from which it claims to have established as facts: (1) That the water from defendant's discharge pipe aforesaid descends in a more or less heated condition to, upon, and across complainant's ice field in such a manner as to affect the temperature thereof; (2) that the said flow can be traced from the discharge pipe aforesaid, in a stream of open water of about 100 feet in width, through complainant's ice field, at times when said ice field would otherwise be frozen up, leaving banks of ice upon each

side thereof; (3) that said stream results in raising the natural temperature of the water in complainant's ice field, or that portion thereof with which it comes in contact, 47/100°; (4) that an increase of 47/100° in temperature materially retards the formation of ice, and in the present case practically destroys complainant's said ice-cutting field, so that, whereas formerly it was able to secure a large supply of commercial ice from that part of the river next to the southerly bank thereof opposite its said plant, now the ice-producing character of that portion of said river is practically ruined, whereby complainant is greatly damaged, and rendered unable to profitably carry on its said ice business; (5) that said injury is a continuing one, and that unless defendant be restrained complainant is remediless in the premises.

While not seriously contesting the rise in temperature of 47/100°, defendant introduced a great volume of evidence to show that its discharged water was not the cause of the failure of complainant's ice field to produce commercial ice; that such failure, if it existed, was owing to the unfavorable weather for ice production at the dates relied on; that a thermal increase of 47/100° in the water constituting complainant's ice-cutting field was of practically insignificant importance; that the discharge of water, heated in the process of cooling machinery, was usual in that locality; that it was not

present exercised by W. & Co.,"—did not give the manufacturing company any right to turn in and store hot water in the pond, which was not subject to the right of an ice company, the successor of W. & Co., to cut and take ice from the pond under its tenancy at will of the premises adjoining the pond, to which the privilege of taking the ice was annexed.

An injunction lies to prevent one from discharging sewage and oil into a private lake, destroying valuable fishing and ice-harvesting privileges. *Fischer v. Missouri P. R. Co.* 135 Mo. App. 37, 115 S. W. 477.

And an injunction lies against the depositing of scantlings, sawdust, pomace, and other refuse in a brook, whereby it is carried into the mill pond of a lower riparian owner, injuring his mill and polluting the water so that ice fit for domestic uses can no longer be harvested therefrom. *Lawton v. Herrick*, 83 Conn. 417, 76 Atl. 986.

In such case the lower owner is not bound to expect that the upper owner will inflict wrongful injuries upon him in the use of the stream, and it is not his duty to take steps to protect himself from unexpected unlawful acts. *Ibid.*

And evidence that the defendant made cider for the plaintiff, and threw the pomace into the brook, would not tend to excuse him for so disposing of other pomace in such quantities as to cause the pollution

complained of, and certainly would not be sufficient to show that the plaintiff had so contributed to his own injury as to deprive him of his right to equitable relief. *Ibid.*

And in such case the defendant cannot show that pomace from another's mill had floated into the plaintiff's pond without polluting his ice. *Ibid.*

The fact that others put refuse into the brook, which combined with that put there by the defendant to produce the injury, does not relieve him from liability, for if different persons by several acts foul the same stream, each is responsible for the result of his own doing of the acts for which he is chargeable. *Ibid.*

And it is no defense to a suit to enjoin the pollution of an ice pond that the water entering the pond becomes polluted from other sources before reaching the pond. *Bradley v. Warner*, 21 R. I. 36, 41 Atl. 564.

If the owner of a mill and the dam subservient thereto wantonly and unnecessarily draws the water from, or lowers the water in, the pond, and by so doing injures or destroys the ice privileges of the owner of the land bordering upon the pond, he thereby renders himself liable in damages to such owner. *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238, 28 L.R.A. 581, 60 N. W. 717. Cases of this kind, however, are not within the letter of the present subject.

W. W. A.

possible, without incurring prohibitive outlay, to reduce the temperature of the water at the point of discharge; and that to restrain such discharge would practically deprive defendant of its right to the use of the river water for machinery cooling purposes.

The errors assigned go to the merits of the controversy.

Argued before Baker, Seaman, and Kohlsaat, Circuit Judges.

Messrs. Francis W. Parker, Donald M. Carter, and Edward H. Brewster, for appellant:

Each riparian owner is entitled to a reasonable use of the flowing water, and if the upper owner makes a reasonable use of the same, and the lower owner suffers an injury incidental thereto, he will have no right of redress.

Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102; Gehlen Bros. v. Knorr, 101 Iowa, 700, 36 L.R.A. 697, 63 Am. St. Rep. 416, 70 N. W. 757; Keeney & W. Mfg. Co. v. Union Mfg. Co. 39 Conn. 576; Hetrich v. Deachler, 6 Pa. 32; Pitts v. Lancaster Mills, 13 Met. 156; Hartzall v. Sill, 12 Pa. 248; Bliss v. Kennedy, 43 Ill. 67; Beidler v. Sanitary Dist. 211 Ill. 628, 67 L.R.A. 920, 71 N. E. 1118; Snow v. Parsons, 28 Vt. 459, 67 Am. Dec. 723; Gould v. Boston Duck Co. 13 Gray, 442; Lancey v. Clifford, 54 Me. 487, 92 Am. Dec. 364; Washington Ice Co. v. Shortall, 101 Ill. 46, 40 Am. Rep. 196.

Where power is desired, the upper proprietor has the right of gathering the water into reservoirs, or using it for the creation of power in steam-condensing engines. It is lawful to so use the water where it is done in good faith for a useful purpose, and with as little interference with the rights of other proprietors as is reasonably practicable under the circumstances.

Gehlen Bros. v. Knorr, 101 Iowa, 700, 36 L.R.A. 697, 63 Am. St. Rep. 416, 70 N. W. 757; Cooley, Torts, p. 584; Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102; Snow v. Parsons, 28 Vt. 459, 67 Am. Dec. 723; Hayes v. Waldron, 44 N. H. 580, 84 Am. Dec. 105; Davis v. Getchell, 50 Me. 602, 79 Am. Dec. 636; Clinton v. Myers, 46 N. Y. 514, 7 Am. Rep. 373.

To determine whether the defendant is making a reasonable use of the stream, all facts which may bear upon the reasonableness of the use must be considered.

Gehlen Bros. v. Knorr, 101 Iowa, 700, 36 L.R.A. 697, 63 Am. St. Rep. 416, 70 N. W. 757; Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102; Bullard v. Saratoga Victory Mfg. Co. 77 N. Y. 530; Pitts v. Lancaster Mills, 13 Met. 156; Cary v. Daniels, L.R.A.1916E.

8 Met. 476, 41 Am. Dec. 532; Snow v. Parsons, 28 Vt. 459, 67 Am. Dec. 723; Davis v. Getchell, 50 Me. 602, 79 Am. Dec. 636; Gould v. Boston Duck Co. 13 Gray, 442; Hayes v. Waldron, 44 N. H. 580, 84 Am. Dec. 105; Tourtellot v. Phelps, 4 Gray, 376.

In order to entitle the complainant to relief, it must show, by a preponderance of the evidence, that its damages are manifest, substantial, and serious, and were caused by the unreasonable or wanton and vexatious use of the water by defendant.

Palmer v. Mulligan, 3 Caines, 307, 2 Am. Dec. 270; Thurber v. Martin, 2 Gray, 394, 61 Am. Dec. 468; Lancey v. Clifford, 54 Me. 487, 92 Am. Dec. 561; Hetrich v. Deachler, 6 Pa. 32; Keeney & W. Mfg. Co. v. Union Mfg. Co. 39 Conn. 576.

An injunction ought not to be granted to regulate the relative rights of riparian owners upon the same stream; and except in very clear cases, or cases of the intentional violation of these rights, the parties should be left to recover their damages at law, if any.

Bliss v. Kennedy, 43 Ill. 67; Stolp v. Hoyt, 44 Ill. 219; Allott v. American Strawboard Co. 237 Ill. 55, 86 N. E. 685; Cummings v. Barrett, 10 Cush. 186; Hoxsie v. Hoxsie, 38 Mich. 77; W. H. Howell Co. v. Charles Pope Glucose Co. 171 Ill. 350, 49 N. E. 497, 61 Ill. App. 596; Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102; Gehlen Bros. v. Knorr, 101 Iowa, 700, 36 L.R.A. 699, 63 Am. St. Rep. 416, 70 N. W. 757; Merritt v. Brinkerhoff, 17 Johns, 321, 8 Am. Dec. 404.

Mr. Clyde Smith, for appellee:

Defendant has no right to turn heated water into the stream to the injury of complainant.

Mason v. Hill, 5 Barn. & Ad. 11, 2 Nev. & M. 747, 2 L. J. K. B. N. S. 118, 25 Eng. Rul. Cas. 383; Walker Ice Co. v. American Steel & Wire Co. 185 Mass. 463, 70 N. E. 936; New England Cotton Yarn Co. v. Laurel Lake Mills, 190 Mass. 48, 76 N. E. 231.

The discharge of heated water across complainant's ice fields is an unreasonable exercise of defendant's common right in the river.

Tetherington v. Donk Bros. Coal & Coke Co. 232 Ill. 522, 83 N. E. 1048; Elliot v. Fitchburg R. Co. 10 Cush. 191, 57 Am. Dec. 85; Washington Ice Co. v. Shortall, 101 Ill. 46, 40 Am. Rep. 196; Davis v. Getchell, 50 Me. 604, 79 Am. Dec. 636; Snow v. Parsons, 28 Vt. 459, 67 Am. Dec. 723; Hayes v. Waldron, 44 N. H. 580, 84 Am. Dec. 105; Lancey v. Clifford, 54 Me. 487, 92 Am. Dec. 561; Bliss v. Kennedy, 43 Ill. 67.

A modification of the conditions of a stream by which its flow is retarded or accelerated, its volume diminished, its loca-

tion changed, or its purity impaired, will be held to be unlawful, if it works substantial injury to the riparian owner.

Lockwood Co. v. Lawrence, 77 Me. 297, 52 Am. Rep. 763; *Farrell v. Richards*, 30 N. J. Eq. 511; *Indianapolis Water Co. v. American Strawboard Co.* 53 Fed. 970; *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312.

Complainant's ice is property for injury to which he may maintain trespass.

Washington Ice Co. v. Shortall, 101 Ill. 46, 40 Am. Rep. 196; *Bigelow v. Shaw*, 65 Mich. 341, 8 Am. St. Rep. 902, 32 N. W. 800; 28 Am. & Eng. Enc. Law, 586.

Its pollution may be enjoined.

Barrett v. Mt. Greenwood Cemetery Asso. 159 Ill. 385, 31 L.R.A. 109, 50 Am. St. Rep. 168, 42 N. E. 891.

The right of a riparian owner to have the water flow in its natural state is a part of his freehold of which he cannot be deprived without due process of law.

Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388.

The necessity of one man's business is not the standard of another's rights.

Strobel v. Kerr Salt Co. 164 N. Y. 303, 51 L.R.A. 687, 79 Am. St. Rep. 643, 58 N. E. 142, 21 Mor. Min. Rep. 38; *Columbus & H. Coal & I. Co. v. Tucker*, 48 Ohio St. 41, 12 L.R.A. 577, 29 Am. St. Rep. 528, 26 N. E. 630; *Union Mill & Min. Co. v. Ferris*, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Mor. Min. Rep. 90.

Usage is unimportant.

Columbus & H. Coal & I. Co. v. Tucker, 48 Ohio St. 41, 12 L.R.A. 577, 29 Am. St. Rep. 528, 26 N. E. 630; *Cleveland, C. C. & St. L. R. Co. v. Jenkins*, 174 Ill. 398, 62 L.R.A. 922, 66 Am. St. Rep. 296, 51 N. E. 811; *Wilson v. Bowman*, 80 Ill. 493; *Bissell v. Ryan*, 23 Ill. 596.

The law will not balance conveniences.

21 Am. & Eng. Enc. Law, 689, 690; 5 Pom. Eq. Jur. 530; *Northern P. R. Co. v. Cunningham*, 103 Fed. 708; *Swift v. Jenks (C. C.)* 19 Fed. 641; *United States v. Shannon (C. C.)* 151 Fed. 863, affirmed in 88 C. C. A. 52, 160 Fed. 870; *American Smelting & Ref. Co. v. Godfrey*, 89 C. C. A. 139, 168 Fed. 225, 14 Ann. Cas. 8; *Bristol v. Palmer*, 31 L.R.A. (N.S.) 881, note; *Wente v. Commonwealth Fuel Co.* 232 Ill. 526, 83 N. E. 1049.

The remedy is in equity by injunction.

Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388; 6 Pom. Eq. Jur. 3d ed. chap. XXVI, p. 965, § 561.

Kohlsaat, Circuit Judge, delivered the opinion of the court:

As usual in such cases, the testimony is conflicting. Out of the vast volume of it, L.R.A.1915E.

however, the district court, which heard and saw the witnesses, must have found, and doubtless did find: (1) That defendant's discharge of from 3,000,000 to 4,000,000 gallons per day into the Rock river during the ice-forming weather conditions, at a temperature of from 50° to 60°, resulted in an increase of the temperature of the water of the river opposite and adjoining complainant's plant, or that part thereof used by complainant as and for its ice-cutting field, of 47/100°; (2) that such increase in temperature was sufficient to and did practically retard the formation, at the times when it would be otherwise naturally produced, of ice thereon of a commercial character, to a degree, which made it impossible for complainant to conduct its said ice business at a profit; (3) that, in order to protect the interests of complainant in the premises, the defendant should desist or be restrained from emptying into the river at its plant hot water from its condensing or other machinery in such a manner as will tend to increase the temperature of the water in complainant's said ice field during ice-forming weather, provided the court has the power so to do under the circumstances of this case without unlawful interference with the rights of defendant as the owner or lessee of its said riparian rights. These deductions of fact we accept as fairly sustained by the evidence, reinforced by the presumptions which attend the finding of the trial court.

That each riparian owner is entitled to the reasonable use of the water of Rock river at its respective site is too well settled to require citation. The question presented is: Was the use made of the upper riparian rights here involved a reasonable use thereof? If so, the complainant may not complain, even though it suffer some injury incidental thereto. *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102; *Gehlen Bros. v. Knorr*, 101 Iowa, 700, 36 L.R.A. 697, 63 Am. St. Rep. 416, 70 N. W. 757; *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85; *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763; *Beidler v. Sanitary Dist.* 211 Ill. 628, 67 L.R.A. 820, 71 N. E. 1118. Says the court in the last-named case: "The limitation and extent of the use of the water is that it shall not interfere with the public right of navigation, nor in a substantial degree diminish and impair the right of use of the water by other riparian owners."

In *Palmer v. Mulligan*, 3 Caines, 307, 2 Am. Dec. 270, it was held that the upper owner had the right to erect a dam when necessary for the enjoyment of his riparian rights, even though such obstruction necessitated increased expense on the part of

the lower owner and greater difficulty in getting logs to his mill, provided enough water was left to work the lower mill. To the same effect is *Gould v. Boston Duck Co.* 13 Gray, 442.

So, in *Keeney & W. Mfg. Co. v. Union Mfg. Co.* 39 Conn. 576, where the upper owner was obliged to run his mill by day only, and where he allowed the water to accumulate overnight to the injury of the lower owner, whose mill ran day and night, a restraining order was denied. It was there held that each had the right to a reasonable use of the running water; that the burden of showing unreasonable use by the upper owner was on the lower owner; that in deciding the conflicting rights the court should consider (1) the custom of the country; (2) the local custom; (3) what general rule will best secure the entire stream to useful purposes; and (4) whether the injury to the lower owner does not arise from the insufficiency of his own privilege.

It is the duty of each of the riparian owners to use all reasonable effort and means to avoid interference with each other's use of the water, and the burden is on the lower owner to show that its damages are substantial, and are caused by the unreasonable acts of the upper owner.

It appears from the evidence that to restrain defendant from emptying its heated water into Rock river will result in great hardship and expense, so that the injury to complainant and defendant's unreasonable use must be clearly established. Complainant may not insist on such a use of the water by the defendant as will deprive the latter of any use thereof which may be necessary for its business purposes, provided complainant can by reasonable diligence and effort make the flowing water reasonably answer its own purposes. There must be a fair participation between them. "When questions arise between riparian owners respecting the right of one to make a particular use of the water in which they have a common right, the right will generally depend on the reasonableness of the use and the extent of the detriment to the lower owner." *Tetherington v. Donk Bros. Coal & Coke Co.* 232 Ill. 522, 83 N. E. 1048. But where, as in the present case, it is shown by the evidence that defendant's use of the river water, while essential for its own purposes, entirely destroys the right of complainant thereto, there can be no claim by defendant that its use thereof is reasonable. In other words, the emergency of defendant's needs is not the measure of its rights in the water. 40 Cyc. 563, and cases there cited; *Strobel v. Kerr Salt Co.* 164 N. Y. 303, 51 L.R.A. 687, 79 Am. St. L.R.A.1915E.

Rep. 643, 58 N. E. 142, 21 Mor. Min. Rep. 38.

The running of water in a heated state down upon a lower riparian owner has several times been before the courts. In *Mason v. Hill*, 5 Barn. & Ad. 11, 2 Nev. & M 747, 2 L. J. K. B. N. S. 118, 25 Eng. Rul. Cas. 383, damages so sustained were awarded and allowed to stand. "However great his necessity," says the court in *Walker Ice Co. v. American Steel & Wire Co.* 185 Mass. 463, 70 N. E. 937, "one riparian owner would have no right to foul the water of a stream or turn in hot water to the injury of another riparian owner,"—citing *Merrifield v. Lombard*, 13 Allen, 16, 90 Am. Dec. 172.

The pollution of a stream constitutes the taking of property, which may not be done without compensation. *Tetherington v. Donk Bros. Coal & Coke Co.* supra; *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85. In *Tipping v. Eckersley*, 2 Kay & J. 264, the court held that to use water, and return it into the stream heated to such a temperature as to make it unfit for use below, was an unreasonable use thereof. The general rule is well stated in the case of *Lancey v. Clifford*, 54 Me. 487, 92 Am. Dec. 561: "Each proprietor may make any use of the water flowing over his premises which does not essentially or materially diminish the quantity, corrupt the quality, or detain it so as to deprive other proprietors, or the public, of a fair and reasonable participation in its benefits. *Race v. Ward*, 30 Eng. L. & Eq. Rep. 187, 4 El. & Bl. 702, 3 C. L. R. 744, 24 L. J. Q. B. N. S. 153, 1 Jur. N. S. 704, 3 Week. Rep. 240; *Johnson v. Jordon*, 2 Met. 234, 37 Am. Dec. 85; *Dickinson v. Grand Junction Canal Co.* 7 Exch. 282, 21 L. J. Exch. N. S. 241, 16 Jur. 200; *Tyler v. Wilkinson*, 4 Mason. 397, Fed. Cas. No. 14,312. This rule does not require that there shall be no diminution, abstraction, or detention whatever by the upper or lower riparian proprietor, as that would be to prevent all reasonable use of it. The same principle in regard to use by the riparian proprietors applies as in the public use of the stream as a highway; it must be a reasonable use, and not inconsistent with the reasonable enjoyment of the stream by others who have an equal right to its use. Reasonable use is the touchstone for determining the rights of the respective parties."

Authorities to the same effect might be multiplied indefinitely. We do not deem it necessary. We conclude that the use made by defendant of the said water of Rock river, taken in connection with its discharge of the heated return water into said river, was an unreasonable use of the

flowing water of said river; that the same was an unwarranted interference with the riparian rights of the complainant, and that complainant was entitled to have defendant restrained from continuing its said unreasonable acts.

The decree of the District Court is affirmed.

Writ of certiorari denied by the Supreme Court United States May 17, 1915, in 238 U. S. 630, 59 L. ed. —, 35 Sup. Ct. Rep. 793.

FLORIDA SUPREME COURT.

CARRIE ROBINSON, Plff. in Err.,
v.
STATE OF FLORIDA.

(— Fla. —, 68 So. 649.)

Indictment — murder — sufficiency.

1. Where the language of an indictment for murder in the first degree is clear enough to enable the jury to easily understand it, and is not so vague as to mislead the accused and embarrass her in the preparation of her defense or expose her to substantial danger of another prosecution for the same offense, the indictment, if not otherwise defective, should not be quashed.

Same — failure to charge mortal injury.

2. An indictment for murder in the first degree is not defective for failure to allege that the defendant administered to the deceased "a mortal wound" or "mortal injury" or "mortal sickness," where the language of the indictment sets up a plain, direct, and certain state of facts constituting the crime, from which the connection between the facts alleged as the cause of death and the death itself appears.

Same — absence of necessary information.

3. Where the language of an indictment is sufficiently certain to enable an innocent person to prepare for trial, and furnishes the accused with reasonable information of what he is called upon to answer by setting forth the constituent elements of the crime charged, it cannot be maintained that the accused is not apprised of the nature and cause of the accusation against him.

Headnotes by ELLIS, J.

Note. — The right of accused to complain because prosecution is conducted or assisted by an unofficial member of the bar is treated in the notes to *State v. Bartley*, 24 L.R.A.(N.S.) 564, and *Flege v. State*, 47 L.R.A.(N.S.) 1106; and see references in latter note for annotation on collateral questions.
L.R.A.1915E.

Criminal law — assistant to prosecutor.

4. A member of the bar privately employed by citizens interested in the suppression of crime may, with the consent of the state attorney and the court, be permitted to participate in the prosecution of a criminal cause in the circuit courts of this state, as assistant to the state attorney.

Homicide — premeditation — necessity.

5. Where a woman is charged with the murder of her infant child, and the evidence tends to show that it was destroyed immediately upon its birth, evidence of the woman's intention or desire before the birth of the child to produce an abortion is admissible as tending to show the existence of a motive for the destruction of the infant and of a premeditated design to destroy it.

Criminal law — verdict against evidence — setting aside.

6. A verdict will not be set aside as against the evidence where there is evidence to support it, and where it does not appear that the jury were not governed by the evidence.

Appeal — instruction — absence of defect.

7. Where an instruction is considered in connection with other instructions upon the same subject, or the entire charge, and is found to be free from the defects complained of in the assignment of error, the assignment will fail.

(April 27, 1915.)

ERROR to the Circuit Court for Columbia County to review a judgment convicting defendant of murder. Affirmed.

The facts are stated in the opinion.

Mr. J. B. Hodges, for plaintiff in error:

It is necessary to allege the infliction of a mortal wound, injury, or sickness by the defendant.

Keech v. State, 15 Fla. 608; *Hodge v. State*, 26 Fla. 11, 7 So. 593; *Walker v. State*, 34 Fla. 167, 43 Am. St. Rep. 186, 16 So. 80; *Adams v. State*, 28 Fla. 554, 10 So. 106; *Padgett v. State*, 40 Fla. 451, 24 So. 145; *Williams v. State*, 45 Fla. 128, 34 So. 279; *Cooper v. State*, 47 Fla. 21, 36 So. 53; *Ewert v. State*, 48 Fla. 36, 37 So. 334; *Daniels v. State*, 52 Fla. 18, 41 So. 609; *State v. Hyde*, 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D, 191.

The participation of private counsel was error.

Eldridge v. State, 27 Fla. 188, 9 So. 454; *Lambright v. State*, 34 Fla. 572, 16 So. 584, 9 Am. Crim. Rep. 383; *State v. Kent*, 4 N. D. 577, 27 L.R.A. 686, 62 N. W. 631; *McKay v. State*, 90 Neb. 63, 39 L.R.A. 714, 132 N. W. 741, Ann. Cas. 1913B, 1034; *Territory v. Chong Chak Lai*, 19 Haw. 437, Ann. Cas. 1912B, 657.

It is not homicide to kill an unborn child. Hubbard v. State, 72 Ala. 164; State v. Prude, 76 Miss. 543, 24 So. 871, 11 Am. Crim. Rep. 466; Evans v. People, 49 N. Y. 86; Wallace v. State, 7 Tex. App. 570; Harris v. State, 28 Tex. App. 308, 19 Am. St. Rep. 837, 12 S. W. 1102.

Messrs. T. F. West, Attorney General, and C. O. Andrews, Assistant Attorney General, for the State:

Section 1791 of the General Statutes of 1906 specifically authorizes the state attorney to ask for assistance, and it also clothes the circuit judge with full power to grant such request.

Lambright v. State, 34 Fla. 564, 16 So. 584, 9 Am. Crim. Rep. 383; Thalheim v. State, 38 Fla. 169, 20 So. 938; State v. Kent, 4 N. D. 577, 27 L.R.A. 686, 62 N. W. 631; State v. Bartley, 24 L.R.A. (N.S.) 564, note.

Ellis, J., delivered the opinion of the court:

Carrie Robinson, a white woman, was indicted for the murder of her infant child, and was found guilty of murder in the first degree and recommended to mercy. She was sentenced to imprisonment in the state prison at hard labor for the period of her natural life.

A motion was made to quash the indictment, which motion was overruled, and such order is assigned as error. The motion contains ten grounds, but only the fifth and ninth grounds are argued; the others being expressly abandoned. The fifth ground of the motion is as follows:

"(5) Because the said indictment fails to allege the manner of the death of the deceased."

And the ninth ground is as follows:

"(9) Because said indictment fails to show that deceased received a mortal wound or injury at the hands of defendant whereby death was caused."

The indictment, omitting the venue, is as follows:

In the name of the state of Florida, the grand jurors of the state of Florida, duly chosen, impaneled, and sworn diligently to inquire and true presentment make in and for the body of the county of Columbia, upon their oath present that Carrie Robinson, late of said county, on the 13th day of April, A. D. 1914, in the county and state aforesaid, with force and arms, in and upon a certain child then recently born of the said Carrie Robinson, and not named, of and from a premeditated design to effect the death of the said child, did unlawfully make an assault; and the said Carrie Robinson, of and from a premeditated design

to effect the death of the said child, with the hands of her, the said Carrie Robinson, placed and tightly pressed around and upon the neck of the said child, she, the said Carrie Robinson, did then and there unlawfully of and from a premeditated design to effect the death of the said child give to the said child upon and around the neck of the said child a mortal pressure, choking and strangling the said child, of and from which said mortal pressure, choking, and strangling the said child did then and there die; contrary to the laws of the state of Florida.

Stafford Caldwell,
State Attorney.

It is contended for plaintiff in error that, inasmuch as the indictment does not allege that the defendant administered to the child a "mortal wound" or a "mortal injury" or a "mortal sickness," it is fatally defective, and because the indictment does not allege that the "pressure was administered with the hands of defendant," nor how it was done, the indictment is invalid. The latter point is not argued; the brief for the plaintiff in error containing merely a suggestion that the pressure was not alleged to have been made with the hands of the defendant. The manner and means of the killing is sufficiently alleged under the provisions of §§ 3961 and 3962 of the General Statutes. The nature of the offense charged is described in such language as was sufficiently clear to enable the jury easily to understand it, and it was not so vague, indistinct, and indefinite as to mislead the accused and embarrass her in the preparation of her defense, or expose her to substantial danger of a new prosecution for the same offense. Indictments and informations should be upheld whenever there has been a substantial compliance with the law as announced in those sections of the General Statutes of Florida. Barber v. State, 52 Fla. 5, 42 So. 86; Lewis v. State, 55 Fla. 54, 45 So. 998; Tillman v. State, 58 Fla. 113, 138 Am. St. Rep. 100, 50 So. 675, 19 Ann. Cas. 91. The assault is alleged to have been made by the defendant unlawfully and from a premeditated design to effect the death of her child. The manner of the assault is shown to have been with the hands of the defendant "placed and tightly pressed around and upon the neck of the said child." The indictment then alleges that the defendant did "then and there unlawfully, of and from a premeditated design to effect the death of the said child, give to the said child upon and around the neck of the said child a mortal pressure," etc. The manner and means of the assault and the intention with which it was made are clearly shown. The language of the indictment

might have been made clearer, as counsel for the plaintiff in error insists, by the insertion of the words suggested in his brief; but the statute does not require the highest standard of excellence in the phraseology of indictments. If the language is clear enough to enable the jury to easily understand it, and not so vague as to mislead the accused and embarrass her in the preparation of her defense, or expose her to substantial danger of another prosecution for the same offense, it is sufficient. *Dickens v. State*, 50 Fla. 17, 38 So. 909.

The contention of the plaintiff in error that the indictment is fatally defective because it does not allege that the defendant administered to the child a "mortal wound" or a "mortal injury" or a "mortal sickness" is not well founded. In the case of *Brown v. State*, 18 Fla. 472, Judge Randall, then Chief Justice of this court, announced as his view of the question that: "in addition to requiring the statement of the cause and the manner of the death, the further statement that the wound was 'mortal' has no authority in the logic of the law. The practice has conformed to the forms prescribed by an ancient court, and been perpetuated by the compilers of form books and precedents; and, in my judgment, the use of the words 'mortal wounds' in an indictment for murder by felonious wounding is unnecessary and superfluous, where the indictment alleges a wounding which produces death and precludes the suggestion that the death was caused by any other means."

In the *Keech Case*, 15 Fla. 591, it was held that, where the wound inflicted was an incised wound, its dimensions should be given, and that the part of the body in which the deceased was wounded should be particularly stated. But the views as announced in the *Keech Case* on this subject have been abandoned. See *Hodge v. State*, 26 Fla. 11, 7 So. 593; *Walker v. State*, 34 Fla. 167, 43 Am. St. Rep. 186, 16 So. 80; *Roberson v. State*, 42 Fla. 223, 28 So. 424. The views expressed by Judge Randall have not been repudiated by this court. The cases cited by counsel for plaintiff in error do not sustain his position that the indictment should allege that the wound inflicted was mortal. Although in the cases cited the indictment alleged the wounds to have been mortal, in neither case was the point raised, and the indictments were held to be valid or invalid for other and different reasons. In the case at bar there was no incised wound. Death was alleged to have been produced by a "pressure upon and around the neck." The pressure was alleged to be "a mortal pressure," choking and strangling the child, "of and from which said mortal pressure,

choking and strangling, the said child did then and there die." What better allegation could be made than that the choking and strangling were mortal? What more is necessary to apprise the defendant of the nature and cause of the accusation against her than a plain, direct, and certain statement of the facts constituting the crime from which the connection between the facts alleged as the cause of death and the death itself appears? See 21 Cyc. 847. The indictment shows the adequacy of the means employed to produce death, because it is distinctly averred that the child died of the choking and strangling produced by the pressure of the defendant's hands on the neck of the deceased, which pressure is alleged to have been mortal. 1 Starkie, Crim. Pl. 93; *Lane v. State*, 151 Ind. 511, 51 N. E. 1056; *State v. Noblett*, 47 N. C. (2 Jones, L.) 418.

The second assignment of error is as follows:

"That the court erred in overruling and denying the defendant's demand for the nature and cause of the accusation attempted to be made against her."

The motion to quash the indictment contained a ground based upon the same right of the defendant, that she should be informed of the nature of the "charge and accusation against her," or, as the Constitution provides, "to demand the nature and cause of the accusation against" her. When the motion to quash the indictment was overruled, the defendant below, by her attorney, presented her demand as stated, which was "overruled and denied." This provision in the Constitution was based upon the presumption of innocence, and requires such certainty in indictments and informations as will enable an innocent person to prepare for trial, that will furnish the accused with reasonable information of what he is called upon to answer by setting forth the constituent elements of the offense or crime with which he is charged. This provision requires that the accusation shall set forth with reasonable certainty a charge of the crime for which the prisoner is to be tried; the object of the provision being to protect the innocent, not to shield the guilty. The indictment being duly presented in court, upon being arraigned the prisoner has the right to have it read to him; thus he is advised of and has the nature and cause of the accusation against him. See *Noles v. State*, 24 Ala. 672; *Conner v. Com.* 13 Bush, 714; *State v. Verrill*, 54 Me. 408; *State v. Learned*, 47 Me. 426; *Newcomb v. State*, 37 Miss. 383; *Norris v. State*, 33 Miss. 373; *Com. v. Phillips*, 16 Pick. 211; *Com. v. Robertson*, 162 Mass. 90, 38 N. E. 25; *State v. Doran*, 99 Me. 329,

105 Am. St. Rep. 278, 59 Atl. 440; Moline v. State, 67 Neb. 164, 93 N. W. 228. The indictment was sufficient in its allegations to apprise the defendant of the nature and cause of the accusation against her. She moved the court by her counsel to quash the indictment, and she was then arraigned, and pleaded not guilty. It appears that in this particular her constitutional rights were fully secured to her.

The record discloses the following situation: After the defendant had been arraigned and pleaded not guilty to the indictment, and the jury sworn to try the issue joined, it appearing that the state attorney "was being assisted in the trial of said cause by Mr. F. P. Cone, an attorney at law," the defendant, by her counsel, moved the court "that the statute relating to the employment of private counsel be complied with; that the state attorney make an application to the court showing the necessity of the employment of private counsel by him, and, if the counsel is employed by private parties, that the interest of those parties who employed private counsel be disclosed to the court and to the defendant, in order that it may be shown whether or not those parties have such an interest as entitles them to prosecute crime in this court."

In this motion the defendant asserted that it was her right in the trial of this cause that the state should be represented only by the public prosecutor, the state attorney, unless it was made to appear that the state's business rendered it necessary for the state attorney to procure the assistance of a member of the bar to be compensated by the state attorney or by private parties having "such an interest as entitles them to prosecute crime in this court." The record discloses that the state attorney made the following statement to the court:

"State Attorney: In my place as counsel I will state that Mr. Cone is not employed by any private interest; he is employed by parties who are interested in this case, but he is not employed by anyone who is interested by personal motives any more than they are interested in the efforts of the state attorney. The case, however, is under my direction and control as state attorney. I propose to be present and prosecute the case with Mr. Cone's help, and I have no objection to his being sworn. I will ask the court to swear Mr. Cone as assistant state attorney during the trial."

The court denied the defendant's motion, and decided that "Mr. Cone might be sworn as an assistant to the state attorney for the prosecution of this case."

To this ruling of the court the defendant by her counsel excepted, and the ruling L.R.A.1916E.

forms the basis of the third assignment of error. The defendant by her counsel then interposed the following objection:

"We object to Mr. Cone being sworn as assistant state attorney, because it is not represented by the state attorney that the amount of the state's business at this term of court warrants the securing by him of private counsel to assist him in the prosecution of this case; and, further, it is not shown that, if employed by private parties, what those parties' interest in this case may be."

The state attorney then replied as follows:

"The state attorney represents to the court, as an officer of this court and as state attorney, that Mr. Cone is not employed by any private party interested in this case from any personal motive; that Mr. Cone is employed by a proportion of the citizens of Columbia county acting as a citizenship interested in the suppression of crime, and not from any party or parties interested in the prosecution of the defendant from motives of revenge, hatred, or any other personal motive directly connected with the death of the person alleged to have been killed. The state further represents to the court that by reason of the volume of business transacted and to be transacted at this term of court, by reason of the congested condition of the docket, by reason of the number of causes to be tried and to have been tried, the time that the present state attorney was required with the grand jury in a number of cases at this term, for which indictments were returned at the last term of the court while the state attorney of another circuit was representing the state in this county, with which cases the regular state attorney only had an opportunity to become familiar at this term of court, that it is advisable that the state attorney have an assistant in this case, and for that reason he requests that Mr. F. P. Cone be sworn as assistant state attorney."

The defendant's objection was overruled by the court, to which ruling the defendant excepted by her counsel, and makes it the basis of the fourth assignment of error. Mr. Cone "was then sworn by the court as an assistant state attorney in the prosecution of this case." The defendant interposed the following objection:

"Defendant objects to the participation of Mr. Cone as assistant state attorney in this case, because the statement of the state attorney shows that Mr. Cone has not been paid by himself, the state attorney, as required by law, but that he has been paid by private citizens of this county, and their interest has not been shown in the record here."

This objection was overruled, and forms the basis of the fifth assignment of error.

By these objections the defendant by her counsel presented fully the question whether in this jurisdiction a member of the bar privately employed by "citizens interested in the suppression of crime" may, with the consent of the state attorney and the court, be permitted to participate in the prosecution of a criminal cause, as assistant to the state attorney.

This question is not answered by § 1791, General Statutes of Florida 1906, which is as follows:

"The state attorney, by and with the consent of court, may procure the assistance of any member of the bar when the amount of the state business renders it necessary, either in the grand jury room to advise them upon legal points and framing indictments, or in court to prosecute criminals. But such assistant shall not be authorized to sign any indictments or administer any oaths, or to perform any other duty except the giving of legal advice, drawing up of indictments, and the prosecuting of criminals in open court. His compensation shall be paid by the state attorney and not by the state."

In that statute the legislature has recognized the policy of the employment by the state attorney, by and with the consent of the court, of assistance when the amount of the state's business renders it necessary. In such case the duties of the assistant are defined by the statute. *Miller v. State*, 42 Fla. 266, 28 So. 208. The statutes of this state make it the duty of the state attorneys to appear in the circuit courts within their judicial circuits and prosecute or defend on behalf of the state all suits, applications, or motions, civil or criminal, in which the state is a party, to attend the grand jury for the purpose of examining witnesses in their presence, or giving legal advice in any matter before them, to summon all witnesses required on behalf of the state, etc. (Gen. Stat. of 1906, §§ 1779-1781), and to assist the attorney general in the preparation and presentation of all appeals to the supreme court from the circuit court of their respective circuits of all cases, civil or criminal, in which the state is a party. They may also be required by the governor to exchange circuits when he thinks that the ends of justice require it, or the state attorney may be assigned to discharge the duties of state attorney in any circuit of the state at any regular or special term of the circuit court. They are also required to represent the state in all cases of habeas corpus arising in their respective circuits, and to represent the state either in person or by assistant in cases of preliminary trials

of persons charged with capital offenses, in all cases where the committing magistrates give them timely notice as required by the statute, except in such counties where criminal courts of record or county courts may be established. Laws of Fla. 1905, chap. 5399.

Our view is that these statutes (chapter 5399, Acts 1905, and §§ 1779-1781, Gen. Stat. of 1906) do not give to the state attorney the exclusive duty to conduct and manage criminal prosecutions, nor as declarative of a public policy against the employment by private persons of an attorney to conduct or assist in the prosecution of criminal cases, as has been held by the supreme courts of Massachusetts, Michigan, and Wisconsin.

In the *Thalheim Case*, 38 Fla. 169, 20 So. 938, the court said that it found the overwhelming weight of authority in favor of the practice of allowing attorneys employed or paid by private parties to assist the state attorney in the prosecution of persons charged with crime. It is proper, said the court, "for the state attorney, when there is no express statutory prohibition, to obtain, with the consent of the court, the assistance of other counsel, and other members of the bar are not incompetent to be engaged for such assistance and taking part in the trial by reason of being retained and compensated by the prosecuting witness, the party injured by the crime, or other private interests."

The only point of difference between the case at bar and the *Thalheim Case* is that in the latter case the private counsel were employed by the people whose property was alleged to have been embezzled, who had a close, direct, or concrete interest, it may be said, in the prosecution, while in the case at bar the private counsel was employed by people whose interest in the prosecution was abstract; it was the interest of citizens in the suppression of crime. In this they were further removed from the personal hatred and desire for revenge than might be those whose property was taken or relatives slain or outraged. But the *Thalheim Case* seems not to have been decided upon the theory that persons whose property has been taken or relatives slain or outraged have peculiar right to employ private counsel to assist the state attorney in the prosecution of the wrong done. The court quoted at length from the supreme court of North Dakota in the case of *State v. Kent*, 4 N. D. 577, 27 L.R.A. 686, 62 N. W. 631, in which state, at the time of the trial of the cause, the statute made it the duty of the state attorney for the county to "prosecute all criminal offenses triable in that county." The court said: "We are unable to discover in

the statute any other policy than that of transferring the control of criminal prosecutions from private to public hands."

It has been the practice in this state for many years for counsel employed by persons desirous of a conviction in a criminal cause to assist the prosecuting attorney in the conduct of the prosecution. Public justice sometimes requires it. A community does not surrender its interests in the prosecution of criminals simply because a prosecuting officer is charged with the duty of conducting the prosecution of all criminal cases. When assistance is offered to the state attorney, it may not be rendered without his consent and that of the court whose duty it is at all times to see that the defendant obtains a fair and impartial trial. The state attorney is required to be present at the trial, remaining at all stages of the case in control of the prosecution. It is his duty, as well as that of the court, to see that the prosecution "does not degenerate into a private persecution, and that the administration of the criminal law is not made a vehicle of oppression for the gratification of private malice, or the accomplishment of private gain or advantage." As was said in the case of *State v. O'Brien*, 35 Mont. 482, 90 Pac. 514, 10 Ann. Cas. 1006:

"The defendant is entitled to a fair and impartial trial, but nothing more. Special counsel are subject to the same control by the court as the public prosecutor, and, so long as they are not guilty of conduct prejudicial to the defendant, the latter has no right to complain."

At common law criminal prosecutions were generally carried on by individuals interested in the punishment of the accused, and not by the public. But our system does not exclude counsel for interested persons, whether their interest be concrete or abstract, from all participation in the prosecution. We do not apprehend the danger which counsel fears from such practice. Private counsel cannot initiate the proceedings or conduct them. The legislature has taken the control of criminal prosecutions in the circuit, county, and criminal courts of record out of private hands and placed it in the hands of public officials chosen for that purpose, but there is nothing in the statute to warrant the conclusion that counsel employed by interested persons may not assist the public prosecutor in the prosecution of a criminal case with the latter's consent and that of the court. See *State v. Kent*, supra; *Keyes v. State*, 122 Ind. 527, 23 N. E. 1097; *State v. Wilson*, 24 Kan. 189, 36 Am. Rep. 257; *State v. Fitzgerald*, 49 Iowa, 280, 31 Am. Rep. 148, 3 Am. Crim. Rep. 1; *State v. Helm*, 92 Iowa, 540, 61 N. W. 246; *People v. Powell*, 87 L.R.A.1915E.

Cal. 348, 11 L.R.A. 75, 25 Pac. 481; *State v. Wells*, 54 Kan. 161, 37 Pac. 1005; *State v. Bartlett*, 55 Me. 200; *State v. Bartlett* (*State v. Bartley*) 105 Me. 212, 24 L.R.A. (N.S.) 564, 134 Am. St. Rep. 542, 74 Atl. 18; *Hayner v. People*, 213 Ill. 142, 72 N. E. 792; *Shular v. State*, 105 Ind. 289, 55 Am. Rep. 211, 4 N. E. 870, 7 Am. Crim. Rep. 509; *Jackson v. Com.* 96 Va. 107, 30 S. E. 452; *Com. v. Eisenhower*, 181 Pa. 470, 59 Am. St. Rep. 670, 37 Atl. 521; *State v. Rue*, 72 Minn. 296, 75 N. W. 235. The Nebraska supreme court held the same way (*Polin v. State*, 14 Neb. 540, 16 N. W. 898; *Bradshaw v. State*, 17 Neb. 147, 22 N. W. 361, 5 Am. Crim. Rep. 493, and other cases), but by a divided court in the case of *McKay v. State*, 90 Neb. 63, 39 L.R.A. (N.S.) 714, 132 N. W. 741, Ann. Cas. 1913B, 1034, decided in 1911 under a recent statute prescribing the duties of county attorneys, receded from its former holding. See also *State v. Orrick*, 106 Mo. 111, 17 S. W. 176, 329. There is nothing in the record to show that Mr. Cone conducted himself in any manner unbecoming an officer of the court, nor that the defendant suffered any injustice from his connection with the case. We think the assignments numbered 3, 4, and 5 are not sustained.

The sixth and seventh assignments of error rest upon the action of the court in overruling defendant's objection to certain questions propounded to witnesses. The questions were, in substance, the same to each witness, and their answers similar. The assignments are discussed together and will be considered together.

The question first complained of was as follows:

By the state's counsel to Thomas George, a witness for the state: I will ask you if within a short length of time prior to last April, that is, April, 1914, you heard any conversation by and between the defendant and any other person with reference to the doing away of an unborn infant?

The objection made was:

"That the question is leading; that it is not shown what length of time before the alleged date of the homicide; and upon the further ground that it seeks testimony relative to the crime of abortion, and not the crime of murder."

The questions to Elsie McNish were as follows:

Q. Have you ever had any talk before April, this last gone April, with the defendant, Mrs. Robinson, about doing away with an unborn child?

A. Yes, sir.

Counsel for Defendant: We object to the

question, because it is not shown how long before the commission of the crime laid in the indictment, because it is leading, and because it tends to show that the evidence sought out of this witness is relative to the crime of abortion, which is an indictable offense under our law, and the person mentioned was not in being at the time that the witness is testifying about.

By the Court: The question is too broad.

State Attorney: It is a preliminary question only.

Q. State whether or not during the latter part of last year, 1913, or the early part of this year, 1914, you had any talk with the defendant, Mrs. Robinson, about getting rid of an unborn child.

Counsel for Defendant: We object to the question because it is leading. We object upon the ground that the party defendant is charged with murdering was not in being at that time, and it is relative to the crime of abortion, and not murder.

The court overruled the objection, to which ruling the defendant, by her counsel, duly excepts.

These questions, as the replies to them show, were intended to elicit information as to the fact of the pregnancy of the defendant at the time inquired about, and the defendant's desire to conceal the birth of the child. Premeditation is an essential element of the crime of murder, and may be inferred from the circumstances of the case. *Hicks v. State*, 25 Fla. 535, 6 So. 441; *Lovett v. State*, 30 Fla. 142, 17 L.R.A. 705, 11 So. 550; *Keigans v. State*, 52 Fla. 57, 41 So. 886; *Barnhill v. State*, 56 Fla. 16, 48 So. 251. It was proper for the state to show by evidence that prior to the birth of the child the defendant meditated its destruction. Though, if the fetus had been destroyed pursuant to her design to produce an abortion, it would not have been murder, yet the state of her mind concerning the unborn child would tend to throw light upon the question whether after the act of parturition it had been destroyed by her and the reason which operated in her mind for its destruction. See *Wallace v. State*, 7 Tex. App. 570, and *Harris v. State*, 28 Tex. App. 308, 19 Am. St. Rep. 837, 12 S. W. 1102.

A motion for a new trial was made and overruled, and forms the basis of the eighth assignment of error. The first two grounds of the motion attack the sufficiency of the evidence to support the verdict.

The evidence is conflicting. The state's case rested upon the testimony of the witness Bertha Scott, with such corroborating circumstances as were testified to by the husband of this negress, Dave Scott, and L.R.A.1915E.

other witnesses who testified as to the pregnancy of the defendant. Assuming that the facts sworn to by these witnesses were true, there is sufficient evidence to support the verdict, and it was the jury's province to determine the credibility of the witnesses and the weight of the evidence.

This court has held in a long line of decisions that, where there is any evidence to support the verdict, it will not be set aside as against the evidence where it does not appear that the jury were not governed by it. *Adams v. State*, 56 Fla. 1, 48 So. 219; *Barnhill v. State*, 56 Fla. 16, 48 So. 251; *Kent v. State*, 53 Fla. 51, 43 So. 778; *Lindsey v. State*, 53 Fla. 56, 43 So. 87; *Williams v. State*, 45 Fla. 128, 34 So. 279; *Logan v. State*, 58 Fla. 72, 50 So. 536.

The fifth, sixth, and seventh grounds of the motion attack certain charges of the court numbered 3, 5, and 12. The assignment of error, however, so far as it involves the last-numbered charge, is abandoned.

The third and fifth instructions were as follows:

"(3) The unlawful killing of a human being, when perpetrated from and with a premeditated design to effect the death of the person killed, is murder in the first degree. Upon the birth of a living child, that is, one that breathes and lives after its birth, it becomes and is a human being within the meaning of the law of murder, and it is as much a crime to kill a person that has just begun to live as to kill one that has lived for many years."

"(5) If you believe from the evidence in this case beyond a reasonable doubt that the defendant was with child, and that on April 13, 1914, or at any other time prior to the finding of the indictment, she was delivered of and gave birth to a child, and that such child was born, and that it lived for some period of time, no matter how short, and that the defendant, in this county and state, by and with her hands, by a choking, strangling, and pressure, killed the child, from and with a premeditated design to effect the death of said child, and that from and as a result of such choking, strangling, and pressure the child died, and not otherwise, then you should find the defendant guilty of murder in the first degree."

We find no error in either instruction, and, when read together, they are completely relieved from the criticism made by the counsel for plaintiff in error upon each. No undue importance was given in these instructions to any particular feature of the alleged crime, nor was the testimony of any particular witness singled out and given undue prominence. The entire charge bearing upon the subject should be considered in determining whether there is error.

Hallbeck v. State, 57 Fla. 15, 49 So. 153; Lewis v. State, 55 Fla. 54, 45 So. 998; Davis v. State, 54 Fla. 34, 44 So. 757.

The judgment of the court below is affirmed.

Taylor, Ch. J., and Shackelford, Cockrell, and Whitfield, JJ., concur.

A petition for rehearing having been filed, Ellis, J., on June 2, 1915, handed down the following response:

The plaintiff in error filed a petition for rehearing on the ground that the court "omitted to consider the fact that said indictment fails to allege that a mortal wound, or any wound whatever, was administered to the deceased by the defendant," and that the allegations of the indictment do not "preclude the suggestion that the death was caused by any other means" than by a "mortal pressure, choking, and strangling."

The indictment does not allege that a wound was inflicted upon the child who was killed, but alleges that the defendant gave "to the said child upon and around the neck of the said child a mortal pressure, choking and strangling the said child, of and from which said mortal pressure, choking, and strangling the said child did then and there die," etc. The court said in its opinion that the indictment showed the adequacy of the means employed to produce death; that the indictment contained a plain, direct, and certain statement of the facts constituting the crime, from which the "connection between the facts alleged as the cause of death and the death itself appears." If it appears from the allegations of the indictment that the facts therein alleged produced the death, the suggestion that death might have been caused by other means is necessarily precluded.

The court did not omit the consideration of the questions referred to in the petition as the opinion shows. The petition is therefore denied.

All concur.

IOWA SUPREME COURT.

STATE OF IOWA

v.

WILLIAM STALKER, Appt.

(— Iowa, —, 151 N. W. 527.)

Incest — evidence — sufficiency.

Conviction for incest may be had on the uncorroborated testimony of the prosecutrix L.R.A.1915E.

if she was too young to have consented to the act.

(March 15, 1915.)

APPEAL by defendant from a judgment of the District Court for Polk County convicting him of incest. Affirmed.

Statement by Deemer, Ch. J.:

Defendant was indicted, tried, and convicted of the crime of incest. Upon trial to jury, he was found guilty, and, from the judgment imposed, appeals.

Messrs. Walter McHenry and Earl De Ford for appellant.

Messrs. George Cosson, Attorney General, and Wiley S. Rankin, for the State: Sexual intercourse between a man and his stepdaughter is incestuous.

Taylor v. State, 110 Ga. 150, 35 S. E. 161; State v. Chambers, 87 Iowa, 3, 43 Am. St. Rep. 349, 53 N. W. 1090.

The man may be convicted upon the testimony of the woman, without the corroboration required by § 4559 of the Code.

State v. Chambers, 87 Iowa, 2, 43 Am. St. Rep. 349, 53 N. W. 1090.

The corroboration necessary to convict, where corroboration is necessary, may be founded upon circumstantial evidence.

State v. Miller, 65 Iowa, 65, 21 N. W. 181; State v. Stanley, 48 Iowa, 221.

Mr. Thomas J. Guthrie also for the State.

Deemer, Ch. J., delivered the opinion of the court:

The crime is alleged to have been committed upon Gladys Beebe, who was thirteen years of age on the 8th day of March, 1913. It is claimed that the offense was committed in December of the year of 1912. Prosecutrix is the stepdaughter of the accused, and she testified to acts of intercourse with him, beginning in December, 1912, and continuing down until some time in March of the year 1913, when it was discovered that she was pregnant. There was no testimony which tended to corroborate the prosecutrix, and the conviction must depend upon her testimony alone. There is some testimony tending to show that the defendant had an opportunity to commit the offense on December, 1912, but otherwise she is in no way corroborated, save that she became *enocoite* as a result of

Note.—Age of alleged accomplice in sexual offense as affecting the necessity of corroboration of testimony.

At common law an accused may be convicted upon the unsupported testimony of an accomplice, and so where the common law still prevails it is evident that the question under annotation cannot arise, but

her intercourse with someone. No testimony was offered for the defendant, and the case went to the jury upon instructions which are not complained of as abstract propositions, but which the defendant insists were prejudicial to his case and inapplicable to the testimony adduced. These instructions are as follows:

"As it is presumed by the law that any person between the ages of seven and fourteen years is incapable of entertaining a criminal intent and cannot be an accomplice in a crime, if the witness Gladys Beebe, at the time of the acts of intercourse charged in the indictment, as shown by the testimony, if any such occurred, was incapable of entertaining a criminal intent, then she would not be an accomplice in the crime. But if she did have sufficient mental capacity to entertain a criminal intent, that is, to distinguish between right and wrong, and sufficient mental capacity to intend to do the wrongful act, then she could be an accomplice in the crime, even though she was under the age of fourteen years.

"The presumption as to incompetency of a person between the ages of seven and fourteen years is a presumption of law, which simply means that you will assume in the beginning, before any evidence is introduced, that such person is incapable of entertaining a criminal intent. This presumption, however, is rebuttable. That is, it may be shown that a person under fourteen years of age is capable of entertaining a criminal intent. This presumption may be rebutted by any evidence in the case. And therefore, in determining whether or not the said Gladys Beebe did have sufficient mental capacity to entertain a criminal intent, you will take into consideration all the circumstances of the transaction as disclosed by the testimony, and the manner of her testifying, and all the testimony which you may think throws light upon that subject. The presumption of incompetency as to Gladys Beebe, and the presumption of innocence of the defendant, are both in force at the same time. If the evidence fails to disclose that Gladys Beebe did have sufficient mental capacity to entertain a

arises only where by statute it has been provided that the testimony of an accomplice must be corroborated in order to convict, when the question really resolves itself into whether one who, were he or she an adult, would be an accomplice, is, because of his or her youth, to be considered incapable of being an accomplice.

Cases of rape, statutory or otherwise, are not within the scope of this note, the prosecutrix in such cases being by force of the statute a victim, and not an accomplice.

The rule which obtains in some jurisdictions, that a conviction of that offense cannot rest upon the uncorroborated testimony of the prosecutrix, rests upon another basis than that which sustains the rule requiring corroboration of the testimony of an accomplice.

Incest.

The rules of accomplice testimony apply to testimony of a woman who voluntarily consents to incestuous intercourse, as she is considered an accomplice of the man. Cases, of course, where the act is accomplished under circumstances amounting to rape are excluded, as the woman could not be an accomplice. The decision in *STATE v. STALKER*, that conviction for incest may be had on the uncorroborated testimony of the prosecutrix, if she was too young to consent, finds support in the cases which have considered the question.

Thus, a prosecutrix of the charge of incestuous intercourse, who is too young to give legal assent, is not to be regarded as an accomplice within the rule requiring that her testimony be corroborated. *People v. Stratton*, 141 Cal. 604, 75 Pac. 166.

And although voluntary submission to in-

cestuous intercourse would render a female an accomplice, whose testimony must be corroborated, yet that rule is without force where she is below the age of consent, and could not as to that act be an accomplice. *State v. Sparks*, — Iowa, —, 149 N. W. 871.

In the absence of any evidence tending to overcome the presumption of incapacity to appreciate the wrong she was doing, a female under fourteen cannot be said to have been an accomplice to incestuous intercourse, and so error cannot be predicated on failure to instruct on the subject of corroboration. *State v. Goodsell*, 138 Iowa, 504, 116 N. W. 605.

And because a child thirteen does not resist the approaches of her stepfather, it can hardly be said that she consents to an incestuous intercourse so as to become an accomplice. *State v. Chambers*, 87 Iowa, 1, 43 Am. St. Rep. 349, 53 N. W. 1090.

And in *Straub v. State*, 27 Ohio C. C. 50, the court, in answer to the contention that prosecutrix of a charge of incest should be corroborated, after alluding to the fact that it was not the rule in Ohio that a jury cannot convict upon the uncorroborated testimony of an accomplice, said: "Where a girl of fourteen years, with little conception of the enormity of the offense, is overcome by her father, with whom she is occupying the same bed, and submits to incestuous intercourse upon his suggestion and under his influence, she is not such an accomplice as necessarily renders her testimony on that account incredible or unworthy of belief unless corroborated by other witnesses. There should be in all such cases corroboration if possible, but, as suggested by some of the cases, a girl under those circumstances joining with her father in the commission of the offense is not to

criminal intent, as hereinbefore defined, you will not be justified in assuming that she did have such mental capacity; if you have a reasonable doubt of the guilt of the defendant, he is entitled to an acquittal.

"You have already been instructed that Gladys Beebe could not be an accomplice unless she had sufficient mental capacity to entertain a criminal intent. If you find that Gladys Beebe was not an accomplice under this definition, then you are instructed that it is not necessary that her testimony should be corroborated by other evidence tending to connect the defendant with the commission of the crime, if you find that there was a crime committed. And, further, you are instructed that if an assault is committed upon a woman, and carnal knowledge of such woman is had by force and violence and against her will, then she would not be an accomplice, no matter what her age was, and her testimony would not be required to be corroborated. You are instructed in this case, however, that the testimony is not sufficient to sustain a conviction of this defendant upon

be considered in the light of an ordinary accomplice."

In *Palmer v. State*, 165 Ala. 129, 51 So. 358, it was said that the age of prosecutrix of a charge of incestuous intercourse is a fact of importance as determining whether her testimony is within the rule requiring an accomplice's testimony to be corroborated.

Crimes against nature.

One who participates in the crime against nature is an accomplice, and the rules of accomplice testimony apply.

But a boy seven years of age is not capable of legally consenting to commit the crime of sodomy, and so conviction may be had upon his uncorroborated testimony. *Means v. State*, 125 Wis. 650, 104 N. W. 815.

And to same effect is *Mascolo v. Montezanto*, 61 Conn. 50, 29 Am. St. Rep. 170, 23 Atl. 714, where the boy was twelve years of age.

In *People v. Camp*, — Cal. App. —, 147 Pac. 95, a prosecution of the offense of lewd and lascivious conduct with boy under fourteen, it was held that conviction could be had on the uncorroborated testimony of the boy, where by statute it is provided that children under fourteen years of age are incapable of committing crime in the absence of clear proof that at the time of committing the act charged against them they knew its wrongfulness, and there was not only an absence of clear proof, but no attempt was made to show, that he understood the nature of the act.

In *Kelly v. People*, 192 Ill. 119, 85 Am. St. Rep. 323, 61 N. E. 425, a prosecution of the offense of the crime against nature with and upon a boy under seven years of L.R.A.1915E.

the theory that intercourse with Gladys Beebe was accomplished by fraud or force and violence. Before such condition could exist, said Gladys Beebe would be required to resist the act of intercourse to the full extent of her physical power, and, if at any time her resistance was changed to consent before that act was accomplished, she would then no longer be resisting, and the crime then would not be accomplished by means of fraud or force and violence. Where the crime of incest is accomplished by force and violence and against the consent of the woman, it constitutes what is known in the law as a rape. Yet the fact that it is rape does not prevent its being incest under the statute which covers this. But, as stated above, the testimony in this case will not support a conviction of rape committed by physical force and violence and against the consent of the woman.

"Therefore, unless you shall find in this case, beyond a reasonable doubt, that Gladys Beebe was mentally incompetent by reason of her youth, to entertain a criminal intent you should find the defendant not

age, it was held that the uncorroborated testimony of the boy was sufficient to convict. The court stated that it was not the rule in Illinois that the testimony of an accomplice must be corroborated, but that in any event the consent on the part of the boy in this case could not be presumed, he being incapable of understanding the nature of the act and incapable of committing a crime.

On the other hand, in *State v. Wilkins*, 221 Mo. 444, 120 S. W. 22, a prosecution of the crime against nature committed upon a boy ten years of age, the court stated that if the boy willingly consented to the commission upon him by the defendant of the crime against nature, he was an accomplice in the crime, and testimony connecting the defendant with the offense would need corroboration. In this case, however, the conviction was affirmed, the court stating that defendant had no cause of complaint, because no instruction as to the necessity of corroborating evidence was asked, and further because it appeared that the boy was corroborated by two other witnesses.

Adultery.

In *Price v. State*, 64 Tex. Crim. Rep. 448, 142 S. W. 586, prosecution for adultery with a female under sixteen years of age, it was held that while under the rape statute sexual intercourse with a girl under fifteen years of age, even though with her consent, does not make her an accomplice when the charge is rape, yet this rule does not apply when the charge is living in adultery, even though the woman or female is under the age of fifteen years, and so her testimony must be corroborated.

J. H. B.

guilty. The intent with which an act is committed is a mental state only, and direct proof of it is not required; nor can it ordinarily be shown by direct proof. Intent is a purpose formed to do or not to do something; and the intent of a person in doing a thing may be inferred from the acts done, the nature and character of the act, and from the manner in which, or the circumstances under which, they were done as disclosed by the evidence. . . ."

The real point to appellant's argument is that these instructions are incongruous, in that, in finding that prosecutrix was not an accomplice, the jury had to determine that she was not of sufficient mental capacity to understand the nature and character of her act with the defendant; unable to distinguish between right and wrong; saying at the same time, however, that if such were the fact, her testimony might be given weight, and conviction had upon that alone, but that, if she were of sufficient mental capacity to join in an offense, the defendant could not be convicted unless she was corroborated. This doubtless is the result of the rule, but it not so incongruous as defendant would have us believe. The witness, no matter what her age, was competent, and corroboration of her was only required in the event she was *particeps criminis*. It is well settled in this state that one cannot be an accomplice to either the crime of adultery or incest, unless she consents to the act, and is in fact guilty of it herself. Therefore, if from infancy or any other cause she is unable to consent, she is not an accomplice. But it is nevertheless true that a defendant may be convicted upon her testimony alone, if the jury think she spoke the truth. See *State v. Chambers*, 87 Iowa, 1, 43 Am. St. Rep. 349, 53 N. W. 1090.

The court might well have said that, as the prosecutrix in this case was incapable
L.R.A.1915E,

of consenting to the acts of intercourse, she was not in fact an accomplice, instead of submitting the question of mental capacity to the jury. That it did not do so is no ground for complaint on the part of the defendant. This observation is made simply to show that conviction may be had upon the testimony of an immature woman; whereas, if she were mature and consented to the act, conviction could not be had on her testimony alone.

As the prosecutrix in this case was under the age of consent, we need not scrutinize very carefully the testimony in support of the instructions given; for, notwithstanding the evident maturity of the girl while a witness on the stand, the jury may well have found that she did not possess such capacity as to know the nature and character of her actions, their consequences, and their moral obliquity. Our conclusions are supported by *State v. Sanders*, 30 Iowa, 582; *State v. Donovan*, 61 Iowa, 279, 16 N. W. 130, 4 Am. Crim. Rep. 25. See also *Com. v. Bakeman*, 131 Mass. 577, 41 Am. Rep. 248.

In the *Chambers Case*, supra, the court said: "Guilt may exist, and is none the less enormous, because the act was without the consent of the female. To hold otherwise is to say that the crime of incest cannot be committed with one who, from infancy or other cause, is incapable of consenting to the act. Sarah D. Cowden was but little over thirteen at the time this crime is charged to have been committed; and, although it does not appear that she resisted the approaches of her stepfather, it can hardly be said that she so consented as to become his accomplice in the commission of the crime."

No error appears, and the judgment must be, and it is, affirmed.

Ladd, Evans, and Preston, JJ., concur.

INDEX TO NOTES

(The Index to Cases follows this.)

Abatement and revival.	
Abatement and revival of action for personal injury upon death of plaintiff	1104
Pendency of action for personal injury as abatement of action for death, or <i>vice versa</i>	1132
Judgment in action for personal injury as abatement of action for death or <i>vice versa</i>	1152
Accident insurance.	
See INSURANCE.	
Accomplice.	
Necessity of corroboration of testimony of, see EVIDENCE.	
Age.	
Of alleged accomplice in sexual offense as affecting the necessity of corroboration of testimony	1222
Agisters.	
Duty of agister to supply water	590
Aliens.	
Inheritance by, or through, see DESCENT AND DISTRIBUTION.	
Alimony.	
See DIVORCE AND SEPARATION.	
Amusements.	
As to fairs, see FAIRS.	
Animals.	
Contract of agistment, see AGISTERS.	
Larceny of, see LARCENY.	
Liability of municipality for failure to enforce ordinance in relation to animals	448
Striking or frightening animal as assault upon one in control	812
Appeal and error.	
Power to limit the issues in granting new trial	239
Arrest.	
Of passenger, see CARRIERS.	
Civil liability for making, see FALSE IMPRISONMENT.	
Assault and battery.	
On passenger, see CARRIERS.	
Striking or frightening animal as assault upon one in control	812
Assumption of risk.	
By servant, see MASTER AND SERVANT.	
Attorneys' fees.	
Validity of statutory provision for attorney's fee	948
Automobiles.	
Power to prohibit use of automobile upon public thoroughfares	264
Insurance covering automobiles or indemnity against injury or liability for injury caused thereby	575
Liability of manufacturer or dealer for personal injuries caused by defects in automobile	287
Liability of one other than owner, operator, or guest, for injury by car	486
Responsibility of guest for injury to third person through negligence of person driving car	439
Violation of statute or ordinance by plaintiff as precluding recovery for negligence in action by or against driver or owner of automobile	959
Baggage.	
Of passenger, see CARRIERS.	
Bail and recognizance.	
Right to bail pending attempt to avoid body execution	840
Banks.	
Liability to estate of bank which receives deposit from one assuming without authority to act as executor or administrator	809
Liability of depositor who requests bank to hold noninterest bearing deposit against a claimant, to reimburse bank for interest which it is compelled to pay to claimant on the legal establishment of his claim to the deposit	797
Constitutionality of statute authorizing officer to take charge of assets of bank upon suspicion of insolvency	675
Benevolent societies.	
Insurance by, see INSURANCE.	
Bills and notes.	
Right to recover on a bill or note stolen before delivery	351
Negotiability as affected by provision for discount in event of payment before maturity	564

- Payment to prior party as a defense against one to whom paper was transferred after maturity 895
- Blasting.**
Liability for injury to person or property from concussion caused by blasting 856
- Boards.**
Power of board to appoint officer or to make contract for term extending beyond its own term 581
- Body execution.**
See EXECUTION.
- Bonds.**
Bail bond, see BAIL AND RECOGNIZANCE.
- Bridges.**
Duty as to establishment and maintenance of bridges over canals or ditches for use of adjoining owners 687
- Brokers.**
Right of real estate broker entitled to all over a minimum price to purchase property himself 976
Broker's right to commission on failure of employer's title 714
- Bank sales.**
See FRAUDULENT CONVEYANCES.
- Burial grounds.**
See CEMETERIES.
- Canals.**
Duty as to establishment and maintenance of bridges over canals or ditches for use of adjoining owners 687
- Carriers.**
As to elevators, see ELEVATORS.
Duty of carrier to accept as a passenger one physically or mentally disabled 788
Duty to passenger where journey is interrupted by wreck or other cause 145
Carrier's liability for assault by servant on passenger while on train 668
Liability of carrier for wrongful arrest of passenger caused by servant 320
Sufficiency of tender of fare to prevent ejection 311
Validity of regulations by public concerning the manner of using tickets or mileage books 902
Liability of carrier for baggage not accompanied by a passenger 281
Power to compel railroad to build, maintain, or connect with side track for accommodation of shippers 682
- Caveat emptor.**
Applicability of rule of, to sales by guardian of minors as regards ward's title 834
- Cemeteries.**
Validity of regulations concerning care or improvement of cemetery lots 168
L.R.A.1915E.
- Chattel mortgage.**
Effect of unlawful seizure of property by mortgagee assuming to act under mortgage 193
- Commissions.**
Of brokers, see BROKERS.
- Committee.**
Power of legislature or branch thereof to appoint committee to sit after close of session 496
- Common carriers.**
See CARRIERS.
- Common law.**
Common-law marriage, see MARRIAGE.
Effect of marriage statutes to abrogate 113
- Compromise and settlement.**
As defense to action for death, see DEATH.
- Concussion.**
By blast, see BLASTING.
- Condemnation.**
Of property, see EMINENT DOMAIN.
- Consent.**
Revocation of consent given by one spouse to will of the other in the latter's lifetime 815
- Conspiracy.**
Right of labor union to forbid its members serving a certain person 1037
- Constable.**
Liability for deputy's tort in making arrest 172
- Constitutional law.**
As to search and seizure, see SEARCH AND SEIZURE.
Constitutionality of statute authorizing officer to take charge of assets of bank upon suspicion of insolvency 675
Power of public to determine capacity or suitability of particular officer, agent, or employee of private corporation, or corporation whose business is affected with a public interest 708
Constitutionality of bulk sale legislation 917
Validity of statutory provision for attorney's fee 943
- Constructive trust.**
See TRUSTS.
- Contempt.**
Refusal to proceed with trial of divorce suit because of noncompliance with order to pay temporary alimony, suit money, or counsel fees 567
- Contractors.**
Liability of independent contractor, see MASTER AND SERVANT.

Contracts.

Contract to support for life as within statute of fraud, as to contracts not to be performed within a year or the lifetime of promisor 563

Power of board to make contract for term extending beyond its own term 581

Validity and enforceability of contract to compensate the owner of property stolen or embezzled, in absence of duress or agreement, express or implied, to stifle prosecution 139

Contribution and indemnity.

Liability of depositor who requests bank to hold noninterest bearing deposit against a claimant, to reimburse bank for interest which it is compelled to pay to claimant on the legal establishment of his claim to the deposit 797

Conversion.

Action for, see **TROVER**.

Corporations.

Power of public to determine capacity or suitability of particular officer, agent, or employee of private corporation, or corporation whose business is affected with a public interest 708

Mandamus to compel calling of stockholders' or directors' meeting 774

Corroboration.

Of accomplice, see **EVIDENCE**.

Counties.

Power of board of county commissioners to appoint officer or to make contract for term extending beyond its own term 581

Covenants and conditions.

In oil and gas lease, see **MINES**.

Criminal law.

Requisites and sufficiency of indictment, information, or complaint, see **INDICTMENT, ETC.**

As to search and seizure, see **SEARCH AND SEIZURE**.

Right to a speedy trial of one under confinement for another offense 363

Cruelty.

As ground for divorce, see **DIVORCE AND SEPARATION**.

Damages.

Effect upon character of sum agreed upon for breach, as penalty or liquidated damages, of single or multiple stipulations in contract 873

Damages recoverable for delaying person by blocking railroad crossing 836

Marriage of injured person after his injury as affecting damages recoverable for his death from such injury 1199

Receipt of proceeds of insurance as affecting the measure of damages for injury or death 1201

L.R.A.1915E.

Receipt by beneficiary of property from estate of decedent as affecting damages recoverable for decedent's death 1205

Death.

Abatement of action by, see **ABATEMENT AND REVIVAL**.

Divorce as equivalent of death for purpose of terminating a trust 762

Several actions for death, or injury causing death 1095

Pendency of action for personal injury as abatement of action for death, or *vice versa* 1132

Judgment in action for personal injury as abatement of action for death or *vice versa* 1152

Does settlement by injured person of his claim against tortfeasor preclude an action for his death resulting from the injury 1163

Release of all claim for injury before receiving injury resulting in death, as affecting right of statutory beneficiaries 1170

Right of action by administrator when action to recover for personal injuries was barred at the time of the injured person's death 1178

Necessity for alleging that action for death is within the statutory period 1192

Marriage of injured person after his injury as affecting damages recoverable for his death from such injury 1199

Receipt of proceeds of insurance as affecting the measure of damages for injury or death 1201

Receipt by beneficiary of property from estate of decedent as affecting damages recoverable for decedent's death 1205

Debtor and creditor.

Right to apply indebtedness owed by creditor to debtor for purpose of tolling statute 794

Declarations.

Evidence of, see **EVIDENCE**.

Defenses.

To action for death, see **DEATH**.

In divorce suit, see **DIVORCE OR SEPARATION**.

Necessity of negativing, see **PLEADING**.

Descent and distribution.

Effect of treaties upon alien's right to inherit 827

Description.

Of land in will, see **WILLS**.

Desertion.

As ground for divorce, see **DIVORCE AND SEPARATION**.

Discovery and inspection.

Power to compel plaintiff to submit to a physical examination 936

Disqualification.

Of judge, see JUDGES.

Divorce and separation.

Relations between one spouse and relatives of other as affecting question of desertion or cruelty 161

Subsequent adultery as recriminatory defense to desertion or cruelty 972

Valid divorce granted in one state as affecting independent suit for alimony in another 421

Refusal to proceed with trial of divorce suit because of noncompliance with order to pay temporary alimony, suit money, or counsel fees 567

Divorce as equivalent of death for purpose of terminating a trust 762

Ejection.

Of passenger, see CARRIERS.

Elevators.

Liability for injury to elevator passenger 722

Embezzlement.

Validity and enforceability of contract to compensate the owner of property embezzled, in absence of duress or agreement, express or implied, to stifle prosecution 139

Eminent domain.

Exercise of power of eminent domain for purpose of acquiring fishery right, oyster beds, etc. 443

Equity.

Remedy in equity of wrongful issuance of license for sale of intoxicating liquor 408

Evidence.

Right to seize for purpose of evidence, property of one person under a warrant of arrest against another 399

Presumptions flowing from marriage ceremony 186

Inference or presumption of marriage from continued cohabitation following removal of impediment 91

Proof of ceremonial marriage by testimony of eyewitnesses, celebrant, or parties 121

Admissibility of declarations as *res geste* as affected by incompetency as a witness of person making them 202

Competency of witness to express his conclusion as to character, quality or marketability of title to real property 271

Loss of eyesight of attesting witness preventing his identification of instrument, or signature 593

Parol evidence to correct misdescription of land in will 1008

Age of alleged accomplice in sexual offense as affecting the necessity of corroboration of testimony 1222

L.R.A.1915E.

Execution.

Right to bail pending attempt to avoid body execution 340

Executors and administrators.

Liability to estate of bank which receives deposit from one assuming without authority to act as executor or administrator 309

Exemptions.

Homestead exemption, see HOMESTEAD.

Explosions and explosives.

As to blasting, see BLASTING.

Explosion of gas, see GAS.

Intervening act of third person as affecting proximate cause in case of injury by explosion 479

Expositions.

See FAIRS.

Fairs.

Conducting state fair or exposition as exercise of governmental or private function respecting liability for injury to patron 469

False imprisonment.

Liability of carrier for, see CARRIERS.

Liability of private complainant or informer for an arrest by an officer without a warrant 883

Liability of sheriff, marshal, or constable for his deputy's tort in making an arrest 172

Fare.

Of passenger, see CARRIERS.

Firearms.

Civil liability for injury by negligent discharge of 267

Fire insurance.

See INSURANCE.

Fires.

Negligently setting out fire as proximate cause of injury to one injured while attempting to protect his property 991

Fisheries.

Exercise of power of eminent domain for purpose of acquiring fishery right, oyster beds, etc. 443

Fixtures.

Tenant's rights as to, see LANDLORD AND TENANT.

Forfeiture.

Of insurance policy, see INSURANCE.

Franchise.

Right to exact additional compensation when extending street franchise to cover additional purposes 165

Fraternal societies.

Insurance by, see INSURANCE.

Fraud and deceit. Right of trustee to redress fraud practised on the beneficiary of the trust	451	Incompetent persons. Injury to insured person while insane, see INSURANCE.	
Frauds, statute of. See CONTRACTS.		Indemnity. See CONTRIBUTION AND INDEMNITY.	
Fraudulent conveyances. Constitutionality of bulk sale legislation	917	Indemnity insurance. See INSURANCE.	
Gas. In mines, see MINES. Liability of gas company for negligence in escape or explosion of gas	1022	Independent contractors. Liability of, see MASTER AND SERVANT.	
Guaranty insurance. See INSURANCE.		Indictment, etc. Conviction upon proof of aiding and abetting under indictment simply charging the crime without reference to aiding or abetting	608
Guardian and ward. Applicability of rule <i>caveat emptor</i> to sales by guardian of minors as regards ward's title	834	Infants. Liability of master where servant invites or permits children to ride on engine or cars	888
Guns. See FIREARMS.		Insanity. See INCOMPETENT PERSONS.	
Heat prostration. Assumption of danger of, by servant	613	Insurance. Receipt of proceeds of insurance as affecting the measure of damages for injury or death	1201
Highways. Injury on highway otherwise than by defects, see NEGLIGENCE. Right to exact additional compensation when extending street franchise to cover additional purposes Power to prohibit use of automobile upon public thoroughfares Power to compel railroad to establish or maintain at its own expense an overhead or underground highway crossing Ways for defects or obstructions in which municipality is liable Damages recoverable for delaying person by blocking railroad crossing	165 264 751 597 336	Interchangeableness of "or" and "and" in provision in insurance policy relating to cause or circumstances of death Waiver by officer of subordinate lodge of forfeiture for nonpayment of assessments When death or injury may be deemed to have been caused by accidental means, though the voluntary act of the insured was the primary cause thereof Liability under accident policy for death or injury resulting from surgical operation or medical treatment Construction and effect of provision against liability for injury to or death of insured while or when insane Constructive total loss of insured building Considerations of time and place in determining value of personal property for purpose of fire insurance Insurance covering automobiles or indemnifying against injury or liability for injury caused thereby	695 152 127 955 657 618 489 575
Homestead. Liability of homestead to assessment or lien for local improvement Homestead execution as against claim for money loaned by third person to pay off existing purchase money obligations	662 875	Interest. Liability of depositor who requests bank to hold noninterest bearing deposit against a claimant, to reimburse bank for interest which it is compelled to pay to claimant on the legal establishment of his claim to the deposit	797
Husband and wife. As to divorce or separation, see DIVORCE AND SEPARATION. As to marriage, see MARRIAGE. Revocation of consent given by one spouse to will of the other in the latter's lifetime	815	Intoxicating liquors. Remedy in equity of wrongful issuance of license for sale of intoxicating liquor	408
Ice. Discharging matter into stream preventing formation of, or polluting, ice	1210		
Implied trust. See TRUSTS. L.R.A.1915E.			

Irrigation.

Duty as to establishment and maintenance of bridges over canals or ditches for use of adjoining owners 687

Joint creditors and debtors.

Effect, in release of one joint tortfeasor, of reservation of right as against others 800

Joint tortfeasors.

See JOINT CREDITORS AND DEBTORS.

Judges.

Effect of fact that judge otherwise disqualified is only one who has power to decide case 858
 Libel or slander by 1051

Judgment.

Valid divorce granted in one state as affecting independent suit for alimony in another 421
 Judgment in action for personal injury as abatement of action for death or *vice versa* 1152

Judicial sale.

Applicability of rule of *caveat emptor* to sales by guardian of minors as regards ward's title 884

Jury.

Libel or slander by juror 1051

Labor organizations.

Duty of labor union to notify employer of change of scale 1006
 Right of labor union to forbid its members serving a certain person 1037

Land and tenant.

Agreement between landlord and tenant for removal of fixtures by latter as affecting third persons 822
 Liability of purchaser who takes possession under parol contract of sale in action for rents or for use and occupation, where vendor refuses to perform 405

Larceny.

Right to recover on a bill or note stolen before delivery 851
 Validity and enforceability of contract to compensate the owner of property stolen, in absence of duress or agreement, express or implied, to stifle prosecution 189
 Killing animal and carrying away part of the carcass as larceny of the animal 848

Lease.

Oil and gas lease, see MINES.

Legislature.

Power of legislature or branch thereof to appoint a committee to sit after close of session 496
 L.R.A.1915E.

Libel and slander.

By judicial officer or juror 1051
 Charging one with refusal to pay his debts 455
 Impugning claim or good faith of claimant 275
 Privilege as affected by extent of publication 131
 Privilege of informal communication with respect to criminal charge 413

License.

For sale of intoxicating liquor, see INTOXICATING LIQUORS.

Liens.

Mechanics' liens, see MECHANICS' LIENS.

Life insurance.

See INSURANCE.

Life tenants.

Effect of purchase of tax title by remainderman in expectancy 844

Limitation of actions.

Necessity of alleging that action for death is within the statutory period 1192
 Right of action by administrator when action to recover for personal injuries was barred at the time of the injured person's death 1178
 Right to apply indebtedness owed by creditor to debtor for purpose of tolling statute 794

Liquidated damages.

See DAMAGES.

Lis pendens.

Abatement by pending action, see ABATEMENT AND REVIVAL.

Long-distance messages.

See TELEPHONES.

Mandamus.

Mandamus to compel calling of stockholders' or directors' meeting 774

Manufacturers.

Liability for injury by defects in article sold, see NEGLIGENCE.

Marriage.

As to divorce or separation, see DIVORCE AND SEPARATION.
 Marriage of injured person after his injury as affecting damages recoverable for his death from such injury 1199
 General characteristics and validity of common-law marriage 8
 Sufficiency of words and conduct to constitute common-law marriage, or of circumstantial evidence to imply marriage 60
 Effect of marriage statutes to abrogate the common law 113
 Presumptions flowing from marriage ceremony 186
 Inference or presumption of marriage from continued cohabitation following removal of impediment 91

Proof of ceremonial marriage by testimony of eyewitnesses, celebrant, or parties	121	Liability of municipality for torts in connection with its lighting plant	816
Marshal.		Municipal liability for torts of police officers	460
Liability for deputy's tort in making arrest	172	Negligence.	
Master and servant.		In use of automobiles, see AUTOMOBILES.	
Liability of carrier for acts of servant, see CARRIERS.		Matters peculiar to actions for death caused by, see DEATH.	
Power of public to determine capacity or suitability of particular officer, agent, or employee of private corporation, or corporation whose business is affected with a public interest	708	As to elevators, see ELEVATORS.	
Duty of labor union to notify employer of change of scale	1006	In conduct of fair, see FAIRS.	
Liability of master for injury to servant, other than minor, due primarily to his physical unfitness for the work	369	As to gas, see GAS.	
Assumption of danger of heat prostration	613	Liability of municipality for, see MUNICIPAL CORPORATIONS.	
Liability of contractor to third person for defects in his work, after its completion and acceptance	766	Civil liability for injury by negligent discharge of firearms	267
Liability of master where servant invites or permits children to ride on engine or cars	888	Liability of manufacturer or dealer for personal injuries caused by defects in automobile	287
Materials.		Applicability of rule of road where highway is being used for other than ordinary purpose of travel	1028
Lien for, see MECHANICS' LIENS.		Personal contributory negligence of person riding in vehicle driven or controlled by another at railroad crossing	225
Mechanics' liens.		Negotiability.	
Delivery upon the premises of material sold to contractor	802	Of note, see BILLS AND NOTES.	
Materials wholly or partially consumed in process of work, but not becoming a part of the structure	986	New trial.	
Mileage.		Power to limit the issues in granting new trial	239
Validity of regulations by public concerning the manner of using tickets or mileage books	902	Officers.	
Militia.		Power of board to appoint officer for term extending beyond its own term	581
Power to change the duties or field of service of militiamen	235	Effect of resignation before appointment or election	401
Mines.		Oil.	
Place of use of gas contemplated by covenant or reservation in an oil and gas lease	570	In mines, see MINES.	
Right of lessee in oil or gas lease to determine the extent of development thereunder	1057	Opinion.	
Misdescription.		As evidence, see EVIDENCE.	
Of land in will, see WILLS.		Oral contracts.	
Municipal corporations.		Within statute of frauds, see CONTRACTS.	
Liability for injury by defect in highway, see HIGHWAYS.		Ordinances.	
Violation of ordinance by plaintiff as precluding recovery for negligence in action by or against driver or owner of automobile	959	See MUNICIPAL CORPORATIONS.	
Liability of municipality for failure to enforce ordinance in relation to animals	448	Oysters.	
		See FISHERIES.	
		Parol contracts.	
		Within statute of frauds, see CONTRACTS.	
		Parties.	
		Right of trustee to redress fraud practised on the beneficiary of the trust	451
		Party wall.	
		Liability of part owner to other owner for damages from fall of, or injury to, party wall	926
		Paupers.	
		See POOR AND POOR LAWS.	

- Payment.**
Payment to prior party as a defense against one to whom paper was transferred after maturity 395
- Penalty.**
Distinguished from liquidated damages, see DAMAGES.
- Pendente lite.**
Abatement of action by pending suit, see ABATEMENT AND REVIVAL.
- Petroleum.**
In mines, see MINES.
- Physical examination.**
See DISCOVERY AND INSPECTION.
- Physicians and surgeons.**
Liability of relative for medical services to pauper 844
- Pleading.**
Necessity of alleging that action for death is within the statutory period 1192
- Police.**
Municipal liability for torts of police officers 460
- Poor and poor laws.**
Liability of relative for medical services to pauper 844
- Principal and agent.**
Real estate agents, see BROKERS.
- Private action.**
Private action for violation of statute not expressly conferring it 500
- Privileged communications.**
In libel case, see LIBEL AND SLANDER.
- Proximate cause.**
Intervening act of third person as affecting proximate cause in case of injury by explosives 479
Negligently setting out fire as proximate cause of injury to one injured while attempting to protect his property 091
- Public improvements.**
Liability of homestead to assessment or lien for 662
- Public service corporations.**
See also CARRIERS; RAILROADS.
Right to exact additional compensation when extending street franchise to cover additional purposes 165
Duty to serve public as affecting liability of, for temporary interference with water right 294
Power of public to determine capacity or suitability of particular officer, agent, or employee of corporation whose business is affected with a public interest 708
- Public utilities service.**
See PUBLIC SERVICE CORPORATIONS.
- Qualification.**
Of judge, see JUDGES.
- Railroads.**
As carriers, see CARRIERS.
Power to compel railroad to establish or maintain at its own expense an overhead or underground highway crossing 751
Damages recoverable for delaying person by blocking railroad crossing 336
Personal contributory negligence of person riding in vehicle driven or controlled by another at railroad crossing 225
- Real estate agents.**
See BROKERS.
- Receivers.**
Taxation of property in hands of receiver 211
- Release.**
As defense to action for death, see DEATH.
Of one joint tortfeasor, see JOINT CREDITORS AND DEBTORS.
See also COMPROMISE AND SETTLEMENT.
- Remaindermen.**
See LIFE TENANTS.
- Res gestæ.**
See EVIDENCE.
- Resignation.**
Of officer, see OFFICERS.
- Rules.**
Of telephone company, see TELEPHONES.
- Sale.**
Bulk sales, see FRAUDULENT CONVEYANCES.
Liability of seller for injury by defects in article sold, see NEGLIGENCE.
- Search and seizure.**
Right to seize for purposes of evidence property of one person under a warrant of arrest against another 399
- Seizure.**
See SEARCH AND SEIZURE.
- Settlement.**
See COMPROMISE AND SETTLEMENT.
- Sexual offenses.**
Age of alleged accomplice in sexual offense as affecting the necessity of corroboration of testimony 1222
- Sheriff.**
Liability for deputy's tort in making an arrest 172
- L.R.A.1915E.

Sidings.

Power to compel railroad to build, maintain, or connect with, side track for accommodation of shippers

682

Slander.

See LIBEL AND SLANDER.

Speedy trial.

Right to, see CRIMINAL LAW.

State.

Conducting state fair or exposition as exercise of governmental or private function respecting liability for injury to patron

469

State militia.

See MILITIA.

Statute of frauds.

See CONTRACTS.

Statutes.

Private action for violation of statute not expressly conferring it

500

Violation of statute by plaintiff as precluding recovery for negligence in action by or against driver or owner of automobile

959

Effect of marriage statutes to abrogate the common law

113

Stipulated damages.

See DAMAGES.

Stolen property.

Right to recover on a bill or note stolen before delivery

351

Subway.

Power to compel railroad to establish or maintain at its own expense an underground highway crossing

751

Suit money.

See DIVORCE AND SEPARATION.

Support.

Contract for, see CONTRACTS.

Taxes.

Taxation of property in hands of receiver

211

Effect of purchase of tax title by remainderman in expectancy

344

Telephones.

Reasonableness of rule of telephone company requiring subscriber to pay on all long-distance messages originating from his telephone

823

Tender.

Of fare by passenger, see CARRIERS.

Theft.

See LARCENY.
L.R.A.1915E.

Timber.

Right as between owner of land and owner of timber thereon to annual product of the trees

307

Title.

Opinion evidence as to, see EVIDENCE.

Torts.

Liability of municipality for, see MUNICIPAL CORPORATIONS.

Total loss.

Of insured property, see INSURANCE.

Trade unions.

See LABOR ORGANIZATIONS.

Treaties.

Effect of, upon alien's right to inherit

327

Trover.

Effect of unlawful seizure of property by chattel mortgagee assuming to act under mortgage

193

Trusts.

Right of trustee to redress fraud practised on the beneficiary of the trust

451

Gratuitous conveyance as raising implied, resulting, or constructive trust in favor of the natural objects of the bounty of the grantor or donor

648

Divorce as equivalent of death for purpose of terminating a trust

762

Union labor.

See LABOR ORGANIZATIONS.

Vendor and purchaser.

Competency of witness to express his conclusion as to character, quality, or marketability of title to real property

271

Liability of purchaser who takes possession under parol contract of sale in action for rents or for use and occupation, where vendor refuses to perform

403

Agreement between landlord and tenant for removal of fixtures by latter as affecting third persons

822

Waiver.

By insurance company, see INSURANCE.

Walls.

Party walls, see PARTY WALL.

Waters.

Discharging matter into stream preventing formation of, or polluting, ice

1210

Duty to serve public as affecting liability of public utility for temporary interference with water right

294

Wills.

Loss of eyesight of attesting witness
preventing his identification of in-
strument or signature 598
Correction of misdescription of land in
will 1008

Revocation of consent given by one
spouse to will of the other in the
latter's lifetime 815

Witnesses.

Competency of expert witness, see Evi-
DENCE.

L.R.A.1915E.

GENERAL INDEX

NOTES ARE INDEXED BY THE WORD "ANNOTATED" AFTER THE PARAGRAPHS TO WHICH THEY APPLY.

(Separate Index to Notes Precedes this.)

ABATEMENT AND REVIVAL.

Conflict of laws as to, see Conflict of Laws.

Of nuisance, see Nuisances, 2, 3.

1. The death of a bastard, pending a prosecution under the bastardy act, does not entitle defendant to a dismissal of the proceedings. *People v. Grunland, L.R.A. 1915E, 314, 153 N. W. 4, — Mich. —.*

2. A statutory provision that a common-law action shall not abate by the death of plaintiff, but may be continued by the substitution of his personal representative, is not nullified in respect to its application to actions for personal injuries, by the adoption of a constitutional provision that in case of death from personal injuries the right of action shall survive, and the general assembly shall prescribe for whose benefit such action shall be prosecuted, but even after such adoption actions pending at the death of the injured person may be prosecuted by his personal representative. *Lhots v. Oppenheimer, L.R.A. 1915E, 1102, 93 Atl. 476, 247 Pa. 280. (Annotated)*

3. An action brought in one state by a person for personal injuries alleged to have been caused by the negligence of a railway company in another state, which action was removed to the Federal court, and in which, after her death, her administrator was made a party, is not a ground for abatement of a suit instituted by the administrator after the death of his intestate, in the state court, to recover damages on account of her death caused by the same injury. *Nashville, C. & St. L. R. Co. v. Hubble, L.R.A. 1915E, 1132, 78 S. E. 919, 140 Ga. 368. (Annotated)*

ABUTTING OWNERS.

Right to compel removal of telephone poles from vacated street, see Highways, 6.

ACCIDENT.

Proximate cause of, see Proximate Cause.

ACCIDENT INSURANCE.

See Insurance.

L.R.A. 1915E.

ACQUIESCENCE.

Estoppel by, see Estoppel, 1.

ACTION OR SUIT.

Abatement of, see Abatement and Revival.

Limitation of action or suits, see Limitation of Actions.

Parties to action, see Parties.

1. Beneficiaries having an interest in a trust fund, who are induced by alleged fraudulent representations to assign their respective interest in the fund, which assignment is thereupon presented by the assignee to the trustee, who, without knowledge of the alleged fraud, pays to the assignee the full amount due the beneficiaries, cannot maintain a joint suit in equity for the redress of their alleged grievances, since the causes of action are several, and there is no ground for equitable interference in behalf of the beneficiaries jointly. *Lovato v. Catron, L.R.A. 1915E, 451, 148 Pac. 490, — N. M. —.*

2. A complaint charging that the owner of a building negligently constructed it, and the city negligently permitted it to be constructed, and that it fell and killed plaintiff's intestate, states but one cause of action. *Rowe v. Richards, L.R.A. 1915E, 1069, 142 N. W. 664, 32 S. D. 66.*

ADJOINING OWNERS.

Rights in party wall, see Parties.

ADJOURNMENT.

Appointment of committee which is to endure beyond adjournment of legislature, see Appropriations.

ADMINISTRATION.

Of decedents' estates, see Executors and Administrators.

ADOPTION.

Inheritance by, or through, adopted children, see Descent and Distribution, 4.

ADVERTISING.

Forbidding circulation of advertisements of intoxicating liquors, see Commerce, 1; Constitutional Law, 16; Intoxicating Liquors, 1.

AEROPLANES.

Injury to patrons at fair by one employed to make aeroplane flight, see Agricultural Societies.

AGE.

Of alleged accomplice, as affecting necessity of corroboration of testimony, see Evidence, 42.

AGENCY.

See Principal and Agent.

AGISTERS.

Negligence as question for jury, see Trial, 4.

1. A contract to pasture certain cattle during the season in a named pasture, which the owner of the cattle had never seen, implies an agreement to supply water as well as grass. *Cox v. Chase, L.R.A. 1915E, 590, 148 Pac. 766, 95 Kan. 531.*

(Annotated)

2. Under a contract to pasture certain cattle during the season in a named pasture which the owner of the cattle had never seen, the owner of the pasture is held to ordinary care to keep such pasture supplied with water, and to give the owner of the cattle timely notification in case of its failure. *Cox v. Chase, L.R.A. 1915E, 590, 148 Pac. 766, 95 Kan. 531.*

3. The failure of water in a pasture in which the owner has contracted to keep certain cattle during the season renders the pasture valueless, and works a failure of consideration, the amount of which, together with any damage properly shown, may be deducted from the contract price of the pasturage for the season. *Cox v. Chase, L.R.A. 1915E, 590, 148 Pac. 766, 95 Kan. 531.*

AGRICULTURAL SOCIETIES.

1. A state board of agriculture is, while holding a fair, engaged in the discharge of a governmental function, and is not liable to patrons for injury by one employed to give an exhibition such as an aeroplane flight, to attract people to the grounds and entertain them while there. *Morrison v. MacLaren, L.R.A. 1915E, 469, 152 N. W. 475, 160 Wis. 621.*

(Annotated)

2. A state board of agriculture organized to promote the interests of agricultural, dairying, horticulture, manufactures, and the domestic arts has authority to give exhibitions such as aeroplane flights, in connection with fairs, to attract people to the fairs and entertain them while there. *Morrison v. MacLaren, L.R.A. 1915E, 469, 152 N. W. 475, 160 Wis. 621.*

3. Members of a state board of agriculture are not personally liable for injury to a patron of a fair by the fall of an aeroplane for the flight of which they had con-

tracted as part of the entertainment of the exhibition, if they merely made the contract, leaving the control and management of the flight to the aviator, and he is found to be guilty of no negligence in handling the machine. *Morrison v. MacLaren, L.R.A. 1915E, 469, 152 N. W. 475, 160 Wis. 621.*

ALDERMEN.

Delegation of power to, see Constitutional Law, 1.

ALIENS.

As to inheritance by or through aliens, see Descent and Distribution, 1-3.

ALIMONY.

See Divorce and Separation.

AMOUNT.

Of judgment, see Judgment, 1.

AMOUNT IN CONTROVERSY.

For purpose of jurisdiction, see Appeal and Error, 2.

AMUSEMENTS.

See Agricultural Societies.

ANIMALS.

Agisters, see Agisters.

Striking or frightening horse as an assault, see Assault and Battery, 1, 2.

Larceny of, see Larceny.

Liability of city for injuries by animal allowed to run at large in violation of ordinance, see Municipal Corporations, 4.

Knowledge by its owner of the vicious propensities of a dog is not necessary to justify another in killing it to protect an animal of his own from its attack. *Crow v. McKown, L.R.A. 1915E, 372, 68 So. 341, — Ala. —.*

ANSWER.

See Pleading, 10.

ANTENUPTIAL CONTRACT.

Between husband and wife, see Husband and Wife, 2.

ANTICIPATORY BREACH.

Of executory contract of purchase and sale, see Contracts, 5.

APARTMENT HOUSE.

Liability of one operating elevator in, see Elevators, 2.

APPEAL AND ERROR.

Right to bail pending appeal, see Bail and Recognizance.

Habeas corpus to inquire into denial of bail pending appeal, see Habeas Corpus, 1.

Appellate jurisdiction generally.

1. An action for damages for slander

is appealable regardless of the sum claimed. *Hamilton v. McKenna*, L.R.A.1915E, 455, 147 Pac. 1126, 95 Kan. 207.

Jurisdiction of particular courts.

2. A cause of action in which it appears from all the allegations that the amount in controversy does not exceed \$100, exclusive of costs, is not appealable, although the damages are laid in the sum of \$1,000. *Hamilton v. McKenna*, L.R.A.1915E, 455, 147 Pac. 1126, 95 Kan. 207.

Transfer of cause; security.

3. An appeal or supersedeas bond does not suspend a judgment ousting persons from office so as to prevent the granting of a mandamus to compel recognition of the claimant in whose favor the judgment was entered. *People ex rel. Dibelka v. Reinberg*, L.R.A.1915E, 401, 105 N. E. 715, 263 Ill. 536.

Record on appeal.

4. A judgment cannot be reversed for refusal to give the affirmative charge if the evidence is not shown to be all in the record. *Crow v. McKown*, L.R.A.1915E, 372, 68 So. 341. — Ala. —

Objections and exceptions; raising questions in lower court.

5. A general objection to the whole answer of a witness, to a question put to him without objection by counsel, is properly overruled, where a part of such answer is competent, even though there is some objectionable matter therein. *State v. La-secki*, L.R.A.1915E, 202, 106 N. E. 660, — Ohio St. —

6. In an action against a railroad company for negligently starting a prairie fire, the answer of a witness who had testified that she had seen the fire, that part of it had burned over her own farm, to the question, "With reference to the Northern Pacific Company railroad (the company sued), where was it?" that "it started near the track," is not objectionable, especially where no objection was made to the question and the answer, and the only exception taken was to the court's refusal to strike out the answer on the ground that it was not responsive to the question. *Wilson v. Northern P. R. Co.* L.R.A.1915E, 991, 153 N. W. 429, 30 N. D. 456.

Presumptions.

7. Where the two defendants in an action file separate demurrers to a petition, charging (1) a misjoinder of causes of action, (2) that the petition failed to state facts sufficient to constitute a cause of action against the demurrant, and the court sustains the demurrers, generally, and the record is silent as to the ground or grounds of the decision, it will be presumed that the demurrers were sustained upon the latter ground. *Cody v. Cody*, L.R.A.1915E, 465, 136 Pac. 754, 39 Okla. 719.

8. Where the record on appeal contains no exceptions to the instructions of the jury, and omits such instructions entirely, the presumption will be that the jury was properly instructed on all the phases of the case. *Wilson v. Northern P. R. Co.* L.R.A.1915E, 991, 153 N. W. 429, 30 N. D. 456. L.R.A.1915E.

What reviewable generally.

9. Issues not raised by the pleadings or passed upon by the trial court cannot be considered on appeal, although there is evidence in the record bearing upon them. *Desha Bank & Trust Co. v. Quilling*, L.R.A.1915E, 794, 176 S. W. 132, — Ark. —

Discretionary matters.

10. Where part of an answer is responsive, and a defendant objects to the whole answer as being not responsive, and moves to have the same stricken out, the verdict will not be set aside because of the failure of the court to so order. *Wilson v. Northern P. R. Co.* L.R.A.1915E, 991, 153 N. W. 429, 30 N. D. 456.

11. A party to a lawsuit who voluntarily remains away from the trial of his case until the jury has retired, but arrives before they return a verdict, cannot complain because the court declined to recall the jury on his appearance for the purpose of permitting him to testify; the court's action, being discretionary, is not error unless abused. *Denman v. Brenneman*, L.R.A.1915E, 1047, 149 Pac. 1105, — Okla. —

Questions not raised below.

12. A reply need not be filed when the answer does not really set up new matter, but rather evidential facts in the way of a denial to the plaintiff's petition; at least, a defendant who has gone to trial without objection cannot raise this question upon appeal. *Denman v. Brenneman*, L.R.A.1915E, 1047, 149 Pac. 1105, — Okla. —

13. Failure to place in evidence the notice of accident required by the employers' liability act, in an action to recover damages for a death occurring within its provisions, does not require reversal of a judgment in favor of plaintiff, if defendant acknowledged receipt of it, and called no attention to failure of proof in that respect. *Amberg v. Kinley*, L.R.A.1915E, 519, 108 N. E. 830, 214 N. Y. 531.

14. One dissatisfied with the instructions given by the court upon a particular question must present a request for instructions in accordance with his views. *Taylor v. Indiana & M. Electric Co.* L.R.A.1915E, 294, 151 N. W. 739, — Mich. —

Errors waived or cured below.

15. Where an instruction considered in connection with other instructions upon the same subject, or the entire charge, is found to be free from the defects complained of in the assignment of error, the assignment will fail. *Robinson v. State*, L.R.A.1915E, 1215, 68 So. 649, — Fla. —

16. An incorrect definition of negligence in an instruction to the jury is not reversible error if it is corrected in a requested instruction, so that the two, taken together, constitute a correct definition. *Taylor v. Indiana & M. Electric Co.* L.R.A.1915E, 294, 151 N. W. 739, — Mich. —

Review of facts.

17. A verdict will not be set aside as against the evidence where there is evidence to support it, and where it does not appear that the jury were not governed by the

evidence. *Robinson v. State*, L.R.A.1915E, 1915, 68 So. 649, — Fla. —.

18. A conclusion as to the proximate cause of an injury will not be corrected on appeal if there is evidence to support it, and there was no refusal to find any fact established by undisputed evidence. *Coffin v. Laskau*, L.R.A.1915E, 959, 94 Atl. 370, 89 Conn. 325.

19. The findings of the state court showing that the fare paid by an interstate passenger was less than the amount due under the applicable published rates are conclusive on the Federal Supreme Court on writ of error to the state court, where the carrier's tariffs are not included in the record. *Louisville & N. R. Co. v. Maxwell*, L.R.A. 1915E, 665, P. U. R. 1915C, 300, 35 Sup. Ct. Rep. 494, 237 U. S. 94, 59 L. ed. 853.

20. A finding that a road which was declared established by the board of county commissioners, and which has been used by the public for years, is a regularly laid out highway, will not necessarily be overthrown by the fact that the affidavits showing the service of notice of the viewers' meeting, which the law requires to be filed with the county clerk cannot be found in his office. *State ex rel. Ise v. Atchison, T. & S. F. R. Co.* L.R.A.1915E, 751, 147 Pac. 801, 95 Kan. 22.

Grounds for reversal.

21. In an action against a railroad company for negligently starting a prairie fire, no reversible error is committed in refusing to strike out the answer of a witness to an inquiry as to where he first noticed the smoke of the fire, that "it appeared to me from where I was it was on the railroad track," the objection being that the answer was merely the opinion of the witness and a conclusion, although it afterward developed in his testimony that he was 2½ miles from the fire at the time. *Wilson v. Northern P. R. Co.* L.R.A.1915E, 991, 153 N. W. 429, 30 N. D. 456.

22. Error in the admission, in an action for damages for wrongful death, brought in favor of the dependent mother of decedent, of evidence of the amount of insurance which she collected on his life, is not rendered harmless by testimony that she used it to pay funeral expenses and debts. *Brabham v. Baltimore & O. R. Co.* L.R.A.1915E, 1901, 220 Fed. 35.

23. The admission in chief in an action for slander, of evidence of the reputation and character of the plaintiff, over the defendant's objection, is not material error since it only tends to prove a fact which the law presumes. *Conrad v. Roberts*, L.R.A. 1915E, 131, 147 Pac. 795, 95 Kan. 180.

24. It is not reversible error to instruct the jury that they "must" consider the interest and the appearance upon the witness stand of, and the bias or prejudice shown by, the witnesses. *Tippecanoe Loan & T. Co. v. Jester*, L.R.A.1915E, 721, 101 N. E. 915, 180 Ind. 357.

25. It is error to instruct the jury in an action by a tenant of an apartment house for injuries caused by falling down the

elevator shaft, that it was not his duty to look at every place he stepped in going from the street to his apartment, since the question of his duty in this respect is for the jury. *Tippecanoe Loan & T. Co. v. Jester*, L.R.A.1915E, 721, 101 N. E. 915, 180 Ind. 357.

26. An erroneous instruction which has permitted the jury to award an illegal item of damage is harmless where the illegal allowance can be clearly determined by the court on the record, and a remittitur to cover the illegal allowance is offered and accepted by the plaintiff. *St. Louis & S. F. R. Co. v. Goode*, L.R.A.1915E, 1141, 142 Pac. 1185, 42 Okla. 784.

27. In a prosecution for murder, the court should submit the case to the jury for consideration upon every degree of homicide which the evidence in any reasonable view of it suggests, and if the evidence tends to prove different degrees, the law of each degree which the evidence tends to prove should be submitted to the jury; and where there was evidence of the intoxication of the defendant to the extent of being deprived of the mental capacity to deliberate or premeditate at the time of the homicide, it was prejudicial error to refuse to submit to the jury an instruction in reference to manslaughter in the first degree. *Cheadle v. State*, L.R.A.1915E, 1031, 149 Pac. 919, — Okla. Crim. Rep. —.

28. The refusal in an action for slander in which the words spoken were spoken on an occasion of qualified privilege, of a request by the defendant for a special instruction to the jury, that evidence of a repetition of such charge, made to other persons both before and after the action was commenced, admitted for the purpose of showing malice, cannot be considered in arriving at the amount of damages, is error. *Beshira v. Allen*, L.R.A.1915E, 413, 148 Pac. 141, — Okla. —.

29. Refusal to submit special interrogatories to the jury is not error if they are not specific enough to be controlling in the case. *Taylor v. Indiana & M. Electric Co.* L.R.A.1915E, 294, 151 N. W. 739, — Mich. —.

30. A verdict in a personal injury action, namely: "We, the jury, in the above-entitled action, find for the plaintiff and against the defendant, and assessed the damages in the sum of \$2,400; \$109.25 doctor bill, 7 per cent interest on damages from October 4, 1912, to date," upon which, at the request of the plaintiff, the court entered judgment allowing interest merely on the \$2,400, is not so uncertain as to furnish ground for a reversal of the judgment. *Wilson v. Northern P. R. Co.* L.R.A.1915E, 991, 153 N. W. 429, 30 N. D. 456.

31. In an action by one whose property is injured by the negligent increase of the flow of a stream, to recover for injury to his own property and to that of others whose claims are assigned to him, it is not reversible error to assess the damages to each separately, and render a verdict for the aggregate amount. *Taylor v. Indiana*

& M. Electric Co. *L.R.A.1915E*, 294, 151 N. W. 739, — Mich. —.

Judgment.

Denial of due process by award of new trial upon question of damages only, see *Constitutional Law*, 15.

Denial of right to jury trial by limiting new trial to question of damages, see *Jury*.

32. Where a verdict in a damage suit itemizes the damages allowed, and some of the amounts allowed are not justified under any view of the evidence, but the other amounts allowed seem to have been proper, the court being able to separate the legal from the illegal allowances, plaintiff will be offered the right to remit the amount he is not entitled to receive. *St. Louis & S. F. R. Co. v. Goode, L.R.A.1915E*, 1141, 142 Pac. 1185, 42 Okla. 784.

33. An appellate court has power under the common law upon reversing a case, to award a new trial upon the question of damages only. *Yazoo & M. V. R. Co. v. Scott, L.R.A.1915E*, 239, 67 So. 491, — Miss. —. (Annotated)

34. Power to grant a new trial as to the question of damages only is conferred by a statute providing that every new trial granted shall be on such terms as the court shall direct. *Yazoo & M. V. R. Co. v. Scott, L.R.A.1915E*, 239, 67 So. 491, — Miss. —.

35. Statutory authority to limit a new trial to certain issues upon reversing a judgment on appeal does not nullify the common-law power of the court to limit the trial to other issues. *Yazoo & M. V. R. Co. v. Scott, L.R.A.1915E*, 239, 67 So. 491, — Miss. —.

36. An appellate court may grant a new trial upon the question of damages only, under statutory authority to render such decree as should have been rendered, unless it be necessary that some matter of fact be ascertained or damages be assessed by a jury, when the action shall be proceeded with in the court below according to the direction of the appellate court. *Yazoo & M. V. R. Co. v. Scott, L.R.A.1915E*, 239, 67 So. 491, — Miss. —.

37. Upon reversal of a judgment and award of a new trial upon the question of damages only, the trial court has no power to permit evidence upon other questions to go to the jury. *Yazoo & M. V. R. Co. v. Scott, L.R.A.1915E*, 239, 67 So. 491, — Miss. —.

APPROPRIATIONS.

Mandamus to compel appropriation, see *Mandamus*, 2, 3.

The legislature cannot pay the expenses of a committee created to investigate state institutions and audit their accounts, which is to endure beyond its adjournment, out of the contingent fund of the legislature, where the Constitution provides that no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, the purpose *L.R.A.1915E*.

of which shall be distinctly stated in the bill. *Dickinson v. Johnson, L.R.A.1915E*, 496, 176 S. W. 116, — Ark. —.

ARREST.

Release from, on bail, see *Bail and Recognizance*.

Civil liability for making, see *False Imprisonment*.

ASSAULT AND BATTERY.

On passenger, see *Carriers*, 2, 5.

Measure of damages for, see *Damages*, 2, 3, 13.

Evidence in action for, see *Evidence*, 15, 17.

Injury received during, as an accident within meaning of insurance policy, see *Insurance*, 10.

By police officer, municipal liability for, see *Municipal Corporations*, 5, 6.

1. Striking a horse driven by another, from malice, wantonness, or recklessness, so that the driver is injured, is an assault. *Lambrech v. Schreyer, L.R.A.1915E*, 812, 152 N. W. 645, 129 Minn. 271. (Annotated)

2. One who whips up his own horses to great speed and passes the team of another, driving near and yelling loudly, if such acts are done recklessly and in such manner as to be likely to produce injury, and so that they do cause injury, commits an assault. *Lambrech v. Schreyer, L.R.A.1915E*, 812, 152 N. W. 645, 129 Minn. 271.

3. Contributory negligence of plaintiff is no defense to a civil suit for assault. *Lambrech v. Schreyer, L.R.A.1915E*, 812, 152 N. W. 645, 129 Minn. 271.

ASSESSMENTS.

For insurance, see *Insurance*, 6.

ASSIGNMENT.

Rights against garnishee of assignee who having notice of garnishment failed to appear, see *Garnishment*.

Injunction against assignee of oil and gas lease, see *Injunction*, 1.

Covenant against, in lease, see *Landlord and Tenant*, 1.

Liability of assignee for rent, see *Landlord and Tenant*, 2.

An assignment by a railroad employee of his wages to be earned does not take precedence of an agreement in his employment contract giving the corporation the right to pay for his board and lodging and deduct the amount from his wages. *Steltzer v. Chicago, M. & St. P. R. Co. L.R.A.1915E*, 1017, 134 N. W. 573, 156 Iowa, 1.

ASSUMED NAME.

Failure to comply with regulations as to right to do business under, see *Contracts*, 2.

ASSUMPTION OF RISKS.

By servant, see *Master and Servant*, 3-5.

ATTACHMENT.

As to garnishment, see Garnishment.

ATTORNEYS' FEES.

Validity of statute providing for allowance of, see Commerce, 3, 4; Constitutional Law, 7, 8, 9.

ATTRACTIVE NUISANCE.

See Nuisance, 4-6.

AUDITOR.

Proceeding to compel issue by, of warrants for statutory allowances to state officers, see State.

AUTOMOBILES.

Exclusion of, from certain streets, see Constitutional Law, 1; Highways, 1.

Opinion evidence as to value of car, see Evidence, 11.

Liability of manufacturer for injury to purchaser through collapse of wheel, see Evidence, 18, 25; Negligence, 3.

Evidence on question of damages for injury to, see Evidence, 22.

Insurance against loss or damage by theft, see Insurance, 17, 18.

Question for jury as to whether person riding in car of another is engaged in common enterprise, see Trial, 7.

Negligence in use of.

1. The rule denying liability of passengers for the negligence of the chauffeur of an automobile, from the simple fact of hiring or riding in such a conveyance, applies to persons who ride in private automobiles by permission and invitation of the owners or persons in charge. *Wilkerson v. Myatt-Dicks Motor Co.* L.R.A.1915E, 439, 68 So. 96, 136 La. 977. (Annotated)

2. While two traveling salesmen are engaged in the joint enterprise of transporting themselves by automobile over the territory canvassed by both for different merchants, one of the salesmen owning and operating the automobile, and the other paying sums about equal to the cost of the gasoline and oil consumed, the latter, if possessing joint control over the automobile, may be liable for the negligence of the other in operating it, both being occupants at the time. *Judge v. Wallen*, L.R.A.1915E, 436, 152 N. W. 318, — Neb. —. (Annotated)

Contributory negligence.

3. One is negligent in riding in an automobile with knowledge that the chauffeur is drunk, so as to prevent his holding the driver of another automobile liable, because of the speed at which he was driving, for injury to him by a collision between the two cars, if the injury was caused by the act of the driver of the car in which he was riding. *Lynn v. Goodwin*, L.R.A.1915E, 588, 148 Pac. 927, — Cal. —.

BAGGAGE.

In general, see Carriers, 11-15. L.R.A.1915E.

BAIL AND RECOGNIZANCE.

Habeas corpus to inquire into denial of bail pending appeal, see Habeas Corpus, 1.

One appealing from an order refusing to vacate a body execution, upon the ground that it violates the constitutional provision against imprisonment for debt, is entitled to be admitted to bail pending the appeal. *State ex rel. Syverson v. Foster*, L.R.A.1915E, 340, 146 Pac. 169, — Wash. —.

(Annotated)

BANKRUPTCY.

An individual partner who has not been adjudged a bankrupt may be required to turn over his separate estate for administration to the trustee in bankruptcy of the firm, where the partnership and individual estates together are not enough to pay the partnership debts,—especially where such partner has not objected that he should have been put into bankruptcy, and where, assuming that the case is within the provisions of the bankrupt act of July 1, 1898, § 5h, that "in the event of one or more but not all of the members of a partnership being adjudged bankrupt," the partnership property may be administered by the partners not so adjudged, and does not come into bankruptcy at all except by consent, such partner has never objected to the administration of the firm property by the trustee. *Francis v. McNeal*. L.R.A.1915E, 706, 33 Sup. Ct. Rep. 701, 228 U. S. 695, 57 L. ed. 1029.

BANKS.

Binding effect of custom of, see Custom.

Effect of bank's right to apply deposit on note, to toll running of limitations, see Limitation of Actions, 3.

Validity of statute authorizing bank superintendent to take possession of assets whenever he deems it necessary, see Constitutional Law, 12.

Constitutionality of statute limiting time for action by bank to recover property seized by bank superintendent, see Constitutional Law, 4.

Liability of administrator requesting bank to hold deposit against claimant to reimburse bank for interest which it is compelled to pay to claimant on the legal establishment of his claim, see Contribution and Indemnity.

1. A bank is not liable to account to an administrator of a decedent's estate for money deposited by persons assuming without authority to act as executors of such estate, and paid out on their checks without notice of their lack of authority, even though the payment is in satisfaction of a debt of one of the acting executors. *Holden v. Farmers' & T. Nat. Bank*, L.R.A.1915E, 309, 93 Atl. 1040, — N. H. —.

(Annotated)

2. A bank which pays a deposit made by a person since deceased, upon the order of one acting as executor without authority,

is bound to account therefor to a legal representative of the estate. *Hol'n v. Farmers' & T. Nat. Bank*, L.R.A.1915E, 309, 93 Atl. 1040, — N. H. —.

BAR FIXTURES.

Valuation of insured bar fixtures where prohibition is adopted after policy was issued, see Insurance, 13.

BARRIERS.

At dangerous place in highway, see Highways, 4, 5.

BASTARDY.

Abatement of prosecution under bastardy act, see Abatement and Revival, 1.

No order for the payment of money can be entered against defendant in bastardy proceedings in the absence of evidence showing expenditures incident to the care and support of the child. *People v. Grunland*, L.R.A.1915E, 314, 153 N. W. 4, — Mich. —.

BATTERY.

See Assault and Battery.

BENEFITS.

Estoppel by receiving, see Estoppel, 2.

BENEVOLENT SOCIETIES.

Insurance by, see Insurance.

BIGAMY.

The marriage of a woman against whom a foreign divorce has been granted upon service by publication, which is not recognized as valid by the state of her domicile, is invalid everywhere, and will not support a charge of bigamy against the other party to the ceremony, who abandoned her and married another woman. *People v. Shaw*, L.R.A.1915E, 87, 102 N. E. 1031, 259 Ill. 544.

BILLS AND NOTES.

Effect on rights of one purchasing note of custom of which he had no notice, see Custom.

Parol evidence as to, see Evidence, 10.
Lien on homestead for money loaned to retire purchase money notes, see Homestead.

Authority to receive payment of, see Payment.

Negotiability.

1. A promissory note is not rendered non-negotiable by the insertion of the following provision: "A discount of 6 per cent will be allowed if paid in full within fifteen days from date." *Farmers' Loan & T. Co. v. Planck*, L.R.A.1915E, 564, 152 N. W. 390. — Neb. —. (Annotated)

Presentment; demand; notice; protest.

2. If notice of protest of a negotiable note be regularly mailed as prescribed by § 8, chapter 99, W. Va. Code 1906, it is immaterial that such notice may not have been in fact received by the indorser there-
L.R.A.1915E.

on; he is nevertheless legally bound thereby. *Board of Education v. Angel*, L.R.A.1915E, 139, 84 S. E. 747, — W. Va. —.

Rights and liabilities of transferees.

Right of purchaser of note to subrogation, see Subrogation.

3. That a note was stolen from the maker without delivery is no defense to its enforcement by a bona fide holder for value before maturity, under a statute providing that where the instrument is in the hands of a holder in due course, a valid delivery by all prior parties so as to make them liable to him is conclusively presumed. *Angus v. Downs*, L.R.A.1915E, 351, 147 Pac. 630, — Wash. —. (Annotated)

Maturity.

4. A note payable one year after date matures at that time, so as to render its transfer thereafter subject to equities, notwithstanding a collateral provision that it will be extended from year to year upon payment of a portion of the principal, which payment has not been made. *Calhoun v. Ainsworth*, L.R.A.1915E, 395, 176 S. W. 316, — Ark. —.

BLASTING.

Pleading in action for injury to property by blast, see Pleading, 9.

An owner of land who makes use of high-power explosives in making excavations of rock and earth on his premises is liable for damages to adjacent property proximately and naturally resulting from the concussion and vibration of the earth and air caused by the blasting, irrespective of the question of negligence or want of skill in the blasting operations, and although no rock, soil, or debris is actually thrown upon the adjacent premises. *Louden v. Cincinnati*, L.R.A.1915E, 356, 106 N. E. 970, — Ohio St. —. (Annotated)

BOARDS.

Of agriculture, see Agricultural Societies.

BODY EXECUTION.

Right to bail of one seized under, see Bail and Recognizance; Habeas Corpus, 1.

BONDS.

On appeal, see Appeal and Error, 3.

Bail bonds, see Bail and Recognizance.
Amount of judgment on bond, see Judgment, 1.

Effect of failure to require bond of police officer to render city liable for his acts, see Municipal Corporations, 6.

The owner of premises upon which a building is being erected by a contractor may protect himself from fraudulent conduct on the part of the contractor, by requiring a bond or other security for the payment of material furnished by him on

the credit of the building and premises. *Thompson-McDonald Lumber Co. v. Morawetz*, L.R.A.1915E, 302, 149 N. W. 300, 127 Minn. 277.

BREACH.

Of contract, see Contracts, 5.

BRIDGES.

Imposition on owner of irrigation ditch of expense of constructing and maintaining bridge, see Eminent Domain, 3.

1. A strip of highway 300 feet long and 26 feet wide, constituting a fill over low land, with a brook passing through a culvert under it, and constructed of earth held in place by stone walls with iron railings on top, cannot be held, as matter of law, to be a bridge within the meaning of a statute limiting speed on bridges. *Coffin v. Laskau*, L.R.A.1915E, 959, 94 Atl. 370, 89 Conn. 325.

2. Section 3438, Neb. Rev. Stat. 1913, which requires the owner or those in control of an irrigation ditch or canal, to construct and maintain a bridge across the same, for the free and convenient use of the owner of lands lying on both sides of such ditch or canal, applies in all cases, whether the owner owned it at the time the ditch or canal was built, or subsequently acquired by purchase tracts lying on different sides, which together constitute one farm. *State ex rel. O'Shea v. Farmers' Irrig. Dist.* L.R.A.1915E, 687, 152 N. W. 372, — Neb. —. (Annotated)

BROKERS.

1. Real estate brokers who are to receive for their services all over a specified minimum price which they can obtain for the property may themselves become the purchasers. *Hutton v. Sherrard*, L.R.A.1915E, 976, 150 N. W. 135, — Mich. —. (Annotated)

2. One, contracts for the sale of whose property by agents are subject to his approval, cannot refuse to approve a contract for lack of financial ability of the purchaser, if he refuses to make an investigation as to such ability. *Hutton v. Sherrard*, L.R.A.1915E, 976, 150 N. W. 135, — Mich. —.

3. Brokers cannot recover commissions on a sale of real estate which fails because of defect in title as to a portion of the property, where the vendor had recently purchased the property through them on their representations as to title and boundaries, and immediately listed the property with them for resale. *Leonard v. Vaughan*, L.R.A.1915E, 714, 85 S. E. 471, — Va. —. (Annotated)

BUILDINGS.

Sufficiency of proof that absence of fire escapes was cause of death, see Evidence, 33.
L.R.A.1915E.

Total loss of insured building within fire limits, see Insurance, 15.

Lien on, see Mechanics' Liens.

Party wall for, see Party Wall.

1. A building consisting of two stories above the ground, which is also used as a floor for purposes of the business, is three stories in height within the meaning of a statute requiring fire escapes on buildings three stories high. *Amberg v. Kinley*, L.R.A.1915E, 519, 108 N. E. 830, 214 N. Y. 531.

2. A three-story shed connected with a tannery and used for drying hides, in which employees work, is within the operation of a statute requiring fire escapes on factories, and providing that such terms shall be construed to include any mill, workshop or other manufacturing or business establishment where one or more persons are employed at labor. *Amberg v. Kinley*, L.R.A.1915E, 519, 108 N. E. 830, 214 N. Y. 531.

3. An employer who fails to equip his building with fire escapes as required by statute is liable for the death of an employee due to such failure, regardless of the question of his negligence in other respects. *Amberg v. Kinley*, L.R.A.1915E, 519, 108 N. E. 830, 214 N. Y. 531. (Annotated)

BULK SALES.

See Constitutional Law, 14; Fraudulent Conveyances.

BURDEN OF PROOF.

In general, see Evidence, 1-7.

BY-LAWS.

Of corporation, see Corporations, 1-4.
Of labor organization, injunction to prevent enforcement of, see Injunction, 3.

CANALS.

Cost of constructing bridge over irrigation canal, see Bridges, 2.

CARRIERS.

Elevators as carriers, see Elevators.

Jurisdiction of equity to prevent carrier from excluding passenger, see Equity.

Injunction to prevent exclusion of person from cars, see Injunction, 2.

Repeal of statute exempting carrier from duty to carry all persons, see Statutes, 3.

Measure of damages for assault on passenger, see Damages, 3, 13.

Review of finding that fare paid was less than amount due, see Appeal and Error, 19.

Passing of title on delivery to carrier, see Sale, 1.

Rules and regulations.

1. In the absence of a statute to the contrary, the schedule of a railway company which provides for the nonstoppage of a certain train at a particular place will not be considered unreasonable where it appears that other trains are scheduled to

stop at such place, and it is not alleged that they do not afford adequate service. *Southern R. Co. v. Bailey, L.R.A.1915E, 1043, 85 S. E. 847, — Ga. —.*

Who are passengers.

2. One who purchased a ticket and took passage on a train which was detained by a wreck and returned to the station where he was received as a passenger, at a late hour on a dark and cold night, and who on inquiry of the conductor was told that no place was known by him where shelter and lodging could be secured, and who was given permission by the conductor to remain in the car all night until the journey was resumed in the morning, was a passenger and entitled to reasonable protection at the hands of the railway company, and from any and all unlawful assaults or imprisonment at the hands of its employees. *Turk v. Norfolk & W. R. Co. L.R.A.1915E, 145, 84 S. E. 569, — W. Va. —.*

(Annotated)

Arrest of passenger.

Punitive damages for, see Damages, 4.

Measure of damages for, see Damages, 11, 12, 18.

3. A railroad company is liable for the wrongful arrest by a peace officer, at the instance of a brakeman, of a passenger who in entering the car had a controversy with the brakeman in regard to showing his ticket, the rule with respect to which the brakeman was attempting to enforce, even though the brakeman had no authority to secure the arrest, since the duty rested on the railroad company to protect the passenger from ill-treatment. *St. Louis, I. M. & S. R. Co. v. Tukey, L.R.A.1915E, 320, 175 S. W. 403, — Ark. —.*

(Annotated)

Measure of care required; negligence generally.

Sufficiency of proof that passenger's death was caused by jolt, see Evidence, 32.

4. A carrier who has so overcrowded its train that passengers are compelled to stand must warn those taking a position in an open coal car that it is more dangerous to stand there than in the passenger coach, if such danger in fact exists and the passengers are not aware of it. *Basey v. Louisiana R. & Nav. Co. L.R.A.1915E, 964, 68 So. 824, — La. —.*

5. A railroad company whose employees without interference permit its porter to assault a passenger and advance on him with a deadly weapon, threatening to kill him, is liable to another passenger who takes no part in the affray, for wounds inflicted by a pistol shot fired by the assaulted passenger in an endeavor to protect himself. *St. Louis, I. M. & S. R. Co. v. Jackson, L.R.A.1915E, 668, 177 S. W. 33, — Ark. —.*

(Annotated)

6. A railroad company is not negligent in suddenly slackening the speed of its train to avoid running over horses that have gotten upon the track, so as to render it liable for injury to a standing passenger who is thrown against an obstruction by the resulting jolt. *Basey v. Louisiana R. L.R.A.1915E.*

& Nav. Co. L.R.A.1915E, 964, 68 So. 824, — La. —.

7. A carrier which, by advertisement and special rates, attracts an unusual number of passengers at a particular time to attend an exhibit at a point along the road, is negligent in failing to provide extra accommodations for them, and is therefore liable for injury to a passenger who, being compelled to stand because of the crowd, is thrown against an obstruction by the sudden slackening of the speed of the train to avoid collision with animals on the track. *Basey v. Louisiana R. & Nav. Co. L.R.A.1915E, 964, 68 So. 824, — La. —.*

Ejection of passenger or trespasser.

Punitive damages for, see Damages, 4.

Measure of damages for, see Damages, 11, 18.

Pleading in action for ejection, see Pleading, 2.

8. A passenger ejected for nonpayment of fare is not entitled to acceptance as a passenger on the same train, upon purchasing a ticket merely from the point where ejected to destination. *Chicago, R. I. & P. R. Co. v. Watkirs, L.R.A.1915E, 311, 175 S. W. 1157, — Ark. —.*

Leaving at destination.

9. It is the duty of the purchaser of a ticket, or one who desires to become a passenger on a train, to ascertain before boarding it that it stops at the station to which he desires to be transported; and where he fails to do so, the proper agent of the railway company may compel him to leave the train at the last place at which the train is scheduled by the company's published regulations to stop before reaching the point of destination desired by the passenger. *Southern R. Co. v. Bailey, L.R.A.1915E, 1043, 85 S. E. 847, — Ga. —.*

Disabled or incompetent passengers.

10. A railway company cannot refuse to transport an unattended young man merely because, by reason of infantile paralysis, he is obliged to use crutches, if he is capable of caring for himself without further assistance than the carrier is accustomed to afford passengers generally. *Hogan v. Nashville Interurban R. Co. L.R.A.1915E, 788, 174 S. W. 1118, 131 Tenn. 244.*

(Annotated)

Baggage or property of passenger.

11. A carrier may stipulate in a mileage ticket sold at reduced rates, that baggage will be transported under it only over such lines and between such stations as the purchaser of the ticket will travel on the day the baggage is presented for checking. *Crout v. Yazoo & M. V. R. Co. L.R.A.1915E, 281, 176 S. W. 1027, 131 Tenn. 667.*

(Annotated)

12. The holder of a reduced rate mileage ticket, providing for transportation of baggage only over such lines and between such stations as the holder will travel on the day the baggage is presented for checking, who, for his own convenience, checks baggage to a destination to which he does not intend to go until the following day, cannot hold the carrier liable as such for its

loss by fire in the terminal station before his arrival. *Crout v. Yazoo & M. V. R. Co.* L.R.A.1915E, 281, 176 S. W. 1027, 131 Tenn. 667.

13. To bind a railroad company by a custom of holders of mileage tickets to violate a requirement that they travel with their baggage, it must be so open, notorious, and long continued as to charge the railroad company with notice of it. *Crout v. Yazoo & M. V. R. Co.* L.R.A.1915E, 281, 176 S. W. 1027, 131 Tenn. 667.

14. A passenger cannot establish a waiver by a railroad company of its requirement that he accompany his baggage, by stating in the presence of the agent who checked it, that he did not intend to do so. *Crout v. Yazoo & M. V. R. Co.* L.R.A.1915E, 281, 176 S. W. 1027, 131 Tenn. 667.

15. The liability of a carrier as such for baggage at destination is not established where it was tendered by the owner in violation of a requirement that he accompany it, by a statute making it the duty of the carrier to keep safely any baggage at destination until the owner shall demand it, but allowing the collection of storage charges after four days. *Crout v. Yazoo & M. V. R. Co.* L.R.A.1915E, 281, 176 S. W. 1027, 131 Tenn. 667.

Governmental control; rates; discrimination

Allowance of attorney's fee where claim is not paid within certain time, see Commerce, 3, 4.

Regulations in matters affecting interstate commerce, see Commerce, 3-5.

Equal protection and privileges as to, see Constitutional Law, 5, 7, 8.

Due process in regulations as to, see Constitutional Law, 10, 13.

Impairment of obligation of contract by regulations as to, see Constitutional Law, 19.

Review by court of orders of Public Service Commission, see Public Service Commissions, 2, 3.

16. The fact that railroads, like common carriers at common law, can make reasonable rules and regulations in regard to their own operation, in the absence of a statute or valid rule of a Railroad Commission, does not negative the power of the state directly by legislative act, or through a Railroad Commission duly authorized, to regulate such carriers. *Railroad Commission of Ga. v. Louisville & N. R. Co.* L.R.A.1915E, 902, 80 S. E. 327, 140 Ga. 817.

17. Under Code provisions conferring broad powers upon a Railroad Commission, such a Commission has authority to pass an order providing that "all railroads selling mileage or penny scrip books are hereby required on and after February 1, 1913, to pull the same on the train of the company selling the same, when presented by the holders for transportation between points wholly within the state of Georgia, except where passengers board trains in cities of 10,000 population or more according to the United States census of 1910, in which L.R.A.1915E.

places mileage or penny scrip shall be exchanged for tickets." *Railroad Commission of Ga. v. Louisville & N. R. Co.* L.R.A.1915E, 902, 80 S. E. 327, 140 Ga. 817.

(Annotated)

18. That a state through its legislature or a Railroad Commission cannot fix a reasonable maximum rate for the carriage of passengers by railroad, and then compel carriers to issue certain tickets to certain persons at a less rate, does not negative the power to regulate carriers of passengers which voluntarily issue such tickets; especially is this true as to such tickets issued since the date of the order. *Railroad Commission of Ga. v. Louisville & N. R. Co.* L.R.A.1915E, 902, 80 S. E. 327, 140 Ga. 817.

19. A carrier which has exacted less than the published rate for interstate round-trip passenger tickets over the different routes, going and returning, desired by the purchaser, may, by virtue of the provisions of the act of February 4, 1887, § 6, as amended by the act of June 29, 1906, prohibiting any deviation from the published rates, recover from such purchaser the difference between the amount paid and the amount which should have been charged and collected, although he could have gone to destination and returned over other routes, going and returning, at the rate which he paid. *Louisville & N. R. Co. v. Maxwell*, L.R.A.1915E, 665, P.U.R.1915C, 300, 35 Sup. Ct. Rep. 494, 237 U. S. 94, 59 L. ed. 853.

CAUSE.

Sufficiency of proof of, see Evidence, 32, 33.

Proximate cause, see Proximate Cause.

CAVEAT EMPTOR.

Application of doctrine of, to sale of ward's land under order of court, see Judicial Sale.

CEMETERIES.

Injunction to protect owner of lot in exercise of rights, see Injunction, 5.

1. The grantee in a deed to a lot in a public cemetery, for the purpose of sepulture, acquires only an easement in the soil for the purpose of the grant. *Nicholson v. Daffin*, L.R.A.1915E, 168, 83 S. E. 658, 142 Ga. 729.

2. A municipality acquiring the fee to a cemetery, subject to the easement of the lot owner, may make reasonable rules for the care and management of lots in the cemetery, agreeably with the grant of the easement. *Nicholson v. Daffin*, L.R.A.1915E, 168, 83 S. E. 658, 142 Ga. 729.

(Annotated)

3. A rule requiring the written authority of a commission charged by law with the superintendence of a cemetery owned by a municipality, before any professional gardener or other person for hire can be employed to care for a lot therein, is unreasonably enforced by the arbitrary refusal

to grant permission to a lot owner to employ a suitable person to care for the lot, because, in the opinion of the commission, it can furnish material and perform the work required cheaper than the service may be elsewhere obtained. *Nicholson v. Daffin*, L.R.A.1915E, 168, 83 S. E. 658, 142 Ga. 729.

CERTIORARI.

To review acts of court in habeas corpus proceeding, see Habeas Corpus, 2.

CHATTEL MORTGAGE.

Right to prove amount of debt in mitigation of damages in action against mortgagee for conversion, see Damages, 19.

Defendant's pleadings in action against mortgagee for conversion of property, see Pleading, 10.

Conversion by mortgagee taking possession of property, see Trover.

CHILDREN.

In general, see Infants.

CHURCHES.

Forbidding sale of liquors within certain distance of, see Intoxicating Liquors, 2.

Saloon near, as nuisance, see Nuisances, 2, 3.

CINDERS.

Injury to property by, as a taking thereof, see Eminent Domain, 2.

CIRCUMSTANTIAL EVIDENCE.

Admissibility of, see Evidence, 27.

CITIES.

See Municipal Corporations.

CLAIM AND DELIVERY.

See Replevin.

CLAIMS.

Against city, presentation of, see Municipal Corporations, 7.

CLASSIFICATION.

By statute, see Constitutional Law, 2-8.

COAL.

Lien for, see Mechanics' Liens, 1.

COASTING.

Injury to child coasting in street, see Negligence, 8, 12.

COHABITATION.

Effect of, see Marriage, 6.

COMMERCE.

1. A statute forbidding the circulation within the state of newspapers and magazines containing advertisements of intoxicating liquors does not, even with respect to papers and magazines published in other

states and shipped into the state, infringe the commerce clause of the Federal Constitution so far as it is made to apply to sales from broken packages on the news stands, in view of the Wilson act enlarging the power of the states over interstate transactions in intoxicating liquors. *State ex rel. Black v. Delaye*, L.R.A.1915E, 640, 68 So. 993, — Ala. —.

How far Federal power is exclusive.

2. A state law enacted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an act of Congress regulating commerce, unless there is actual repugnancy, or unless Congress has at least manifested a purpose to exercise its paramount authority over the subject. *Missouri, K. & T. R. Co. v. Harris*, L.R.A.1915E, 942, 34 Sup. Ct. Rep. 790, 234 U. S. 412, 58 L. ed. 1377.

3. The application to a claim against a carrier, based upon a loss of freight shipped in interstate commerce, of the provisions of Texas Laws 1909, p. 93, for the allowance of a reasonable attorney's fee of not over \$20 to the successful plaintiff in a suit in which an attorney is actually employed upon a claim not exceeding \$200, against "any person or corporation doing business in this state, for personal services rendered, or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees," where such claim is not paid within thirty days after demand, and the recovery is for the full amount claimed, does not amount to a direct burden upon interstate commerce, and is therefore not repugnant to the commerce clause of the Federal Constitution, or otherwise in conflict with Federal authority, in the absence of any congressional legislation covering the subject. *Missouri, K. & T. R. Co. v. Harris*, L.R.A.1915E, 942, 34 Sup. Ct. Rep. 790, 234 U. S. 412, 58 L. ed. 1377.

4. Congress has not so far exercised its paramount authority by enacting the Carmack amendment of June 29, 1906, to the act of February 4, 1887, § 20, regulating the liability of a carrier for the loss of or damage to an interstate shipment, as to prevent the application to a claim against a carrier, based upon a loss of an interstate shipment, of the provisions of Texas Laws 1909, p. 93, for the allowance of a reasonable attorney's fee of not over \$20 to the successful plaintiff in a suit in which an attorney is actually employed upon a claim not exceeding \$200, against "any person or corporation doing business in this state, for personal services rendered, or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees," where such claim is not paid within thirty days after demand, and the recovery is for the full amount claimed. *Missouri, K. &*

T. R. Co. v. Harris, L.R.A.1915E, 942, 34 Sup. Ct. Rep. 790, 234 U. S. 412, 58 L. ed. 1377.

Regulating carriers and transportation.

See also *supra*, 3, 4.

5. An order of a Railroad Commission requiring carriers selling mileage or penny scrip books to pull the same on the train of the company, when presented by the holders for transportation between points wholly within the state, except where a passenger boards a train in cities of a stated population or over, in which places mileage or penny scrip shall be exchanged for tickets, is not invalid on the ground that it directly affects and trammels interstate commerce. Railroad Commission of Ga. v. Louisville & N. R. Co. **L.R.A.1915E, 902, 80 S. E. 327, 140 Ga. 817.**

COMMISSIONS.

Of brokers, see *Brokers*, 3.

Injunction against park and tree commission, see *Injunction*, 5.

Public Service Commission, see *Public Service Commissions*.

COMMITTEE.

Power to pay out of contingent fund of legislature, see *Appropriations*.

Power of legislature to appoint by joint resolution committee to exist beyond adjournment of legislature, see *Legislature*.

COMMON CARRIERS.

See *Carriers*.

COMMON ENTERPRISE.

Liability of person engaged in, for negligence of other party, see *Automobiles*, 2.

As question for jury, see *Trial*, 7.

COMMON LAW.

Revival of common-law rule by repeal of constitutional provision, see *Descent and Distribution*, 2.

Common-law marriage, see *Marriage*, 2-6.

1. The common law consists of those principles and rules of action which have been from time to time adopted and acted upon by the courts when administering justice in cases not governed by any written law, arising out of the private disputes of individuals. *Yazoo & M. V. R. Co. v. Scott, L.R.A.1915E, 239, 67 So. 491, — Miss. —.*

2. The common law of England, adopted by Texas as part of its law in 1840, was not the law existing in England at that time, but the law as it was declared by the courts of the different states of the Union. *Grigsby v. Reib, L.R.A.1915E, 1, 153 S. W. 1124, 105 Tex. 597.*

COMPENSATION.

Of officer generally, see *Officers*, 3. **L.R.A.1915E.**

COMPLAINT.

In criminal prosecution, see *Indictment*, etc.

Of plaintiff, see *Pleading*, 5-9.

COMPOUNDING FELONY.

Notwithstanding the pendency of criminal proceedings against the wrongdoer, one whose money or property has been embezzled or fraudulently obtained may contract with such wrongdoer for the payment of the money or satisfaction for the loss sustained, and take security therefor, without invalidating the contract, unless there be included therein as a part of the consideration therefor, some promise or agreement, express or implied, that such prosecution shall be suppressed, stifled, or stayed, but if such contract is made, in whole or part, upon consideration of such unlawful promise or agreement, it is void as against public policy, and will not be enforced by the courts. *Board of Education v. Angel, L.R.A.1915E, 139, 84 S. E. 747, — W. Va. —.* (Annotated)

COMPROMISE AND SETTLEMENT.

Of claim for death as defense to action therefor, see *Death*, 6, 8.

CONCLUSIONS.

Averment of, see *Pleading*, 3.

CONDEMNATION.

Of property, see *Eminent Domain*.

CONDITION.

In insurance contract, see *Insurance*, 4.

CONDUIT.

Easement for, see *Easements*, 2.

CONFLICT OF LAWS.

The effect of a suit brought in one state for personal injuries resulting from the negligence of a railway company in another, which suit was removed to the Federal court, as a bar to a subsequent suit in the former state by the administrator of the injured person, after her death, on account of the death caused by the same injury (it not appearing where the death took place), is to be determined by the law of the state where the injury occurred, where the statute of that state is pleaded as a basis of recovery. *Nashville, C. & St. L. R. Co. v. Hubble, L.R.A.1915E, 1132, 78 S. E. 919, 140 Ga. 368.*

CONSENT.

To jurisdiction of court, see *Courts*, 2.
By surviving spouse to husband's will, see *Wills*, 5, 6.

CONSEQUENTIAL INJURIES.

From condemnation of property, see *Eminent Domain*, 4, 5.

CONSTITUTIONAL LAW.

Effect of repeal of provision as to right of alien to inherit, see Descent and Distribution, 2.

As to search and seizure, see Search and Seizure.

Delegation of power.

1. The legislature may delegate to boards of aldermen in cities, and to selectmen in towns, the power to exclude automobiles from certain streets within their jurisdictions, from which, in their judgment, the public welfare demands such exclusion. *Com. v. Kingsbury*, L.R.A.1915E, 264, 85 N. E. 848, 199 Mass. 542.

Equal protection and privileges.

2. A police regulation is, like any other law, subject to the equal protection of the laws clause of the 14th Amendment to the Federal Constitution. *Atchison, T. & S. F. R. Co. v. Vosburg*, L.R.A.1915E, 953, 35 Sup. Ct. Rep. 675, 238 U. S. 56, 59 L. ed. —.

3. A statute requiring written notice as a condition precedent to the maintenance of a suit to recover damages from a city, as applied to an action against the city for damages on account of an illness contracted from the use of contaminated water supplied from a water works owned and operated by the city, is not an arbitrary discrimination in favor of the municipality owning and maintaining public utilities as against private parties carrying on similar enterprises, and is not violative of any constitutional provision. *Frasch v. New Ulm*, L.R.A.1915E, 749, 153 N. W. 121, 130 Minn. 41.

4. Limiting the right of a bank whose property has been summarily seized because the bank superintendent deemed it to be in an unsafe condition, to bring an action to recover possession of its property ten days, is not such an arbitrary discrimination against banking institutions as to deprive them of the equal protection of the laws. *State Sav. & Commercial Bank v. Anderson*, L.R.A.1915E, 675, 132 Pac. 755, 165 Cal. 437.

5. An order of a Railroad Commission that all railroads selling mileage or penny scrip books shall pull the same on the train of the company selling the same, when presented by the holders for transportation between points wholly within the state, which excepts from its operation cases in which passengers board trains in cities of a stated population or more, is not invalid on the ground that it is discriminatory, especially where the only complainant is the carrier. *Railroad Commission of Ga. v. Louisville & N. R. Co.* L.R.A.1915E, 902, 80 S. E. 327, 140 Ga. 817.

6. A statute providing for the appointment and licensing of insurance agents which fails to prescribe any uniform rule or test of fitness, and vests in the insurance commissioner discretion to determine the fitness of any agent appointed and arbitrary power to license or withhold a license from whomsoever he will, is void. L.R.A.1915E.

as in violation of U. S. Const. 14th Amend., and Okla. Const. art. 2, § 2. *Welch v. Maryland Casualty Co.* L.R.A.1915E, 708, 147 Pac. 1046, — Okla. —.

7. There is no denial of the equal protection of the laws, contrary to U. S. Const., 14th Amend., in the provisions of Texas Laws, 1909, p. 93, for the allowance of a reasonable attorney's fee of not over \$20 to the successful plaintiff in a suit in which an attorney is actually employed upon a claim not exceeding \$200, against "any person or corporation doing business in this state, for personal services rendered, or for labor done, or for material furnished, or for overcharging on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees," where such claim is not paid within thirty days after demand, and the recovery is for the full amount claimed, since this statute makes no classification of debtors, and the kinds of claims included cover a wide range, and do not appear to have been grouped for the purpose of bearing against any class or classes of citizens or corporations. *Missouri, K. & T. R. Co. v. Harris*, L.R.A.1915E, 942, 34 Sup. Ct. Rep. 790, 234 U. S. 412, 58 L. ed. 1377. (Annotated)

8. The equal protection of the laws guaranteed by U. S. Const., 14th Amend., is denied to railroad companies by a statute under which a reasonable attorney's fee is allowed to a shipper who successfully sues a railroad company for failure to furnish cars, while no such allowance may be made in favor of a railway company in the event of its successful prosecution of a suit brought by it under such statute against a shipper who has failed to use the cars promptly. *Atchison, T. & S. F. R. Co. v. Vosburg*, L.R.A.1915E, 953, 35 Sup. Ct. Rep. 675, 238 U. S. 56, 59 L. ed. —.

Due process of law; right to life, liberty, and property.

9. Due process of law is not denied, contrary to U. S. Const., 14th Amend., by the provisions of Texas Laws 1909, p. 93, for the allowance of a reasonable attorney's fee of not over \$20 to the successful plaintiff in a suit in which an attorney is actually employed upon a claim not exceeding \$200, against "any person or corporation doing business in this state, for personal services rendered, or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees," where such claim is not paid within thirty days after demand, and the recovery is for the full amount claimed. *Missouri, K. & T. R. Co. v. Harris*, L.R.A.1915E, 942, 34 Sup. Ct. Rep. 790, 234 U. S. 412, 58 L. ed. 1377. (Annotated)

10. A railroad company cannot, in view of the constitutional provision against taking property without due process of law, be compelled to construct and maintain spurs or sidings to connect industrial plants with its right of way, even upon the sole con-

ditions that they will not cause hazard to the property and trains of the company, and the cost of materials and right of way is imposed upon the applicant. *McInnis v. New Orleans & N. E. R. Co. L.R.A.1915E, 682, P.U.R.1915D, 418, 68 So. 481, — Miss. (Annotated)*

11. A construction of the valued policy law (Neb. Revised Statute 1913, § 3210), which allows the insured to recover as for a total loss, where an insured building located within the fire limits of the city is injured by fire to such an extent that its repair is not allowable, does not deprive the insurance company of its property without due process of law. *Dineen v. American Ins. Co. L.R.A.1915E, 618, 152 N. W. 307, — Neb. —*

12. A bank is not deprived of its property without due process of law by proceedings under a statute authorizing the bank superintendent to take possession of its assets whenever he shall have reason to conclude that it is in an unsound condition, or that it is unsafe or inexpedient for it to continue business. *State Sav. & Commercial Bank v. Anderson, L.R.A.1915E, 675, 132 Pac. 755, 165 Cal. 437. (Annotated)*

13. An order of a Railroad Commission issued in pursuance of statutory authority, requiring carriers selling mileage or penny scrip books to pull the same on the train of the company selling the same, except where passengers board trains in cities of 10,000 population or more, in which places mileage or penny scrip shall be exchanged for tickets, is not a violation of the 14th Amendment of the Federal Constitution as being an unlawful interference with the liberty of contract or the taking of property without due process of law, nor does it violate the due process clause of the state Constitution. *Railroad Commission of Ga. v. Louisville & N. R. Co. L.R.A.1915E, 902, 80 S. E. 327, 140 Ga. 817.*

14. Forbidding a merchant to dispose of his stock in bulk without giving notice to creditors does not deprive him of his property without due process of law, nor is it invalid as class legislation. *Boise Asso. of Credit Men v. Ellis, L.R.A.1915E, 917, 144 Pac. 6, 26 Idaho, 438. (Annotated)*

15. Awarding a new trial upon the question of damages only, upon reversing a judgment, does not deprive defendant of his property without due process of law. *Yazoo & M. V. R. Co. v. Scott, L.R.A.1915E, 239, 67 So. 491, — Miss. —*

Police power.

See also *supra*, 2.

16. The police power extends to the prohibition of advertisements of intoxicating liquors for sale. *State ex rel. Black v. Delaye, L.R.A.1915E, 640, 68 So. 993, — Ala. —*

Impairing obligation of contracts.

Contract of enlistment in state militia, see *Militia*, 1.

17. No unconstitutional impairment of contract rights is effected by permitting a reconsideration of the question whether or not a parcel of land under water is natural

oyster bed, after a lease has been founded upon a finding that it was not, where provision is made for condemnation of the rights of the lessee in case it is found to be natural bed. *Cox v. Revelle, L.R.A.1915E, 443, 94 Atl. 203, 125 Md. 579.*

18. One who obtained a lease of ground for oyster raising, after it had been determined not to be natural bed, cannot complain of a provision for a redetermination of the question which fixes a different standard of natural bed as impairment of the obligation of his contract, if provision is made for condemnation of his rights in case the ground is found to be natural bed. *Cox v. Revelle, L.R.A.1915E, 443, 94 Atl. 203, 125 Md. 579.*

19. Mileage and penny scrip books issued by a carrier of passengers before the passage of a rule or order of the Railroad Commission regulating the use of such books were issued subject to the statutory power of the Railroad Commission to make regulations in regard to such railroads as carry the passengers, and such regulatory order as to operation is not violative of the provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts. *Railroad Commission of Ga. v. Louisville & N. R. Co. L.R.A.1915E, 902, 80 S. E. 327, 140 Ga. 817.*

CONSTRUCTION.

Of insurance policy, see *Insurance*.

Of statute, see *Statutes*, 2.

CONSTRUCTIVE TRUSTS.

See *Trusts*, 1-3.

CONTEMPT.

The court may refuse to proceed to trial of an action for divorce while the husband fails to comply with its order to pay alimony *pendente lite*, notwithstanding he has appealed from the order. *State ex rel. Crombie v. Superior Court for King County, L.R.A.1915E, 567, 148 Pac. 882, — Wash. — (Annotated)*

CONTINGENT FUND.

Power to pay expenses of committee out of contingent fund of legislature, see *Appropriations*.

CONTRACTORS.

Bonds of, see *Bonds*.

Liability of trade union for failure to notify contractor of change in wage scale, see *Labor Organizations*; *Pleading*, 12.

Liability of, for negligence, see *Master and Servant*, 10-14.

Lien for materials furnished to, see *Mechanics' Liens*.

Delivery to contractor by delivery to carrier, see *Sale*, 1.

CONTRACTS.

Implied agreement of agister to supply water to cattle, see *Agisters*, 1.

Failure of consideration for contract of agistment, see Agisters, 3.

Impairing obligation of, see Constitutional Law, 17-19.

Presumption and burden of proof as to, see Evidence, 4.

Enlistment in state militia as a contract, see Militia.

As to municipal contracts generally, see Municipal Corporations, 2.

Of sale, see Sale.

Contracts as to real property generally, see Vendor and Purchaser.

Formal requisites; statute of frauds.

1. A contract to pay money in consideration of support for life is within a statute making invalid, unless in writing, an agreement which is by its terms not to be performed during the lifetime of the promisor. *Hagan v. McNary*, L.R.A.1915E, 562, 148 Pac. 937, — Cal. —. (Annotated)

Validity and effect.

Agreement to recompense one whose property has been stolen or embezzled, see Compounding Felony.

Effect of intoxication, see Drunkenness.

Contracts by infant, see Infants, 3.

2. Failure of one doing business under an assumed name to file a certificate showing his real name, as required by statute providing punishment for failure to do so, does not render contracts made by him in the prosecution of the business unenforceable. *Sagal v. Fylar*, L.R.A.1915E, 747, 93 Atl. 1027, 89 Conn. 293.

3. A contract between a railroad company and its employees, authorizing it to pay claims against the employees for board and lodging, and deduct the amount from wages which may become due, is valid. *Steltzer v. Chicago, M. & St. P. R. Co.* L.R.A.1915E, 1017, 134 N. W. 573, 156 Iowa, 1.

4. A railroad company in granting permission to a manufacturing company to run a motor car upon its tracks may contract for exemption from liability for injury which may result to operatives of the car. *Mehegan v. Boyne City, G. & A. R. Co.* L.R.A.1915E, 1170, 141 N. W. 905, 178 Mich. 694.

Breach and its effect.

Breach of contract of agistment, see Agisters, 3.

Sufficiency of proof of breach, see Evidence, 39.

5. There may be an anticipatory breach of a wholly executory contract of purchase and sale. *Hart-Parr Co. v. Finley*, L.R.A.1915E, 851, 153 N. W. 137, — N. D. —.

CONTRIBUTION AND INDEMNITY.

A special administrator does not, by requesting a bank in which he has money belonging to the estate on deposit, to retain it until the claim of another seeking appointment as administrator, who has made demand for it, can be established, render himself liable to reimburse the bank for the interest which it is finally required to pay L.R.A.1915E.

when he is removed and his rival's claims established, if, at the time the rival made demand for the fund and brought his action to recover it, he had no right to it. *Murphy v. Nett*, L.R.A.1915E, 797, 149 Pac. 713, — Mont. —. (Annotated)

CONTRIBUTORY NEGLIGENCE.

See Negligence, 9-12.

CONVERSION.

Action for, see Trover.

CORPORATIONS.

Parol evidence to show relation of parties to corporate note, see Evidence, 10.

Right of foreign insurance company to do business, see Insurance, 1.

Mandamus to, see Mandamus, 4.

Receiver for, see Receivers.

By-laws.

1. The function of a by-law is to prescribe the rights and duties of the members with reference to the internal government of the corporation, the management of its affairs, and the rights and duties existing between the members *inter se*. *Cummings v. Wallower*, L.R.A.1915E, 774, 149 Pac. 864, — Okla. —.

2. Notwithstanding a statutory provision that all by-laws of a corporation shall be certified "by a majority of the directors and secretary of the corporation," by-laws which are not certified are not rendered ineffective in an action between directors of the company charged with knowledge of the by-laws and their contents, where the statute does not undertake to make the by-laws ineffective unless so certified, but, after providing for certification and copying, provides that "no by-laws shall take effect until so copied." *Cummings v. Wallower*, L.R.A.1915E, 774, 149 Pac. 864, — Okla. —.

3. Under § 1127, Okla. Rev. Laws 1910, providing that persons signing articles of incorporation and their associates and successors shall be a body politic and corporate by the name and for the purposes stated in said articles, the subscribers to the articles of incorporation are therefore stockholders, and the fact that they have not paid for the stock subscribed, or that stock certificates have not been issued to them, does not affect their right to adopt by-laws. *Cummings v. Wallower*, L.R.A.1915E, 774, 149 Pac. 864, — Okla. —.

4. By-laws typewritten on a sheet of paper and pasted in a book kept in the office of the corporation, though the book be not designated as provided by statute, sufficiently comply with § 1248, Okla. Rev. Laws 1910, providing that all by-laws adopted must be certified by a majority of the directors and secretary of the corporation, and copied in a legible hand in some book kept in the office of the corporation, to be known as the "Book of By-laws," and that no by-laws shall take effect until so copied, especially where another provision of stat-

ute is to the effect that writing may be made in any manner, except, when a person entitled to require the execution of a writing demands that it be made in ink, it must be so made. *Cummings v. Wallower*, L.R.A. 1915E, 774, 149 Pac. 864, — Okla. —.

Directors' meetings.

Mandamus to compel calling of special meeting of directors, see Mandamus, 4, 6.

5. A director of a private corporation may empower an agent or attorney for him and in his name, to make and serve a demand for a special meeting of a board of directors. *Cummings v. Wallower*, L.R.A. 1915E, 774, 149 Pac. 864, — Okla. —.

CORROBORATION.

Of prosecutrix in prosecution for incest, see Evidence, 42.

COURTS.

Contempt of, see Contempt.

Courts-martial, see Courts-Martial.

As to judges, see Judges.

Judicial proceedings as privileged communication, see Libel and Slander, 5.

Mandamus to, see Mandamus, 1.

Review of orders of Public Service Commission, see Public Service Commissions, 2, 3.

1. A court having general equity jurisdiction is not limited in the exercise of such jurisdiction by statute. *Bodie v. Bates*, L.R.A.1915E, 421, 146 N. W. 1002, 95 Neb. 757.

2. Where consent to the exercise of judicial power in a manner not authorized by statute is relied upon as a bar to equitable relief demanded in another state, it should be made clearly to appear that the *res* of the equity so demanded was within the contemplation of the consenting parties, and was considered by the court when it acted upon their consent, since such consent, and the action of the court based thereon, should not be extended, by construction, so as to defeat a clear equity of either of the consenting parties in the courts of the other state. *Bodie v. Bates*, L.R.A.1915E, 421, 146 N. W. 1002, 95 Neb. 757.

3. A technical rule of construction should not be applied where the application thereof would defeat a clear equity. *Bodie v. Bates*, L.R.A.1915E, 421, 146 N. W. 1002, 95 Neb. 757.

COURTS-MARTIAL.

Inquiry into question of jurisdiction of, in habeas corpus, see Habeas Corpus.

The provisions of the state Constitution establishing the judiciary department of the state government, and vesting the judicial power of the state in certain named and designated courts, do not preclude the exercise by the general assembly of the power granted by other provisions of the Constitution, to establish as an instrumentality of the executive department a

"well-regulated militia," declared by the Constitution to be necessary "to the security of a free state," to provide by law how such militia shall be organized and trained, and incidentally to authorize the creation of courts-martial, as one of the ancient and recognized methods by which such instrumentality may be regulated and disciplined. *State ex rel. Lannig v. Long*, L.R.A.1915E, 235, 66 So. 377, 136 La. 1.

COVENANTS AND CONDITIONS.

In lease, generally, see Landlord and Tenant, 1.

In oil and gas lease, see Mines, 5, 7.

COW.

Larceny of, see Larceny.

Liability for personal injuries by, see Municipal Corporations, 4

CRIMINAL LAW.

Bail and recognizance, see Bail and Recognizance.

As to compounding felony, see Compounding Felony.

Private counsel to aid prosecution, see District and Prosecuting Attorneys.

Demonstrative evidence in prosecution for crime, see Evidence, 8.

Opinion evidence in prosecution for crime, see Evidence, 12.

Evidence as to acts and declarations of third persons generally, see Evidence, 16.

Evidence as to intent or purpose generally, see Evidence, 19, 20.

Evidence as to identity, in criminal prosecution, see Evidence, 28.

Corroboration of accomplice or associate, see Evidence, 42.

Extradition, see Extradition.

Civil liability for false arrest and imprisonment, see False Imprisonment.

Habeas corpus, see Habeas Corpus.

As to requisites of indictment, information and complaint, see Indictment, etc.

See also Bastardy; Bigamy. Homicide; Incest; Larceny.

Capacity to commit.

Error in refusing to instruct as to effect of intoxication, see Appeal and Error, 27.

Admissibility of evidence of intoxication, see Evidence, 19.

1. Insanity, though superinduced by excessive and long-continued indulgence in alcoholic liquors, and known as "delirium tremens" or *mania a potu*, renders a person so afflicted irresponsible for his acts, if it be of such a character as to deprive him of the mental capacity to distinguish between right and wrong, as applied to the particular act, whether he be under the influence of liquor at the time of the commission of the act or not; but, to do so, his affliction must be settled or fixed insanity, not a mere fit of drunkenness.

Cheadle v. State, L.R.A.1915E, 1031, 149 Pac. 919, — Okla. Crim. Rep. —.

2. In a prosecution for murder, alcoholic insanity, or mental incapacity produced by voluntary intoxication existing only temporarily at the time of the homicide, is no justification or excuse; to constitute insanity caused by intoxication, a defense in a trial for murder, it must be insanity caused by chronic alcoholism, and not a mere temporary mental condition. Cheadle v. State, L.R.A.1915E, 1031, 149 Pac. 919, — Okla. Crim. Rep. —.

3. Intoxication, either voluntary or involuntary, is to be considered by the jury in a prosecution for murder in which a premeditated design to effect death is essential, with reference to its effect upon the ability of the defendant at the time to form and entertain such a design, not because, *per se*, it either excuses or mitigates the crime; but because, in connection with other facts, an absence of malice or premeditation may appear. Cheadle v. State, L.R.A.1915E, 1031, 149 Pac. 919, — Okla. Crim. Rep. —.

4. A person who commits a homicide while so drunk as to be incapable of forming a premeditated design to kill, if he had formed no purpose to commit the crime prior to the time he became so intoxicated, is not guilty of murder, but is guilty of manslaughter in the first degree. Cheadle v. State, L.R.A.1915E, 1031, 149 Pac. 919, — Okla. Crim. Rep. —.

Speedy trial.
5. One charged with other crime while undergoing imprisonment for one offense is entitled to the benefit of the constitutional and statutory provisions guarantying a speedy trial, and is entitled to his discharge if the state, before proceeding with trial of the second indictment awaits termination of the former sentence, when under normal conditions it should have proceeded sooner. Arrowsmith v. State, L.R.A.1915E, 363, 175 S. W. 545, 131 Tenn. 480.

(Annotated)

6. The speedy trial guaranteed by the Constitution is one as soon after indictment as the prosecution can with reasonable diligence prepare for it, having in view its regulation and conduct by fixed rules of law. Arrowsmith v. State, L.R.A.1915E, 363, 175 S. W. 545, 131 Tenn. 480.

CROWDING.

Of railroad train, see Carriers 4, 7.

CUSTODY.

Of children, see Infants, 1, 2.

CUSTODY OF LAW.

Tax on property in hands of receiver, see Receivers.

CUSTOM.

Evidence of, generally, see Evidence, 18.

One purchasing notes of a bank is not bound by its custom of which he had L.R.A.1915E.

no notice, to make collections for such purchasers. Calhoun v. Ainsworth, L.R.A. 1915E, 395, 176 S. W. 316, — Ark. —.

DAMAGES.

Instructions as to, see Appeal and Error, 26.

Refusal of instruction as to, see Appeal and Error, 28.

Prejudicial error as to measure of, see Appeal and Error, 31.

Awarding new trial on question of damages only, see Appeal and Error, 33, 34, 36, 37; Constitutional Law, 15; Jury.

Relevancy of evidence as to, see Evidence, 22-24.

Preventing unnecessary amount.

Reduction or mitigation of damages, see *infra*, 19.

1. A member of a mutual telephone company who is refused the services due a member, unless he pays an excessive and unauthorized charge, cannot be damaged in excess of such unauthorized charge, since it is his duty to pay such charge in case he intends to hold the operator of the mutual company in damages, and thus mitigate any damages suffered by him on account of the refusal of the operator of the telephone company to render him the service due. Hamilton v. McKenna, L.R.A.1915E, 455, 147 Pac. 1126, 95 Kan. 207.

Exemplary or punitive.

2. Contractual relations with the principal are not necessary to render him liable in exemplary damages for a wanton assault by his agent within the line of his duty, and therefore one whose automobile drops into an unguarded excavation made by a street railway company in a public street may recover such damages from the company for such an assault made upon him by one employed by the company to watch the excavation, because of the accident and the steps taken to extricate the machine. Memphis Street R. Co. v. Stratton, L.R.A.1915E, 704, 176 S. W. 105, 131 Tenn. 620.

3. Exemplary damages may be awarded against a railroad company for an assault by its porter upon a passenger who does not move rapidly enough when entering the car, which is renewed after the passenger has taken a seat, so that the passenger is severely beaten, where the train auditor fails to afford protection although present in the car. St. Louis, I. M. & S. R. Co. v. Jackson, L.R.A.1915E, 668, 177 S. W. 33, — Ark. —.

4. A passenger who is ejected with considerable force and violence, and placed in an unsanitary lockup by an officer secured by the carrier, may recover exemplary damages, where the carrier's acts were wilful, wanton, and in utter disregard of the passenger's rights. Turk v. Norfolk & W. R. Co. L.R.A.1915E, 145, 84 S. E. 569, — W. Va. —.

Breach of contract of sale.

5. One who has breached an executory

contract of purchase cannot have title forced upon him in the face of his persistent refusal to accept title or the goods purchased, and therefore the purchase price cannot be recovered of him as the measure of damages for such breach. *Hart-Parr Co. v. Finley*, L.R.A.1915E, 851, 153 N. W. 137, — N. D. —.

6. Freight charges incurred by a vendor in an attempt to deliver the property at the time provided by his contract, to the purchaser thereof, but after the purchaser has given an unconditional notice of cancellation, which is not acquiesced in by the vendor, cannot be recovered of the purchaser, who stands upon his repudiation of the contract and refuses to receive the property. *Hart-Parr Co. v. Finley*, L.R.A.1915E, 851, 153 N. W. 137, — N. D. —.

7. The purchase price of machinery cannot, independently of the passing of title, be recovered of a purchaser who has breached his contract while wholly executory, as the measure of damages for such breach, where there is no basis in the pleadings for such a claim, and where the contract negatives such a claim, and shows on its face that it is a contract for the purchase and sale of personal property with payment by notes stipulated to be made as a condition concurrent with delivery of such property, with the title the consideration for the notes. *Hart-Parr Co. v. Finley*, L.R.A.1915E, 851, 153 N. W. 137, — N. D. —.

Liquidated damages.

Presumption and burden of proof as, see Evidence, 4.

8. When damages are to be ascertained for the breach of a single stipulation contained in an agreement, and they are uncertain in amount and not readily susceptible of proof, then if the parties have agreed upon a sum as the measure of compensation for the breach, and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages; but where the agreement contains disconnected stipulations of various degrees of importance, the sum named therein to be paid in case of a failure of performance will be considered as a penalty, unless the agreement specifies the particular stipulation or stipulations to which the liquidated damages are to be confined. *Summit v. Morris County Traction Co.* (N. J. Err. & App.) L.R.A.1915E, 385, 88 Atl. 1048, 85 N. J. L. 193. (Annotated)

9. The payment called for by a bond given by a traction company to a city, in accordance with a provision of the ordinance granting it a franchise, for the faithful performance of the conditions specified in the ordinance, which were many in number and of varying importance, most of them carrying with them a specific penalty for violations thereof by the company, is by way of penalty, and not as liquidated damages; so that, in the absence of proof of special damage sustained by the city, only nominal damages may be recovered in an action thereon. *Summit v. Morris County* L.R.A.1915E.

Traction Co. L.R.A.1915E, 385, 88 Atl. 1048, 85 N. J. L. 193.

10. A provision as liquidated damages in case the vendor of a mill re-entered the business within five years after selling it, of a sum equal to one half the purchase price of the mill, which included merely the value of the property, with no separate allowance for good will, will not be enforced as liquidated damages where the breach occurs within a few months of the expiration of the five-year period. *Mount Airy Milling & Grain Co. v. Runkles*, L.R.A.1915E, 373, 84 Atl. 533, 118 Md. 371.

(Annotated)

Expulsion of, or failure in duty to, passenger.

See also *infra*, 18.

11. A verdict of \$500 compensatory and \$1,000 exemplary damages is not excessive in an action by a passenger against a carrier for being ejected from a car with considerable force and violence, and being placed in an unsanitary village lockup, where he was forced to remain over night, and then released without explanation or any charge being filed against him. *Turk v. Norfolk & W. R. Co.* L.R.A.1915E, 145, 84 S. E. 569, — W. Va. —.

12. Five hundred dollars is not excessive to award to a railroad passenger not given to drinking, for arrest, and removal from the car, and detention for some minutes, on the charge of drunkenness, which charge was without foundation in fact. *St. Louis, I. M. & S. R. Co. v. Tukey*, L.R.A.1915E, 320, 175 S. W. 403, — Ark. —.

13. Two hundred dollars is not an excessive allowance as compensatory damages to a passenger who is assaulted and beaten by a train porter until he bleeds profusely, and then frightened by the conductor's entering the car with a drawn pistol, so that he jumps from the rapidly moving train and cuts a long gash in his head. *St. Louis, I. M. & S. R. Co. v. Jackson*, L.R.A.1915E, 668, 177 S. W. 33, — Ark. —.

Torts generally.

As to preventing unnecessary amount, see *supra*, 1.

14. For a breach of an obligation not arising from contract, except when otherwise provided by the Code of North Dakota, the measure of damages is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. *Wilson v. Northern P. R. Co.* L.R.A.1915E, 891, 153 N. W. 429, 30 N. D. 456.

Personal injuries; death.

Evidence as to, see Evidence, 23, 24.

Instructions as to, see Trial, 10.

15. Five hundred dollars is not excessive as damages for a wound made by a pistol bullet in one's shoulder which requires treatment from two different doctors, and prevents the injured person from following his occupation for more than a month. *St. Louis, I. M. & S. R. Co. v. Jackson*, L.R.A.1915E, 668, 177 S. W. 33, — Ark. —.

Eminent domain cases.

16. The damages for taking an easement

for a water conduit over private property are the diminution of the fair market value of the property arising from the taking, and in case the value has been enhanced by the wrongful construction of the conduit across the property, that fact may be considered so far as it enhances the fair market value of the property; but no consideration can be given to possible necessities of the municipality to take the particular property. *Perley v. Cambridge*, L.R.A.1915E, 432, 108 N. E. 494, 220 Mass. 507.

17. The value of a conduit placed by a municipal corporation upon private property without right must be taken into consideration in assessing the damages for a right of way which it subsequently seeks to condemn across the property. *Perley v. Cambridge*, L.R.A.1915E, 432, 108 N. E. 494, 220 Mass. 507.

Mental anguish.

18. In estimating the damages of a passenger who has been ejected from the carrier's car with considerable force and violence, and placed in an unsanitary lock-up by an officer secured by the carrier, the bodily and mental pain and anguish resulting from the carrier's act, and the humiliation put upon the passenger, may be taken into consideration in estimating the damages. *Turk v. Norfolk & W. R. Co.* L.R.A.1915E, 145, 84 S. E. 569, — W. Va. —.

Mitigation; reduction.

19. The provision of N. D. Comp. Laws 1913, § 6721, that, even though the wrongful conversion of mortgaged property by the mortgagee will extinguish the lien of the mortgage, such mortgagee may, if an action is brought for the conversion of the property, prove the amount of the debt secured by the mortgage in mitigation of damages, does not apply to actions in claim and delivery. *Steidl v. Aitken*, L.R.A.1915E, 192, 152 N. W. 276, 30 N. D. 281.

DANGEROUS AGENCY.

Negligence as to, generally, see Negligence, 2.

DEATH.

Abatement of action by death, see Abatement and Revival, 1, 2.

Error in admission of evidence in action for, see Appeal and Error, 22.

Conflict of laws as to abatement of action for, see Conflict of Laws.

Evidence on question of damages for, see Evidence, 23, 24.

Proof of cause of, see Evidence, 32, 33.

Instructions as to damages in action for, see Trial, 10.

Effect on competency of witness, see Witnesses, 2.

Right of action for causing.

Abatement of action for, see Abatement and Revival, 3.

Sufficiency of statute requiring notice before bringing action for death, see Statutes, 1.

L.R.A.1915E.

Repeal of statute forbidding action to be brought by widow or next of kin, see Statutes, 4.

1. A cause of action growing out of injuries to the person and one based on death by negligence do not conflict, and do not merge upon the occurrence of the death, and the prosecution or satisfaction of one is not a bar to the other. *Rowe v. Richards*, L.R.A.1915E, 1069, 142 N. W. 664, 32 S. D. 66.

2. The right of action which is given by Okla. Comp. Laws, §§ 5945, 5946, to the personal representative of one whose death has been caused by the wrongful act or omission of another, for the benefit of certain beneficiaries therein named, is a new cause of action, separate and distinct from the right of action of a person injured through the wrongful act of another, death not being instantaneous, to recover damages sustained thereby, which, under Okla. Comp. Laws, §§ 5943, 5944, does not abate with the death of the person thus wrongfully injured; and the latter action may be prosecuted to final judgment notwithstanding a recovery in the former. *St. Louis & S. F. R. Co. v. Goode*, L.R.A.1915E, 1141, 142 Pac. 1185, 42 Okla. 784. (Annotated)

3. The damages recoverable in an action which has been begun by one who has been injured by the wrongful act of another, and which has been revived in the name of his administrator after his death, are only such as were sustained by the injured person in his lifetime (such as accrued in the period between the injury and his death), and when recovered are assets of his estate, and are not for the benefit of the widow and next of kin except as they may take as heirs upon the final distribution of the estate. *St. Louis & S. F. R. Co. v. Goode*, L.R.A.1915E, 1141, 142 Pac. 1185, 42 Okla. 784.

Defenses.

Effect of bar of action by person injured on administrator's right to maintain action for his death, see Limitation of Actions, 1, 2.

Negation of defense in action for death, see Pleading, 5.

4. A mother cannot hold a railroad company liable for negligently killing her minor child where the negligence of the father proximately contributed to the accident, although the father was also killed in the same accident. *Darbrinsky v. Pennsylvania Co.* L.R.A.1915E, 781, 94 Atl. 269, 248 Pa. 503.

5. That a woman's marriage takes place after her husband has received a mortal injury through another's negligence does not prevent her recovering substantial damages for his death as executrix of his estate, where the statute permits the personal representative of a decedent who has left a wife surviving, to recover damages for the wrongful act by which the death was caused, against the one who would have been liable to an action in favor of decedent.

had death not ensued. *Radley v. Le Ray Paper Co.* L.R.A.1915E, 1199, 108 N. E. 86, 214 N. Y. 32. (Annotated)

6. A contract by one to release another from liability for injuries which the latter may negligently inflict upon him prevents an action for his death through such negligent injuries under a statute providing that whenever the death of a person shall be caused by wrongful act and the act is such as would, if death had not resulted, have entitled the injured person to maintain an action therefor, then the negligent person shall be liable to an action, to be brought by the personal representative of the deceased person, and the recovery distributed as intestate property. *Mehegan v. Boyne City, G. & A. R. Co.* L.R.A.1915E, 1170, 141 N. W. 905, 178 Mich. 694. (Annotated)

7. A release by a person injured by another's negligence, of all and every claim for damages which he may or could possibly have for or on account of his injuries, precludes an action for his death from such injuries, under a statute rendering one who would have been liable for damages for personal injuries if death had not ensued liable to an action for damages notwithstanding the death of the person injured. *State use of Melitch v. United R. & E. Co.* L.R.A.1915E, 1163, 88 Atl. 229, 121 Md. 457. (Annotated)

8. A release by a person injured by another's negligence of all damages occasioned by the negligent act does not prevent an action after his death for the benefit of his widow and children under a statute providing that whenever the death of a person shall be caused by wrongful act such as would, if death had not ensued, have entitled the injured person to recover damages, the one who would have been liable if death had not ensued shall be liable, notwithstanding the death, in an action for the benefit of the next of kin for damages such as the jury may think proportionate to the pecuniary injury resulting to the persons for whose benefit the action is brought. *Rowe v. Richards*, L.R.A.1915E, 1075, 151 N. W. 1001, — S. D. —. (Annotated)

DEBTOR AND CREDITOR.

Insolvency of debtor, see Bankruptcy.
Joint creditors and debtors, see Joint Creditors and Debtors.
Libel in charging nonpayment of debt, see Libel and Slander, 2.

DECEDENTS.

Administration of estates of, see Executors and Administrators.

DECLARATIONS.

Evidence of, see Evidence, 13-17.
In pleading, see Pleading, 5-9.

DEEDS.

To wife, see Husband and Wife, 1.
Effect of intoxication, see Drunkenness.

A reservation by a grantor of real estate of the timber growing thereon, with L.R.A.1915E.

the right to remove it within a specified time, does not include title to the annual product of the trees after it has ripened and fallen to the ground. *Vincent v. Haycraft*, L.R.A.1915E, 307, 166 S. W. 613, 158 Ky. 845. (Annotated)

DEFENDANTS.

Parties defendant, see Parties, 2.

DEFENSES.

To action for causing death, see Death, 4-8.
To action for divorce, see Divorce and Separation, 2.
In mandamus case, see Mandamus, 6.
Negation of, see Pleading, 5.

DEFINITENESS.

Of pleading, see Pleading, 1, 13.

DEFINITIONS.

Common law, see Common Law, 1.

DELEGATION OF POWER.

Constitutionality of, see Constitutional Law, 1.

DELIRIUM TREMENS.

Commission of crime while suffering from, see Criminal Law, 1.

DEMAND.

For special meeting of board of directors, see Corporations, 5.

DEMURRER.

To evidence, see Trial, 1, 8.
In general, see Pleading, 11-15.

DENATURED ACHOHOL.

Injury to child by, see Negligence, 4.

DEPUTY.

Sheriff's liability for wrongful arrest by, see False Imprisonment, 2.

DESCENT AND DISTRIBUTION.

1. No right to inherit real estate is conferred upon an alien by article 6 of the treaty between the United States and Sweden originally negotiated April 3, 1783, and revived in article 17 of the treaty of July 4, 1827, providing that the subjects of the contracting parties may dispose of their "goods and effects" by testament or otherwise, and that their heirs shall receive the succession even *ab intestato* without having to take out letters of naturalization, since this provision does not refer to or embrace real estate. *Johnson v. Olson*, L.R.A. 1915E, 327, 142 Pac. 256, 92 Kan. 819. (Annotated)

2. In the absence of a governing treaty, the repeal of the constitutional provision that no distinction shall be made between citizens and aliens in the inheritance, enjoyment, and descent of property, and the adoption in its place of the provision that the rights of aliens in reference to the inheritance, enjoyment, and descent of property shall be regulated by law, without en-

acting a statute regulating the inheritance of property by aliens, revive and reinstate the common-law rule that an alien cannot inherit from a deceased citizen. *Johnson v. Olson*, L.R.A.1915E, 327, 142 Pac. 256, 92 Kan. 819.

3. At common law, the children of an alien sister of an intestate, who was living at the date of the death of the intestate, and who would have inherited from the intestate had she not been an alien, do not inherit a share of the estate of such intestate upon the death of their mother, although they are citizens of the United States. *Johnson v. Olson*, L.R.A.1915E, 327, 142 Pac. 256, 92 Kan. 819.

4. A statute establishing the relation of parent and child between a child and one adopting it, and entitling the child to inherit from the parent, does not give the adopting parent a right to inherit from the child in preference to its natural parent. *Edwards v. Yearby*, L.R.A.1915E, 462, 85 S. E. 19, 168 N. C. 663.

DESCRIPTION.

Of property devised, mistake in, see Evidence, 9.

Of offense in indictment, see Indictment, etc.

DESERTION.

As ground of divorce, see Divorce and Separation.

DE SON TORT.

Executor de son tort, see Executors and Administrators.

DESTINATION.

Leaving passenger at, see Carriers, 9.

DETINUE.

See Replevin.

DILIGENCE.

Evidence of, see Evidence, 8.

DISAFFIRMANCE.

Of infant's contract, see Infants, 3.

DISCHARGE.

Of trust, see Trusts, 4.

DISCONTINUANCE.

Of highway, see Highways, 6.

DISCOVERY AND INSPECTION.

1. In an action for damages caused by injuries to the person, the trial courts have power to order an expert examination of the person of the party injured, when the circumstances of the trial make it necessary to do so, and no substantial harm can result therefrom. *State ex rel. Parmenter v. Troup*, L.R.A.1915E, 936, 152 N. W. 748, — Neb. —. (Annotated)

2. An expert examination of the person in an action for damages caused by injuries to the person will not be ordered unless it thoroughly appears that a condition exists that can be definitely determined by such L.R.A.1915E.

examination, and cannot be satisfactorily determined without. *State ex rel. Parmenter v. Troup*, L.R.A.1915E, 936, 152 N. W. 748, — Neb. —.

DISCRETION.

Review of, on appeal, see Appeal and Error, 10, 11.

DISCRIMINATION.

Unconstitutionality of, see Constitutional Law, 2-8.

DISEASE.

Effect of existence of, on right to recover on accident insurance policy, see Insurance, 8.

DISQUALIFICATION.

Of judge, see Judges.

DISTRICT AND PROSECUTING ATTORNEYS.

A member of the bar privately employed by citizens interested in the suppression of crime may, with the consent of the state attorney and the court, be permitted to participate in the prosecution of a criminal cause in the circuit courts of the state, as assistant to the state attorney. *Robinson v. State*, L.R.A.1915E, 1215, 68 So. 649, — Fla. —.

DIVORCE AND SEPARATION.

Effect of divorce to terminate trust created by will, see Trusts, 4.

Effect of, on competency of husband or wife as witness, see Witnesses, 1.

Refusal to proceed to trial while husband fails to comply with order to pay temporary alimony, see Contempt; Mandamus, 5.

Estoppel to maintain independent suit for alimony, see Estoppel, 2.

Effect of foreign judgment to bar independent suit for alimony, see Judgment, 6.

1. A wife who leaves the home of her husband's parents, to which he has taken her to live, because she cannot live happily there, is not, where there is no necessity for her living in that place because of the needs of either the parents or the husband, guilty of desertion which will entitle the husband to a divorce. *Marshak v. Marshak*, L.R.A.1915E, 161, 170 S. W. 567, — Ark. —. (Annotated)

2. A man guilty of adultery is not entitled to a divorce from his wife for desertion although the statutory period of desertion had elapsed before his act was committed, and the abandonment was the inciting cause of his act. *Green v. Green*, L.R.A.1915E, 972, 93 Atl. 400, 125 Md. 141. (Annotated)

DOGS.

Liability for killing of, or injury to, see Animals.

DRAINS AND SEWERS.

Right of one granting easement for construction of water conduit to construct sewer above it, see Easements, 2.

DRUNKENNESS.

Negligence in riding in automobile with knowledge that chauffeur is drunk, see Automobiles, 3.

As affecting criminal responsibility, see Criminal Law, 1-4.

A deed executed by a person so destitute of reason as not to know the nature or consequences of his act, though his incompetency be produced by intoxication, is voidable and may be avoided by himself, though the intoxication was voluntary, and not produced by the circumvention of the other party. *Coody v. Coody*, L.R.A.1915E, 465, 136 Pac. 754, 39 Okla. 719.

DUE PROCESS OF LAW.

See Constitutional Law, 9-15.

DUES.

Of member of benefit association, see Insurance, 6.

DUPLICITY.

In pleading, see Pleading, 4, 15.

DUST.

Right to recover for, in condemnation proceedings, see Eminent Domain, 5.

EASEMENTS.

Creation of, by deed to lot in public cemetery, see Cemeteries, 1.

1. No easement is created by constructing an irrigation ditch under parol license across land of the licensor where the licensee was given a permanent right of way until the reclamation service should provide other means for conducting water to the land of the licensee. *Davis v. Tway*, L.R.A.1915E, 604, 147 Pac. 750, — Ariz. —.

2. The acquisition by a municipal corporation of an easement in a way for the construction of a water conduit to be composed of the most durable material, many feet below the surface, does not deprive the fee owner of the right to construct a sewer above it. *Perley v. Cambridge*, L.R.A.1915E, 432, 108 N. E. 494, 220 Mass. 507.

EJECTION.

Of passenger, see Carriers, 8.

ELECTION.

Between legacy and dower, see Will, 5, 6.

ELECTRICITY.

Liability of corporation organized to generate, for injury to lower riparian owner by increasing flow of stream, see Water, 1.

A municipal corporation is liable for the death of a telephone lineman because of L.R.A.1915E.

the negligent maintenance by its employees of a heavily charged wire carrying the current of a plant operated by the municipality to light its streets and public buildings, which charged a guy wire of the telephone company with a deadly current, since, in performing such service, it is engaged in a private enterprise. *Saulman v. Nashville*, L.R.A.1915E, 316, 175 S. W. 532, 131 Tenn. 427. (Annotated)

ELEVATORS.

Sufficiency of proof of negligence, see Evidence, 36.

Elevator shaft as dangerous attraction to children, see Negligence, 6.

Liability of agent for negligence as to elevator shaft, see Principal and Agent, 2.

Error in instruction as to contributory negligence, see Appeal and Error, 25.

Allegations of freedom from contributory negligence in action for injury, see Pleading, 6, 7.

Contributory negligence as question for jury, see Trial, 6.

1. It is not negligence *per se* to operate an elevator without a call bell in an unfinished building not open to the public, but only to employees and licensees of the contractor. *Wright v. Selden-Breck Constr. Co.* L.R.A.1915E, 740, 151 N. W. 928, 97 Neb. 840.

2. One operating a passenger elevator in an apartment house is not an insurer of the safety of passengers. *Tippecanoe Loan & T. Co. v. Jester*, L.R.A.1915E, 721, 101 N. E. 915, 180 Ind. 357. (Annotated)

3. Liability is not confined to shafts sunk after the passage of a statute imposing a penalty upon everyone who sinks a shaft and fails to cover or fence it, by a provision that the owner of any property shall be deemed to be within the provisions of the statute "if he permits any such shaft" to remain unprotected for more than ten days. *Conway v. Monidah Trust*, L.R.A.1915E, 500, 132 Pac. 26, 47 Mont. 269.

4. One who desires to call an elevator in an unfinished building should act with care and caution, since an elevator shaft is a place of danger, and if he carelessly thrusts his head through an opening in the door into the shaft, and on account of such negligence he suffers injury, he is not entitled to damages. *Wright v. Selden-Breck Constr. Co.* L.R.A.1915E, 740, 151 N. W. 926, 97 Neb. 840.

EMBEZZLEMENT.

Validity of agreement to recompense one whose property has been embezzled, see Compounding Felony.

EMERGENCY.

Injury to passenger by sudden stopping of train in emergency, see Carriers, 6.

EMINENT DOMAIN.

For what purpose.

1. The acquisition of natural oyster beds for purposes of public fishery is a public use which will support an exercise of the right of eminent domain, although the exact nature of the use is not defined, and under existing laws the use of beds within the limits of any county is confined to the inhabitants of that county. *Cox v. Revelle*, L.R.A.1915E, 443, 94 Atl. 203, 125 Md. 579. What constitutes a taking of, or injury to, property.

2. The injury to property abutting on a duly authorized railroad track, by smoke and cinders due to the non-negligent operation of the road, is not a taking for which compensation must be made. *Roman Catholic Church of St. Anthony v. Pennsylvania R. Co.* L.R.A.1915E, 623, 207 Fed. 897, 125 C. C. A. 629.

Necessity of making compensation.

Amount of recovery, see Damages, 16, 17.

3. Section 3438, Neb. Rev. Stat. 1913, which requires the owner or those in control of an irrigation ditch or canal, to construct and maintain a bridge across the same, for the free and convenient use of the owner of lands lying on both sides of such ditch or canal, is not void as authorizing the taking of the property of the ditch company without compensation, since the burden so imposed upon ditch companies constitutes a part of the consideration for the valuable right of eminent domain given to such companies by other provisions of the statute. *State ex rel. O'Shea v. Farmers' Irrig. Dist.* L.R.A.1915E, 687, 152 N. W. 372, — Neb. — (Annotated)

Consequential injuries.

4. The consequential, incidental, and unavoidable annoyance or injury resulting to occupants of land adjacent to a duly authorized railroad, by its non-negligent and careful operation, does not constitute an actionable nuisance. *Roman Catholic Church of St. Anthony v. Pennsylvania R. Co.* L.R.A.1915E, 623, 207 Fed. 897, 125 C. C. A. 629.

5. Injury to neighboring property by the ordinary operation of a railroad without negligence, caused by jar and the casting thereon of smoke, soot, dust, and sparks, is not within the operation of a constitutional provision of compensation for property damaged for public use, since it is *damnum absque injuria*. *Taylor v. Chicago, M. & St. P. R. Co.* L.R.A.1915E, 634, 148 Pac. 887, — Wash. —

EMPLOYEES.

Rights, duties and liabilities of, generally, see Master and Servant.

ENGINE.

Injury to child invited by engineer to ride on engine, see Master and Servant, 8, 9; Negligence, 5, 11.

ENLISTMENT.

In state militia, see Militia. L.R.A.1915E.

EPILEPSY.

Assumption by epileptic servant of risk of seizure, see Master and Servant, 5.

EQUAL PROTECTION AND PRIVILEGES.

See Constitutional Law.

EQUITABLE ESTOPPEL.

See Estoppel.

EQUITY.

Subrogation in, see Subrogation. See also Injunction.

Equity has jurisdiction to prevent a carrier from excluding from its cars a person who has occasion to use them in his daily travel between his home and place of business, to prevent a multiplicity of suits. *Hogan v. Nashville Interurban R. Co.* L.R.A.1915E, 788, 174 S. W. 1118, 131 Tenn. 244.

ESTOPPEL.

1. A tenant who, although in the actual possession and occupancy of land, stands by and participates in a sale of the land by the holder of the legal title, and fails to give the purchaser notice of rights which are not disclosed by the record, or are not apparent from an inspection of the premises, is estopped by his silence from subsequently insisting upon the right to remove fixtures placed by him upon the land under an agreement for removal, where such fixtures are in nature and character apparently permanent improvements and such as ordinarily may be found attached to and a part of real property. *Pabst v. Ferch*, L.R.A.1915E, 822, 147 N. W. 714, 126 Minn. 58.

2. Acceptance by a woman of the benefits of a decree granting a divorce and awarding alimony out of the property of her husband within the jurisdiction of the court does not estop her from maintaining in another state an independent suit to recover alimony out of the real estate of her former husband situated in the latter state which the court granting the divorce did not take into account in fixing the amount of alimony. *Bodie v. Bates*, L.R.A.1915E, 421, 146 N. W. 1002, 95 Neb. 757.

EVIDENCE.

Sufficiency of objections and exceptions to, see Appeal and Error, 5, 6.

First raising objection as to, on appeal, see Appeal and Error, 13.

Prejudicial error as to, see Appeal and Error, 22, 23.

Seizing property of one person for use as evidence against another, see Injunction, 4; Search and Seizure.

Conformity of judgment to proof, see Judgment, 2.

Presumptions and burden of proof.

1. A child of a man's first marriage must, to defeat the right of children of a

*second marriage duly solemnized and followed by cohabitation for many years, to share in his estate, prove that the first marriage had not been dissolved by death or divorce when the second was contracted. *Shaeffer v. Richardson*, L.R.A.1915E, 186, 93 Atl. 391, 125 Md. 88. (Annotated)

2. Neither active nor constructive fraud will be presumed from the fact alone of the relationship of the parties in a transaction by which a husband conveys, without valuable consideration, land to his wife. *Clester v. Clester*, L.R.A.1915E, 648, 135 Pac. 996, 90 Kan. 638.

3. The rule of *res ipsa loquitur* may be applied in an action against a gas company where the evidence discloses that gas escaped in destructive quantities from a break in the service pipe installed by the gas company, upon the consumer's premises at his cost, and further shows that there had been no work or change upon such premises which could have affected the pipe, and no interference therewith. *Manning v. St. Paul Gaslight Co.* L.R.A.1915E, 1022, 151 N. W. 423, 129 Minn. 55.

4. That a provision for liquidated damages in case the vendor of a mill re-engaged in business was inserted in the contract, which made no provision for sale of good will, after it had been prepared for signature, places upon the vendee the burden of showing that it was intelligently inserted, and with the deliberate purpose of fixing a measure of damages in case the vendor re-entered the business. *Mount Airy Milling & Grain Co. v. Runkles*, L.R.A.1915E, 373, 84 Atl. 533, 118 Md. 371.

5. A conveyance of real estate by a husband to the wife without any valuable consideration is presumed to be a gift and in the absence of evidence of a contrary intention the presumption is conclusive. *Clester v. Clester*, L.R.A.1915E, 648, 135 Pac. 996, 90 Kan. 638.

6. The burden of proving that the best interest of a child will be subserved by giving it into the care of the parent seeking to recover its custody, is not upon the parent, but the burden of proving the contrary is upon the party opposing the restoration of the child to the custody of its parent. *Focks v. Munger*, L.R.A.1915E, 1019, 149 Pac. 300. — N. M. —

7. To entitle the lessor under a lease for the production of oil and gas, containing the usual terms and conditions, to damages for unreasonable or arbitrary evasion of the implied covenant of the lease, for diligent prosecution of operations, either mineral being found in paying quantities on the premises, the lessor assumes the burden of showing by clear and convincing proof that the lessee, having due regard for the advantage and profit of himself and lessor, has not exercised ordinary diligence in conducting such operations. *Grass v. Big Creek Development Co.* L.R.A.1915E, 1057, 84 S. E. 750, — W. Va. —

Demonstrative evidence.

8. In a prosecution for the larceny of a cow by killing the cow and carrying away L.R.A.1915E

the hide, where a witness testified fully as to the physical signs, tracks, etc., around and about the scene of the crime, it is not improper to permit such signs, tracks, etc., so found, to be illustrated by pantomime of the conclusions carried to the mind by such silent evidence surrounding the scene of the crime. *Flowers v. State*, L.R.A.1915E, 848, 68 So. 754, — Fla. —

Parol and extrinsic evidence concerning writings.

9. A devise, by the owner of only the south half of a quarter section of land, of the northwest quarter of such quarter section; may be shown by parol to have meant the southwest quarter, where otherwise the southwest quarter will be intestate property, and no provision will be made for the two children to whom the devise is made. *Re Boeck*, L.R.A.1915E, 1008, 152 N. W. 155, 160 Wis. 577. (Annotated)

10. A promissory note, the body of which is in the usual, simple form, and signed, "F. U. S. Co., By W. M. D., Direct., J. A. Z., Direct., R. M., Direct., J. W. Mc., Direct., H. C. C., Direct., D. E. A., Pres.,"—the first name being that of a corporation, is not necessarily the independent obligation of the corporation, but it is ambiguous in the sense that it is not error to admit parol evidence to show that the intention of the parties was to obligate themselves for its payment. *Denman v. Brennehan*, L.R.A.1915E, 1047, 149 Pac. 1105, — Okla. —

Opinions and conclusions.

Weight of opinion evidence, see *infra*, 31.

11. One who has dealt for two or three years in automobiles of a particular kind, and has made inquiries as to their price, new and secondhand, may be permitted to testify as to the value of such a car injured by a collision. *Coffin v. Laskau*, L.R.A.1915E, 959, 94 Atl. 370, 89 Conn. 325.

12. In a prosecution for the larceny of a cow by killing the cow, stripping and carrying away the hide, where a witness describes fully the visible signs, tracks, etc., around and about the scene of a crime, it is not error to permit him to convert into living words the story told by the silent evidences deduced from such signs, tracks, etc. *Flowers v. State*, L.R.A.1915E, 848, 68 So. 754, — Fla. —

Hearsay; declarations; *res gestæ*.

Weight of exclamation as question for jury, see Trial. 2.

13. The doctrine of *res gestæ* applies equally to participants, bystanders, and persons incompetent to be witnesses. *State v. Lasecki*, L.R.A.1915E, 202, 106 N. E. 660, — Ohio St. —

14. The doctrine of *res gestæ*, as applied to exclamations, should have its limits determined not by the strict meaning of the word "contemporaneous," but rather by the causal, logical, or psychological relation of such exclamations to the primary facts in controversy. *State v. Lasecki*, L.R.A.1915E, 202, 106 N. E. 660, — Ohio St. —

15. It is no error to receive in evidence as a part of the *res gestæ* in an action for assault by one striking the horses hitched to a surrey in which plaintiff was riding, causing the team to collide with a stump, throwing the plaintiff, his wife, and three children out of the vehicle, a statement made by a daughter of the plaintiff, who was not injured, but who jumped out of the surrey, while the defendant was still shouting, gesticulating, and flourishing his whip and looking toward them, and while she was frightened from the occurrence, that "Schreyer. (the defendant) struck our horses," where other testimony showed that defendant struck one of the plaintiff's horses with a whip. *Lambrecht v. Schreyer*, L.R.A. 1915E, 812, 152 N. W. 645, 129 Minn. 271.

16. The exclamation of a boy four years of age, that "the bums killed pa with a broomstick," which was made from ten to thirty seconds after a fatal assault upon his father made in the boy's presence, is competent evidence to go to the jury as explanatory and illustrative of the manner and means by which the father was assaulted, since the utterance of the boy under such circumstances, made at the earliest opportunity to make an outcry, in the presence and hearing of others, was the spontaneous and impulsive language of the situation, free from any subterfuge, artifice, or motive to fabricate. *State v. Lasecki*, L.R.A. 1915E, 202, 106 N. E. 660, — Ohio St. —. (Annotated)

17. In a civil action for assault it is competent to prove threats of violence made by defendant against plaintiff two years and four months before the assault. *Lambrecht v. Schreyer*, L.R.A. 1915E, 812, 152 N. W. 645, 129 Minn. 271.

Relevancy and materiality.

18. Upon the question of the liability of an automobile manufacturer for injury to a purchaser through collapse of a wheel, evidence is admissible as to the practice of manufacturers of such vehicles, and of the trade, with respect to the examination of wheels to be used on them. *Cadillac Motor Car Co. v. Johnson*, L.R.A. 1915E, 287, 221 Fed. 801.

19. Under Okla. Penal Code (§ 2313, Rev. Laws 1910), homicide is murder "when perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being," and evidence of intoxication is admissible to show an absence of the premeditated design to kill, for the purpose of determining whether the offense is murder or manslaughter, and a state of intoxication which will reduce homicide from murder to manslaughter in the first degree must be of such character and extent as to render the defendant incapable of entertaining or forming a design to effect death, and this question is for the jury to determine. *Cheadle v. State*, L.R.A. 1915E, 1031, 149 Pac. 919, — Okla. Crim. Rep. —.

20. Where a woman is charged with the murder of her infant child, and the evidence tends to show that it was destroyed

immediately upon its birth, evidence of the woman's intention or desire before the birth of the child to produce an abortion is admissible as tending to show the existence of a motive for the destruction of the infant, and of a premeditated design to destroy it. *Robinson v. State*, L.R.A. 1915E, 1215, 68 So. 649, — Fla. —.

21. Evidence of a repetition of scandalous words originally spoken on an occasion of qualified privilege, made to other persons both before and after an action is commenced, is admissible for the purpose of showing malice, but not for the purpose of increasing the damages. *Beshirs v. Allen*, L.R.A. 1915E, 413, 148 Pac. 141, — Okla. —.

22. Upon the question of damages to be allowed for injury to an automobile, evidence is admissible of its value before and after the accident. *Coffin v. Laskau*, L.R.A. 1915E, 959, 94 Atl. 370, 89 Conn. 325.

23. Upon the question of financial loss for which children are to be compensated in case of the negligent killing of their mother, evidence is not admissible of the property left by her which comes into their possession, although income used by her for their benefit was derived from such property. *McLaughlin v. United Railroads*, L.R.A. 1915E, 1205, 147 Pac. 149, — Cal. —.

(Annotated)

24. In an action under the Federal employers' liability act for the benefit of the mother of decedent, who was dependent upon his earnings, evidence is not admissible as to the amount which she collected on a policy of insurance upon his life in her favor. *Brabham v. Baltimore & O. R. Co.* L.R.A. 1915E, 1201, 220 Fed. 35.

(Annotated)

25. Upon the question of the liability of the manufacturer of an automobile for injury to the purchaser through collapse of a wheel which he obtains from another manufacturer, evidence is admissible of the inquiries made and the information received by him before contracting for the wheel, what reputation the manufacturer of the wheel had, and the price and reputation of his wheels. *Cadillac Motor Car Co. v. Johnson*, L.R.A. 1915E, 287, 221 Fed. 801.

26. Evidence of the increase of the number employed to perform a particular piece of work, after one so employed was overcome by heat in the performance of his duties, is not admissible in an action to hold the employer liable for the injury so caused. *Louisville & N. R. Co. v. Williams*, L.R.A. 1915E, 613, 176 S. W. 1186, 165 Ky. 386.

27. In an action against a gas company for negligently permitting gas to escape, evidence as to the character of the soil wherein, and the depth at which, the gas pipe was laid, the absence of the usual blocking under the joint and the distance the pipe had sagged, and the condition in which the foundation of the house had been left where the pipe passed through, is admissible under proper pleading. *Manning v. St. Paul Gaslight Co.* L.R.A. 1915E, 1022, 151 N. W. 423, 129 Minn. 55.

28. In a prosecution for the larceny of a cow by killing the cow, stripping and carrying away the hide, evidence as to the finding of a living young calf within 40 or 50 yards of the dead carcass of the cow in question, some two days after she was killed, is admissible as tending to identify the dead carcass as being the mother of the waiting calf, both of whom were known to their owner as his property, and both of whom he had missed for two or three days. *Flowers v. State*, L.R.A.1915E, 848, 68 So. 754, — Fla. —.

29. In an action by the wife of a homesteader for injury suffered by her in attempting to put out a prairie fire negligently set by a railroad company on the land of her husband, there is no error in sustaining objections to questions seeking to illicit information as to the domestic affairs of the plaintiff and her husband. *Wilson v. Northern P. R. Co.* L.R.A.1915E, 901, 153 N. W. 429, 30 N. D. 456. **Weight, effect, and sufficiency.**

Review of facts on appeal, see Appeal and Error, 17-20.

Sufficiency of evidence to go to jury, see Trial, 1.

Weight of evidence as question for jury, see Trial, 2.

30. A verdict on evidence furnishing no reasonably accurate foundation for computation of damages resulting from breach of contract cannot serve as a basis for a judgment thereon. *Grass v. Big Creek Development Co.* L.R.A.1915E, 1057, 84 S. E. 750. — W. Va. —.

31. The testimony of a Missouri lawyer of fifteen years' experience, and of a Missouri abstractor of titles of twenty years' experience, neither contradicted or discredited, is sufficient basis for a judgment that the title to a tract of Missouri land is merchantable and vested in the record owner free and clear of encumbrances. *Spaeth v. Kouns*, L.R.A.1915E, 271, 148 Pac. 651, 95 Kan. 320. (Annotated)

32. A verdict against a carrier for a passenger's death is not supported by evidence that he was thrown against an obstruction by the sudden slackening of the speed of the train, received assistance, complained of pain, and sought medical and legal advice because of an alleged bruise on his side, where, after the injury, for the remainder of the day, he was upon his feet, sight-seeing, and immediately planned suit against the corporation, in connection with which he misstated facts and finally abandoned his suit, while there is evidence that his death was due to tuberculosis existing prior to the alleged injury. *Basey v. Louisiana R. & Nav. Co.* L.R.A.1915E, 964, 68 So. 824. — La. —.

33. That absence of fire escapes on a building was the cause of the death of an employee by fire may be found from evidence that a few minutes before the fire started with a truck load of hides which he was to hang up on the third floor, and that after the fire his body was found near the truck under the place where his duty L.R.A.1915E.

called him, while there was no adequate means of escape from the third floor after the fire started. *Amberg v. Kinley*, L.R.A.1915E, 519, 108 N. E. 830, 214 N. Y. 531.

34. Undue influence in securing a release by an employee of damages for injuries received in the business may be found from evidence that it was secured by the employer's claim agent when he was alone with the injured employee, and absolves the employer from all further liability when only a fraction of the lost time was paid for, without allowing anything for suffering and reduced capacity. *Causey v. Seaboard A. L. R. Co.* L.R.A.1915E, 1185, 81 S. E. 917, 166 N. C. 5.

35. Undue influence to make a will in favor of cousins with whom testator has made his home practically all his life, to the exclusion of half brothers and their descendants, is not shown by the fact that he is shown to have deferred on occasions to the wishes of one of the cousins, in that he gave her a horse, to the inconvenience of his business, gave her some gold money when she tried to secure some by exchanging with a stranger, after telling her she did not need it, took her advice rather than the physician's with respects to screens for his sick room, and conveyed land to her brother for a home. *Reynolds v. Sevier*, L.R.A.1915E, 593, 176 S. W. 961, 165 Ky. 158.

36. A storekeeper may be found negligent and held liable for the consequent injuries where he employs a boy below the statutory age to run his elevator, who, while a passenger is alighting, leaves the operating lever unguarded and in the presence of another boy, who has made attempts to get control of the lever, and who, while it is so unguarded, seizes it and starts the car with a jerk to the injury of the passenger. *Jones v. Co-operative Asso.* L.R.A.1915E, 745, 84 Atl. 985, 109 Me. 448.

37. In an action against a gas company for negligently permitting the escape of gas, evidence that the character of the soil around the consumer's home was such that it was liable to settle, and yet the usual precaution to block the service pipe at the coupling or joint was not taken; that the soil was also of such character that the action of the frost was likely to heave or unsettle it to a great extent, and yet the pipe was placed at a depth of less than 3 feet, and that no attempt was made in the original installation to plaster or make tight the foundation of the house where the pipe passed through, thus affording a ready excess to the basement for the gas escaping from a break in the service pipe outside the wall, justifies a verdict for the plaintiff. *Manning v. St. Paul Gaslight Co.* L.R.A.1915E, 1022, 151 N. W. 423, 129 Minn. 55.

38. A marriage, like any other civil contract, may be proved by parol, and it is not necessary to produce the marriage certificate, or explain its absence, for the existence of the marriage may be proved by eyewitnesses to the performance of the mar-

riage, or by the testimony of one of the contractants. *Watson v. Lawrence, L.R.A. 1915E, 121, 63 So. 873, 134 La. 194.*

(Annotated)

39. Breach by a municipality of a contract for street sprinkling is not shown by evidence that the one having the contract was told by the marshal that they were going to take off the wagon; that he was ordered off; without anything to show action by the municipal council. *Tempe v. Corbell, L.R.A.1915E, 581, 147 Pac. 745, — Ariz. —*

40. Inability of an attesting witness to identify the will and his signature thereto, because of failure of sight, does not defeat probate, if he testifies to the proper execution and attestation of a will, and the other attesting witnesses, besides giving similar testimony, identify the will offered as the one attested by such witness. *Reynolds v. Sevier, L.R.A.1915E, 593, 176 S. W. 961, 165 Ky. 158.*

(Annotated)

41. The location of the boundaries of a city at the time of an accident is not established by testimony that witness knew them at the time of the trial, receiving his information from an ordinance which did not, and could not, fix the boundaries without further proceedings. *Conway v. Monidah Trust, L.R.A.1915E, 500, 132 Pac. 26, 47 Mont. 269.*

42. Conviction for incest may be had on the uncorroborated testimony of the prosecutrix if she was too young to have consented to the act. *State v. Stalker, L.R.A.1915E, 1222, 151 N. W. 527, — Iowa, —*

(Annotated)

Admissibility under pleadings.

43. The defendant in an action for slander may, notwithstanding neither justification nor mitigating circumstances have been pleaded, prove the truth of the utterance complained of, or may prove conduct of the plaintiff justifying the utterance of the words, where the defense consists of a general denial and a plea that the matter was privileged. *Conrad v. Roberts, L.R.A.1915E, 131, 147 Pac. 795, 95 Kan. 180.*

44. In an action for slander where the plaintiff, for the purpose of showing malice, proves the utterance of words not alleged in the petition, the defendant may prove the truth of these matters under a general denial, or may offer evidence showing conduct of the plaintiff which would excuse or justify the language. *Conrad v. Roberts, L.R.A.1915E, 131, 147 Pac. 795, 95 Kan. 180.*

EXECUTION.

Right of one seized on body execution to bail pending appeal, see Bail and Recognizance; Habeas Corpus, 1.

Sales under, see Judicial Sale.

EXECUTORS AND ADMINISTRATORS.

Survivability of action, see Abatement and Revival, 2, 3.

L.R.A.1915E.

Liability of bank for money paid out, on checks of persons assuming without authority to act as executors, see Banks.

Liability of administrator requesting bank to hold deposit against claimant to reimburse bank for interest which it is compelled to pay to claimant on the legal establishment of his claim, see Contribution and Indemnity.

Right of action for death as assets of estate, see Death, 3.

One appointed administrator of decedent's estate after forging an order upon decedent's bank account in his own favor cannot ratify the order so as to absolve the bank from liability to an administrator *de bonis non* on the theory that he was acting as executor *de son tort*, if the making of the order was the only act he did as representative of the estate before his appointment. *Walker v. Portland Sav. Bank, L.R.A.1915E, 840, 93 Atl. 1025, — Me. —*

EXECUTORY CONTRACT.

Anticipatory breach of, see Contracts, 5.

Damages for breach of, see Damages, 5-7.

EXEMPLARY DAMAGES.

See Damages, 2-4.

EXEMPTIONS.

Homestead exemption, see Homestead.

EXPERT TESTIMONY.

Weight of, see Evidence, 31.

EXPLOSIONS AND EXPLOSIVES.

Of blast, see Blasting.

As nuisance, see Nuisances, 1.

Proximate cause of injury, see Proximate Cause, 1.

1. The owner of so inherently dangerous a commodity as solidified glycerin is required to exert the highest degree of care to keep it in close custody to prevent its doing mischief, and that duty never ceases; and such owner is liable for all the natural and probable consequences which flow from any breach of that duty. *Clark v. Dupont de Nemours Powder Co. L.R.A.1915E, 479, 146 Pac. 320, 94 Kan. 268.*

2. It is gross negligence for an agent of a powder company, after shooting an oil well with solidified glycerin, to leave a quart of that explosive lying near the well. *Clark v. Dupont de Nemours Powder Co. L.R.A.1915E, 479, 146 Pac. 320, 94 Kan. 268.*

EXTERNAL, VIOLENT, AND ACCIDENTAL MEANS.

Injury or death of insured by, see Insurance, 9.

EXTRADITION.

One is not a fugitive from justice subject to extradition, who, after leaving his wife with her consent and going to another state with no intention of abandoning her, forms within the latter state such intention, although he is subsequently indicted for such abandonment at his former domicil. *Ex parte Roberson*, L.R.A.1915E, 691, 149 Pac. 182, — Nev. —.

EYESIGHT.

Inability of witness to identify will because of failure of eyesight, see Evidence, 40.

FACTS.

Review of, on appeal, see Appeal and Error, 17-20.

FAIR.

Held by state board of agriculture, see Agricultural Societies.

FALSE IMPRISONMENT.

Liability of carrier for arrest of passenger, see Carriers, 3.

Measure of damages for arrest of passenger, see Damages, 4, 11, 12.

Sufficiency of petition in action for, see Pleading, 3.

1. One who in good faith reports to a police officer the violation of a city ordinance, and at the same time asks that the violator be arrested, but does not assume to say what steps shall be taken to that end, is not thereby rendered liable for damages because the arrest is made without the issuance of a warrant. *Lemmon v. King*, L.R.A.1915E, 882, 148 Pac. 750, 95 Kan. 524. (Annotated)

2. An arrest by a deputy sheriff under circumstances not authorized by statute, as where he has no warrant, or reason to believe that the person arrested has committed a felony, and no offense has been committed in his presence, is not in his official capacity, and therefore the sheriff is not liable for his act. *Jones v. Van Bever*, L.R.A.1915E, 172, 174 S. W. 795, 164 Ky. 80. (Annotated)

FELLOW SERVANTS.

See Master and Servant, 6, 7.

FIGHTING.

Injury received during fight as accident within meaning of insurance policy, see Insurance, 10.

FIREARMS.

Negligence in use of, see Negligence, 2.

FIRE ESCAPES.

On buildings, see Buildings.

FIRE INSURANCE.

See Insurance.
L.R.A.1915E.

FIRES.

Sufficiency of objection to evidence in action for injury by, see Appeal and Error, 6.

Reversible error in action for, see Appeal and Error, 21.

Evidence in action for personal injury received in attempt to put out fire negligently set, see Evidence, 29.

Proximate cause of personal injuries received in fighting fire, see Proximate Cause, 3.

Contributory negligence in fighting, as question for jury, see Trial, 5.

1. Where a prairie fire is negligently caused by a railway company, and the wife of a homesteader, who is left at home alone with her young daughter, uses every reasonable effort to put out such fire, and in doing so overworks and strains herself so that permanent injuries ensue, she can recover damages from such company therefor, provided that she did not unreasonably and recklessly expose herself to such injury. *Wilson v. Northern P. R. Co.* L.R.A.1915E, 991, 153 N. W. 429, 30 N. D. 456. (Annotated)

2. It is not necessary, in order that a married woman may recover damages for injuries sustained in an attempt to stop a prairie fire which threatens her home, that such woman should own the fee of the property, and the fact that she has merely a homestead interest in the same is no bar to her recovery. *Wilson v. Northern P. R. Co.* L.R.A.1915E, 991, 153 N. W. 429, 30 N. D. 456.

FISHERIES.

Constitutionality of statute as to, see Constitutional Law, 17, 18.

Exercise of right of eminent domain, acquisition of oyster beds, see Eminent Domain, 1.

Effect of judgment to bar proceeding to ascertain whether oyster bed is desirable for public use, see Judgment, 4.

FIXTURES.

Right of tenant to remove fixtures as against purchaser of property, see Vendor and Purchaser, 2, 3.

FOREIGN CORPORATIONS.

Foreign insurance company, see Insurance, 1.

FOREIGN JUDGMENT.

Against garnishee, see Garnishment.

In general, see Judgment, 6.

FORGERY.

By administrator, see Executors and Administrators.

FRANCHISE.

Stipulated damages in ordinance granting, see Damages, 9.

To use streets, see Municipal Corporations, 1.

FRAUD AND DECEIT.

Joinder of causes of action for, see Action or Suit, 1.

Presumption and burden of proof as to, see Evidence, 2.

Transfers in fraud of creditors, see Fraudulent Conveyances.

In application for insurance, see Insurance, 4.

Of mortgagee in securing possession of chattels, see Trover.

FRAUDULENT CONVEYANCES.

Constitutionality of statute as to sales in bulk, see Constitutional Law, 14.

Fixtures used in connection with a business are not within the operation of a statute forbidding a merchant to dispose of his goods, wares, and merchandise in bulk without giving notice to creditors. *Boise Asso. of Credit Men v. Ellis, L.R.A. 1915E, 917, 144 Pac. 6, 26 Idaho, 438.*

FRIGHT.

Proximate cause of injury by, see Proximate Cause, 3.

FUGITIVES.

Extradition of, see Extradition.

GARNISHMENT.

A railroad company which is garnished in one state for wages due its employee will be protected by the courts of another state against a second payment to an assignee of the wages, residing there, if, upon receiving due notice of the garnishment, he neglects to appear and protect his claim, so that judgment was rendered in favor of the original creditor and paid. *Steltzer v. Chicago, M. & St. P. R. Co. L.R.A. 1915E, 1017, 134 N.W. 573, 156 Iowa, 1.*

GAS.

Presumption as to negligence in permitting escape of gas, see Evidence, 3.

Evidence in action for negligently permitting escape of gas, see Evidence, 27.

Sufficiency of proof of negligence in permitting escape of gas, see Evidence, 37.

Instructions in action for injury through escape of gas, see Trial, 11.

As to gas in mine, generally, see Mines.

Franchise to occupy streets with gas mains, see Municipal Corporations, 1.

A company which manufactures and distributes illuminating gas, which, when allowed to escape in any considerable quantity, becomes a highly dangerous substance, must exercise a commensurate degree of care to prevent the gas from escaping up to the time it is measured and delivered, through its meter, to the consumer. *Man- L.R.A. 1915E.*

ning v. St. Paul Gaslight Co. L.R.A. 1915E, 1022, 151 N.W. 423, 129 Minn. 55.

(Annotated)

GASOLENE ENGINE.

As fixture, see Vendor and Purchaser, 2.

GIFT.

Presumption and burden of proof as to, see Evidence, 5.

Of real estate by husband to wife, see Husband and Wife, 1.

GLYCERIN.

Explosion of solidified glycerin, see Explosions and Explosives.

GUARDIAN AND WARD.

Application of doctrine *caveat emptor* to sale of ward's land under order of court, see Judicial Sale.

GUEST.

Liability of guest for negligence of chauffeur, see Automobiles, 1.

GUN.

Negligence in use of, see Negligence, 2.

HABEAS CORPUS.

1. The supreme court may issue a writ of habeas corpus to inquire into the legality of a denial of bail pending appeal from an order refusing to vacate a commitment under a body execution, where the right to such execution is disputed because of constitutional provisions, although the denial was by a court of competent jurisdiction. *State ex rel. Syverson v. Foster, L.R.A. 1915E, 340, 146 Pac. 160, — Wash. —.*

2. The question of the jurisdiction of a court-martial is open to inquiry on habeas corpus issued from a court having authority to issue that writ; and the action of such court in the premises may be reviewed by the supreme court on application for writs of certiorari and prohibition, in the exercise of the jurisdiction conferred by article 94 of the Constitution. *State ex rel. Laang v. Long, L.R.A. 1915E, 235, 66 So. 377, 136 La. 1.*

HARMLESS ERROR.

See Appeal and Error, 21-31.

HEARSAY.

Evidence of, see Evidence, 13-17.

HEAT PROSTRATION.

Assumption by servant of risk of, see Master and Servant, 3.

HEIRS.

As to descent and distribution to, see Descent and Distribution.

Validity as against heirs of husband, of gift of real estate to wife, see Husband and Wife, 1.

HIGHWAYS.

Review on appeal of finding as to, see Appeal and Error, 20.

Across railroad property, see Railroads, 2, 3.

Proof of breach by municipality of contract for street sprinkling, see Evidence, 39.

Contract by municipal officers for street sprinkling beyond term of office, see Municipal Corporations, 2.

Lien for coal sold to highway contractor, see Mechanics' Liens, 1.

Uses; what allowed in, generally.

Delegation of power as to, see Constitutional Law, 1.

Exacting percentage of receipts of corporation on extending its rights in street, see Municipal Corporations, 1.

Obstruction of crossing as proximate cause of injury, see Proximate Cause, 2.

1. The legislature may, with a view to the safety of the public, provide for the complete exclusion of automobiles from a highway on which, in its judgment, such machines should not be allowed. *Com. v. Kingsbury*, L.R.A.1915E, 264, 85 S. E. 848, 199 Mass. 542. (Annotated)

2. One injured by the blocking of a street crossing by a railroad company contrary to the provisions of a statute may recover damages therefor although no penalty is provided for violation of the statute. *Louisville & N. R. Co. v. Cooper*, L.R.A. 1915E, 336, 175 S. W. 1034, 164 Ky. 489.

3. One obstructed, in crossing a railroad track at a highway crossing, by a train standing on the crossing contrary to statute, is not bound to seek a railroad employee and request the moving of the train, to hold the railroad company liable for injuries thereby caused. *Louisville & N. R. Co. v. Cooper*, L.R.A.1915E, 336, 175 S. W. 1034, 164 Ky. 489.

Liability for injuries on.

Negligence in leaving bottle of denatured alcohol in highway where children will find it, see Negligence, 4.

Liability for injury due to negligent driving, see Negligence, 8.

Contributory negligence of person injured otherwise than by defects, see Negligence, 9, 12.

4. A city which, in bringing a street to grade, excavates such street to a depth of several feet at a point where it intersects with a well-established road which has been constantly traveled for years, although not laid out as a street, and by such excavation creates and leaves a place of danger unguarded, and without barriers or signals to warn one accustomed to travel said road and enter the street at the place of such excavation, is liable for damages sustained by such person being precipitated into such excavation and injured. *De Long v. Oklahoma City*, L.R.A.1915E, 597, 148 Pac. 701, — Okla. —. (Annotated) L.R.A.1915E.

5. A municipal corporation which grants a permit to construct a wall so near a sidewalk that, if it falls or materials or tools fall from it, persons on the walk are likely to be injured, is bound to place barriers or other contrivances to prevent injury to passersby. *Rowe v. Richards*, L.R.A.1915E, 1069, 142 N. W. 664, 32 S. D. 66.

Discontinuance; alteration.

6. Abutting property owners cannot compel the removal without compensation from a vacated street, of telephone poles which were placed in the street under municipal authority by one not made a party to the vacation proceedings. *Louisville & N. R. Co. v. Russellville Home Teleph. Co.* L.R.A.1915E, 138, 173 S. W. 1106, 163 Ky. 415.

HOMESTEAD.

Enforcement of public improvement assessment against, see Public Improvements.

Money loaned to retire purchase money notes of a homestead is not within the operation of a constitutional provision excepting purchase money from the homestead exemption. *Phillips v. Colvin*, L.R.A. 1915E, 875, 169 S. W. 316, — Ark. —. (Annotated)

HOMICIDE.

Error in refusal of instruction as to manslaughter, see Appeal and Error, 27.

Speedy trial, necessity of, see Criminal Law, 5, 6.

Effect of intoxication, see Criminal Law, 2-4.

Evidence as to acts and declarations of third persons generally, see Evidence, 16.

Evidence of intoxication of defendant, see Evidence, 19.

Evidence on question of premeditation, see Evidence, 19, 20.

Indictment for, see Indictment, etc., 2-4.

HORSES.

Striking or frightening horse as an assault, see Assault and Battery, 1, 2.

HOSPITAL.

Liability of relatives for hospital care given pauper, see Poor and Poor Laws.

HUNTING.

Injury through discharge of gun in hands of hunting companion, see Trial, 1.

HUSBAND AND WIFE.

Divorce or separation, see Divorce and Separation.

As to marriage, see Marriage.

Contributory negligence of father as defense to action by mother for death of minor child, see Death, 4.

Presumption of fraud in conveyance to wife, see Evidence, 2.

Presumption that conveyance by husband to wife was a gift, see Evidence, 5.

Trust in conveyance by husband to wife, see Trusts, 1-3.

Extradition of husband who has abandoned wife, see Extradition.

Slander by wife in conversation with husband in presence of third person, see Libel and Slander, 6, 7.

Competency of, as witness, see Witnesses, 1.

1. A husband may make a gift of his real estate to his wife, when no rights of creditors interfere, and it will be upheld as against his heirs, notwithstanding they were, at the time the conveyance was made, and continued to be, dependent upon him for subsistence and support. *Clester v. Clester*, L.R.A.1915E, 648, 135 Pac. 996, 90 Kan. 638.

2. An antenuptial agreement by a woman to live after marriage in the home of the parents of her intended husband is terminated by the marriage. *Marshak v. Marshak*, L.R.A.1915E, 161, 170 S. W. 567, — Ark. —.

ICE.

Liability of riparian owner for preventing formation of ice, see Water, 2.

IDENTITY.

Evidence as to, generally, see Evidence, 28.

ILLEGITIMATES.

Right of natural mother to custody of child, see Infants, 1, 2.

IMPAIRMENT OF OBLIGATIONS.

See Constitutional Law, 17-19.

IMPLIED TRUSTS.

See Trusts, 1-3.

IMPLIED WARRANTY.

See Sale, 2.

IMPROVEMENTS.

Estimate of value of, in condemnation proceedings, see Damages, 16, 17.

Lien for, see Mechanics' Liens.

Public improvements, see Public Improvements.

INCEST.

Necessity of corroboration of testimony of prosecutrix, see Evidence, 42.

INCOMPETENT PERSONS.

Competency to commit crime, see Criminal Law, 1-4.

Infants, see Infants, 3.

Suicide of insane person, see Insurance, 11.

Injury to insured person while insane, see Insurance, 12.

L.R.A.1915E.

INCONSISTENCY.

In pleading, see Pleading, 2.

INDEFINITENESS.

See Definiteness.

INDEMNITY.

See Contribution and Indemnity.

INDEPENDENT CONTRACTORS.

Liability of, for injuries, see Master and Servant, 10-14.

INDICTMENT, INFORMATION AND COMPLAINT.

1. Where the language of an indictment is sufficiently certain to enable an innocent person to prepare for trial, and furnishes the accused with reasonable information of what he is called upon to answer by setting forth the constituent elements of the crime charged, it cannot be maintained that the accused is not apprised of the nature and cause of the accusation against him. *Robinson v. State*, L.R.A.1915E, 1215, 68 So. 649, — Fla. —.

2. An indictment for murder in the first degree is not defective for failure to allege that the defendant administered to the deceased "a mortal wound" or "mortal injury" or "mortal sickness," where the language of the indictment sets up a plain, direct, and certain state of facts constituting the crime, from which the connection between the facts alleged as the cause of death and the death appears. *Robinson v. State*, L.R.A.1915E, 1215, 68 So. 649, — Fla. —.

3. Proof of aiding and abetting a murder will not support a conviction on an indictment charging one alone with murder, with no reference to aiding and abetting the commission of such crime. *Hollin v. Com.* L.R.A.1915E, 608, 165 S. W. 407, 158 Ky. 427. (Annotated)

4. Where the language of an indictment for murder in the first degree is clear enough to enable the jury easily to understand it, and is not so vague as to mislead the accused and embarrass her in the preparation of her defense, or expose her to substantial danger of another prosecution for the same offense, the indictment, if not otherwise defective, should not be quashed. *Robinson v. State*, L.R.A.1915E, 1215, 68 So. 649, — Fla. —.

INFANTILE PARALYSIS.

Refusal of carrier to transport person afflicted with, see Carriers, 10.

INFANTS.

Contributory negligence of father as defense to action by mother for death of minor child, see Death, 4.

Evidence of declarations of, see Evidence, 16.

Necessity of corroboration of infant prosecutrix, see Evidence, 42.

Liability of master for injury to child invited by engineer to ride on engine, see Master and Servant, 8, 9.

Negligence towards, generally, see Negligence, 4-6.

Injury to child coasting in street, see Negligence, 8.

Contributory negligence of, see Negligence, 11; Railroads, 4.

Allegation of freedom from contributory negligence in action for injury to, see Pleading, 6, 7.

Proximate cause of injury to, see Proximate Cause, 1.

Custody.

Presumption and burden of proof as to what best interests of child require, see Evidence, 6.

1. Where habeas corpus proceedings are instituted by a natural mother to recover the custody of her child from the adopted mother, the expressed desire of the child, ten years of age, to be permitted to remain with the adopted mother, should not control, or be determinative of what is to the best interest of such child. *Focks v. Munger*, L.R.A.1915E, 1019, 149 Pac. 300, — N. M. —.

2. Where, upon habeas corpus proceedings instituted by the natural mother for the custody of her child, against the foster mother, it appears that the child was stolen from the natural mother when but two or three years of age, and placed in the custody of the foster mother, who, however, was without knowledge of theft of the child, or the name or whereabouts of its mother, and such foster mother has given the child the tenderest of care and every attention, and the evidence also shows that the natural mother is a good, responsible, and worthy mother, against whose character and capacity to take care of said child no charge is made, the natural mother is entitled to the custody of the child. *Focks v. Monger*, L.R.A.1915E, 1019, 149 Pac. 300, — N. M. —.

Disaffirmance of contract.

3. In a suit in equity brought by a Cherokee Indian, immediately upon attaining his majority, to cancel certain leases and a mortgage given by him during minority on his allotted lands, a petition which charged that all of the money paid him on account thereof during his minority had been spent and squandered prior to attaining his majority sufficiently excused the failure of an offer to return the consideration received. *Coody v. Coody*, L.R.A.1915E, 465, 136 Pac. 754, 39 Okla. 719.

INFORMATION.

For criminal offense, see Indictment, etc.

INHERITANCE.

See Descent and Distribution. L.R.A.1915E.

INJUNCTION.

Injunction against nuisance, see Nuisances, 3.

Against withdrawal of funds from bank by trade union, see Pleading, 14.

1. The assignee of the lessee of an oil and gas lease which provides that the lessor shall have free gas for domestic purposes by making his own connection, and which does not limit such use to the leased premises, may be enjoined from interfering with the rights of the lessor's grantee to make connections with and obtain gas from a well on the leased premises, for use for domestic purposes on other premises. *Harbert v. Hope Natural Gas Co.* L.R.A.1915E, 570, 84 S. E. 770, — W. Va. —.

2. Injunction lies to prevent a carrier from excluding a man from transportation upon its cars as a persecution for having brought a suit against it for damages. *Hogan v. Nashville Interurban R. Co.* L.R.A.1915E, 788, 174 S. W. 1118, 131 Tenn. 244.

3. Injunction will not lie in favor of the proprietor of a dance hall against a musicians' union, to prevent the enforcement of a by-law forbidding members of the union to serve one who has broken a contract with its members, upon its termination after hearing that his discharge of an orchestra employed by him for incompetency was a breach of his contract, although the effect will be to prevent him from employing union musicians. *Rhodes Bros. Co. v. Musicians Protective Union, Local No. 198*, L.R.A.1915E, 1037, 92 Atl. 641, — R. I. —. (Annotated)

4. One whose property is seized upon his premises, on the ground that it may contain evidence to be used against another arrested for violation of a municipal ordinance, without any other authority than the warrant against the one arrested, is entitled to the remedy of injunction to restrain the officers who have thus taken the property into their possession from forcibly or otherwise effecting a threatened injury to the same, or interfering with the owner's possession. *Owens v. Way*, L.R.A.1915E, 399, 82 S. E. 132, 141 Ga. 796.

5. Injunction is a proper remedy for the owner of a lot in a public cemetery owned by a municipality, to restrain the park and tree commission which is in charge of the cemetery, and which has informed her that it would not permit her to bring into the cemetery for use upon her lot any fertilizer, irrespective of its innocuous character, nor permit her to employ a competent and skilful gardener to look after and care for her lot, but that she would have to accept service from the commission, from interfering with her employment of such a gardener and placing fertilizer and material on the lot and doing work thereon. *Nicholson v. Daffin*, L.R.A.1915E, 168, 83 S. E. 658, 142 Ga. 729.

INSOLVENCY.

As to bankruptcy, see Bankruptcy.
As to receivers, see Receivers.

INSPECTION.

See Discovery and Inspection.

INSTRUCTIONS.

In general, see Trial, 9-11.

INSURANCE.

Evidence as to insurance on life of deceased in action for death, see Appeal and Error, 22; Evidence, 24.

Companies, officers, and agents.

Discrimination in statute as to appointment and licensing of insurance agents, see Constitutional Law, 6.

1. The words "suitable person" in a statute providing that, "upon written notice by an authorized foreign insurance company, of its appointment of a suitable person to act as its agent within this state, . . . the insurance commissioner shall, if the facts warrant it, grant to such person a license," etc., relate to the right and authority of the insurance company in the first instance to appoint some person suitable to it, and the further words, "if the facts warrant it," relate to the question as to whether or not the insurance company is authorized to engage in business within the state by complying with the law, and to the question of the sufficiency of the notice to the insurance commissioner of the appointment of such agent. *Welch v. Maryland Casualty Co. L.R.A.1915E, 708, 147 Pac. 1046, — Okla. —* Construction of policy generally.

2. When writing insurance on a building situate within fire limits of a city, the insurance company is bound by the laws and ordinances of the city, and such laws and ordinances should be considered as a part of the policy. *Dinneen v. American Ins. Co. L.R.A.1915E, 618, 152 N. W. 307, — Neb. —*

3. If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. *Oklahoma Nat. L. Ins. Co. v. Norton, L.R.A.1915E, 695, 145 Pac. 1138, — Okla. —*

Warranties; representations; conditions.

4. That the holder of an accident policy who warranted that he had never made any claim, nor received any indemnity, for any accident, had received indemnity for injury to his knee, does not, as matter of law, show such a misrepresentation as will prevent recovery on the policy for his death by falling from a ship at sea. *Rathman v. New Amsterdam Casualty Co. L.R.A.1915E, 980, 152 N. W. 983, — Mich. —*

Reinstatement.

5. A member of a mutual benefit association cannot effect his reinstatement by paying dues when he is ill, although the L.R.A.1915E.

local lodge makes no objection, where the rules of the order allow reinstatement only if the applicant is in good faith, and make the payment of arrears a warranty of good health. *Hartman v. National Council, K. & L. of S. L.R.A.1915E, 152, 147 Pac. 931, — Or. —* (Annotated)

Premiums and assessments.

6. A contract by a member of a mutual benefit society, formed by his assent to its by-laws, that the local lodge to which he is attached and its officers shall be his agents in collecting and transmitting assessments and reinstating suspended members, and that the national council shall not be bound by any irregularity on the part of such lodge or officers, is valid and binding. *Hartman v. National Council, K. & L. of S. L.R.A.1915E, 152, 147 Pac. 931, — Or. —* Risks and causes of loss, injury or death.

7. The bursting of the stitches closing a wound made by an operation for appendicitis, by a fit of coughing and vomiting, requiring a second operation, in which the patient dies under the influence of the anesthetic, is not within the operation of a policy insuring against bodily injury through accidental means, resulting directly, independently, and exclusively of all other causes, in death. *Stokely v. Fidelity & Casualty Co. L.R.A.1915E, 955, 69 So. 64, — Ala. —* (Annotated)

8. No recovery can be had for the death of one falling from a ship at sea while suffering from hardened arteries, nephritis, heart trouble, and weakness affecting his mind, under a policy insuring against death by accident independent of all other causes, which provides that the insurer shall not be liable for any loss caused or contributed to by disease, since the disease rendered the insured less able to care for himself, and therefore contributed to the loss. *Rathman v. New Amsterdam Casualty Co. L.R.A.1915E, 980, 152 N. W. 983, — Mich. —*

9. Under the provision of an accident insurance policy that a certain amount shall be payable in the event of the death of the insured by bodily injury effected exclusively by external, violent, "or" accidental means, resulting in death within a given time, the insurer is liable to the beneficiary to the extent named in the particular provision of the policy, where the insured was killed by gunshot wounds inflicted by another, without regard to whether such fatal injury be deemed accidental or not, since the character of the bodily injuries covered by the policy is in the disjunctive. *Oklahoma Nat. L. Ins. Co. v. Norton, L.R.A.1915E, 695, 145 Pac. 1138, — Okla. —*

(Annotated)

10. A policy insuring against injury by accidental means does not cover the breaking of a leg in an effort by one assaulted by insured to defend himself, although insured intended to make the initial assault so effective as to prevent resistance. *Hutton v. States Acci. Ins. Co. L.R.A.1915E, 127, 108 N. E. 296, 267 Ill. 267.*

(Annotated)

11. Insurance against accidental injury which provides that insurers shall not be liable for payment of any sum whatever, if the injury is sustained by insured when insane, does not cover suicide if it is committed when the insured is so insane that he is not able to understand the nature of his act. *Interstate Business Men's Acci. Asso. v. Atkinson*, L.R.A.1915E, 656, 177 S. W. 254, 165 Ky. 532.

12. The idea of action so as to exempt the insurers from liability only in case of mental effort is not to be read into the first exception in a provision in a policy insuring against accident, that the insurer shall not be liable, if the injury be sustained when the insured is insane, not in full possession of his faculties, engaged in any act in violation of any law or ordinance, but each ground of exception stands by itself, so that the insurer is not liable for injury to the insured while insane, although he is not capable of rational mental effort. *Interstate Business Men's Acci. Asso. v. Atkinson*, L.R.A.1915E, 656, 177 S. W. 254, 165 Ky. 532. (Annotated)

Extent of injury or loss.

Constitutionality of statute as to, see Constitutional Law, 11.

13. In valuing, under a policy providing that the insurer shall not be liable beyond the actual cash value of the property, with proper deduction for depreciation, however caused, bar fixtures located where prohibition was adopted after the policy was issued, their value is not limited to their worth at such place, but must be ascertained at the nearest fair market, subject to deduction for transportation. *Prussian Nat. Ins. Co. v. Lawrence*, L.R.A.1915E, 489, 221 Fed. 931. (Annotated)

14. A provision in an insurance policy that the insurance company shall not be liable for loss beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of building, is invalid under the Nebraska valued policy law (Revised Statute 1913, § 3210). *Dinneen v. American Ins. Co.* L.R.A.1915E, 618, 152 N. W. 307, — Neb. —.

15. Where an insured building situated within the fire limits of a city is injured by fire to such an extent that its repair is not allowed under the ordinances relating to the construction and repair of frame buildings within the fire limits, the insured is entitled to recover as for a total loss under the valued policy act (Neb. Revised Statutes 1913, § 3210). *Dinneen v. American Ins. Co.* L.R.A.1915E, 618, 152 N. W. 307, — Neb. —. (Annotated)

Interest in proceeds.

16. The construction of a provision in an accident insurance policy for the payment of an increased sum in case of the death of the insured by bodily injury effected exclusively by external, violent, or accidental means is not affected by the fact that in a separate provision of the policy relating to death caused by bodily injury effected exclusively by external, violent, and

accidental means while riding in any vehicle or conveyance, the word "and" is used instead of "or," so as to require the first provision to be interpreted as though the word "and" were used. *Oklahoma Nat. L. Ins. Co. v. Norton*, L.R.A.1915E, 695, 145 Pac. 1138, — Okla. —.

Theft insurance.

17. Diminution in the value of an automobile because of theft is within the operation of a policy insuring against any loss or damage if amounting to \$25 or more on any single occasion by theft, robbery, or pilferage, although the policy also provides that in the event of loss or damage the insurer shall be liable only for the actual cost of repairing, or, if necessary, replacing the parts damaged or destroyed. *Federal Ins. Co. v. Hiter*, L.R.A.1915E, 575, 176 S. W. 210, 164 Ky. 743.

18. Liability under a policy insuring the owner of an automobile against loss or damage by theft, robbery, or pilferage arises in case one borrowing the car to go to a specified place drives it to a distant state and abandons it in a remote place in a badly damaged condition, and fails to notify the owner where it may be found. *Federal Ins. Co. v. Hiter*, L.R.A.1915E, 575, 176 S. W. 210, 164 Ky. 743.

(Annotated)

INTENT.

Parol evidence as to, see Evidence, 9.
Evidence as to generally, see Evidence, 19, 20.

INTEREST.

Liability of administrator requesting bank to hold deposit against claimant to reimburse bank for interest which it is compelled to pay to claimant on the legal establishment of his claim, see Contribution and Indemnity.

Disqualification of judge by, see Judges.

Upon repudiation of an oral contract for the purchase of land of which the vendee has had possession, interest on purchase money paid will be allowed only from the time when the contract was disaffirmed. *Grainger v. Jenkins*, L.R.A.1915E, 404, 160 S. W. 926, 156 Ky. 257.

INTERSTATE COMMERCE.

See Commerce.

INTOXICATING LIQUORS.

Forbidding circulation of advertisements of liquor, see Commerce, 1; Constitutional Law, 16.

Valuation of insured bar fixtures where prohibition is adopted after policy was issued, see Insurance, 13.

Sale of liquor within certain distance of church, see Nuisances, 2, 3.

1. A statute forbidding the circulation of advertisements of intoxicating liquors throughout the state applies in counties in which the sale of liquors is legal under the local option law. *State ex rel. Black v.*

Delaye, L.R.A.1915E, 640, 68 So. 993, — Ala. —.

2. Either of the doors leading from the streets on the corners of which a church is situated, into the tower, from which one door leads to the auditorium of the church, must be regarded as the front entrance within the meaning of a statute prohibiting the establishment of a saloon within a specified distance from the front entrance of a church, although the door from one street may be used more than that from the other. *George v. Travis*, L.R.A.1915E, 408, 152 N. W. 207, — Mich. —.

INTOXICATION.

See Drunkenness.

IRRIGATION.

Cost of constructing bridge over ditch, see Bridges, 2; Eminent Domain, 3.

JAR.

Right to recover for injury caused by, in condemnation proceedings, see Eminent Domain, 5.

JOINDER.

Of causes of action, see Action or Suit. Of parties defendant, see Parties, 2.

JOINT CREDITORS AND DEBTORS.

Joint liability of parties to common enterprise for negligence of one of them in use of automobile, see Automobiles, 2.

Effect of attachment of seal to release of one joint tortfeasor, see Seal.

But one satisfaction can be obtained for a personal injury negligently inflicted by several joint tortfeasors, and therefore, under a reservation of a right to sue others when releasing one, only such recovery can be had as, together with the amount received from the one released, will amount to satisfaction. *Dwy v. Connecticut Co.* L.R.A.1915E, 800, 92 Atl. 883, 89 Conn. 74. (Annotated)

JOINT TORT FEASORS.

See Joint Creditors and Debtors.

JOLT.

Injury to passenger by, see Carriers, 6, 7.

JUDGES.

Slander by, see Libel and Slander, 5. Extra or additional compensation to, see Officers, 3.

A judge is not deprived of jurisdiction of a suit to compel a public officer to issue warrants for an extra statutory allowance to another occupant of the same bench, the result of which will determine his own right to a similar allowance, because of his interest, if there is no other judicial tribunal to which the question can be presented. *McCoy v. Handlin*, L.R.A. 1915E, 858, 153 N. W. 361, — S. D. —. L.R.A.1915E.

JUDGMENT.

Effect of supersedeas bond to suspend, see Appeal and Error, 3.

On appeal, see Appeal and Error, 32-37. In replevin suit, see Replevin.

Form and substance.

1. Where a statute provides that in an action on a bond for a penalty judgment shall be entered for the penalty, but that the execution thereon shall issue only for such damages as have been assessed, the entry of a judgment for 6 cents damages is error. *Summit v. Morris County Traction Co.* L.R.A.1915E, 385, 88 Atl. 1048, 85 N. J. L. 193.

2. It is not proper for the district court to disregard the evidence of witnesses competent to testify as to the sufficiency of a title to land in another state, and, without either pleading or proof of the law of such other state, to pass judgment by an independent examination of the abstract. *Spaeth v. Kouns*, L.R.A.1915E, 271, 148 Pac. 651, 95 Kan. 320.

3. It is not proper for the district court to give judgment on an issue not fairly raised by the pleadings. *Spaeth v. Kouns*, L.R.A.1915E, 271, 148 Pac. 651, 95 Kan. 320.

Validity; effect and conclusiveness.

4. A judgment to the effect that alleged oyster ground is barren, and not desirable for public use, under the provisions of one act, is not a bar to a subsequent proceeding to ascertain whether or not the same ground is barren and not desirable under the provisions of a later act. *Cox v. Revelle*, L.R.A.1915E, 443, 94 Atl. 203, 125 Md. 579.

5. A judgment denying a lien upon land for money advanced to retire purchase money notes is conclusive against the right to claim subrogation to the lien of the vendor in a subsequent proceeding to establish an exemption of the land from an execution levied thereon. *Phillips v. Colvin*, L.R.A.1915E, 875, 169 S. W. 316, — Ark. —.

Foreign judgments.

Effect of invalidity of foreign decree of divorce on liability for bigamy, see Bigamy.

Garnishment in other state, see Garnishment.

6. A decree granting a divorce and awarding as alimony a sum based upon the property of the husband situated within the jurisdiction of the court is no bar to an independent suit in another state to recover alimony out of the property of the husband situated in the latter state, which the court granting the divorce did not take into account in fixing the amount of alimony awarded by it. *Bodie v. Bates*, L.R.A. 1915E, 421, 146 N. W. 1002, 95 Neb. 757. (Annotated)

JUDICIAL SALE.

The doctrine of *caveat emptor* does not apply to a sale by a guardian of his ward's real estate under order of court, so as to deprive the purchaser of a city lot of

relief because of diminution in value of the property on account of a public right of way over a portion of the lot of which neither party was aware. *Stonerook v. Wisner*, L.R.A.1915E, 834, 153 N. W. 351, — Iowa, —. (Annotated)

JURISDICTION.

On appeal, see Appeal and Error.
Inquiry into question of, in habeas corpus, see Habeas Corpus, 2.

JURY.

Questions for, see Trial, 2-8.

The constitutional right of trial by jury is not infringed by limiting a new trial to the question of damages upon the reversal of a judgment on appeal. *Yazoo & M. V. R. Co. v. Scott*, L.R.A.1915E, 239, 67 So. 491, — Miss. —.

KNOWLEDGE.

See Notice.

LABORERS.

Liens of, see Mechanics' Liens.
In general, see Master and Servant.

LABOR ORGANIZATIONS.

Injunction against, see Injunction, 3.
Pleading in action for failure to notify contractor of change in wage scale, see Pleading, 12.
Injunction against withdrawal from bank by, see Pleading, 14.

A trade union having absolute control of the labor market in a particular locality is liable to a contractor for the amount in which he is compelled to pay for labor under the scale fixed by it, in case it fails to notify him of a reduction in the scale, so that he continues to pay the former rates. *Powers v. Journeymen Bricklayers' Union No. 3*, L.R.A.1915E, 1006, 172 S. W. 284, 130 Tenn. 643. (Annotated)

LAND CONTRACT.

See Vendor and Purchaser.

LANDLORD AND TENANT.

Lease by infant, see Infants, 3.
Oil and gas lease, see Mines.
Estoppel to insist on right to remove fixtures, see Estoppel, 1.
Right of tenant to remove fixtures as against purchaser of property, see Vendor and Purchaser, 2, 3.
Liability of independent contractor for injury to tenant, see Master and Servant, 10.
Liability of landlord's agent for injury to tenant, see Principal and Agent, 2.
Duty to one in possession of land under parol contract of purchase to account for rent upon rescission by vendor, see Vendor and Purchaser, 1.

1. A covenant in a lease requiring written consent of the lessor to any assignment L.R.A.1915E.

of the lease may be waived by the lessor and it is waived by acceptance of rent from the assignee with knowledge of the assignment. *Cohen v. Todd*, L.R.A.1915E, 848, 153 N. W. 531, 130 Minn. 227.

2. An assignee of a lease who assumes no obligation by contract to pay rent is liable for rent during the time he holds the lease, but after he makes a reassignment and delivers possession to a second assignee, his liability for rent thereafter to accrue ceases, since his liability during the time he holds the lease is founded on the privity of the estate, and as soon as such privity of estate ceases, the liability ceases with it. *Cohen v. Todd*, L.R.A.1915E, 848, 153 N. W. 531, 130 Minn. 227.

LARCENY.

Rights of transferee of stolen note, see Bills and Notes, 3.
Evidence in prosecution for, see Evidence, 8, 12, 28.
Insurance against theft, see Insurance, 17, 18.

The killing of a cow, the property of another, on her range in the woods, stripping off her hide and selling such hide to a dealer to whom it is taken, constitutes larceny of such cow, although the entire carcass is left in the woods. *Flowers v. State*, L.R.A.1915E, 848, 68 So. 754, — Fla. —. (Annotated)

LEASE.

Of oyster bed, see Constitutional Law, 17, 18.
By infant, see Infants, 3.
Oil and gas lease, see Mines.
In general, see Landlord and Tenant.

LEGISLATURE.

Power to pay expenses of committee out of contingent fund of legislature, see also Appropriations.
Delegation of power by, see Constitutional Law, 1.

A committee to exist beyond the adjournment of the legislature for the investigation of public institutions and auditing of their accounts cannot be appointed by the legislature by joint resolutions, where the Constitution provides that no law shall be passed except by bill, since the creation of a committee to endure beyond the termination of the legislative session requires the enactment of a law. *Dickinson v. Johnson*, L.R.A.1915E, 496, 176 S. W. 116, — Ark. —. (Annotated)

LEVY AND SEIZURE.

Exemption of homestead, see Homestead.

LIBEL AND SLANDER.

Appealability of action for, see Appeal and Error, 1.
Error in admission of evidence, see Appeal and Error, 23.

Refusal of instructions in action for, see Appeal and Error, 23.

Admissibility of evidence under pleadings, see Evidence, 43, 44.

1. A reply by a seller of hay to a claim of shortage by attorneys for the buyer, that it is a case where the buyer wishes to get an allowance on a car of hay, is not libelous. *Brown v. Elm City Lumber Co.* L.R.A.1915E, 275, 82 S. E. 961, 167 N. C. 9. (Annotated)

2. A statement made to the plaintiff in the presence of others, "All I want you to do is to pay your honest debts," is not slanderous. *Hamilton v. McKenna*, L.R.A. 1915E, 455, 147 Pac. 1126, 95 Kan. 207. (Annotated)

Privileged communications.

Admissibility of evidence of repetition on question of malice, see Evidence, 21.

3. Words actionable in themselves, because they charge the plaintiff with having committed a felony, spoken to a sheriff while engaged in hunting for the culprits actually guilty of the felony, are qualifiedly privileged if they are spoken in good faith, with an honest belief that they are true, with the sole intent of aiding justice, and with no motive or intent to injure the person spoken of. *Beahrs v. Allen*, L.R.A.1915E, 413, 148 Pac. 141, — Okla. —. (Annotated)

4. A reply by a seller of hay to a claim for shortage made by the buyer's attorneys, that it is a case where the clients want an allowance on a car of hay, is quasi privileged, and will not sustain a libel suit unless malice is shown. *Brown v. Elm City Lumber Co.* L.R.A.1915E, 275, 82 S. E. 961, 167 N. C. 9.

5. No action lies for slanderous words spoken by a judge in the course of a judicial proceeding over which he is presiding, such words being absolutely privileged. *Houghton v. Humphries*, L.R.A.1915E, 1051, 147 Pac. 641, — Wash. —. (Annotated)

What constitutes a publication.

6. In an action for slander in which the defendant pleaded a qualified privilege that the words were spoken in a conversation with her husband at a time when she understood that her husband was liable to be arrested for his conduct with the plaintiff and another woman at the house where he lived, and that it would result in disgrace being brought upon their family, and that she desired to warn him in the protection of his own interest as well as that of the family, an instruction charging that if a third person overheard what was said, the matter is not privileged unless such person was a mere eavesdropper, is error. *Conrad v. Roberts*, L.R.A.1915E, 131, 147 Pac. 795, 95 Kan. 180.

7. Where the presence of bystanders at a conversation between husband and wife is a mere casual incident, not in any sense sought for by the wife, who is subsequently made a defendant in an action for slander on account of statements made in the conversation, the wife will not be deprived of the privileged nature of the conversation. L.R.A.1915E.

Conrad v. Roberts, L.R.A.1915E, 131, 147 Pac. 795, 95 Kan. 180. (Annotated)

LICENSE.

Of foreign insurance company, see Insurance, 1.

To run motor car over railroad tracks, see Railroads, 1.

LIENS.

Mechanics' liens, see Mechanics' Liens.

LIFE INSURANCE.

See Insurance.

LIFE TENANTS.

1. A remainderman not in possession, and having no right to the occupancy or use of the land, may purchase and hold a tax title thereon under a sale for delinquent taxes which the life tenant ought to have paid. *Jinkiaway v. Ford*, L.R.A.1915E, 343, 145 Pac. 885, 93 Kan. 797. (Annotated)

2. One of several remaindermen, who does not have the possession or right of possession, or right to rents and profits, who purchases the property at a sale for taxes which the life tenant ought to have paid, to whom a tax deed valid on its face is issued, may hold the tax title for his own use and benefit as against other remaindermen. *Jinkiaway v. Ford*, L.R.A. 1915E, 343, 145 Pac. 885, 93 Kan. 797.

3. A tax title acquired by a remainderman not in possession, and having no right to the occupancy or use of the land, under which he enters into possession, does not necessarily merge in a conveyance of the life estate to him by the life tenant by quitclaim deed. *Jinkiaway v. Ford*, L.R.A. 1915E, 343, 145 Pac. 885, 93 Kan. 797.

4. It is the duty of a tenant for life in possession, and enjoying the rents and profits of land, to pay the taxes thereon. *Jinkiaway v. Ford*, L.R.A.1915E, 343, 145 Pac. 885, 93 Kan. 797.

LIMITATION OF ACTIONS.

Constitutionality of statute as to, see Constitutional Law, 4.

Negation of defense of, see Pleading 5.

1. The bar by lapse of time of a common-law action by a person injured by another's negligence to recover for the injuries will not affect the right of his administrator to maintain a statutory action for his death from such injuries. *Causey v. Seaboard A. L. R. Co.* L.R.A.1915E, 1185, 81 S. E. 917, 166 N. C. 5.

2. An administrator who by statute may maintain an action for wrongful death within two years thereafter if decedent left husband, wife, or next of kin, against one who would have been liable to decedent had death not ensued, cannot maintain an action if decedent's right to sue was barred by limitation before his death. *Kelliher v. New York, C. & H. R. R. Co.* L.R.A.1915E, 1178, 105 N. E. 824, 212 N. Y. 207. (Annotated)

3. The mere existence of a deposit ac-

count of the maker of a note in the bank which holds the note, which the bank has a right to apply on the note, does not toll the running of the statute of limitations against the note; actual application of the deposit being necessary to effect that result. *Desha Bank & Trust Co. v. Quilling, L.R.A. 1915E, 794, 176 S. W. 132, — Ark. —*

(Annotated)

LIQUIDATED DAMAGES.

See Damages, 8-10.

LIS PENDENS.

Abatement by pendency of action, see Abatement and Revival, 3.

LOAN.

Of money to retire notes for purchase price of homestead, see Homestead.

LOCAL IMPROVEMENTS.

See Public Improvements.

LONG-DISTANCE MESSAGES.

Rule of telephone company as to, see Telephones.

LOSS.

Of insured property, extent of, see Insurance, 13-15.

MALICE.

Evidence as to, see Evidence, 21.
Of mortgagee in taking possession of property under invalid clause, see Trover.

MANDAMUS.

To court or judge.

1. Although the common-law writ of prohibition has been abolished in this state, the duty is still imposed upon the court to prevent violation of law by inferior tribunals, and when there is no adequate remedy in the ordinary course of the law, mandamus is the appropriate remedy. *State ex rel. Parmenter v. Troup, L.R.A.1915E, 936, 152 N. W. 748, — Neb. —*

To state officers.

2. The remedy by action at law to secure a state appropriation for official expenses is not adequate so as to prevent the issuance of a writ of mandamus to compel payment thereof, if the action at law cannot be tried before the date when the appropriation would lapse. *McCoy v. Handlin, L.R.A.1915E, 858, 153 N. W. 361, — S. D. —*

3. The remedy by suit is not adequate for one entitled by law to a warrant on the state treasury for the payment of money, so as to prevent the issuance of a writ of mandamus to compel the issuance of the warrant. *McCoy v. Handlin, L.R.A.1915E, 858, 153 N. W. 361, — S. D. —*

To corporations.

4. Mandamus will lie to compel the president of a corporation to call a special meeting of the board of directors, there being a valid by-law requiring the issuance of the call, and the necessary demand therefor having first been made. *Cummings v. L.R.A.1915E.*

Wallower, L.R.A.1915E, 774, 149 Pac. 864, — Okla. — (Annotated)

Hearing and determination; defenses.

5. The reasonableness of an order for alimony *pendente lite* and the wife's motives cannot be questioned in a mandamus proceeding to compel the trial court to proceed with the trial of a divorce action on its merits after the husband has appealed from an order committing him for contempt for refusal to comply with the order. *State ex rel. Crombie v. Superior Court for King County, L.R.A.1915E, 867, 148 Pac. 882, — Wash. —*

6. The right of the board of directors to discharge plaintiff in error as manager of the corporation cannot be considered a defense to an action for mandamus to compel the calling of a directors meeting, though called for the purpose of considering his removal. *Cummings v. Wallower, L.R.A. 1915E, 774, 149 Pac. 864, — Okla. —*

MANUFACTURER.

Liability for injury due to defects in articles manufactured, see Negligence, 3.

MARRIAGE.

Remarriage of woman against whom foreign divorce has been granted which is not recognized as valid by state of her domicile, see Bigamy.

Divorce or separation, see Divorce and Separation.

Presumptions as to, see Evidence, 1.

Sufficiency of proof of, see Evidence, 38.

1. Marriage, in the legal sense, is a civil contract, and it is not indispensable that a clergyman should be present to authorize and confirm the contract in order to give validity thereto. *Re Love, L.R.A. 1915E, 109, 142 Pac. 305, 42 Okla. 478.*

Common-law marriage.

2. Notwithstanding statutes which prescribe certain forms for entering into the marriage relation, such as the issuing of a license, the performing of the ceremony by certain persons, the presence of witnesses, and the signing and returning of the certificate and the recording of the same, in the absence of a statute declaring void a marriage entered into otherwise than in the statutory way, a common-law marriage is valid. *Re Love, L.R.A.1915E, 109, 142 Pac. 305, 42 Okla. 478.* (Annotated)

3. A common-law marriage exists where competent parties agree to be and become immediately man and wife, and pursuant thereto enter into and maintain thereafter the marriage relation. *Re Love, L.R.A. 1915E, 109, 142 Pac. 305, 42 Okla. 478.*

4. To constitute a common-law marriage, the parties must, in addition to present consent to take each other for husband and wife, professedly live and cohabit together as such in pursuance of the agreement, and therefore no marriage exists between a man and the proprietor of a rooming house, who in her room agreed to be

man and wife, if she retains her own name, and conducts her business as formerly with nothing to indicate that her status was changed. *Grigsby v. Reib*, L.R.A.1915E, 1, 153 S. W. 1124, 105 Tex. 597. (Annotated)

5. Where by statute marriage is a civil contract, a so-called common-law marriage by present consent, consummation, and holding out is valid, although the statute requires for a marriage a license and solemnization before a civil officer or clergyman. *Becker v. Becker*, L.R.A.1915E, 56, 140 N. W. 1082, 153 Wis. 226. (Annotated)

6. Cohabitation in a state where the marriage would have been valid, of a couple who went through a marriage ceremony in the state of the domicile of the woman, against whom a foreign divorce had been granted on substituted service, which was not recognized as valid at such domicile, will not constitute a valid common-law marriage, if the parties relied on the ceremony, and did not contemplate a common-law marriage. *People v. Shaw*, L.R.A.1915E, 87, 102 N. E. 1031, 259 Ill. 544.

(Annotated)

MARRIED WOMEN.

In general, see Husband and Wife.

MARTIAL LAW.

See Militia.

MASTER AND SERVANT.

Rights of assignee of wages, see Assignment.

Validity of contract as to deductions from wages, see Contracts, 3.

Garnishment of wages of employee, see Garnishment.

Raising objection for first time on appeal in action for injury to servant, see Appeal and Error, 13.

Injury to or death of employee because of lack of fire escapes, see Buildings, 2, 3.

Sufficiency of proof that absence of fire escapes was cause of death of employee, see Evidence, 33.

Evidence on question of damages in action for death of servant, see Evidence, 24.

Evidence of precautions after accident in action for injury to employee, see Evidence, 26.

Sufficiency of proof of cause of death of servant, see Evidence, 33.

Release of employer from liability for injury to servant, see Release.

Sufficiency of proof of undue influence in securing release from injured employee, see Evidence, 34.

When relation exists.

1. Where service is restricted to a single act or transaction, the relation of master and servant, if any such relation exists, terminates with the act or transaction. *Wilkerson v. Myatt-Dicks Motor Co.* L.R.A. 1915E, 439, 68 So. 96, 136 La. 977.

2. The fact that an established railroad company desiring to construct a branch line

chose to accomplish its purpose through the medium of a corporation which it organized, officered, and financed entirely within itself, does not prevent one engaged in the construction work from being a servant of the railroad company. *Nicholson v. Atchison, T & S. F. R. Co.* L.R.A.1915E, 417, 147 Pac. 1123, 95 Kan. 13.

Servant's assumption of risks.

3. One employed to remove the cinders from a pit into which they are dumped from railroad engines assumes the risk of injury from heat prostration by working on a sultry night, if he is not required to do more than the customary amount of work, and he increases the hazard by imprudence in the use of ice water. *Louisville & N. R. Co. v. Williams*, L.R.A.1915E, 613, 176 S. W. 1186, 165 Ky. 386. (Annotated)

4. Where a portion of a line of railroad in process of construction has been completed, inspected, and passed, and a speed of 10 miles per hour over that portion has been authorized, the conductor of a construction train carrying materials to the site of track-laying operations, and running at the rate of 4 miles per hour, does not assume the risk of injury from the sinking of an approach to a bridge in the completed part of the road, due to negligent construction and inspection. *Nicholson v. Atchison, T. & S. F. R. Co.* L.R.A.1915E, 417, 147 Pac. 1123, 95 Kan. 13.

5. An epileptic assumes, in undertaking work about a blast furnace, the risk of injury from a seizure which causes his fall into contact with molten metal or cinders. *Tennessee Coal, I. & R. Co. v. Moody*, L.R.A. 1915E, 369, 68 So. 284, — Ala. —.

(Annotated)

Fellow servants and their negligence.

6. The general rule that the master owes to his servant the duty to keep an appliance used by the latter in order, and that he cannot delegate the duty so as to escape responsibility, does not apply to defects arising in its daily use, which are not of a permanent nature, and do not require the help of skilled mechanics to repair, but which may easily be, and are usually, remedied by the workmen, and to repair which proper and suitable materials are furnished. *Oklahoma Portland Cement Co. v. Shepherd*, L.R.A.1915E, 699, 147 Pac. 1031, — Okla. —.

7. The employees in the sacking department of a cement plant, who are charged with the duty of repairing the sacks used in the packing department, and who are furnished suitable material for that purpose, are fellow servants of an employee in the packing department, so as to preclude a recovery by him for injury suffered when attempting to tie a sack after it had been filled with cement, where in so doing, owing to the failure of the employees in the sacking department to repair two holes near the top of the sack, two jets of hot cement escaped therefrom because of the employee's weight upon the sack, and struck him in the eyes and injured him. *Oklahoma Portland*

Cement Co. v. Shepherd, L.R.A.1915E, 699, 147 Pac. 1031, — Okla. —.

Master's liability for acts of servant.

Carrier's liability for arrest of passenger, see Carriers, 3.

Measure of damages for assault by servant, see Damages, 2.

Liability of city for negligence of its officers or agents, see Municipal Corporations, 3-6.

Application of doctrine of attractive nuisance to locomotive engine on which child is invited to ride by engineer, see Negligence, 5.

8. An engineer is not shown to be incompetent so as to render his employer liable for his act by the fact that, without authority, he permits children to ride on the engine. Lovejoy v. Denver & R. G. R. Co. L.R.A.1915E, 888, 146 Pac. 263, — Colo. —.

9. A railroad company is liable for injury to a child by falling from an engine on which the engineer has invited him to ride, although the invitation was beyond the scope of the engineer's employment, if it was his duty to remove the child from the engine, or refrain from starting it while he was in a place of danger. Lovejoy v. Denver & R. G. R. Co. L.R.A.1915E, 888, 146 Pac. 263, — Colo. —. (Annotated)

Liability of independent contractor.

10. An independent contractor employed by the owner of a building to install a stationary washstand and connect the same with the waterworks system of the city, who in making such installation replaced a board which it had been necessary to remove from the floor, without supporting the end of the board so as to render it safe, is not liable for injuries sustained by a tenant of the building on account of the defective replacing of the board, where the work was accepted by the owner and the independent contractor had no knowledge of the defect. Wood v. Sloan, L.R.A.1915E, 766, 148 Pac. 507, — N. M. —.

(Annotated)

11. An independent contractor employed to construct or install any given work or instrumentality, who has constructed or installed the same, which is then received and accepted by the employer and the contractor discharged, is no longer liable to third persons for injuries received as the result of defective construction or installation, unless the thing dealt with is imminently dangerous in kind, or is rendered dangerous by a defect of which the contractor had knowledge. Wood v. Sloan, L.R.A.1915E, 766, 148 Pac. 507, — N. M. —.

12. Actual knowledge by an independent contractor of a defect or danger in work put out by him is not always necessary to render him liable for such defects, but such knowledge may in some circumstances be inferred or imputed. Wood v. Sloan, L.R.A.1915E, 766, 148 Pac. 507, — N. M. —.

13. If an independent contractor manufactures an instrumentality defectively, and the defect renders the same dangerous, and he does not know of the defect and its

dangerous character by reason of his failure to exercise due care, he is guilty simply of negligence; but if he knows of the defect and its dangerous character, and puts out the thing in deceit, fraud, malice, or perhaps with other bad motives, he is not guilty of negligence at all; in such circumstances the transaction leaves the field of negligence and passes in to the domain of tort. Wood v. Sloan, L.R.A.1915E, 766, 148 Pac. 507, — N. M. —.

14. The doctrine of implied invitation cannot be invoked to render liable an independent contractor employed by the owner of a building to install a stationary washstand and to connect the same with the waterworks system of the city, for injuries to a tenant of the building because of the defective replacing of a board in the floor which it was necessary to remove, after the work has been accepted by the owner. Wood v. Sloan, L.R.A.1915E, 766, 148 Pac. 507, — N. M. —.

MATERIALITY.

Of evidence, see Evidence, 18-29.

MATERIALS.

Lien for, see Mechanics' Liens.

MATURITY.

Of note, see Bills and Notes, 4.

MAXIMS.

1. Caveat emptor. Stonerook v. Wisner, L.R.A.1915E, 834, 153 N. W. 351, — Iowa, —.

2. Consensus non concubitus facit matrimonium. Grigsby v. Reib, L.R.A.1915E, 1, 153 S. W. 1124, 105 Tex. 597.

3. Damnum absque injuria. Rhodes Bros. Co. v. Musicians Protective Union. Local No. 198, L.R.A.1915E, 1037, 92 Atl. 641, — R. I. —; Taylor v. Chicago, M. & St. P. R. Co. L.R.A.1915E, 634, 148 Pac. 887, — Wash. —.

4. De minimis non curat lex. Roman Catholic Church v. Pennsylvania R. Co. L.R.A.1915E, 623, 126 C. C. A. 629, 207 Fed. 897; Taylor v. Chicago, M. & St. P. R. Co. L.R.A.1915E, 634, 148 Pac. 887, — Wash. —.

5. Expressio unius est exclusio alterius. Yazoo & M. V. R. Co. v. Scott, L.R.A.1915E, 239, 67 So. 491, — Miss. —.

6. General expressions in every opinion are to be taken in connection with the case in which those expressions are used. McCoy v. Handlin, L.R.A.1915E, 858, 153 N. W. 361, — S. D. —.

7. It is to the interest of the commonwealth that there should be an end of litigation. McHegan v. Boyne City, G. & A. R. Co. L.R.A.1915E, 1170, 141 N. W. 905, 178 Mich. 694.

8. No man of full age shall be, in any plea to be pleaded by himself, received by the law to stultify himself and to set up his own disability in avoidance of his acts. Coody v. Coody, L.R.A.1915E, 465, 136 Pac. 754, 39 Okla. 719.

9. No man should be a judge in his

own cause. *McCoy v. Handlin*, L.R.A.1915E, 858, 153 N. W. 361, — S. D. —.

10. No one shall take advantage of his own wrong. *McLaughlin v. United Railroads*, L.R.A.1915E, 1305, 147 Pac. 149, — Cal. —.

11. Personal actions die with the person. State use of *Melitch v. United Railways & Elec. Co.* L.R.A.1915E, 1163, 88 Atl. 229, 121 Md. 457.

12. *Res ipsa loquitur*. *Manning v. St. Paul Gaslight Co.* L.R.A.1915E, 1022, 151 N. W. 423, 129 Minn. 55.

13. *Respondeat superior*. *Saulman v. Nashville*, L.R.A.1915E, 316, 175 S. W. 532, 131 Tenn. 427.

14. *Sic utere tuo ut alienum non laedas*. *Louden v. Cincinnati*, L.R.A.1915E, 356, 106 N. E. 970, — Ohio St. —.

15. There can be no wrong without a corresponding right. *Rowe v. Richards*, L.R.A.1915E, 1075, 151 N. W. 1001, — S. D. —.

16. There is no wrong without a remedy. *McCoy v. Handlin*, L.R.A.1915E, 858, 153 N. W. 361, — S. D. —.

MECHANICS' LIENS.

Bond of contractor, see Bonds.

1. Coal sold to a highway contractor and used to generate steam to propel road rollers and traction engines used on the contract is not within the operation of a statute giving a lien to any person furnishing material to a contractor for "the construction of a public improvement," upon the moneys due him by the state. *Shultz v. C. H. Quereau Co.* L.R.A.1915E, 986, 104 N. E. 621, 210 N. Y. 257. (Annotated)

2. An actual delivery upon the premises of material sold and furnished a contractor for use in the construction of a building thereon is not necessary, as against the owner, to vest in the materialman a right of lien, a delivery in good faith of such material to the contractor, for use in the building, being all that is necessary in the absence of fraud and collusion between the materialman and the contractor. *Thompson-McDonald Lumber Co. v. Morawetz*, L.R.A.1915E, 302, 149 N. W. 300, 127 Minn. 277. (Annotated)

3. It is not essential to a mechanics' lien that material sold and furnished a contractor for use in the construction of a building be actually used in the building. *Thompson-McDonald Lumber Co. v. Morawetz*, L.R.A.1915E, 302, 149 N. W. 300, 127 Minn. 277.

MEETINGS.

Of corporate directors, see Corporations, 5.

MENTAL ANGUISH.

Damages for, see Damages, 18.

MERGER.

Of tax title acquired by remainderman in conveyance of life estate to him, see Life Tenants, 3.
L.R.A.1915E.

MILEAGE.

Stipulation in mileage tickets as to baggage, see Carriers, 11-13.

Regulations by public service commission as to mileage books, see Carriers, 17, 18; Commerce, 5; Constitutional Law, 5, 13, 19.

MILITIA.

Trial of member of, see Courts-Martial.

1. Enlistment in the active militia of the state, save in times of war or public danger or disturbance, is voluntary, and is a "contract," and the state has no power, by the repeal of the law under which it was entered into (which is the measure of the rights and obligations of the parties thereto), and the substitution of another law in its stead, to impose upon the other contracting party more onerous conditions and obligations than those to which he has given his assent. *State ex rel. Lanng v. Long*, L.R.A.1915E, 235, 66 So. 377, 136 La. 1. (Annotated)

2. Under Louisiana act 191 of 1912, relating to enlistments in the state militia, from which it appears that the taking of the prescribed oath is the determinative act, a member of the militia under a previous act, who has never taken the oath prescribed by the later act, nor done acts which amounted to an enlistment, cannot be held to have enlisted under the later act. *State ex rel. Lanng v. Long*, L.R.A.1915E, 235, 66 So. 377, 136 La. 1.

MINES.

Oil and gas leases.

Presumption and burden of proof as to diligence in conducting operations, see Evidence, 7.

Injunction to protect rights of lessor's grantee, see Injunction, 1.

1. Where no definite basis is available for the ascertainment of damages for breach of the implied covenants of an oil and gas lease, the best evidence which the circumstances will permit is all the law requires. *Grass v. Big Creek Development Co.* L.R.A.1915E, 1057, 84 S. E. 750, — W. Va. —.

2. The owner of a lease for the production of oil and gas, containing the usual terms and conditions, must, if either mineral is found in paying quantities on the lands, exercise due and reasonable diligence in prosecuting operations thereunder for the mutual benefit of himself and his lessor; and if he unreasonably fails or refuses so to do, damages therefor are recoverable against him in appropriate action at law. *Grass v. Big Creek Development Co.* L.R.A.1915E, 1057, 84 S. E. 750, — W. Va. —.

3. The circumstances to be considered in determining whether or not a lessee under a lease for the production of oil and gas, containing the usual terms and conditions, exercised ordinary diligence in conducting operations thereunder, are the situation of the parties, the character of the mineral product, the nature of the oil-bearing sand; developments on contiguous lands,

whether by the same or different operators; cost of drilling; proximity to market, and facilities for marketing; current prices; location of the lands; and such other conditions attendant upon the operations as may explain necessity for prompt, or furnish excuse for delayed, action in prosecuting such developments. *Grass v. Big Creek Development Co. L.R.A.1915E, 1057, 84 S. E. 750, — W. Va. —*

4. The judgment of an operator of a lease for the production of oil and gas, containing the usual terms and conditions as to the diligence with which, and extent to which, wells should be drilled thereunder, upon discovery of either mineral in paying quantities, will control, if exercised not unreasonably or arbitrarily to promote his own peculiar benefit to the manifest prejudice of the lessor, but in good faith, and that degree of diligence is exercised which, surrounding circumstances and conditions being considered, would reasonably be expected of operators of ordinary prudence, experienced, and engaged in the same business, having due regard for the interest and advantages of themselves and their lessors. *Grass v. Big Creek Development Co. L.R.A. 1915E, 1057, 84 S. E. 750, — W. Va. —*

(Annotated)

5. A stipulation in an oil and gas lease, that, if gas is found in paying quantities, the lessor shall have free gas for domestic purposes by making his own connection, is a covenant running with the land, but is not necessarily to be performed on the land. *Harbert v. Hope Natural Gas Co. L.R.A. 1915E, 570, 84 S. E. 770, — W. Va. —*

6. Consumption of gas by the lessor under an oil and gas lease, allowing him free gas for domestic purposes, not being confined to a dwelling house on the leased premises by the terms of the lease, the place of consumption is one of intention to be determined by the facts and circumstances relating to the subject-matter of the contract, known to the parties at the time, and by their subsequent conduct in the execution thereof, indicating such intention. *Harbert v. Hope Natural Gas Co. L.R.A.1915E, 570, 84 S. E. 770, — W. Va. —* (Annotated)

7. If, after a producing gas well is drilled on land held under a lease by the terms of which the lessor is to have free gas for domestic purposes, the lessor's grantee and assignee of the free gas right applies to the lessee's assignee of the lease for free gas for use in his dwelling house not situate on the land covered by the lease, and such assignee through his agents, having knowledge of the fact, permits him to tap one of its gas lines in the vicinity of such well, but not connected with it, and to use gas therefrom for a long period of time, such conduct evidences a practical construction of the covenant, and is an implied admission of the covenantee's right to consume the gas elsewhere than on the leased land, but not of his right to free gas from wells other than those on the leased premises. *Harbert v. Hope Natural Gas L.R.A.1915E.*

Co. L.R.A.1915E, 570, 84 S. E. 770, — W. Va. —

MINORS.

See Infants.

MITIGATION.

Of damages, see Damages, 19.

MORTGAGE.

By infant, see Infants, 3.

MUNICIPAL CORPORATIONS.

Rules as to cemeteries, see Cemeteries, 2, 3.

Delegation of power to, see Constitutional Law, 1.

Discrimination in statute as to, see Constitutional Law, 3.

Acquisition of easement in way for construction of water conduit, see Easements, 2.

Sufficiency of proof of location of boundaries of city, see Evidence, 41.

Rights and powers as to highways generally, see Highways.

Public improvements by, in general, see Public Improvements.

Ordinances.

As denying equal protection of the laws and abridging privileges and immunities, see Constitutional Law, 2-8.

Stipulation in ordinance granting franchise for penalty for violation thereof, see Damages, 9.

Reading ordinance into insurance policy, see Insurance, 2.

1. A city may, in granting to a corporation having power to occupy its streets with mains to supply its inhabitants with gas for lighting purposes, a franchise to supply gas for heat and power, exact a percentage of the gross annual receipts of the corporation, because of the additional authority granted, although the service is to be rendered by the use of the mains already in the streets. *Hanford v. Hanford Gas & P. Co. L.R.A.1915E, 165, 147 Pac. 969, — Cal. —* (Annotated)

Contracts.

Sufficiency of proof of breach, see Evidence, 39.

2. Retiring members of a municipal council cannot, on grounds of public policy, pending the induction into office of their successors, who have been elected, make a binding contract by the year for the sprinkling of the streets, where a statute confers upon the council the exclusive control of the streets, although power is also given to appoint agents for the town from time to time. *Tempe v. Corbell, L.R.A.1915E, 581, 147 Pac. 745, — Ariz. —* (Annotated)

Liability for damages.

For injury by electric wire, see Electricity.

For defects or obstructions in street, see Highways, 4, 5.

Discrimination in statute as to, see Constitutional Law, 3.

Sufficiency of title of statute as to, see Statutes, 1.

3. A city is not liable in a civil action for damages for failure of its officers to enforce governmental ordinances enacted in the interest of the public welfare. *Everly v. Adams*, L.R.A.1915E, 448, 147 Pac. 1134, 95 Kan. 305. (Annotated)

4. A city is not liable in a civil action for damages suffered by a woman who was injured on her own premises by a vicious cow which she was attempting to drive away, and which the city officers knew was running at large, contrary to an ordinance prohibiting cattle from running at large within the city limits. *Everly v. Adams*, L.R.A.1915E, 448, 147 Pac. 1134, 95 Kan. 305.

5. A city is not liable for injuries received by a person on its streets in an assault by a police officer, although such officer is known to the officials appointing him to be a man of vicious propensities and violent temper. *Lamont v. Stavanaugh*, L.R.A.1915E, 460, 152 N. W. 720, — Minn. —. (Annotated)

6. The failure of a city to require a bond of a police officer known to the officials appointing him to be a man of vicious propensities and violent temper does not make the city liable for an assault by such officer on a street. *Lamont v. Stavanaugh*, L.R.A.1915E, 460, 152 N. W. 720, — Minn. —.

7. A statute providing for service of a written notice as a condition precedent to the maintenance of an action in damages against a municipality applies to an action to recover damages from a city on account of an illness contracted from the use of contaminated water supplied from the waterworks owned and operated by the city. *Frasch v. New Ulm*, L.R.A.1915E, 749, 153 N. W. 121, 130 Minn. 41.

MURDER.

See Homicide.

MUTUAL INSURANCE COMPANY.

See Insurance.

NAME.

Regulation of right to do business under assumed name, see Contracts, 2.

NATURAL GAS.

In mines, see Mines.

NEGATIVE.

In pleading, see Pleading, 5.

NEGLIGENCE.

Of agisters, see Agisters.

Liability of state board of agriculture for, see Agricultural Societies.

Insufficiency of verdict in action for, see Appeal and Error, 30.

In use of automobiles, see Automobiles.

In blasting, see Blasting.

As to fire escapes, see Buildings.

Of carrier, see Carriers.

L.R.A.1915E.

Measure of damages for negligence causing personal injury, see Damages, 15.

Matters peculiar to action for death, see Death.

Unguarded elevator wells or shafts, see Elevators, 3.

Presumption and burden of proof as to, see Evidence, 3.

Relevancy of evidence as to, see Evidence, 18, 25.

Evidence of precautions after accident to show, see Evidence, 26.

Sufficiency of proof of, see Evidence, 36, 37.

Of master or servant, see Master and Servant.

Independent contractor's liability, see Master and Servant, 10-14.

Of municipal corporations, see Municipal Corporations, 3-7.

Liability of agent for, see Principal and Agent, 2.

Proximate cause of injury by, see Proximate Cause.

Of railroad, see Railroads.

Release from damages for injury by, see Release.

Question for jury as to, see Trial, 3-6.

1. An act is negligent and furnishes the foundation for an action in tort, if the same is forbidden by law, or the person doing it might reasonably anticipate that it might be injurious to someone, but it is not necessary that that someone should be the person who is actually injured. *Wilson v. Northern P. R. Co.* L.R.A.1915E, 991, 153 N. W. 429, 30 N. D. 456.

Dangerous agencies.

Electricity, see Electricity.

As to explosions, see Explosions and Explosives.

As to fires, see Fires.

As to gas, see Gas.

Sufficiency of evidence of negligence to go to jury, see Trial, 1.

2. Where a person is injured by the accidental discharge of a gun in the hands of another, the test of liability is not whether the injury was accidentally inflicted, but whether the defendant is free from all blame. *Annear v. Swartz*, L.R.A.1915E, 267, 148 Pac. 706, — Okla. —. (Annotated)

Liability of seller or manufacturer.

Evidence in action for, see Evidence, 18, 25.

3. That a manufacturer of automobiles ought to have discovered that a wheel purchased from another manufacturer was defective before placing it in a car does not render him liable to one who purchases the car from a dealer, for injury through collapse of the wheel, although his prospectus expressly states that the wheels used are the best obtainable. *Cadillac Motor Car v. Johnson*, L.R.A.1915E, 287, 221 Fed. 801. (Annotated)

Injuries to children; dangerous attractions.

Proximate cause of injury, see Proximate Cause, 1.

4. Leaving a bottle of denatured alco-

hol beside the road, after completing work in connection with which it has been used, does not render one liable for injury to a child who finds it and is burned in attempting to set it afire, since such result could not reasonably have been expected. *Hall v. New York Teleph. Co.* L.R.A.1915E, 191, 108 N. E. 182, 214 N. Y. 49.

5. The doctrine of attractive nuisance is not applicable to a locomotive engine in charge of an engineer so as to render the railroad company liable for injuries to a child whom the engineer permits to ride upon the engine. *Lovejoy v. Denver & R. G. R. Co.* L.R.A.1915E, 888, 146 Pac. 263, — Colo. —.

6. Noncompliance with a statute imposing a penalty for failure to cover or fence a shaft renders the owner liable for injury to a child injured by falling down the shaft while playing on the property, although he was a trespasser in so doing. *Conway v. Monidahl Trust.* L.R.A.1915E, 500, 132 Pac. 26, 47 Mont. 269. (Annotated)
On highways.

Assault by negligent driving, see Assault and Battery, 2.

7. A sled used by a boy in coasting down hill is not a "motor vehicle" within the meaning of a statute limiting the speed of motor vehicles under certain circumstances. *Terrill v. Virginia Brewing Co.* L.R.A.1915E, 1028, 153 N. W. 136, 130 Minn. 46.

8. Minnesota Laws 1911, chap. 365, § 15 (Gen. St. 1913, § 2634), providing, among other things, that "all vehicles must keep to the right of the center of the street," apply in case of a collision between a boy coasting down hill on a city street and a sleigh ascending the hill on the left-hand side of the street; at least, the violation of law by the owner of the sleigh is evidence of negligence and justifies a finding thereof. *Terrill v. Virginia Brewing Co.* L.R.A.1915E, 1028, 153 N. W. 136, 130 Minn. 46. (Annotated)

Contributory.

As defense to civil suit for assault, see Assault and Battery, 3.

Of person injured by automobile, see Automobiles, 3.

Contributory negligence of father as defense to action by mother for death of minor child, see Death, 4.

Contributory negligence of elevator passenger, see Elevators, 4.

Of one injured as result of obstruction of street crossing by railroad train, see Highways, 3.

Allegation of freedom from, see Pleading, 6, 7.

Of children injured by railroad train, see Railroads, 4.

Question for jury as to, see Trial, 3, 5, 6.

9. One travelling at a prohibited rate of speed on the highway, when he collides with a negligently driven vehicle, is not prevented from holding the owner of the other vehicle liable for his injuries, unless his violation of the law was the proximate cause L.R.A.1915E.

of the injury. *Coffin v. Laskau*, L.R.A. 1915E, 959, 94 Atl. 370, 89 Conn. 325.

(Annotated)

10. Where a tort has been committed, it is the duty of the injured party to use reasonable efforts to avoid the consequences thereof, and to reduce the damages sustained thereby, and if in such reasonable attempt he is injured, damages may be recovered therefor. *Wilson v. Northern P. R. Co.* L.R.A.1915E, 891, 153 N. W. 429, 30 N. D. 456.

11. A five-year-old child is not guilty of contributory negligence in accepting an invitation to ride on a locomotive engine. *Lovejoy v. Denver & R. G. R. Co.* L.R.A. 1915E, 888, 146 Pac. 263, — Colo. —.

12. It cannot be said, as a matter of law, that a boy is guilty of contributory negligence in coasting in a city street, so as to bar a recovery for his death due to a collision with a sleigh which was ascending the hill on the wrong side of the street, where no team had ever before been met in coasting which was on the wrong side of the road, and the same driver had frequently been met on the right side, and there was ample room if the law requiring vehicles to keep to the right of the center of street had been obeyed. *Terrill v. Virginia Brewing Co.* L.R.A.1915E, 1028, 153 N. W. 136, 130 Minn. 46.

NEGOTIABILITY.

Of note, see Bills and Notes, 1.

NEWSPAPERS.

Forbidding circulation of newspapers containing advertisements of intoxicating liquors, see Commerce, 1.

NEW TRIAL.

Grounds for, on appeal, see Appeal and Error, 33-36.

Where a jury answers special interrogatories without rendering a general verdict, and the parties then agree that the legal questions shall be reserved for the decision of the court, a motion for a new trial made within the required time after the court has rendered its judgment is in proper time. *Dinneen v. American Ins. Co.* L.R.A.1915E, 618, 152 N. W. 307, — Neb. —.

NOTICE.

Of vicious propensities of dog, see Animals.

Of accident required by employers' liability act, see Appeal and Error, 13.

Of protest of note, see Bills and Notes, 2.

Effect of, on servant's assumption of risk, see Master and Servant, 5.

Of claim against city, see Municipal Corporations, 7.

NUISANCES.

1. The maintenance of a magazine for the storage of high explosives does not constitute a nuisance which will entitle the

owner of adjoining property to damages for depreciation of the value of such property because of its presence. *Simpson v. Du Pont Powder Co.* L.R.A.1915E, 430, 85 S. E. 344, — Ga. —.

2. The prosecuting attorney may file a bill to abate as a nuisance a saloon conducted within a distance of a church prohibited by statute. *George v. Travis*, L.R.A.1915E, 408, 152 N. W. 207, — Mich. —.

3. A saloon established within a prohibited distance of a church may be abated by a court of equity as a nuisance, although a license has been issued by the proper authorities and the statute provides a penalty for its violation, if the license was issued under a mistake of fact. *George v. Travis*, L.R.A.1915E, 408, 152 N. W. 207, — Mich. —. (Annotated)

OBJECTIONS.

To raise questions on appeal, see Appeal and Error, 5, 6.

OFFICERS.

Effect of supersedeas bond to suspend judgment ousting persons from office, see Appeal and Error, 3.

Liability for false imprisonment, see False Imprisonment, 2.

Injunction against, see Injunction, 4, 5.

Judges, see Judges.

Mandamus to, see Mandamus, 2, 3.

Municipal liability for acts of, see Municipal Corporations, 3-6.

Power of municipal officers to contract for period beyond term of office, see Municipal Corporations, 2.

Illegal seizure by, see Search and Seizure.

1. When the law does not fix any time for the commencement of a term of office to be filled by appointment, the term will begin to run from the date of the appointment. *People ex rel. Dibelka v. Reinberg*, L.R.A.1915E, 401, 105 N. E. 715, 263 Ill. 536.

2. Undated resignations placed in the hands of an appointing power by persons about to be appointed to office are without effect, and their acceptance after the appointment does not vacate the office. *People ex rel. Dibelka v. Reinberg*, L.R.A.1915E, 401, 105 N. E. 715, 263 Ill. 536.

(Annotated)

3. An extra allowance of a specified sum per month to such of the judges of the supreme court as take up their residence at the capital, to meet the extra expenses thereby caused, is not prohibited by constitutional provisions that such judges shall receive no fees or perquisites whatever for any duties connected with their offices, that their salaries shall not be increased, and that no judge shall receive any compensation, perquisite, or emolument for or on account of his office in any form whatever except his salary. *McCoy v. Handlin*, L.R.A.1915E, 858, 153 N. W. 361, — S. D. —.

L.R.A.1915E.

OIL.

As to mines generally, see Mines.

OPERATION.

Bursting of stitches closing wound made by operation as an accident within meaning of insurance policy, see Insurance, 7.

OPINION.

As evidence, see Evidence, 11, 12.

Weight of, see Evidence, 31.

ORAL CONTRACTS.

See Contracts.

ORAL EVIDENCE.

See Evidence, 9, 10.

ORDINANCES.

In general, see Municipal Corporations, 1.

OVERFLOW.

Liability for, see Water, 1.

OYSTERS.

Constitutionality of statute as to, see Constitutional Law, 17, 18.

Exercise of right of eminent domain, acquisition of oyster beds, see Eminent Domain, 1.

PANTOMIME.

Evidence by means of, see Evidence, 8.

PARENT AND CHILD.

Contributory negligence of father as defense to action by mother for death of minor child, see Death, 4.

Inheritance by, or through, adopted children, see Descent and Distribution, 4.

Evidence on question of damages for negligent killing of parent, see Evidence, 23.

Matters as to infants generally, see Infants.

PARKS AND SQUARES.

Injunction against park and tree commission see Injunction, 5.

PAROL CONTRACTS.

See Contracts.

PAROL EVIDENCE.

As to writing, see Evidence, 9, 10.

PARTIES.

Who may have remedy against nuisance, see Nuisances, 2.

Liability of state to suit, see State.

1. Where beneficiaries having an interest in a trust fund are induced by alleged fraudulent representations to assign their respective interests in the fund, and the assignee presents the respective assignments to the trustee, who, without knowledge of the alleged fraud, pays to the assignee the full amount due the beneficiaries, respective-

ly, the trust is thereby fully executed, and the trustee has no further interest in the fund, and cannot maintain a suit in equity, for and on behalf of the beneficiaries, to cancel the assignments and compel the assignee to account to beneficiaries for the true amount due. *Lovato v. Catron*, L.R.A. 1915E, 451, 148 Pac. 490, — N. M. —.

(Annotated)

2. A defendant cannot complain because unnecessary persons are made parties defendant, upon the ground that there is a defect of parties. *Rowe v. Richards*, L.R.A. 1915E, 1069, 142 N. W. 664, 32 S. D. 66.

PARTNERSHIP.

Bankruptcy of, see Bankruptcy.

PARTY WALL.

1. That one of the owners of a party wall whose building is destroyed by fire undertakes to prop the wall, which is weakened by the fire, does not render him liable for injury to the property of the other owner because of insufficiency of the props. *Swentzel v. Holmes*, L.R.A. 1915E, 926, 175 S. W. 871, — Mo. —.

2. Failure of the part owner of a party wall, whose building is destroyed by fire, to obey the orders of the municipal authorities to remove the dangerous portion of the standing wall, gives the other owner no right of action for injury to his property by fall of the wall upon it, since it was equally his duty to remove the wall. *Swentzel v. Holmes*, L.R.A. 1915E, 926, 175 S. W. 871, — Mo. —.

(Annotated)

3. That when one of two owners of a party wall discovers that the building of the other owner has been destroyed by fire, and the wall weakened, such other has attempted to prop the wall, does not entitle him to hold such other liable for injury to his property by the fall of the wall, on the theory that the wall was in the other's possession, so that he was prevented from taking steps to protect his own property. *Swentzel v. Holmes*, L.R.A. 1915E, 926, 175 S. W. 871, — Mo. —.

PAUPERS.

See Poor and Poor Laws.

PAYMENT.

Effect of custom as to, see Custom.

Subrogation for, see Subrogation.

Payments to the original holder, who has no authority to collect on an overdue note which was transferred after maturity, and is not in possession of such holder, are not valid as against the true owner. *Calhoun v. Ainsworth*, L.R.A. 1915E, 395, 176 S. W. 316, — Ark. —.

(Annotated)

PENALTIES.

Distinguished from liquidated damages, see Damages, 8-10.

For nonpayment of public improvement assessment, see Public Improvements.

L.R.A. 1915E.

PERMIT.

To run motor car over railroad tracks, see Railroads, 1.

PERSONAL INJURIES.

Survivability of cause of action for, see Abatement and Revival, 2, 3.

Insufficiency of verdict in action for, see Appeal and Error, 30.

Measure of damages for, see Damages, 15.

Received in fighting prairie fire negligently, see Fires.

To employee generally, see Master and Servant.

Proximate cause of, see Proximate Cause.

On railroad track, see Railroads.

Release from liability for, see Release.

PETITION.

Of plaintiff, see Pleading, 5-9.

PETROLEUM.

In mines generally, see Mines.

PHYSICAL EXAMINATION.

In general, see Discovery and Inspection.

PHYSICIANS AND SURGEONS.

Liability of relatives for emergency services to pauper, see Poor and Poor Laws.

PIPES.

Easement for, see Easements, 2.

PLEADING.

Joinder of causes of action, see Action or Suit.

Review of discretion as to, on appeal, see Appeal and Error, 10.

First objecting on appeal to absence of reply, see Appeal and Error, 12.

Reversal for error as to, see Appeal and Error, 21.

Evidence admissible under, see Evidence, 43, 44.

In criminal prosecution, see Indictment, etc.

Conformity of judgment to pleading, see Judgment, 3.

Definiteness.

See also *infra*, 13.

1. One who makes a bargain to trade real estate properties with another cannot avoid his contract on the indefinite plea that the title of the other is "encumbered by liens and clouds, so that the title is unsatisfactory, unmerchantable, and defective," without pleading any specific defects, and without even adducing any evidence in support of such indefinite plea. *Spaeth v. Kouns*, L.R.A. 1915E, 271, 148 Pac. 651, 95 Kan. 320.

Inconsistency.

2. A declaration against a railway company for alleged injuries sustained by a passenger by being ejected from one of its cars is not bad on demurrer, because it al-

leges that the acts of defendant's servants complained of were done negligently, wilfully, maliciously, and so forth,—supposed inconsistent causes of action,—such defects therein, if any, being cured by § 29, chapter 125, serial § 4783, Code 1913. *Turk v. Norfolk & W. R. Co.* L.R.A.1915E, 145, 84 S. E. 569, — W. Va. —.

Conclusions.

3. An allegation in a petition to hold a sheriff liable for an arrest made by his deputy, that the act was done by the deputy in his official capacity, is a mere conclusion of law. *Jones v. Van Bever*, L.R.A.1915E, 172, 174 S. W. 795, 164 Ky. 80.

Duplicity.

See also *infra*, 15.

4. The test of whether there is more than one cause of action stated or attempted to be stated in a petition in a suit in equity is whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication. If there is, the pleading is demurrable. *Coody v. Coody*, L.R.A.1915E, 465, 136 Pac. 754, 39 Okla. 719.

Declaration or complaint.

5. A complaint filed to recover damages for wrongful death is not demurrable for failure to state that the action was brought within the period prescribed, after death, under a statute giving the personal representative a right under certain circumstances to maintain an action for wrongful acts resulting in death, to be commenced within two years after the death. *Sharrow v. Inland Lines*, L.R.A.1915E, 1192, 108 N. E. 217, 214 N. Y. 101. (Annotated)

6. Alleging that a seven-year-old child ran into a shaft to his injury, without showing that he was at the time exercising ordinary care and circumspection, does not render demurrable a complaint seeking damages for the injury. *Conway v. Monidah Trust*, L.R.A.1915E, 500, 132 Pac. 26, 47 Mont. 269.

7. Contributory negligence on the part of a seven-year-old infant who fell down an unguarded shaft to his injury is sufficiently negated by alleging his age, that he did not know of the shaft, and was engrossed in a childish pursuit in the dark, while using due care and prudence, and without contributory fault and carelessness on his part. *Conway v. Monidah Trust*, L.R.A.1915E, 500, 132 Pac. 26, 47 Mont. 269.

8. A pleading charging that the operator of a mutual telephone company refused the plaintiff, who was a member of the company, the services due a member, unless he would pay an excessive and unauthorized charge, which refusal damaged the plaintiff in his business to the sum of \$1,000, states a cause of action. *Hamilton v. McKenna*, L.R.A.1915E, 455, 147 Pac. 1126, 95 Kan. 207.

9. A petition averring that defendants in the use of high explosives broke into plaintiff's land and dwelling house with force and violence, by means of explosions of great power and frequency in the street L.R.A.1915E.

adjacent to and in close proximity to plaintiff's dwelling house, and thereby produced concussions and vibrations of the earth and air, causing foundations, walls, chimneys, ceilings, cistern, vault, and window glass of plaintiff's house to break and fall, rendering such house unsafe for habitation and untenable, states a cause of action. *Louden v. Cincinnati*, L.R.A.1915E, 356, 106 N. E. 970, — Ohio St. —.

Pleas and answers.

10. In an action of conversion against the mortgagee for the wrongful seizure of mortgaged chattels, the defendant must plead and prove mortgage debt, if he seeks to mitigate damages for the unlawful seizure by the amount of such debt, under N. D. Comp. Laws 913, § 6721. *Steidl v. Aitken*, L.R.A.1915E, 192, 152 N. W. 276, 30 N. D. 281.

Demurrer.

Presumptions on appeal as to rulings on demurrer, see *Appeal and Error*, 7.

See also *supra*, 2, 4.

11. Where a general demurrer is filed to a petition as a whole, if any paragraph of the pleading is good and states a cause of action, the demurrer should be overruled. *Coody v. Coody*, L.R.A.1915E, 465, 136 Pac. 754, 39 Okla. 719.

12. A demurrer to a bill to hold a trade union liable for overpayments by a contractor to employees because of its failure to notify him of a reduction in the wage scale, on the ground that the loss falls on the builder, and not on him, is invalid as a speaking demurrer where such fact does not appear in the bill. *Powers v. Journeymen Bricklayers' Union No. 3*, L.R.A.1915E, 1006, 172 S. W. 284, 130 Tenn. 643.

13. The sufficiency of a declaration indefinitely stating a good cause of action cannot, under the West Virginia Code, be tested by demurrer, but only by demand for a bill of particulars containing a more specific statement of the cause imperfectly averred as the basis for recovery. *Grass v. Big Creek Development Co.* L.R.A.1915E, 1057, 84 S. E. 750, — W. Va. —.

14. Objection to a portion of a bill seeking damages against a trade union which seeks to enjoin the withdrawal of its funds from a bank cannot be taken by demurrer. *Powers v. Journeymen Bricklayers' Union No. 3*, L.R.A.1915E, 1006, 172 S. W. 284, 130 Tenn. 643.

15. Under the West Virginia Code a demurrer does not lie for duplicity in pleading, unless there is a misjoinder of two inconsistent causes of action. *Grass v. Big Creek Development Co.* L.R.A.1915E, 1057, 84 S. E. 750, — W. Va. —.

POLICE.

Liability of city for acts of, see *Municipal Corporations*, 5, 6.

POLICE POWER.

See *Constitutional Law*, 16.

POLLUTION.

Of water generally, see Water, 2.

POOR AND POOR LAWS.

In an action for the reasonable value of medical and hospital care, treatment, and services rendered to a dependent relative in an emergency case, where there is an urgent requirement for both physician's services and hospital care, imperative and admitting of no delay, plaintiffs may recover from a relative upon whom rests the statutory duty to support such dependent relative, compensation for the reasonable value of such services, even though such services were rendered without the knowledge of the relative sought to be charged. *Tryon v. Moyer*, L.R.A.1915E, 844, 153 N. W. 307, 130 Minn. 198. (Annotated)

POSTOFFICE.

Effect of mailing notice of protest of note, see Bills and Notes, 2.

PRAIRIE FIRE.

See Fires.

PRECAUTIONS.

Evidence of, to show prior negligence, see Evidence, 26.

PREJUDICIAL ERROR.

See Appeal and Error, 21-31.

PREMIUMS.

For insurance, see Insurance, 6.

PRESUMPTIONS.

On appeal, see Appeal and Error, 7, 8.
In general, see Evidence, 1-7.

PRINCIPAL AND AGENT.

Right of director to empower agent to serve demand for special meeting, see Corporations, 5.

Authority to receive payment, see Payment.

1. A subagent in actual control of a business is the agent of the principal, if he knew from the character and location of the business that it could not be carried on by the principal agent, and that the subagent had been employed. *Tippecanoe Loan & T. Co. v. Jester*, L.R.A.1915E, 721, 101 N. E. 915, 180 Ind. 357.

2. Agents of an apartment building with full authority to keep it in repair and hire the employees are personally liable for injury to a tenant through their negligence to keep the door of the elevator shaft in repair, so that it stands open when the elevator is not at the floor where the door is located, and the tenant, misled by the open door, steps into the shaft and falls to the bottom, since they are guilty of misfeasance in permitting the elevator to be operated in an unsafe condition. *Tippecanoe Loan & T. Co. v. Jester*, L.R.A.1915E, 721, 101 N. E. 915, 180 Ind. 357. L.R.A.1915E.

PRIORITY.

Between assignees, see Assignment.

PRIVATE ACTION.

By one injured as result of violation of statute, see Highways, 2; Negligence, 6.

PRIVILEGED COMMUNICATIONS.

In libel case, see Libel and Slander, 3-5.

PROBATE.

Of will, see Wills, 4.

PROHIBITION.

To review acts of court in habeas corpus proceeding, see Habeas Corpus, 2.

PROTEST.

Of note for nonpayment, see Bills and Notes, 2.

PROXIMATE CAUSE.

Review on appeal of conclusion as to, see Appeal and Error, 18.

1. The act of a workman unskilled in the use of high explosives, in removing a quart of solidified glycerin left lying near a well by the agent of a powder company, after shooting the well, and placing it in a near-by stone fence to prevent injury to himself and his fellow workmen, does not amount to an unrelated, intervening, and efficient cause, so as to excuse the powder company from its liability for damages to children who about two years after find the solidified glycerin and are injured by it. *Clark v. Dupont de Nemours Powder Co* L.R.A.1915E, 479, 146 Pac. 320, 94 Kan. 268. (Annotated)

2. A pedestrian cannot hold a railroad company liable for the results of a chill caused by delay at a highway crossing on a cold night on account of a train standing on the crossing in violation of the terms of a statute, if stores open and warm and join the highway at the crossing in which he might have secured shelter until the train was moved. *Louisville & N. R. Co v. Cooper*, L.R.A.1915E, 336, 175 S. W. 1034, 164 Ky. 489. (Annotated)

3. Though as a rule damages which are occasioned by fright alone cannot be recovered in a tort action without proof of a physical injury, the mere fact that a person may have been frightened by fire, and that such fright may have had some influence in inducing her to fight against it, does not preclude a recovery for injury sustained in such attempt, where the exertion put forth was the exertion that a reasonably prudent person would have put forth under like circumstances. *Wilson v. Northern P. R. Co.* L.R.A.1915E, 991, 153 N. W. 429, 30 N. D. 456.

PUBLICATION.

Of libel, see Libel and Slander, 6, 7.

PUBLIC CONTRACT.

As to municipal contracts generally, see Municipal Corporations, 2.

PUBLIC IMPROVEMENTS.

The provision of article 12, chap. 10, Okla. Rev. Laws 1910 (§§ 608-646), which authorizes municipal corporations to impose a penalty of 18 per cent after maturity for nonpayment of any assessment for improvements constructed under and by virtue of the provisions of said article, applies to homesteads within the improvement district, and a lien attaches thereto as to other property for such penalty, and such homestead may be sold under the provisions of said article to enforce the payment thereof. *Patterson v. Wallace*, L.R.A.1915E, 662, 147 Pac. 1034, — Okla. — (Annotated)

PUBLIC MONEYS.

Necessity of and formalities in appropriation of, generally, see Appropriations.

PUBLIC SERVICE COMMISSION.

Validity of regulations as to mileage books, see Carriers, 17, 18.

Constitutionality of regulations by, see Constitutional Law, 5, 13, 19.

1. An order promulgated by a Railroad Commission stands as the official action of the body, and is to be dealt with as such, although a minority of the members thereof dissent. *Railroad Commission of Ga. v. Louisville & N. R. Co.* L.R.A.1915E, 902, 80 S. E. 327, 140 Ga. 817.

2. Where, under statutory authority, a Railroad Commission of a state, after full hearing as to the facts, passed a regulatory order providing that "all railroads selling mileage or penny scrip books are hereby required on and after February 1, 1913, to pull the same on the train of the company selling the same, when presented by the holders for transportation between points wholly within the state of Georgia, except where passengers board trains in cities of 10,000 population or more according to the United States census of 1910, in which places mileage or penny scrip shall be exchanged for tickets," it will not be declared void by the courts merely because, in the absence thereof, a different regulation or agreement made by the railroad companies might have been held valid. *Railroad Commission of Ga. v. Louisville & N. R. Co.* L.R.A.1915E, 902, 80 S. E. 327, 140 Ga. 817.

3. A regulatory order made by the State Railroad Commission within its statutory authority, after a full hearing from the parties concerned, including the carrier, will not be disregarded by the court as of no effect upon the question as to the reasonableness and propriety of such order; nor will the court deal with those questions as if the body charged with the duty of considering them had not acted upon them. *Railroad Commission of Ga. v. Louisville* L.R.A.1915E.

& N. R. Co. L.R.A.1915E, 902, 80 S. E. 327, 140 Ga. 817.

PUBLIC SERVICE CORPORATIONS.

Imposition on owner of irrigation ditch expense of constructing and maintaining bridge, see Eminent Domain, 3.

Liability for injury by hastening or increasing flow of water, see Water, 1.

See also Carriers; Railroads.

PUNITIVE DAMAGES.

See Damages, 2-4.

PURCHASE MONEY.

What constitutes purchase money excepted from homestead exemption, see Homestead.

QUALIFICATIONS.

Of judge, see Judges.

QUASHING.

Of indictment, see Indictment, etc., 4.

RAILINGS.

On highway, see Highways, 4, 5.

RAILROAD COMMISSION.

See Public Service Commission.

RAILROADS.

Reversible error in action for fire set by, see Appeal and Error, 21.

Evidence in action for personal injury received in fighting fire, see Evidence, 29.

Contract by railroad permitting other company to run motor car upon its tracks for exemption from liability for injury, see Contracts, 4.

Injury to property by smoke and cinders as a taking thereof, see Eminent Domain, 2.

Consequential injury from construction and operation of, see Eminent Domain, 4, 5.

Obstruction of street crossing by train, see Highways, 2, 3.

Obstruction of crossing as proximate cause of injury, see Proximate Cause, 2.

Injury to employee, see Master and Servant.

1. A railroad company may grant to a manufacturing plant which ships its raw material and finished product over its road permission to run a motor car upon its tracks under supervision of its own employees to aid the employees of the licensee in procuring material and increasing the output of the plant if it will not interfere with the performance of the duties of the railroad to the public. *Mehegan v. Boyne City, G. & A. R. Co.* L.R.A.1915E, 1170, 141 N. W. 905, 178 Mich. 694.

Highway crossings.

2. Whether or not the railway company is ordinarily required, at its own

expense, to place a highway, at a point where it is laid out across an existing railroad, in such condition that there shall be no unnecessary interference with travel, this obligation results where a highway which antedates the railroad is vacated, and a new road taking its place is established, crossing the track near the same point, and several years after the embankment on which the railroad track is laid is raised some 8 feet. *State ex rel. Ise v. Atchison, T. & S. F. R. Co. L.R.A.1915E, 751, 147 Pac. 801, 95 Kan. 22.*

3. Where the situation is such that a railway company is under a legal obligation to restore a highway across its track to a reasonably safe condition for travel, and this result cannot be otherwise accomplished, a court may require the construction of a subway, but only where the necessity is clearly shown, and supported by competent expert evidence. *State ex rel. Ise v. Atchison, T. & S. F. R. Co. L.R.A. 1915E, 751, 147 Pac. 801, 95 Kan. 22.*

(Annotated)

Contributory negligence.

4. A twelve-year-old boy riding in a delivery wagon by permission of the driver is negligent in permitting the vehicle to be driven over a railroad crossing with which he is familiar, while all its occupants are engaged in play, and paying no attention to the possible approach of trains, so as to preclude recovery for injury caused by the vehicle being struck by a train while on the crossing. *Crosby v. Maine C. R. Co. L.R.A. 1915E, 225, 93 Atl. 744, — Me. —.*

(Annotated)

RATES.

Of carriers, see Carriers, 19.

REAL ESTATE BROKER.

See Brokers.

REAL PROPERTY.

Life estates in, see Life Tenants.

Conclusiveness of judgment affecting, see Judgment, 5.

Rights, duties and liabilities on transfer of, see Vendor and Purchaser.

RECEIVERS.

The property of a corporation is not relieved from taxation by placing it in the hands of a receiver, but the claim for taxes is paramount to all other claims although under the laws of the state taxes are neither a lien nor a debt. *Coy v. Title Guarantee & T. Co. L.R.A.1915E, 211, 220 Fed. 90.*

(Annotated)

RECOGNIZANCE.

See Bail and Recognizance.

RECORDS AND RECORDING LAW.

Record on appeal, see Appeal and Error, 4.

REINSTATEMENT.

Of insured, see Insurance, 5, 6.
L.R.A.1915E.

RELATION.

Of parties to note, parol evidence as to, see Evidence, 10.

RELEASE.

Validity of contract as to, see Contracts, 4.

Sufficiency of proof of undue influence in securing, see Evidence, 34.

Of claim for death as defense to action therefor, see Death, 6, 8.

Of one joint debtor, see Joint Creditors and Debtors.

The method by which an amount received by a servant from his employer in satisfaction of a claim for personal injury was arrived at is immaterial upon the question of its being a bar to an action for the injury. *Tennessee Coal, I. & R. Co. v. Moody, L.R.A.1915E, 369, 68 So. 274, — Ala. —.*

RELEVANCY.

Of evidence, see Evidence, 18-29.

RELIGIOUS SOCIETIES.

Forbidding sale of liquor within certain distance of church, see Intoxicating Liquors, 2.

Saloon near church as nuisance, see Nuisances, 2, 3.

REMAINDERMEN.

See Life Tenants.

REMITTITUR.

On appeal, see Appeal and Error, 32.

REPEAL.

Of statute generally, see Statutes, 3, 4.

REPLEVIN.

Measure of damages in action of, see Damages, 19.

1. In a claim and delivery proceeding in which the plaintiff is shown to be entitled to the possession of property seized by the defendant, and in which the trial is had to a court without a jury, and in which no demand is made for a specific valuation of the property, a judgment for the return of the property which is specified, or in the alternative for the payment of a certain sum, being the aggregate value thereof, in case said return cannot be had, is not invalid because of a lack of a specific valuation of each article in said judgment. *Steidl v. Aitken, L.R.A.1915E, 192, 152 N. W. 276, 30 N. D. 281.*

2. Where, in an action of claim and delivery, a return of all of the property cannot be had, and a judgment in the alternative is directed for the value thereof, such judgment may be rendered for the aggregate value of the property, and it need not specify the value of each article, unless a demand for such specification has been made upon the trial. *Steidl v. Aitken, L.R.A.1915E, 192, 152 N. W. 276, 30 N. D. 281.*

RESCISSION.

Of land contract, see Vendor and Purchaser.

RESERVATION.

In deed, see Deeds.

RES GESTÆ.

See Evidence, 13-17.

RESIGNATION.

From office, see Officers, 2.

RESPONDEAT SUPERIOR.

See Master and Servant, 8, 9.

RESTORATION.

On disaffirmance of infant's contract, see Infants, 3.

REVERSIBLE ERROR.

See Appeal and Error, 21-31.

REVIVAL.

Of suit, see Abatement and Revival.

RULES.

Of carrier, see Carriers, 1.

Of telephone companies, see Telephones.

SALE.

Sales in bulk, see Constitutional Law, 14; Fraudulent Conveyances.

Anticipatory breach of executory contract, see Contracts, 5.

Damages for failure to complete contract, see Damages, 5-7.

Presumption and burden of proof as to, see Evidence, 4.

Judicial sale, see Judicial Sale.

Libel by statement by seller to attorney for buyer, see Libel and Slander, 1, 4.

Of land generally, see Vendor and Purchaser.

1. A delivery of material sold and furnished a contractor for use in the construction of a building, to a carrier consigned to the contractor, is a delivery to the contractor. *Thompson-McDonald Lumber Co. v. Morawetz*, L.R.A.1915E, 302, 149 N. W. 300, 127 Minn. 277.

2. One selling a secondhand hearse not fit for use cannot retain the purchase price, although he expressly refused to warrant its condition, and advised the purchaser to see it, since he was bound to furnish an article capable of being used. *Hall Furniture Co. v. Crane Breed Mfg. Co.* L.R.A. 1915E, 428, 85 S. E. 35, — N. C. —.

SCIENTER.

See Animals.

SEAL.

The attachment of a seal to a release of one joint tortfeasor from further liability does not destroy the operation of a clause in the instrument reserving the right to sue any other party or parties, where satisfaction for the injury has not been L.R.A.1915E.

received. *Dwy v. Connecticut Co.* L.R.A. 1915E, 800, 92 Atl. 883, 89 Conn. 74.

SEARCH AND SEIZURE.

Injunction against interference with owner's possession of property illegally seized, see Injunction, 4.

A municipal officer who has arrested an alleged violator of a municipal ordinance has no power, without other authority than the warrant against the accused, to take and carry away the property of a third person from the latter's premises, on the ground that the property of such third person so seized may contain evidence to be used against the defendant in the warrant, since such a seizure is a violation of the constitutional guaranty against unreasonable searches and seizures. *Owens v. Way*, L.R.A.1915E, 399, 82 S. E. 132, 141 Ga. 796. (Annotated)

SECONDHAND ARTICLES.

Warranty on sale of, see Sale, 2.

SECURITY.

On appeal, see Appeal and Error, 3.

SEIZURE.

See Search and Seizure.

SEPARATION.

See Divorce and Separation.

SHERIFF.

Liability for wrongful arrest by deputy, see False Imprisonment, 2.

Privileged communications to, see Libel and Slander, 3.

SHOOTING.

Of passenger, see Carriers, 5.

SICKNESS.

Of passenger, effect on carrier's duty, see Carriers, 10.

SIDING FACILITIES.

Requiring carrier to construct and maintain, see Constitutional Law, 10.

SILENCE.

Estoppel by, see Estoppel, 1.

SLANDER.

See Libel and Slander.

SMOKE.

Injury to property by, as a taking thereof, see Eminent Domain, 2.

Right to recover for, in condemnation proceedings, see Eminent Domain, 5.

SOOT.

Right to recover for, in condemnation proceedings, see Eminent Domain, 5.

SPEAKING DEMURRER.

See Pleading, 12.

SPECIAL INTERROGATORIES.

See Trial, 12.

SPECIAL VERDICT.

See Trial, 12.

SPEED.

Limiting speed on bridges, see Bridges, 1.

Contributory negligence of one traveling at prohibited rate of speed on highway, see Negligence, 9.

SPUR TRACK.

Requiring carrier to construct and maintain, see Constitutional Law, 10.

STATE.

Liability of state board of agriculture, see Agricultural Societies.

Mandamus to officers of, see Mandamus, 2, 3.

The proceeding to compel a state auditor to issue warrants for specific allowances made by statute for state officers is governed by the statutory provision authorizing the issuance of mandamus to any officer to compel the performance of an act which the law specially enjoins as a duty resulting from an office, and not by the provision authorizing suit against the state by any person deeming himself aggrieved by the refusal of the auditor to allow any just claims, and providing that, if judgment is recovered, the auditor shall audit the amount of the judgment, which shall be paid out of the state treasury, since the latter provision applies only in cases where the auditor is vested with some judgment or discretion as to the amount, if any, which shall be allowed. *McCoy v. Handlin*, L.R.A.1915E, 858, 153 N. W. 361, — S. D. —.

STATE MILITIA.

See Militia.

STATE'S ATTORNEY.

District attorney, see District and Prosecuting Attorneys.

STATUTE OF FRAUDS.

See Contracts, 1.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

Private action by one injured because of violation of, see Highways, 2; Negligence, 6.

1. A title and act concerning liability of cities for personal injuries is not sufficiently broad to cover a provision requiring notice before bringing an action for death. *Rowe v. Richards*, L.R.A.1915E, 1069, 142 N. W. 664, 32 S. D. 66.

2. A statute which is not uncertain or ambiguous will be construed according to its terms. *State ex rel. O'Shea v. Far-* L.R.A.1915E.

mers Irrig. Dist. L.R.A.1915E, 687, 152 N. W. 372, — Neb. —.

Amendment; repeal.

Effect of constitutional provision on statute as to abatement of action by death, see Abatement and Revival, 2.

3. A statute exempting railroad companies from the duty of carrying persons whom they choose for any reason not to carry is abrogated by a subsequent statute declaring that all railway companies shall be common carriers, and making it unlawful for them to subject any person to an undue or unreasonable prejudice or disadvantage. *Hogan v. Nashville Interurban R. Co.* L.R.A.1915E, 788, 174 S. W. 1118, 131 Tenn. 244.

4. A statute providing that whenever the death of a person shall be caused by wrongful act such as would, if death had not ensued, have entitled the person injured to maintain an action, such action may be brought in the name of his personal representative, is not limited to actions which survive the death of the person injured, but includes rights of action which arise because of the death, and repeals former statutes which permit the latter actions to be brought by the widow or next of kin. *Rowe v. Richards*, L.R.A.1915E, 1069, 142 N. W. 664, 32 S. D. 66.

STOLEN PROPERTY.

Rights of transferee of stolen note, see Bills and Notes, 3.

STREETS.

See Highways.

STREET SPRINKLING.

Proof of breach by municipality of contract for, see Evidence, 39.

Power of municipal officers to contract for, beyond term of office, see Municipal Corporations, 2.

SUBAGENT.

As agent of principal, see Principal and Agent, 1.

SUBROGATION.

Effect of judgment to bar right to subrogation to vendor's lien, see Judgment, 5.

One purchasing notes given for the purchase price of real estate is entitled to subrogation to the lien of the vendor. *Calhoun v. Ainsworth*, L.R.A.1915E, 395, 176 S. W. 316, — Ark. —.

SUBWAY.

Requiring railroad to construct subway under highway, see Railroads, 3.

SUICIDE.

Of insured, see Insurance, 11.

SUPERSEDEAS.

See Appeal and Error, 3.

SUPPORT.

Validity of oral contract for, see Contracts, 1.

SURVIVAL.

Of cause of action, see Abatement and Revival.

TAXES.

Purchase by life tenant, see Life Tenants, 1-3.

Liability of life tenant, see Life Tenants, 4.

Tax on property in hands of receiver, see Receivers.

TELEPHONES.

Damages for refusal of service, see Damages, 1.

Right of abutting owner to compel removal of poles from vacated street, see Highways, 6.

Pleading in action for refusal of service, see Pleading, 8.

1. A rule of a telephone company requiring a subscriber to pay for all long-distance messages originating from his telephone, whether O. K'd by him or not, is reasonable. *Southwestern Teleg. & Teleph. Co. v. Sharp*, L.R.A.1915E, 323, 177 S. W. 25, — Ark. — (Annotated)

2. Failure in two instances to enforce a rule requiring telephone subscribers to pay for messages originating from their telephones is not such discrimination as to nullify the rule. *Southwestern Teleg. & Teleph. Co. v. Sharp*, L.R.A.1915E, 323, 177 S. W. 25, — Ark. —

3. Request by operators to subscribers to O. K. long-distance messages originating on their telephones in some instances does not abrogate a rule making subscribers liable for such messages whether O. K'd or not. *Southwestern Teleg. & Teleph. Co. v. Sharp*, L.R.A.1915E, 323, 177 S. W. 25, — Ark. —

4. That a telephone company on request reverses charges for long-distance messages does not abrogate a rule requiring subscribers to pay for such messages originating on their telephones. *Southwestern Teleg. & Teleph. Co. v. Sharp*, L.R.A.1915E, 323, 177 S. W. 25, — Ark. —

TENANTS.

See Landlord and Tenant.

TERM.

Of office, see Officers, 1.

TERMINATION.

Of trust, see Trusts, 4.

THEFT.

Insurance against, see Insurance, 17, 18.
In general, see Larceny.

THREATS.

Evidence of, see Evidence, 17.

TIMBER.

Reservation of, in deed, see Deeds.
L.R.A.1915E.

TIME.

To move for new trial, see New Trial.

TITLE.

Weight of opinion evidence as to sufficiency of, see Evidence, 31.

Defects in, on judicial sale, see Judicial Sale.

TORTS.

Measure of damages for, see Damages, 14.

Injunction against tortious acts, see Injunction, 2, 3.

Pleading as to, see Pleading, 8, 9.

In a tort action damages can be recovered for injuries which proximately follow from the wrongful act, whether such injuries were or could have been anticipated or not. *Wilson v. Northern P. R. Co.* L.R.A.1915E, 391, 153 N. W. 429, 30 N. D. 456.

TOTAL LOSS.

Of insured property, see Insurance, 15.

TRADE UNION.

See Labor Organizations.

TRAVELING SALESMEN.

Joint liability of, for negligence in use of automobile, see Automobiles, 2.

TREATIES.

Effect of, on alien's right to inherit, see Descent and Distribution, 1.

TRIAL.

Review of discretion as to, see Appeal and Error, 11.

Error in refusal to submit special interrogatories, see Appeal and Error, 29.

Right to trial by jury, see Jury.

Proceedings in, or reports of, as privileged communications, see Libel and Slander, 5.

New trial, see New Trial.

Sufficiency of evidence to go to jury.

1. In an action by one for injuries suffered through the discharge of a gun in the hands of a hunting companion, evidence that the hammer of the defendant's gun was worn through, and that the defendant, seeing the plaintiff and knowing the gun was pointed toward him, attempted to let down the hammer, which slipped through his fingers and thereby discharged the gun, is sufficient to take the case to the jury on the issue of negligence, and it is error to sustain a demurrer to the evidence. *Annear v. Swartz*, L.R.A.1915E, 267, 148 Pac. 706, — Okla. —

Questions of law and fact.

2. The weight of exclamations which are a part of the *res geste* is purely a question for the jury. *State v. Lasecki*, L.R.A. 1915E, 303, 106 N. E. 660, — Ohio St. —

3. The questions of negligence and of contributory negligence are primarily questions of fact for the jury to pass upon.

Wilson v. Northern P. R. Co. L.R.A.1915E, 991, 153 N. W. 429, 30 N. D. 456.

4. As to whether the owners of a pasture who have contracted to pasture certain cattle during the season have exercised ordinary care in supplying the pasture with water is a question of fact for the jury. Cox v. Chase, L.R.A.1915E, 590, 148 Pac. 766, 95 Kan. 531.

5. Whether the wife of a homesteader was reckless and negligent in attempting to put out a prairie fire negligently caused by a railway company, so as to preclude a recovery for her injuries, is primarily a question of fact for the jury, and not of law for the court. Wilson v. Northern P. R. Co. L.R.A.1915E, 991, 153 N. W. 429, 30 N. D. 456.

6. The jury must determine whether or not a tenant of an apartment in a building, who knows of a custom to have a door to the elevator shaft open only when the car is there, is negligent in stepping through an open door without ascertaining that the car is in fact there. Tippecanoe Loan & T. Co. v. Jester, L.R.A.1915E, 721, 101 N. E. 915, 180 Ind. 357.

7. Whether a person riding in an automobile of another is engaged in a common enterprise with the latter is a question for the jury, where it is an issuable fact in the case. Judge v. Wallen, L.R.A.1915E, 436, 152 N. W. 318, — Neb. —.

Demurrer to evidence.

See also, *supra*, 1.

8. On a demurrer to evidence, it must be taken that he who interposes it admits all the facts which the evidence in the slightest degree tends to prove, and all the inferences or conclusions which may be reasonably and logically drawn therefrom, and the court will not weigh conflicting evidence, but will treat as withdrawn all evidence which is most favorable to the party demurring. Annear v. Swartz, L.R.A.1915E, 267, 148 Pac. 706, — Okla. —.

Instructions.

Presumptions as to, on appeal, see Appeal and Error, 8.

First raising objection as to, on appeal, see Appeal and Error, 14.

Waiver or cure of objection to, see Appeal and Error, 15, 16.

Prejudicial error as to, see Appeal and Error, 24-28.

9. Requested instructions inapplicable to the issues involved are rightfully refused. Perley v. Cambridge, L.R.A.1915E, 432, 108 N. E. 494, 220 Mass. 507.

10. Refusal to instruct, in an action by children to recover for the negligent killing of their mother, that the pecuniary value of the life of decedent to the plaintiffs is the value in money of the life of their decedent to the plaintiffs at the time of her death, is not error if the element of damages has been fully explained to the jury, or there is nothing to explain to them what is included in the term "value in money." McLaughlin v. United Railroads, L.R.A.1915E, 1205, 147 Pac. 149, — Cal. —.

L.R.A.1915E.

11. Since the duty of a company furnishing illuminating gas to exercise a high degree of care continues until the gas is delivered through its meter in the consumer's building, although the service pipe between the lot line and the building is paid for by the consumer, but installed by the company, the company, in an action against it for damages resulting from its negligently permitting the escape of gas through a break in the pipe just outside, the wall of the consumer's building, is not entitled to an instruction to the effect that there is no justification for finding it liable on the ground of defective installation, or for failure to maintain in a safe condition, or for not guarding against the action of frost. Manning v. St. Paul Gaslight Co. L.R.A.1915E, 1022, 151 N. W. 423, 129 Minn. 55.

Verdict or findings of jury.

Review of, on appeal, see Appeal and Error, 17-20.

Prejudicial error as to, see Appeal and Error, 30, 31.

12. Answers to special interrogatories inconsistent with the general verdict will control. Graas v. Big Creek Development Co. L.R.A.1915E, 1087, 84 S. E. 750, — W. Va. —.

TROVER.

Defendant's pleading in action for conversion, see Pleading, 10.

A mortgagee who, under the insecurity clause in his mortgage, seeks to obtain possession of the property mortgaged, and does so maliciously and by force or fraud, is a trespasser, and as such is guilty of wrongful conversion, which, under the provisions of § 6721, N. D. Comp. Laws 1913, extinguishes the lien of the mortgage. Steidl v. Aitken, L.R.A.1915E, 192, 152 N. W. 276, 30 N. D. 281. (Annotated)

TRUSTEE PROCESS.

See Garnishment.

TRUSTS.

Joint suit by beneficiaries of, see Action or Suit, 1.

Proper party to sue after termination of trust, see Parties, 1.

Right of officer of trust company named as trustee in will to act as witness, see Wills, 1, 3.

Implied and constructive trusts.

1. No inference of an agreement that land is to be held in trust can be drawn from the unreasonableness of a conveyance from a husband to his second wife of land acquired with money derived from his first wife's separate estate so as to exclude his heirs by his first wife from sharing in the estate. Clester v. Clester, L.R.A.1915E, 648, 135 Pac. 996, 90 Kan. 638.

2. In the absence of active or constructive fraud the mere fact that a husband conveys land to his wife without a valuable consideration is not sufficient to raise a trust by implication. Clester v. Clester, L.R.A.1915E, 648, 135 Pac. 996, 90 Kan. 638.

3. Although a constructive trust arises whenever the circumstances under which property is acquired make it inequitable that it should be retained by the person who holds the legal title, equity has no power to declare a trust and enforce it to prevent injustice merely because the transaction results inequitably, as in the case of a gift from a husband to his second wife of his real estate, thus depriving children of his first marriage of all interest therein, even though he acquired the real estate from money derived from his first wife's separate property. *Clester v. Clester*, L.R.A.1915E, 648, 135 Pac. 996, 90 Kan. 638.

(Annotated)

Termination; release; discharge.

4. Under a devise in trust of a share in testator's estate for his daughter whose husband is dissipated, with directions to pay her the income until the death of her husband, and then put her in possession of the property, and in case she dies before her husband her interest to be divided among her children, she is entitled to possession of the property upon being divorced from her husband. *Re Cornils*, L.R.A.1915E, 762, 149 N. W. 65, — Iowa, —. (Annotated)

UNCERTAINTY.

Of verdict, see Appeal and Error, 30.

UNDUE INFLUENCE.

Sufficiency of proof of, see Evidence, 34, 35.

UNION LABOR.

See Labor Organizations.

USAGE.

See Custom.

VALUATION.

Of insured property, see Insurance, 13.

VALUE.

Opinion evidence as to, see Evidence, 11.

VENDOR AND PURCHASER.

Sale under execution, see Judicial Sale.
Weight of opinion evidence as to title, see Evidence, 31.

Definiteness of pleading as to defects in title, see Pleading, 1.

Computation of interest on purchase money upon repudiation of contract for purchase of land, see Interest.

Subrogation to vendor's lien, see Judgment, 5; Subrogation.

Estoppel of tenant to assert right against purchaser of property, see Estoppel, 1.

1. One who has been in possession of land under a parol contract for its purchase is, where the vendor refuses to perform, liable to account for rent only from the time when the contract was disaffirmed. *Grainger v. Jenkins*, L.R.A.1915E, 404, 160 S. W. 926, 156 Ky. 257. (Annotated)

2. A gasoline engine and equipment L.R.A.1915E.

placed upon a farm by a tenant for use in pumping water from a well, and under agreement for removal, is not prima facie a permanent improvement, and a purchaser of the farm is under legal obligation to inquire of the tenant respecting his rights thereto. *Pabst v. Ferch*, L.R.A.1915E, 822, 147 N. W. 714, 126 Minn. 58. (Annotated)

3. A purchaser of land is under no legal obligation to make inquiry of a tenant in possession thereof, as to the ownership of fixtures, such as an inclosure made of wire attached to posts set into the ground for the purpose of confining ducks and young chickens, or a small building upon the farm, adjacent to a well thereon, in which to house a gasoline engine used in pumping water, where the tenant participates in the negotiations for the sale, and is cognizant of the terms thereof, and asserts no right in or to the fixtures. *Pabst v. Ferch*, L.R.A.1915E, 822, 147 N. W. 714, 126 Minn. 58.

VERDICT.

In general, see Trial, 12.

WAGE SCALE.

Liability of trade union for failure to notify contractor of change in wage scale, see Labor Organizations.

WAIVER.

Of requirement by carrier, see Carriers, 14.

Of covenant in lease, see Landlord and Tenant, 1.

WALLS.

Party wall, see Party Wall.

WAR.

As to militia, see Militia.

WARNING.

To passenger of danger, see Carriers, 4.

WARRANTY.

In insurance contract, see Insurance, 4.
On sale of personalty, see Sale, 2.

WATERS.

Prejudicial error as to damages in action for injury by, see Appeal and Error, 31.

Duty of agister to furnish cattle with water, see Agisters.

Easement for construction of water conduit, see Easements, 2.

Imposition on owner of irrigation ditch expense of constructing and maintaining bridge, see Eminent Domain, 3.

Conditions precedent to action against city for damages from use of contaminated water supply, see Municipal Corporations, 7.

1. The liability of a public service corporation organized to generate electricity to supply consumers with power and light,

for negligently discharging the water from its pond to the injury of lower riparian property, is not different from that of private mill owners, and it cannot escape liability for emptying its pond for the purpose of making repairs on its wheels, so rapidly that lower riparian property is inundated, on the theory that it was necessary to do so to meet its obligations to the public. *Taylor v. Indiana & M. Electric Co.* L.R.A.1915E, 294, 151 N. W. 739, — Mich. —.

(Annotated)

2. The use by a riparian owner of such quantity of the water of the stream to cool his machinery that, when returned to the stream in its heated condition, it prevents the formation of ice which a lower owner takes from the river for commercial purposes, is unreasonable, and may be enjoined. *Sandusky Portland Cement Co. v. Dixon Pure Ice Co.* L.R.A.1915E, 1210, 221 Fed. 200.

(Annotated)

WIDOW.

Election by, see Wills, 5, 6.

WILLS.

Parol evidence as to meaning of, see Evidence, 9.

Sufficiency of proof of undue influence, see Evidence, 35.

Termination of trust for benefit of devisee, see Trust, 4.

Who may be witness.

1. One who is president and a stockholder in a trust company which is named as trustee in a will is a competent subscribing witness to the will. *Re Wiese*, L.R.A.1915E, 832, 153 N. W. 556, — Neb. —.

2. The term "competent witnesses," as used in the statute relating to the execution of wills, means a person who, at the time of making the attestation, can legally testify in court to the fact which he attests by subscribing his name to the will. *Re Wiese*, L.R.A.1915E, 832, 153 N. W. 556, — Neb. —.

3. A trust estate created by a will is not invalidated because of the fact that one who is president and a stockholder in a trust company which is made trustee under the will is one of the two subscribing witnesses. *Re Wiese*, L.R.A.1915E, 832, 153 N. W. 556, — Neb. —.

L.R.A.1915E.

Probate.

Sufficiency of proof of will, see Evidence, 40.

4. In a proceeding to probate a will, the question to be decided is whether the instrument offered is the will of the decedent. *Re Wiese*, L.R.A.1915E, 832, 153 N. W. 556, — Neb. —.

Election.

5. Under the provisions of Minn. Gen. Stat. 1913, §§ 7237, 7238, 7239, 7243, a surviving spouse who had consented to her husband's will, and codicils added thereto, cannot arbitrarily withdraw her consent and elect to take under the statute instead of under the will. *State ex rel. Minnesota Loan & T. Co. v. Probate Court*, L.R.A.1915E, 815, 152 N. W. 845, 129 Minn. 442. (Annotated)

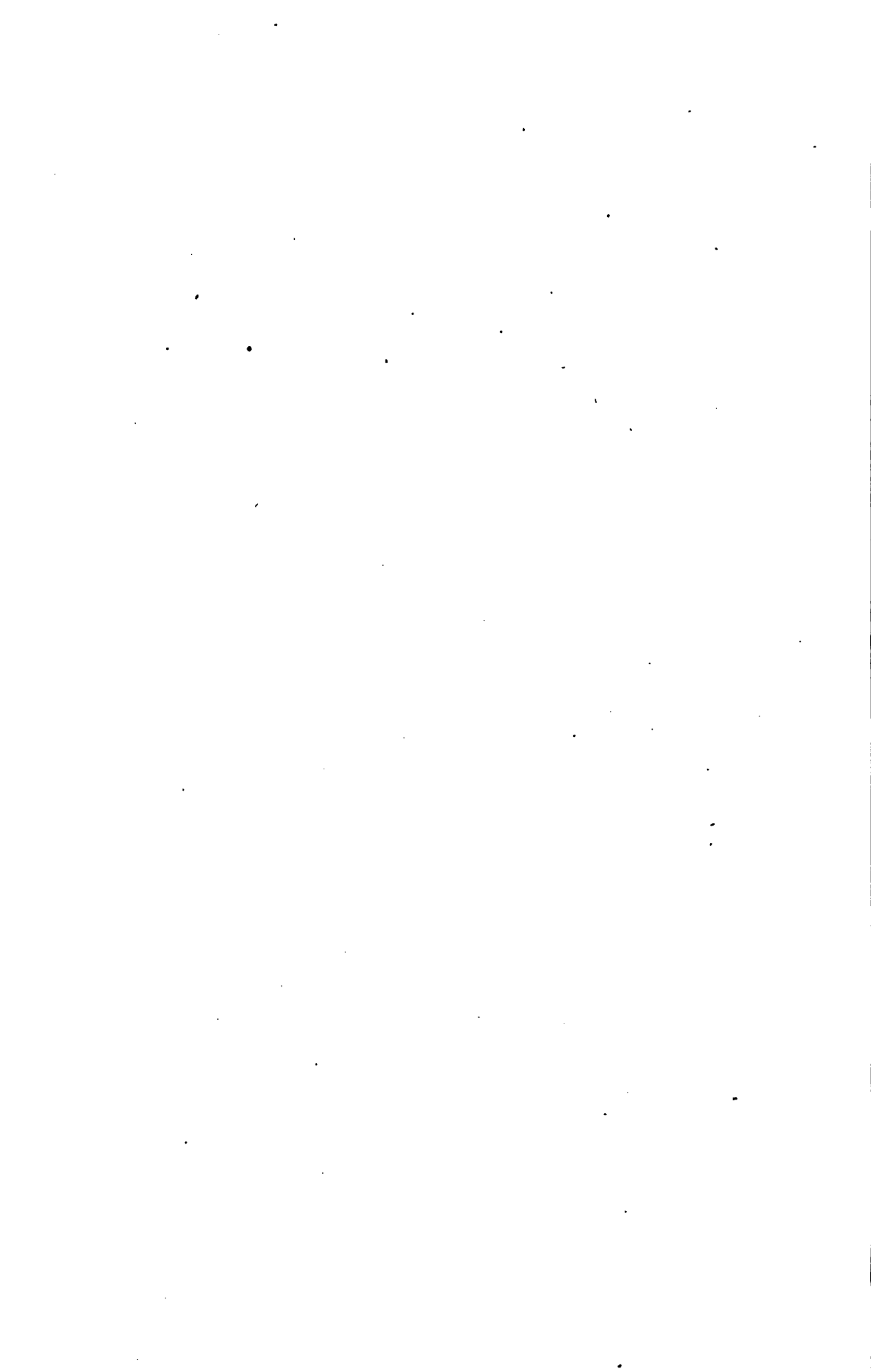
6. Where the husband procures his wife's consent in writing to his will, and to codicils added thereto, there is cast upon him the affirmative duty of making a fair disclosure of his property so that she may have knowledge of the effect of the will upon her rights, and intelligently determine whether she will consent; and if such disclosure is not made, the surviving wife, not being guilty of laches, and not being precluded from doing so by contract or estoppel, may, after his death, rescind her consent and elect to take under the statute. *State ex rel. Minnesota Loan & T. Co. v. Probate Ct.* L.R.A.1915E, 815, 152 N. W. 845, 129 Minn. 442.

WITNESSES.

To will, see Wills, 1-3.

1. Neither the statute nor the common law prevents one spouse, after the marriage relation has terminated, from testifying in a case in which the other is a party, as to independent facts within the knowledge of the witness, and not coming within the definition of privileged communication. *St. Louis & S. F. R. Co. v. Goode*, L.R.A.1915E, 1141, 142 Pac. 1185, 42 Okla. 784.

2. The heirs of a deceased person are not incompetent to give in evidence declarations or conversations of the deceased, where neither they nor the estate can be made liable for the result of the action. *Pabst v. Ferch*, L.R.A.1915E, 822, 147 N. W. 714, 126 Minn. 58.











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